

Balthasar Vs. Emperor

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Court : Kolkata

Decided On : Feb-04-1914

Reported in : AIR1915Cal266,(1914)ILR41Cal844

Judge : Holmwood and ;Sharfuddin, JJ.

Appellant : Balthasar

Respondent : Emperor

Judgement :

Holmwood and Sharfuddin, JJ.

1. This is an appeal from the judgment and sentence of the learned. Presidency Magistrate, Fifth Court, convicting the appellant C. Balthasar, of an offence under Section 409 of the Indian Penal Code and sentencing him to pay a fine of 500 Rupees, or in default to be rigorously imprisoned for four months on the first count of the charge, no separate sentence being passed on the other two counts of the charge.

2. The first objection raised to this conviction is that the charge is defective and misleading, and that no conviction can be held upon that charge for the alleged misappropriation of the sale-proceeds of the furniture. The second objection is that there is no finding of when and how the appellant criminally misappropriated the sale-proceeds and nothing to show dishonest intention.

3. The charge is a curious one and runs as follows: 'That you on or about the 24th November 1912, in Calcutta, being a public auctioneer, committed criminal breach of trust in respect of three articles of house-hold furniture, almirah, etc., worth 109 rupees, given to you by Mr. W.J. O'Grady for sale and remittance of the sale proceeds to him, and you thereby committed an offence under Section 409 of the Indian Penal Code;' and the other two charges are similar with regard to sales of furniture on the 5th December 1912, and on the 22nd December 1912.

4. It is argued, and in our opinion very forcibly argued, that this charge cannot possibly relate to the alleged misappropriation of the sale proceeds. Section 405 says, '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, or of any legal contract expressed or implied which he has made touching the discharge of such trust, is guilty of criminal breach of trust.' Now, substituting the word 'furniture' for the word 'property,' it would be clear that the section does not cover misappropriation of the sale-proceeds. But even assuming, as we think it ought to be assumed, that the word 'property' includes furniture or the value thereof, even then it could not be said that the appellant had disposed of the furniture or the value thereof, namely, the sale-proceeds, in violation of his contract dishonestly, unless it were shown that he had the intention of dishonestly appropriating the sale-proceeds at the time of the sale; and the dates given in the charge clinch this contention which is admitted by the learned vakil for the prosecution. He says that it is incumbent on the prosecution to prove that on the date of sale the accused intended to misappropriate the sale proceeds. There is absolutely no evidence for that, and indeed all the evidence goes to the contrary. There was a regular business going on and all moneys received were paid into the account of that business, and the ordinary practice of the business was to pay the sale proceeds out to the owners of the goods sold one month after the sale, and it is put forward as evidence of the dishonest intention of the appellant, that not having been able to pay the money due on the 23rd December in connection with the sale of the 24th November, he still went on selling the furniture for Mr. O.'Grady on the 29th December and took the sale-proceeds. But this apparently was with Mr. O'Grady's knowledge and consent, and it was not till January or

February that Mr. O'Grady removed the remainder of his furniture from the appellant's hand. It cannot be said that the auctioneer is liable for criminal breach of trust if he does not punctually carry out every term in the agreement. For instance, if he did not hold the sale on the agreed date, the 24th November, it could not be said that he committed criminal breach of trust. In the same way if there was delay in payment, that is not in itself a breach of trust. On the dates in the charge it is clear that the wider sense which is sought to be given to the charge cannot possibly be accepted. The offence having been said to have been committed on the 24th November, it cannot be applied to misappropriation of money on or after the 23rd December. It is conceivable that a charge might have been framed to cover the whole circumstances of the transaction, but this is not such a charge; and it seems to us to fall within the rule laid down in the case of *Bipra Das Giri v. Niradmoni Bewa* (1908) 12 C.W.N. 577 to which one of us was a party, that where the charge against the accused is to the effect that he committed breach of trust in respect of some property which he took from the complainant, and was, therefore, guilty of an offence punishable under Section 406, but at the trial he was convicted of embezzling not the property but the amount obtained by dealing with the property, that the conviction was bad and must be set aside. We are, therefore, of opinion that, on the first point, this appeal must succeed and the conviction and sentence must be set aside.

5. But as that might render a re-trial necessary, we must also proceed to deal with the second point namely, whether there is any finding or any evidence of dishonest intention referable to the 24th November, 5th December and 22nd December, respectively, in respect of these three charges. We are unable to find any such finding or any such evidence, and none has been shown to us. It is not pretended that on the dates of the auction sales the appellant had the slightest dishonest intention or did not mean to make good the money to the complainant.

6. It is admitted that, owing to terrible domestic misfortune in which the complainant himself deeply sympathised, he was unable to attend to his business and fell into grave pecuniary difficulties. Under these circumstances, he has been unable to satisfy his creditors of whom the complainant is one. But that he has been endeavouring to do so is clear from the evidence of Mrs. Brennan who,

although she comes forward with the allegation that she has been cheated by the appellant, admits that she has been paid every penny of her money except Rs. 2-13. Then again it is sought to show dishonesty from the evidence of one Mr. Salt, a civil engineer, who says that he instituted a case on the same ground as the present case against the appellant in the Second Presidency Magistrate's Court, but withdrew it on getting a hundi which subsequently turned out to be a bogus one on a forged Bank (whatever that may be), and it was dishonoured. He was cross-examined to show that he had received a notice from the Court prohibiting the accused from paying the money on the hundi. This he denied, but the learned Counsel who appears for the appellant has very rightly laid before us the actual order of this Court prohibiting the appellant from paying the money due on that hundi to Mr. Salt on the ground that it was attached by one of Mr. Salt's creditors. There is, therefore, absolutely no evidence of dishonesty in this incident, nor, had it been shown that the appellant acted dishonestly towards Mr. Salt, could we have accepted that as any evidence of intention in the present case: for we are not aware when these transactions took place with Mr. Salt, and there is nothing in the evidence to show us. We are, therefore, on the second point also of opinion that the conviction is bad, there being no evidence and no finding of dishonest intention within the meaning of Section 405 of the Indian Penal Code.

7. The conviction and sentence are, therefore, set aside and the accused acquitted. The fine, if paid, will be refunded and the appellant will be discharged from his bail.

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