AMBIKA PRASAD

v.

REGINAM

[SUPREME COURT, 1963 (Hammett P.J.), 28th June, 9th August]

Appellate Jurisdiction

Criminal law—larceny by servant—money order cashed—date of intent to deprive—Penal Code (Cap. 8) ss. 300 (*a*) (i), 285 (1).

Criminal law—practice—power to substitute verdict—Criminal Procedure Code (Cap. 9).

The appellant was charged that between the 1st January and the 3rd February, 1962, he stole a money order from his employer. He was given the money order on the 20th January to cash and pay the proceeds to his employer's trust account. He left his employment on the 3rd February and on the same day caused the money order to be cashed. He later told his employer falsely that he had between the 3rd and 9th February paid the cash to his employer's senior clerk, but on the 9th February he in fact did send the money to the senior clerk. The trial court was left in no doubt that " at the time he took the ten shillings he intended to deprive his master of it if he could ".

Held.—(1) The trial court's finding did not show that at the time he " took " the money order the appellant intended to deprive his employer of it permanently, but that he later formed the intent to deprive him of the cash.

(2) That he was accordingly not guilty of larceny of the money order.

(3) Under the Criminal Procedure Code neither the trial court nor the appellate court had power to substitute a conviction of larceny of the ten shillings cash.

Appeal against conviction.

Falvey for the appellant.

Gajadhar for the Crown.

HAMMETT P. J. [9th August, 1963]—

The appellant was convicted of the offence of Larceny by Servant contrary to section 300 (*a*) (i) of the Penal Code and sentenced to 12 months' imprisonment. He appeals against both conviction and sentence.

The particulars of offence read:

> " Ambika Prasad son of Gauri Shankar between the 1st day of January, 1962, and the 3rd day of February, 1962, at Varoka, Ba, in the Western Division, being a clerk to Adi Mullam Raman, did steal from the said Adi Mullam Raman a money order in the sum of 10s.".

The third ground of appeal is that the verdict is unreasonable and cannot be supported having regard to the evidence.

The facts were as follows. The appellant was a solicitor's clerk to Mr. A. M. Raman.—(The record makes frequent reference to the dates of events being in 1963 but both sides agree that this must be either a slip of the tongue by the witnesses or a clerical error in compiling the record since all the

events in the case occurred in 1962 and the charge was dated in 1962 and I have, therefore, read the record accordingly).—On or about 20th January, 1962, his master handed him the money order for 10s. mentioned in the particulars of offence and told him to encash it and deposit the cash in the trust account.

Two weeks later, i.e. on 3rd February, 1962, the appellant left the employment of his master, with his master's permission, to take up employment with another solicitor.

There was no independent evidence that the money order in question was ever encashed. The only evidence on this point was that given by the appellant and that contained in the appellant's statement to the police, which was to the effect that he had given the money order to an unnamed client to cash at the Post Office and this was done and the money handed to him and that he then gave ten shillings cash to his master's senior clerk. He said this was done on 3rd February, 1962, and that a receipt was issued to him by that clerk. The learned trial Magistrate accepted that part of the appellant's story in which he admitted he encashed the money order for 10s. but rejected that part of the story in which he said he handed the ten shillings cash to his master's senior clerk. Instead the trial Court held that it was not until 9th February after the appellant had left the employment of the master and had come to know that inquiries were being made by the master about the 10s. money order that he then paid the ten shillings cash by sending it by the hand of a third party to his former master's senior clerk.

The trial Court's findings may be summarised, therefore, as follows:—

(1) That the appellant was handed the money order for 10s. on or about the 20th January, 1962, by his master with instructions to cash it and pay the proceeds into his master's trust account;

(2) That he did not cash it until 3rd February, 1962, which was the day he left his master's employment;

(3) That he did not pay this ten shillings cash into his master's trust account as he had been instructed to do;

(4) That he falsely told his master, some time between 3rd and 9th February, that he had paid the ten shillings in cash to his master's senior clerk;

(5) That on 9th February, 1962, he sent ten shillings in cash to his master's senior clerk by the hand of the third party.

On these facts the learned trial Magistrate found on the issue of the appellant's intent, and he recorded his finding in his reserved judgment, in the following terms:—

"... in all the circumstances of this incident the Court is left in no doubt that at the time he took the ten shillings he intended to deprive his master of it if he could."

There is no finding of fact of when the appellant actually "took" the ten shillings cash but this would appear to have been on 3rd February, 1962.

Since the appellant could only have taken the ten shillings in cash on or after 3rd February, 1962, after the money order had been cashed, the "taking" referred to in the judgment cannot have occurred before 3rd February, 1962. It must also be noted that the appellant was not charged with the larceny of ten shillings in cash on or about 3rd February, 1962, but the larceny of a ten shilling money order on some date between 1st January and 3rd February, 1962.

The definition of larceny contained in the first paragraph of section 285 (1) of the Penal Code reads:

> " A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof."

It is abundantly clear that in order to succeed in this case, the prosecution had to prove that at the very time he " took " the money order the appellant did, at that same time, intend to deprive his master of it permanently. This the trial Court did not find to be the case. On the contrary it specifically held that it was not until the appellant took the actual ten shillings into which the money order had already been encashed, some 14 days after he had first received the money order, that he formed the intent to deprive his master of this ten shillings cash. There is no finding of fact that he ever formed an intent to deprive his master of the ten shillings money order at any time.

It appears to me that the findings of the trial Court might have been sufficient to sustain a charge of either—

(*a*) fraudulent conversion of the ten shillings cash, or

(*b*) larceny of the ten shillings cash.

In view of the specific finding, however, that the intent permanently to deprive his master was not in fact formed until some time after he had received or " taken " the money order, it appears that the appellant was not guilty of and could not have been guilty of larceny of the money order.

I have examined the provisions of the Criminal Procedure Code to ascertain whether on the express findings of the trial Court it would have been open to that Court, and therefore now to this Court, to substitute for the conviction of larceny of this ten shillings money order at some date between 1st January and 3rd February, 1962, a conviction of larceny of the ten shillings cash. It appears that neither the trial Court nor this Court has any power to substitute such a verdict and learned counsel for the Crown has been unable to produce any authority for such a course despite my invitation to him to do so.

For these reasons the appeal must be allowed. The conviction is set aside and the sentence quashed.

Appeal allowed.

Solicitors for the appellant: ***Cromptons.***

Solicitor-General for the Crown.