

(1874) 03 CAL CK 0009

Calcutta High Court

Case No: Criminal Appeal of 1874

In Re: Nagendra Lal
Chatterjee
 The
Queen

APPELLANT

Vs

RESPONDENT

Date of Decision: March 30, 1874

Judgement

Sir Richard Couch, Kt., C.J.

In this case a charge was preferred by the applicant against Okhoy Coomar Shaw and others before the Magistrate of an offence of criminal misappropriation. The Magistrate dismissed the complaint, and discharged the defendants on the ground that the complainant and the accused were partners, or, as he says in the first part of his judgment, that they were, according to a deed of partnership, joint owners of the property in respect of which the criminal misappropriation was alleged. He founded his decision upon a case in this Court--In the matter of the Petition of Lall Chand Roy 9 W.R. Cr. Rul., 37--in which two of the learned Judges, Kemp, J., and the late Mitter, J., held that, if there was a partnership, there could not be a conviction for criminal breach of trust. Elphinstone Jackson, J., appears to have doubted this, and not to have concurred with the other two Judges. He took a different view of the facts of the case, and also said that he was inclined to think that there might be circumstances under which one partner might be guilty of criminal breach of trust against another. An application was made to this Court before myself and Ainslie, J., under s. 297 of the Criminal Procedure Code, to send for the papers, and to decide upon the validity, in point of law, of the Magistrate's decision.

2. Seeing that the Magistrate had acted upon a decision of this Court, we felt bound to refer the question for decision by a Full Bench, although I think, I may say, that we neither of us at the time entertained any serious doubt upon it.

3. It appears that there is a decision of Markby and Birch, JJ., in the case of *The Queen v. Gour Benode Dutt* ⁽¹⁾, in which those learned Judges have held that there may be an offence under s. 424 of the Penal Code; there may be a fraudulent concealment or

removal of property, whether the fraud is intended to be practiced on creditors or partners. This case was not quoted when the application was made to us; but, if it had been, we should still have been under the necessity of referring the question to a Full Bench.

4. We think the words of s. 405 of the Penal Code are large enough to include the case of a partner, if it be proved that he was in fact entrusted with the partnership property, or with a dominion over it, and has dishonestly misappropriated it or converted it to his own use. There is no reason that the case of a partner should be excepted from the operation of this section. Indeed, there is every reason that it should be included in it. It is a question of fact whether there has been an entrusting of the property, or giving a dominion over it, sufficient to come within what is required. But if it be made out by the evidence, that one partner was entrusted by his co-partners with property or with a dominion over it, and that he had dishonestly misappropriated it, or dishonestly used it in violation of the mode in which his trust was to be discharged, or of the agreement between the parties as to the use he was to make of the property, he ought to be tried for that offence. I, therefore, think we should say that the decision in the matter of the *Petition of Lall Chand Roy* 9 W.R., Cr. Rul., 37 cannot be supported, and that the Magistrate ought to enquire into the charge, and determine whether, upon the evidence which may be produced before him, there is sufficient ground for putting the accused upon their trial. I do not think that we can make an order of that kind in the Full Bench. The matter will, therefore, stand over until Ainslie, J., returns. Ainslie, J., was at this time absent on leave.

(2) Before Mr. Justice Markby and Mr. Justice Birch.

The Queen v. Gour Benode Dutt And Another, *

The 4th December 1873.

Penal Code (Act XLV of 1860), s. 424--Partner--Fraudulent Removal of Property.

Mr. T.D. Ingram (*Baboo Purno Chunder Mookerjee and Sham Lal Mitter with him*) for the petitioners.

The judgment of the Court was delivered by

Markby, J.--The prisoners in this case have been convicted of dishonestly removing certain account-books under s. 424 of the Indian Penal Code. It appears that the books in question were books of account belonging to a partnership, and I will assume, for the purposes of this case, that the Magistrate has found that the prisoner Gour Benode Dutt was a partner in this business, and therefore, as a partner, the books will be the property of himself jointly with his co-partners. The books were kept at the head-quarters of the firm at Cutwa, and were removed by the prisoners at night. There had been some

disputes between the members of the firm; and, upon the removal of the books being made the subject of a charge against the prisoners, they denied having removed the books, and said that it was a false charge got up against them.

Now it is contended before us that the prisoner Gour Benode Dutt, as being a partner in the concern, and having therefore a right to the custody of these books, could not be guilty of the offence under s. 424. It is urged that s. 424 belongs to a class of offences which comprise concealment or removal of property so as to defraud creditors; and further that a person could not be guilty, criminally speaking, of removing property of which he himself is the owner. Now it is not necessary for us to enter into the question, whether or no a partner would have a right of removing books of the firm from their proper place of custody, namely, the place where the business is usually carried on. Assuming that he has such a right, still it appears to us that the case falls within s. 424. It is found that the object of removal was to defraud his co-partners, and there is nothing in s. 424 which would justify us in limiting it, as we are asked to do, to offences in respect of creditors only. The heading of the Chapter is perfectly general--"Of fraudulent Deeds and Dispositions of Property;" and the words of the section are also perfectly general. There is no reason why a man should not be criminally punished for defrauding his partner, just as he would be criminally punished for defrauding his creditors; nor is there any reason why a man should not fraudulently remove the property of a partnership just as he may fraudulently remove the property which belongs to himself. There may not have been that particular sort of removal which is necessary to constitute theft; but what we are considering is, not whether the prisoners are guilty of theft, but whether they are guilty of an offence under this section, and the offence which this section contemplates is such a removal or concealment of property,--in other words, such a change of the place in which the property is deposited as can be considered fraudulent. That having been found to be the case, I see no reason in point of law why this conviction should not stand.

Mr. Ingram is also desirous to go into the facts of the case. I think it would be contrary to the practice of this Court, when the facts have been twice investigated and found against the prisoners, that they should be again reconsidered here. Assuming the facts found to be correct, I think that the prisoners are rightly convicted.

I wish to add that, in our opinion, the case which has been referred to--The Queen v. Allah Buksh ^(a)--is quite distinguishable from the present one. The observations of the Chief Justice in that case, we think, were only intended to apply to the facts of that case and the charge then under consideration. That was not a charge under s. 424, nor was there any allusion to that section, but the charge was one of the theft under s. 378, and the Chief Justice only says that, if any offence had been committed at all, it certainly was not theft.

The case will, therefore, go back to the Magistrate of the District, who will give necessary orders for carrying out the sentence passed upon the prisoners.

(a) Before Mr. Justice Norman, Officiating Chief Justice, and Mr. Justice" Loch.

The 15th April 1871.

The Queen v. Allah Buksh.*

Penal Code (Act XLV of 1860), s. 378--Partner--Theft.

Norman, J.--The facts of this case are as follow:--Kiamooddeen, the gomasta of a shop, called the shop of Mozuffer Meah, was coming out of the Small Cause Court with some books, a khatiyān and a jama-kharch account, belonging to that shop. Allah Buksh, who had a share in that shop, took these books out of the possession of Kiamooddeen, and kept them against the will of Kiamooddeen, saying they were his.

The Deputy Magistrate says: "The fact of Allah Buksh having a right to the papers is not questioned in this case. He may have every right to them; but, so long as they are legally in the possession of another person, he can not get possession of them, except through the Civil Court. It matters little either whether he is any special gainer by taking possession of the papers, when the fact remains that he did take them, and that against the will of the complainant."

The Deputy Magistrate found Allah Buksh guilty of theft, and sentenced him to a fine of Rs. 10, and ordered the papers to be returned to the complainant.

It appears to me that this conviction cannot be sustained.

Kiamooddeen was the servant of the prisoner Allah Buksh and his partners. By s. 27 of the Indian Penal Code, it is declared that, when property is in the possession of a person's servant, it is in that person's possession within the meaning of that Code. The khatiyān and jama-kharch account must, therefore, be taken to have been in the possession of Allah Buksh and his co-sharers at the time when Allah Buksh took them from Kiamooddeen. S. 378 does not include under the offence of theft the case where one joint proprietor takes into his own sole possession property belonging to himself and his co-proprietors, which had been previously in their joint custody. If the law were as supposed by the Magistrate, no master could safely take his own property from the hand of his servant: no partner in a business could safely take a rupee from the till for the most urgent necessity. It may be that the accused did, or intended to do, some wrong to his co-sharers in taking possession of the books. But if so, the offence, if any, is not theft.

I am of opinion that the conviction and order of the Deputy Magistrate must be quashed, and the fine refunded.

Loch, J.--To constitute the offence of theft, there must be not only a taking against the will of the person in possession, but a taking dishonestly. The definition of "dishonestly," as given in s. 24 of the Penal Code, is the doing anything "with the intention of causing

wrongful gain to one person or wrongful loss to another person." Did Allah Buksh take the book from the gomasta dishonestly as defined above? He does not appear to have done so with any intent to injure his co-partners, or to derive gain to himself. It is true that the gomasta says in his examination that the papers showed an entry of Rs. 500, by not showing which the accused would gain. But there is nothing to show that Allah Buksh intended to make away with these papers, and the gomasta admits that they were heretofore in the possession of Allah Buksh and his two co-sharers.

I do not think the charge of theft is made out and I concur with the Chief Justice in quashing the conviction and directing the repayment of the fine.

Application under s. 297 of the Criminal Procedure Code against an order of the Officiating Magistrate of East Burdwan, dated the 22nd September 1873.

Reference to the High Court under s. 434, Act XXV of 1861, by the Officiating Magistrate of Backergunge, dated Barisal, the 27th March 1871.