FERNANDO *v.* CHARLES.

P. C., Colombo, 66,459.

1900.

October 8 and 16.

Penal Code, s. 386—Dishonest misappropriation—Fraudulent failure to account.

Though the mere fact of a servant not paying over to his master moneys received by him on account of his master is not an offence under section 386 of the Penal Code, yet a fraudulent failure to account for such moneys is dishonest misappropriation.

A, having been placed in funds by his master to carry on the concerns of a shop, caused an entry to be made in the account books debiting the master with Rs. 2,465 as amount paid by A to meet a bill drawn by a foreign firm on the master, whereas in fact no such amount was ever paid.

Held, this was a fraudulent failure to account, and that the Police Magistrate was wrong in refusing to issue process on the accused on the complaint of the master.

COMPLAINANT, a shop-keeper, whose shop was managed by his son-in-law, charged him with having criminally

1900. October 8 and 16.

misappropriated a sum of Rs. 2,465.65 which the complainant alleged belonged to him, and which was entrusted to the accused to be paid to the National Bank of India, Limited, for and on behalf of the complainant on account of a certain bill of exchange which had been drawn on the complainant by Joseph Showell & Co., of Birmingham.

The Magistrate, after recording the evidence of complainant, declined to issue process on the accused in these terms:—

" After reading the judgment in case No. 22,645 of this Court " (*Buchanan v. Conrad, 1 S. C. R. 335*), I must decline to issue " process. There is nothing before me from which I can infer that the man Charles, who is charged, misappropriated any " specific sums. Had complainant put any evidence before me " that he had placed funds in accused's hands shortly before the " alleged misappropriation sufficient to meet the amount due on " the bills, and that Charles had made a false entry and declined " to account for the balance which he ought to have had when " called on to do so, I might have been able to issue process. But " the evidence seems to show that complainant left the business " when started four years ago entirely in accused's hands, and did " not trouble to look into it until December last, and he has not " shown that any specific sums were placed in accused's hands or " that he misappropriated them."

Against this order the complainant appealed with the sanction of the Attorney-General.

H. J. C. Pereira, for appellant.

16th October, 1900. MONCREIFF, J.—

The appellant is the owner of a shop in Colombo which was managed by his son-in-law Charles. He charged his manager in the Police Court of Colombo with criminal misappropriation on the 16th June, 1899, of the sum of Rs. 2,465.65. But the learned Magistrate, on the strength of a judgment delivered by Withers, J., in (*Buchanan v. Conrad, 1 S. C. R. 335*) refused to issue process. From that refusal an appeal was taken.

The appellant says that, when he bought goods from persons in England, the course of business was that the English merchant draws bills against the goods; that the bills were presented by the National Bank of India for his acceptance; that they were in due course paid by Charles, and that upon payment Charles debited the appellant with the amount in his books. He also says that he kept Charles in funds for the purpose of maintaining this course of business.

1900.
October 8 and 16.
MONCREIFF J.

On the 16th June, 1899, Seneviratne, the clerk, with the knowledge and no doubt under the direction of Charles, made an entry in the books debiting the appellant with Rs. 2,465.65. The meaning of the entry was that Charles had met a bill for that amount drawn by Showell & Co., of Birmingham, upon the appellant and paid the amount to the bank. He had in fact not paid a cent of the money.

If this statement of facts be true, has Charles dishonestly misappropriated and converted to his own use (under section 386 of the Penal Code) any money belonging to the appellant?

In the case cited Withers, J., felt himself bound to follow the rule of the English Courts in cases of embezzlement as stated in *R.v.Hodgson(1828),3 C.&P.424*,viz.(as stated by Vaughan,B). that "if the prisoner regularly admits the receipt of money the *mere* "fact of not paying it over is not a felony—it is but matter of "account." But it is clearly established that this rule does not apply where the prisoner *wilfully* or *fraudulently* fails to account.* The other rule of English jurisprudence relied upon is thus stated by Alderson, B. (*8 C. & P. 288*): "It is not sufficient to prove at the "trial a general deficiency in accounts. Some specific sum must "be found to have been stolen." Now, in this case, the learned judge had before him (1) a general statement from the appellant that he had supplied Charles with money, and (2) an admission from Charles in his accounts that he had not accounted for the balance in his hands. If that were all, I might agree with him that there was no evidence of the misappropriation of a specific sum. But in fact Charles tells us by his books not only that he has not accounted for the balance of his account, but that he has taken a sum of Rs. 2,465.65 due upon Showell & Co.'s bill. On the 16th June, 1899, he tells his employer that, out of a sufficient balance in his hands, he has paid a sum of Rs. 2,465.65 to the bank. Knowing the statement to be untrue, he allows it to remain in falsification of the accounts for six months. It is proved that he had not paid, and when he was asked for an explanation he simply walked out of the appellant's shop and disappeared.

In my opinion the evidence, in so far as it is disclosed, shows that Charles misappropriated a definite sum of money which he himself admits he employed in meeting a certain bill; and that the case is not one of a *mere* failure, but of a *fraudulent* failure to account. I therefore think that process should issue, and that the petitioner's appeal should be allowed.

---

* *R. v. Jackson* (*1 C. & K. 384*) : *R. v. Welch* (*2 C. & K. 296*); see also Archbold *21st ed., p. 520*, where it is stated that *R. v. Jones* (*7 C. & P. 833*) to the contrary must be regarded as over-ruled.