

# PATNA HIGH COURT

Emperor

Vs

Chaturbhuj Narain Choudhury

(Varma, C.J. Rowland, J.)

30.09.1935

## JUDGMENT

### **Rowland, J.**

1. This is an appeal by Government against the judgment and order of the Deputy Magistrate, Darbhanga, acquitting the accused Babu Chaturbhuj Narain Choudhury Pleader, on a charge of an offence punishable under Section 409, Indian Penal Code, which was to the effect that he between March 21 and March 27, 1934, being an agent for the Maharajadhiraj of Darbhanga, had committed criminal breach of trust by misappropriating Rs. 5,689-7-6, money belonging to his employer consisting of decretal amounts withdrawn from the Munsifs Court in Darbhanga and decretal money and unsued for rents realized from tenant defendants or judgment-debtors and the balance of unspent law advances. The judgment of the Magistrate opens with a clear statement of the facts. He has correctly recited the duties of the accused as Raj Pleader from which recital it is perfectly clear that the moneys received by him in the course of his employment were so received in the capacity of an agent. He was discharged from the service of the Raj on March 20, 1934. He submitted his accounts within the next few days, and according to those accounts there was a balance of Rs. 5,689-7-6 due to the Raj. He has not paid any part of this amount in spite of repeated demands. "The allegation, therefore, is that as an agent he was guilty of an offence under Section 409, Indian Penal Code.

2. The accused admits withholding the money. He says in his written statement "the, money on account is lying with me to the credit of the Raj." He says that he was ready to pay up the balance in hand but was advised not to pay because the Raj would not finally accept his account as correct and would not dispose of his claims (for election expenses and some other items), therefore, he says he withheld the money:to compel the Raj to go to the Civil Court so that the accused's due may be judicially recognized and adjusted and at the same time the accounts of the accused may be judicially pronounced to be correct so that the accused may be freed from all future troubles.

3. The Magistrate thought that the accused had claims which justified him in withholding the money and has acquitted him. In appeal it is said that the Magistrate has proceeded on a wrong view of law and that the claims which accused might have against the Raj could not, in any case, amount to more than a few hundred rupees which could not justify him in withholding payment of over five thousand rupees. It is contended that this withholding of the money is itself sufficient to establish the offence charged. The correspondence will not support the inference which the Magistrate has based on it. Before examining the facts it will be well to make it quite clear what the prosecution has to prove in a case of this nature. The English Law is thus stated in Halsbury's Laws of England : Vol. 9, Part 13, para. 892 ;The crime of embezzlement is complete when the servant fraudulently misappropriates the property and he is not necessarily entitled to be acquitted because he has made true and correct entries in his master's accounts. But if the money received for the employer is accounted for and not denied the fact of not paying it over without some evidence of fraudulent intent is not sufficient proof of the felony.If the prisoner does not deny the receipt or appropriation of property which he is accused of embezzling but acknowledges that he received it and alleges a right or an excuse for detaining the property unless it is clear that such allegation is merely a pretence he ought not to be convicted of embezzlement.

4. This is of course the briefest summary of the decisions, and the last proposition is based on a decision R.B. Norman (1842) Car. & M 501, which has not always been followed in subsequent cases. The principles to be borne in mind in a prosecution for embezzlement were examined in *L. E. Lanier v. Reg.*<sup>1</sup>, where the essence of the offence is said to be that:The conduct which is libelled has been a wilful appropriation by the accused of the property of another, or after possession of the same has been acquired a wilful squandering or destruction of it to his prejudice. The mixture of the funds of another with one's own funds may be in many cases natural and proper, in other cases convenient but irregular, and in the third, both irregular and criminal. The distinctions between these cases require to be treated with the greatest judicial care, so as while observing the amplest civil responsibility to prevent the third or criminal category from being extended to mistaken though convenient acts. This is only to say that apart from constructive criminal responsibility which of course may be imposed by statute, a Court of justice cannot reach the conclusion that crime has been committed unless it be a just result of the evidence that the accused in what was done or omitted by him was moved by the guilty mind.

5. That case was a decision on facts different from those before us and involving the construction of statutory provisions different from those of the Indian Penal Code but it is laid down as a principle of general application that unless the statute creates an offence independently of dishonest intention, there ought not to be a conviction unless the guilty mind is proved. The definition of criminal breach of trust in Section 405 penalises a dishonest misappropriation or

conversion or dishonest use or disposal of property in an improper manner, that is to say, dishonesty is an essential ingredient in the offence and must be proved. "Dishonestly" is an expression defined in the Penal Code and it is to that definition and not to the popular meaning of the word that we must look. It is important to notice that fraud or deceit is not an ingredient in the definition. A thing is said to be done dishonestly according to the definition in Section 24, Indian Penal Code when it is done with the intention of causing wrongful gain to one person or wrongful loss to another and these expressions are defined in Section 23, and have been explained in the Full Bench decision of the Calcutta High Court in *Queen-Empress v. Sri Churn Chungo*<sup>2</sup> which was followed in this Court in *Jagannath Misra v. Emperor*<sup>3</sup> Wrongful gain includes wrongful retention and wrongful loss includes being wrongfully kept out of property as well as being wrongfully deprived of property Explanation (1) to Section 403, Indian Penal Code makes it clear that a dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

6. The decision of the Full Bench was that where a creditor seized property of his debtor with the intention not of permanently retaining that property but of compelling the debtor to satisfy the debt the taking was dishonest within the meaning of the definition. To establish dishonesty, therefore, it is not necessary that the prosecution should establish an intention to retain permanently the property misappropriated. An intention wrongfully to deprive the owner of the use of the property for a time and to secure the use of the property for his own benefit for a time may be sufficient. It was so held in *Emperor v. Chhagan Lal*<sup>4</sup> At the hearing we were shown a large number of decisions on cases in which the prosecution had established irregularities of one kind or another, retention of trust property, omission to account false accounting and in which such irregularities had been held to amount or not to amount to criminal breach of trust. It will serve no useful purpose to examine the facts of all those decisions in the attempt to arrive at a rule enabling one to say that this or that overt act or this or that irregularity in conduct will or will not amount to criminal misappropriation or breach of trust. I am quite unable to deduce any such hard and fast rule from the decision and I do not think that there is any such rule. The principle to be followed is if I may say so with respect, correctly laid down in two decisions : one of this Court *Harakrishna Mahatab v. Emperor*<sup>5</sup>, a case ending in acquittal; and the other in *Grown v. Dina*<sup>6</sup> which ended in conviction. In the former of these cases Fazl Ali, J., said: It is not necessary or possible in every case of criminal breach of trust to prove in what precise manner the money was spent or appropriated by the accused because under the law even temporary retention is an offence provided that it is dishonest," but the essential thing to be proved in case of criminal breach of trust is whether the accused was actuated by dishonest intentions or not. As the question of intention is not a matter of direct proof the Courts have from time to time laid down certain broad tests which would generally afford useful guidance in deciding whether in a

particular case the accused had mens rea for the crime. So in cases of criminal breach of trust the failure to account for the money proved to have been received by the accused or giving a false account as to its use is generally considered to be a strong circumstance against the accused. We should, however, not lose sight of the principle and make a universal formula of what is after all only an indication of or a piece of evidence pointing to dishonest intention.

7. The other case proceeded directly on the view that ' the mental act or intent to deprive the master of his property is the gist of the offence.' Extracts are cited from two English decisions in each of which the jury were told that some circumstance proved was evidence from which you may infer that she (or he) intended to appropriate the money;" and that if they drew that inference they should convict. These decisions, it seems to me, are entirely in accordance with the principal laid down by their Lordships of the Privy Council in *Laniers case* (1914) AC 221 : 83 LJPC 116 : 110 LT 326 : 24 Cox CC 53 : 30 TLR 53 (Supra)above cited, The Magistrate's statement of the law applicable is that if the accused's submissions are reasonable, and if it appears that he had a bona fide even though mistaken idea of his claims, he would be not guilty; on the other hand if his claims appear to be clearly empty ones, without any substance, then of course he is guilty.

8. These remarks do not show a grasp of the fundamental idea that the essence of the case was what intention is to be attributed to the accused. In dealing with this matter, which is one of inference and opinion rather than one capable of direct proof, we have further to remember that this is an appeal from an acquittal, and as pointed out in *Emperor v. Deboo Singh*<sup>7</sup> The accused in an appeal from an acquittal retains his right of being presumed to be innocent until the charge is fully brought home to him. He has the right which he had in the trial Court of being given the benefit of a reasonable doubt as to his guilt. He must also have the benefit of the opinion of the trial Court upon the credibility of the witness whom that Court had the advantage of seeing face to face and judging of their demeanour and he has the right to ask that the acquittal should not be set aside unless the trial Court has taken a perverse view of the evidence and has arrived at an unnatural and distorted conclusion.

9. The principles which should govern the High Court in dealing with an appeal from acquittal were considered in *Sheo Swamp v. Emperor*<sup>8</sup> by their Lordships of the Privy Council whose conclusion agrees with what is slated in the Patna decision. In the present case the following matters detract from the weight to be attached to the decision of the first Court. First, in stating the law he appears to have missed the substantial point of the matter that he had to try and instead propounded as the main question a point which is really a side issue; secondly, the material evidence in the case was almost entirely documentary. Practically nothing turned ' on the appreciation of oral evidence, and so far as the documents are concerned, the Appellate Court is in as good a position to form its own conclusion as the Court of first instance ; thirdly, the

Magistrate's examination of the papers is based on an incomplete survey of the documentary material. His attention was drawn prominently to the letters which referred to the dispute between the accused and Babu Bulaki Lall Matha, Circle Manager of Ahins Circle; but to form a correct conclusion on the point which I have stated for our consideration, it is necessary to deal with the whole of the correspondence relied on by both sides, which I shall therefore now proceed to examine (After examining the whole of the correspondence his Lordship continued). The charge refers to the period between March 21 and March 27, 1934. That is the period during which the accused wrote letters bearing date March 21-23, 1934, to the several Circle Managers advising them that he was sending their dues as noted in the chalans which he sent with his letter, but, did not send any money. The evidence as to the history and the dealings between accused and the officers of the Raj is relevant under Section 14, Evidence Act, for the purpose of showing the accused's state of mind and it is from this evidence that we have to deduce whether the intention of the accused was dishonest within the meaning of the statute, always remembering that if there is room for reasonable doubt the accused is to get the benefit of it.

10. I propose to examine the claims referred to in para. 4. of the accused's written statement. The first claim mentioned is that for election expenses. Exhibit A shows that he was promised Raj support and Ex. B shows that the Circle Managers concerned were instructed to give him assistance. It nowhere appears that the Chief Manager ever undertook to bear the entire expenses which might be incurred by the accused in contesting the election. When the accused found himself incurring heavy expenses on account of the election, it was a loan of Rs. 300 and not a grant which he asked for in his letter Ex. 19. Exhibit E-3 of May 16, 1933 may be described as a begging letter rather than a letter making any claim. Ex. G of August 25, 1933, if genuine, is the letter with which the accused sent to the Chief Manager his election accounts for Rs. 1,472-5-0 saying that he had only been granted Rs. 500 and had taken Rs. 300 as an advance against his retainer fee. Assuming it to be genuine, it is certainly a request and not a demand or claim. Exhibit G-1 of December 11, 1933, is again a request and not a claim. The letter concludes by leaving everything to the kindness of the Chief Manager. In Ex. 53 dated April 2, 1931. it is no claim that accused puts forward, but a prayer for "kind indulgence over my election account." The matter is again referred to in Ex. 19-8 from the accused to the Chief Manager dated June 26, 1934, where he says:

Besides I should be permitted to claim some more money from the Raj as requested in my demi-official letter No. 1 of April 10, 1934, of course this is entirely dependent upon your kindness.

11. Therefore the election account was not a business in respect of which anything was justly due from the Raj to the accused and in respect of which the accused could lawfully claim to withhold payment until it was adjusted. Mr. Danby, P. W. No. 23, says that Rs. 300 was the amount that

was ordinarily allowed to those candidates whom the Raj helped. The accused in fact got Rs. 500 and Babu Bulaki Lal Matha, another candidate supported by the Raj, got Rs. 350 towards his expenses. Mr. Tarleton, P. W. No. 3, also stood as a candidate and his expenses were paid by the Raj, but it does not appear how much. The written statement refers to "other claims," but the only one that I can trace is a claim for Rs. 192. The earliest reference to this in the correspondence appears to be in Ex. 19-4, letter of accused to the Chief Manager, dated April 10, 1934, and demi-official letter of the same date Ex. 53-1 from the accused to the Chief Manager. In the official letter the accused says: I have furthermore to request you to direct early payment of the balance of my bill of Rs. 192 on Ahins Circle account out of which, I am told, you have ordered for deduction of a sum of Rs. 50, the only sum standing against me in my advance account.

12. This sum of Rs. 50 appears to be the balance of the loan of Rs. 300 taken by the accused as a personal advance in May 1933. In the demi-official letter accused says:

My bill for Rs. 192 have been passed with respect to Ahins Circle, and I am told, you have ordered for a deduction of Rs. 50 which is the only sum standing against me in my advance account. May I get that balance amount of Rs. 152 soon.

13. It may be noted that the balance after deducting Rs. 50 from Rs. 192 would be Rs. 142 and not Rs. 152. The matter is again referred in letter Ex. 19-8, dated June 26, 1934, from the accused to the Chief Manager. The accused says: Raj should pay me a sum of Rs. 192 only as my dues of fees on account of Ahins Circle for which my bill has been passed and payment has been withheld soon.

14. Here the accused ignores the deduction of Rs. 50 on account of outstanding advance to him. The correspondence regarding this claim does not at all disclose that it was either the reason or the pretext for withholding payment of the Raj dues. The two items of claim, if we call them both claims together, only amount to Rs. 972-5-0 and Rs. 142, total Rs. 1,114-5-0, and this could never justify the accused in withholding the Raj' dues exceeding this claim by over Rs. 4,000. I turn now to the matter which has attained such prominence in the judgment of the Magistrate, that is to say, the relations between accused and the Circle Manager, Ahins. It is not necessary to make a separate analysis of this part of the correspondence. It is clear that from the start Babu Bulaki Lal Matha was disposed to regard the accused's accounting with suspicion and in every case of irregularity to infer if not to impute dishonesty. Perhaps a more generous spirit would not have been so ready at the earliest moment to think the worst of accused, but the fact is clear that there were material irregularities since several months before the dates which have been the subject of the charge, and by February the accused was definitely behind hand with remittances which were due on fixed dates. The suggestion, however, that accused was withholding the

moneys due because of an imputation made against his conduct by the Ahins Manager, does not appear until a later stage. The earlier defaults were explained by the accused at the time as being due to an accounting irregularity, namely, that being kept short of advances on law cash account by the Manager, Ahins, he found it necessary to use some of the decretal moneys in his hand for urgent law expenses and therefore was not in a position to make remittances punctually. "I have spent and am spending the Raj money in Raj cases" Ex. E. In his letter Ex. G-3, dated March 16, to Maharajadhiraj, the accused says: I had several disputes with Manager, Ahins Circle, for not sending advances to meet expenses of cases pending in my file.

15. There is no suggestion that it was withheld because of an imputation that his accounts were incorrect. There was an offer in February to pay up Rs. 2,000 then in arrears, conditionally on receiving an assurance that accused would not be discharged. The plea that money was withheld because an imputation was made that accused had not correctly accounted appears for the first time after the Chief Manager had written to the accused letter Ex. 54-2, dated March 28, 1934. The summary which I have given makes it clear how the expression "not credited in your accounts" was apparently based on a misunderstanding of Surendra Prasad's note Ex. 48-1. The accused has made this imputation the central point of his defence and contends that so long as that imputation is not withdrawn he was justified in withholding the money. I have pointed out that in office notes on the correspondence it was stated "there is no question of suppression of any account at present," but this does not appear to have been communicated to the accused. That is unfortunate and its result certainly was to leave the accused in suspense as to whether he was likely to be charged only with wrongful retention of Raj money or also with falsification of his accounts. It was not until oral evidence was entered into that accused could know that no charge of falsification was laid against him and no such imputation made. The complainant Babu Dani Lal Matha in cross-examination states: The accounts were correctly drawn up. I know of no item in which the accused may have realised money and not noted it; and similar admissions were taken from other witnesses. But the fact remains, that the accused had failed in his duty before Mr. Danby ever wrote his unfortunate letter, Ex. 54-2, dated March 28. Therefore, though this letter may have given a pretext for the withholding of money during the subsequent period, it cannot be the reason why the money was not paid as it should have been before the letter was issued. The point that we have to see is whether the accused was guilty of criminal breach of trust in not paying the money before that date. At the time of his dismissal he took a week's time for making over charge completely which of course must include making payment. He advised the respective circles that money was actually being sent and he sent none. The point we have to see is, was this dishonest? There is dishonesty if he had spent it for his own purposes and had not the means to send it. The Government Advocate has argued that the inference to be drawn from what happened in February and March was that the accused had spent the money for his own purposes,

and he has referred us to the existence of decrees obtained by creditors against the accused for the money. These are Ex. 51, dated December 4, 1931, a compromise decree for Rs. 310, payable in three instalments; Rs. 100 in February 1932, Rs. 105 in April 1932, and 105 in June 1932, a compromise decree Ex. 51-2, July 5, 1933, for a sum of Rs. 700, and a consent decree, Ex. 51-1, dated September 14, 1932, for Rs. 395. (The last named decree, however, appears to be beyond the period which we are considering and to be hardly relevant). The abortive negotiations for payment in February and for part payment in July are, however, undoubtedly relevant. From the whole tenor of the correspondence it seems to be clear that the accused was in March, 1934, unable or unwilling to produce the money, and from then onwards was playing for time.

16. The sending of letters to the Circle Managers was merely in the words of the Manager, Ahins, "a dodge played" by the accused who did not intend to send" the money. His failure to do so was wilful and dishonest within the meaning of the statute. I would, therefore, allow the appeal and convict the accused of criminal breach of trust. It has been argued that as the breach of trust charged relates to a period during which the accused was no longer in Raj service having been dismissed on 20th March 1934, and, therefore, the offence is not criminal breach of trust by an agent punishable under Section 409 but at most a breach of trust punishable under Section 406, Indian Penal Code. The marginal note to Section 409, describes the offence as criminal breach of trust by public servant...or an agent, and may lend some colour to the argument advanced, but the description of the offence in the section itself must prevail over that in the margin. It is clear from the definition that the person charged must have been entrusted with the property in the capacity of an agent, but the section does not require that he should be still an agent at the time of committing the breach of trust. I have shown above that the money was entrusted to the accused in the capacity of an agent, and, therefore, the offence falls under Section 409. The date assigned in the charge to the commission of the offence is between March 21 and 27, 1934 : whereas the evidence indicates at least the possibility that accused had committed the misappropriation earlier. Is the charge then defective ? I think not. The gist of the offence being the mental act of the accused, it is beyond the power of any other person to give direct proof of the act or of its date ; the prosecutor in asking the Court to frame a charge is entitled to refer to the date of the overt act by which that intention is manifested and put into effect, and on which he relies as proof of the misappropriation. It is the practice, and in my view, the correct practice, to frame the charge with reference to any such act.

17. It remains to consider the question of sentence. In deciding what sentence to impose, I think that, we ought to bear in mind the fact that, so far as it appears, the accused correctly entered in his account all items of receipt and has not made any false entries in his books. We should also bear in mind that the accused was put in fear of a possible charge of fraudulent accounting in addition to that of retention of the trust money and suffered in consequence additional anxiety

and mental distress. Therefore, in my opinion, it is not necessary to impose a long term of imprisonment though the section requires us to pass a sentence of imprisonment. I would impose the sentence of rigorous imprisonment for three months and a fine of Rs. 7,500, in default to be rigorously imprisoned for a further period of one year and three months. Of the fine, if realised, Rs. 6,000 should be paid to the complainant on behalf of the Maharajadhiraj of Darbhanga as compensation and expenses under Section 545, Criminal Procedure Code.

**Varma, J.**

18. I agree.

Cases Referred.

1(1914) AC 221 : 83 LJPC 116 : 110 LT 326 : 24 Cox CC 53 : 30 TLR 53  
222 C 1017

310 PLT 483 : 115 Ind. Cas. 895 : AIR 1929 Pat. 429 : 30 Cr.LJ 546

48 Bom. LR 951 : 5 Cr.LJ 5

511 PLT 319 : 121 Ind. Cas. 321 : Ind. Rul. (1930) Pat. 97 : AIR 1930 Pat. 209 : 31 Cr.LJ 249

66 Lah. 257 : 88 Ind. Cas. 461 : AIR 1925 Lah. 411 : 26 Cr. LJ 1149 : 2 LC 12

78 Pat. 496 : 120 Ind. Cas. 634 : AIR 1929 Pat. 491 : (1929) Cr. Cas. 243 : 10 PLT 838 : Ind. Rul. (1930) Pat. 58 : 31 Cr.LJ 148:

815 PLT 607 : 151 Ind. Cas. 322 : AIR 1934 PC 227 : (1934) Cr. Cas. 1134 : 56 A 645 : 61 IA 398 : 7 RPC 63 : 11 OWN 1119 : (1934) ALJ 905 : 40 LW 436 : (1934) MWN 1017 : 67 MLJ 664 : 60 CLJ 276 : 39 CWN 15 : 36 Bom.LR 1185 (P.C.),