BOMBAY HIGH COURT

Jagannath Raghunathdas

Vs

Emperor

(John Beaumont, Kt., C.J.Barlee, J.)

12.08.1931

JUDGMENT

John Beaumont, Kt., C.J.

1. This is an appeal by the accused from a con-vicbion before the Chief Presidency Magistrate under Section 406 of the Indian Penal Code. The charge is that the accused on or about September 14, 1929, at Bombay did bring various sums of money aggregating to Rs 51,228-5-0 from several constituents of the firm of Rai Saheb Ramdayal Ghasiram for the use of the said firm and did dishonestly misappropriate the said sum to his own use and thereby committed an offence punishable under Section 406. He was sentenced to six months' rigorous imprisonment and a fine of Rs. 1,000, in default six months' rigorous imprisonment.

2. The history of the matter so far as is material is this: There was an old firm in which one Gopilal, whose Munim Ganpatlal Jankidas is the complainant in this case (though I will hereafter refer to Gopilal as the complainant), was a partner, and the accused and a man named Motiram were also partners. That firm was wound up in July 1928, a settlement was then arrived at and a deed of retirement executed. The firm was to be taken as having been wound up from October 26, 1927, and Motiram retired. The deed of settlement shows that Motiram was indebted to the firm in a sum of Rs. 48,000 odd and the accused was indebted in a sum of Rs. 42,000 odd. For that sum the accused gave a promissory note to the complainant and it is said, and I will assume, that thereby the accused's liability to the firm was discharged. Very shortly prior to this settlement in July 1928, the complainant had written some letters to the accused pointing out that the accused was indebted to the firm and that until that debt was paid off' the accused was not entitled to draw a single pie out of the firm and the accused seems to have acquiesced in that position. Those letters were strongly relied upon by the learned Magistrate as showing that the withdrawals--the subject-matter of the charge, could not possibly have been justified. But it is, I think, a fair criticism that those letters were written prior to the settlement of July 2, and I will assume for the purposes of my judgment that the arrangement embodied in those letters did not

continue after July 2. Motiram having retired, there is no question but that the complainant and the accused continued in partenership. There is a question as to the relative shares which they had in the partnership business and profits, but I will assume for the purposes of my judgment that the accused was entitled (as he claims) to a half share in the profits. It is in evidence that the accused brought no capital into the business. That statement was elicited in the cross-examination of the complainant's Munim. Now, on September 14, 1929, the accused admittedly collected outstandings of the firm amounting to the sum mentioned in the charge, that is to say Rs. 51,000 odd, and he applied those moneys for his own purposes: that is to say, he did not put them into the firm, he debited himself in the accounts with the firm as having had those moneys but he put the moneys in fact into his own pocket. The question is whether in those circumstances he can be charged with criminal breach of trust under ss. 405 and 406 of the Indian Penal Code. Section 405 is in these terms:--Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law proscribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust.'

3. Now Mr. Thakor's first point is that that section does not apply to the case of a partner dealing with partnership property. He points out that all the illustrations are illustrations of a person entrusted absolutely with property of another and do not relate to property which is in part in the ownership of the accused. But, in my opinion, the words of the section are quite wide enough to cover the case of a partner. Where one partner is given authority by the other partners to collect moneys or property of the firm I think that he is entrusted with dominion over that property, and if ho dishonestly misappropriates it, then I think he comes within the section. That is the view which prevailed in a full bench case of the Calcutta High Court as long ago as 1874--the case of *Queen v. Okhoy Goomar Shaw* [1] and the view was adopted by this Court apparently with approval in *Emperor v. Lalloo*[2] and in my opinion that is the right view. Then Mr. Thakor says that assuming the section applies, the burden is upon the prosecution to prove a case under it, and one of the essential ingredients which has to be proved is that there was a dishonest intent, and Mr. Thakor says that we cannot uphold this conviction unless the prosecution have proved such a position that a dishonest intent must necessarily be inferred. Well I agree with that, I think that the prosecution must prove facts from which the only possible inference which can reasonably be drawn is that there was a dishonest intent. Here the accused brought no capital to this firm. I ought perhaps to have mentioned in my statement of the relevant facts that when the old firm was wound up in 1929 some of the property was retained by the three former partners jointly and the accused says that that property may be of value. But I think that property must be left out of

account entirely in dealing with this charge. I think that it is really essential for the accused's case to say that a new firm started in July 1928 because otherwise he would still be saddled with the liability of Rs. 42,000. Therefore, I leave out of account the property in the joint names which formerly formed part of the old partnership assets, and I repeat that the accused brought no capital into the new firm. The accused says that he had reasonable grounds for thinking that at the time when he received this Rs. 51,000 and applied it to his own use his share in the partnership was at least equal to that sum. Now, can we accept that view ? The accused had no interest in the capital of the firm, the firm had only been in existence for two years and there is some evidence that a certain amount of profit had been made. But no accounts had been taken. This is clear from the evidence. Therefore it was impossible to say what the profits were. The complainant in a plaint which he filed against the accused in a civil action admitted that the profits for 1928 were Rs. 30,000. On the other hand, the witness Dagroolal Shivnarayan says that he thinks that in 1929 there will be a loss of Rs. 50,000. However that may be there is not a particle of evidence that the profits of the new rirm will amount to anything like Rs. 1,00,000, and unless it does, clearly the accused was not entitled to withdraw Rs. 51,000, Nor can I see any evidence from which the accused could bare supposed that the profit reached that figure. It seems to me that on the facts as proved by the prosecution we must necessarily infer that when the accused received collectively Rs. 51,000 odd and put them into his own pocket he did it dishonestly, We have got his account with the firm and it appears that at no time during 1928 and 1929 did he withdraw a sum exceeding at any one time Rs. 300. Most of his withdrawals are quite small. There is one item of just over Rs 4,000, but that according to an entry in the book was a havala entry because the accused had settled a claim for Rs. 4,000 and the firm accepted that settlement and credited him with the amount. But so far as ordinary drawings are concerned he had only withdrawn small sums below Rs. 300 and then suddenly for no particular reason he collects Rs. 51,000 and puts the whole amount into his pocket at once.

4. In these cases of charges against partners of criminal breach of trust, I think the Court ought to be very careful, In many cases it is impossible to say what the share of the accused may be, whether he is indebted to the firm or whether the firm is indebted to him, and if the firm is indebted to him there may be no dishonest intent in his withdrawing money from the firm. If there is any doubt upon the matter, I think the accused must always have the benefit of the doubt. To some extent the question is one of degree. If you have a partnership consisting of two partners entitled in equal shares and the assets consist of a particular item of property, say a ship, and you find that the managing partner has sold the ship and put the whole of the sale proceeds into his own pocket, that would be an obvious case from which one would have to infer a dishonest intention because it is plainly robbing the partner of his share of the entire property. On the other hand, if you have a firm with assets valued at a lac of rupees and you find that the managing

partner entitled to half the assets has put into his own pocket sums amounting to Rs. 10,000 or Rs. 20,000, I think it would be impossible to infer a dishonest intention because it is really then only a question of accounting and his partners are not going to lose. As I say, if there is any doubt, it is the duty of the criminal Court to say that the prosecution must wait until the accounts are gone into in a civil action, if there is a civil action proceeding, as in this case there is. But in my view on the facts of this case it is impossible really to say that there is any doubt at all. The accused might have given evidence himself to displace the prosecution case. Mr. Thakor very much objects to the phrase that the burden of proof shifts to the accused. He says that the burden reproof in a criminal case is always on the prosecution. I think it is really only a question of language. I agree that the burden of proof is always on the prosecution and that they must prove their case, and where a dishonest intention is an essential ingredient, they must prove facts from which the necessary inference is that there was a dishonest intention. But having got to that point it is open to the accused to bring evidence to disprove the facts or to give evidence of new facts from which it appears that the inference of a dishonest intention should not necessarily be drawn. It would have been open to the accused here to give evidence to show that he had reasonable grounds for thinking that he had a right to a share in the assets greater than the amount which he withdrew. But he gave no such evidence and on the prosecution evidence as it stands I think the charge under Section 405 is made out. The appeal, therefore, must be dismissed.

5. We modify the sentence of six months' rigorous imprisonment to six months' simple imprisonment. Fine to stand.

Barlee, J.

6. The facts in this case shortly are that the complainant, the accused and one Motiram were partners in business. All the capital was supplied by the complainant. That business went on for many years until 1927 Diwali when Motiram retired. The complainant and the accused each had a six annas share and Motiram had a four annas share and one anna was devoted to charity making in all a rupee of seventeen annas. The making of the accounts lasted till the next July and then it was discovered after leaving aside certain items of which the value could not be estimated at that time, that there was a debit balance against Motiram of some Rs. 26,000 and against the accused of some Rs. 42,000. The items excluded were, firstly, an item of Rs. 22,000, secondly, an item of anamat amounting to Rs. 18,084, and, thirdly, an unvalued item, i. e., a decree of a civil Court by which the partnership had become entitled to land.

7. After this settlement the accused gave the complainant a promissory note for Rs. 42,000 and his account of the old partnership was squared. The accused and the complainant continued as partners and it has been found by the learned Chief Presidency Magistrate that their shares in the new partnership were eight annas each. The accused had a power-of-attorney and managed the

business in Bombay and Bayandar. He did not pay up the amount of the promissory note and was pressed for security but he did not give it. Then a year later, in September, 1929, the accused who had been in the habit of drawing small amounts--never more than Rs. 200 or 300, from the shop presumably for his maintena and as pocket money, suddenly collected from the constituents and withdrew Rs. 51,000 odd. He entered this withdrawal, debiting the amount against himself in his own hand in the account book and wrote to his capital partner at Hyderabad asking him to come down and take over charge. The complainant came down, looked into the accounts and at once filed the complaint against the accused for criminal breach of trust as a servant. He also filed two suits, one on the promissory note and one for the dissolution of the partnership. These suits have been mentioned in the argument, but it is only necessary to say here that they were referred to arbitration, that the arbitrators made awards but they were not accepted and the criminal prosecution was persisted in.

8. The learned Chief Presidency Magistrate convicted the accused. He held that the accused was a partner and not a mere servant as had been stated in the complaint. But he also held that by agreement which is evidenced by certain letters he was restricted to withdrawals of about Rs. 250 a month and on this account he decided that the withdrawal of Rs. 51,000 amounted to misappropriation and was dishonest.

9. I shall take it for the purpose of this case that these letters had not the effect which has been given them by the learned Chief Presidency Magistrate. As pointed out by Mr. Thakor the only letters which really restricted the power of the accused to draw were written before the settlement of the accounts in 1927, and it is not unfair to say that this restriction had no effect afterwards or at any rate that these letters do not prove that the restriction was in force at the time of the withdrawal of Ra 51,000 in 1929. The only questions of fact about which there has been any dispute here are as to who supplied the capital and whether there were any losses or profits in the new partnership.

10. The first question does not appear to have been disputed in the lower Court where it seems to have been assumed all through by every one that the accused had supplied no capital but that the capital had all been supplied by the complainant. Nevertheless it was necessary for the complainant to prove that the capital belonged to him and it was very fortunate for the prosecution that this fact was elicited by the defence in the course of the cross-examination.

11. It was also argued here by learned counsel for the accused that there was no evidence on the record to show that there had not been any profits in the new firm. At first on searching the of Lord and looking through the examination-in-chief of the complainant's witnesses we failed to find any evidence on this important point. But later on it was pointed out that one of the prosecution witnesses had been questioned on the matter in cross-examination and that he had

stated that he had been through the accounts and had found that there had been a loss of Rs 50,000. That of course may or may not be true but the fact remains that this point which was very important to the prosecution is on the record owing to the kindness of the defence in the lower Court.

12. Now the first and most important point in this case is whether the evidence offered by the complainant in the lower Court was sufficient to satisfy the burden of proof, that is, was the accused to be called on for an explanation or was he entitled to an acquittal even though he had kept his mouth shut and refused to make any statement at all. Mr. Thakor's argument is partly based on the wording of Section 405 and partly on the law of partnership. He practically denies that a partner can be guilty of criminal breach of trust on the ground that it cannot be said that partnership funds of which he has control and which he is entrusted with come within the meaning of Section 405. He has relied on the case of Debi Prasad Bhagat v. Nagar Mull (1908) I.L.R. 35 Cal. 1108, where it is laid down that a partner cannot be held guilty of misappropriation, but is only entitled to be called upon for an account of the expenditure of the money which he has received, and that it is open to him to spend the money received by him and to account for it in dealing with the partnership. But so long as 1874 a Full Bench of the Calcutta High Court in *Queen v. Okhoy Coomar Shaw*[3] decided that a partner, who dishonestly misappropriates or converts to his own use any of the partnership property with which he is entrusted or which he has dominion over, is guilty of an offence under Section 405, and this Full Bench case is quoted with approval in a case of our own High Court, *Emperor v. Lalloo*[4] I agree, therefore, with his Lordship the Chief Justice in the view that there is nothing in Section 405 to prevent its being applied to a partner. Especially this is the case where, as here, we have a capital partner and a working partner. A capital partner is one who supplies the capital for the working partner and it seems to me that in such a case it can certainly be said that the working partner is entrusted with dominion over the capital partner's property. The position in law seems to be this that the working partner, as the accused ice this case was, was entitled only to a share in the profits and had no interest in the capital. Therefore he was an agent and trustee for the capital partner's capital and was entitled only to the profits after they had been ascertained. Speaking strictly, therefore, according to the section it can be said that if he used for himself any of the property in his hands which could not be looked upon as profits, he was misappropriating it. Whether of course the misappropriation is criminal or not depends naturally on the intention with which it was done. But I cannot agree with the learned counsel on behalf of the accused that under Section 405 there can be no misappropriation of partnership property on the ground that the partner cannot be looked upon as a person entrusted with partnership property.

13. Then the question arises whether on the prosecution evidence it is possible to assume in the absence of any defence that there was a dishonest intention. [His lordship then proceeded to

discuss the evidence.]

Cases Referred.

1(1874) 13 Beng. L.R. 307, F.B
2(1904) 6 Bom. L.R. 553
3(1874) 13 Bang. L.R. 307, F.B
4(1904) 6 Bom. L.R. 553