assault [351] and criminal trespass, the Magistrate disbelieved the witnesses for the prosecution. We ought not, we think, in these circumstances, to direct the Magistrate to take further evidence to rebut the accused's story about the alleged arrangement, and then to re-assess the value of the whole evidence in the case in the light of that evidence. We reject the application.

1890
JULY 30.
REVISIONAL CRIMINAL.

Application rejected.

15 B. 349.

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15 B. 351.

REVISIONAL CRIMINAL.

Before Mr. Justice Birdwood and Mr. Justice Candy.

QUEEN-EMPRESS *v.* E. M. SLATER.* [5th August, 1890.]

Defamation—Indian Penal Code (Act XLV of 1860), s. 499, Exception 9—Imputation made in good faith by a person for the protection of his interest.

In order to substantiate a defence under the ninth exception to s. 499 of the Indian Penal Code (Act XLV of 1860), it is sufficient to show that the imputation was made in good faith and for the protection of the interest of the accused.

Any one in the transaction of business with another has a right to use language *bona fide* which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly or by its consequences be injurious or painful to another.

The complainant, Haji Jusub Pirbhoy, and his partner Baladina were owners of the steam-ship "Tanjore." The ship was mortgaged to the Bank of Bengal for Rs. 50,000. In March, 1890, the complainant desired to send the vessel to Jeddah with pilgrims and freight. For this purpose he entered into an agreement with Mr. Slater, the Agent of the Bank, to pay Rs. 5,000 to the Bank as a condition precedent to the vessel being allowed by the mortgagees to go on her intended voyage. The sum was to be paid out of the freight and passage-money collected by the complainant. On the 9th April, 1890, on which day the vessel sailed, the complainant promised to pay the sum in the evening. This he did not do. Thereupon Mr. Slater wrote to the complainant, demanding immediate payment of the amount, and also sent for him five or six times, but the complainant neither called at Mr. Slater's office, nor made the payment. On the 12th April Mr. Slater wrote to the complainant's partner as follows:—"Haji Jusub Pirbhoy (*i.e.*, the complainant) has misappropriated the Rs. 5,000 which were to have been paid to the Bank for allowing the 'Tanjore' to go to Jeddah, and is keeping out of the way." Immediately after the receipt of this letter the complainant tendered the money to Bank's solicitors. Thereupon Mr. Slater wrote to Baladina on the 13th April, withdrawing the statement made by him about the complainant in his letter of the 12th April. On the 14th April, the complainant filed a complaint against Mr. Slater, charging him with [352] defamation in his letter of the 12th April 1890. Mr. Slater was convicted by the Magistrate under s. 500 of the Indian Penal Code and sentenced to pay a fine of Rs. 200.

Held, reversing the conviction and sentence, that the imputations complained of were made in good faith, and for the protection of the interest of the accused; and, therefore, fell under the ninth exception to s. 499 of the Indian Penal Code.

[F., 19 B. 340 (349); R., 17 B. 573 (577).]

THIS was an application under s. 435 of the Code of Criminal Procedure (Act X of 1882).

The accused, E. M. Slater, was charged with defamation under s. 499 of the Indian Penal Code.

* Criminal Application for Revision No. 136 of 1890.

1890
AUG. 5.
REVISIONAL CRIMINAL.
15 B. 351.

The material facts of the case were as follows:—The complainant, Haji Jusub Pirbhoy, and one Haji Abdul Latiff Baladina were owners of the steam-ship "Tanjore." The ship was mortgaged by them to the Bank of Bengal for Rs. 50,000. In March 1890 the complainant desired to send the vessel to Jeddah with pilgrims and freight, and he agreed with Mr. Slater, the Agent of the Bank of Bengal, that he would have the vessel docked and pay the Bank Rs. 3,000 if the Bank (the mortgagees) would allow her to go upon this voyage. The complainant, however, was unable to get the vessel docked. Thereupon Mr. Slater insisted on payment of Rs. 5,000 instead of Rs. 3,000 before allowing the vessel to go to Jeddah. The complainant and his partner agreed to pay Rs. 5,000 on the 3rd April 1890. In payment of this sum the complainant subsequently tendered Rs. 3,000 in cash and a cheque for the balance. Mr. Slater refused to accept the cheque, and required the whole amount to be paid in cash on the 9th April, on which day the vessel started on her voyage. The complainant promised to Mr. Slater to pay the Rs. 5,000 in the evening. The sum was to be paid out of the freight and passage-money collected by the complainant. The payment, however, was not made as promised. Thereupon Mr. Slater wrote to the complainant demanding immediate payment, and also sent for him five or six times between the evening of the 9th and the morning of the 12th April.

The complainant, however, neither came to Mr. Slater's office, nor paid in the amount. On the 12th April Mr. Slater wrote to the complainant's partner, Baladina, the following letter containing the alleged defamatory imputation:—

[353] "Haji Jusub Pirbhoy has misappropriated the Rs. 5,000 which were to have been paid to the Bank for allowing the 'Tanjore' to go to Jeddah, and is keeping out of the way. Please recover the money and pay it in according to your promise. I have put the matter, so far as Jusub is concerned, into the hands of Messrs. Craigie, Lynch and Owen."

On the 13th April the complainant tendered the sum of Rs. 3,000 to the Bank's solicitors. Thereupon Mr. Slater wrote to Baladina as follows:—

"Haji Jusub Pirbhoy has (through his solicitors) tendered Rs. 3,000 on account of the 'Tanjore;' so I withdraw the statements made about him in my letter of yesterday."

On the 14th April, Haji Jusub Pirbhoy filed a complaint in the Presidency Magistrate's Court against Mr. Slater, charging him, under s. 499 of the Indian Penal Code, with making defamatory imputations on his character in his letter to Baladina dated 12th April 1890.

The accused pleaded that the letter complained of was written in good faith and for the protection of the Bank's interest, and was, therefore, a privileged communication falling under exception 9 to s. 499 of the Indian Penal Code.

The Magistrate convicted the accused of defamation and sentenced him to pay a fine of Rs. 200, or, in default of payment, to undergo simple imprisonment for two months. The reasons for the conviction are stated in the following judgment:—

"The accused, Mr. Slater, is charged with having defamed one Haji Jusub Pirbhoy, an offence punishable under s. 500 of the Indian Penal Code. It appears from the the evidence of the complainant that one Haji Abdul Latiff, Baladina and himself are shareholders of the steamer

1890
AUG. 5.
REVISIONAL CRIMINAL.
15 B. 351.

'Tanjore,' which is mortgaged to the Bank of Bengal for Rs. 50,000. As complainant and his partner were desirous that it should undertake a voyage to Jeddah with pilgrims, they made arrangements with Mr. Slater. The terms agreed upon were then reduced into writing (Ex. A) by Mr. Slater, and are to the effect that Rs. 3,000 were to be paid to the Bank of Bengal for allowing the 'Tanjore,' to proceed to Jeddah and back with pilgrims and freight. Subsequently some misunderstanding arose between Mr. Slater and the complainant, owing to his demanding Rs. 5,000 instead of Rs. 3,000. Mr. Slater wrote on the 12th April, 1890, to Haji Abdul Latiff Baladina as follows:—'Haji Jusub Pirbhoy has misappropriated the Rs. 5,000 which were to have been paid to the Bank for allowing the "Tanjore" to go to Jeddah, and is keeping out of the way.' After writing the above, Mr. Slater addressed a letter the following day to Haji Abdul Latiff Baladina:—'Haji Jusub Pirbhoy has (through his solicitors) tendered Rs. 3,000 on account of the "Tanjore;" so [354] I withdraw the statements made about him in my letter of yesterday.' Mr. Slater has not set up a justification in his defence to show that he had grounds for believing the imputations to be true. It has been unsuccessfully attempted to prove that a verbal agreement had been entered into with the complainant for the payment of Rs. 5,000—after Ex. A had been executed. Although Mr. Slater afterwards withdrew the imputations which he made against the complainant, his attempt of justification now of the expressions used by him is inconsistent with his previous action of withdrawal. The allegations that complainant had misappropriated the money which was to have been paid to the Bank of Bengal, and that he was keeping out of the way, have not been substantiated. These imputations have been made by Mr. Slater without due care and caution being exercised by him, and are injurious to the complainant's reputation. The Court finds that Edward Murray Slater is guilty of the offence specified in the charge—namely, that he defamed one Haji Jusub Pirbhoy, and thereby committed an offence punishable under s. 500 of the Indian Penal Code; and the Court orders that the said Edward Murray Slater pay a fine of Rs. 200, or, in default of payment, undergo simple imprisonment for two months."

Against this conviction and sentence the accused applied to the High Court under its revisional jurisdiction.

The High Court sent for the record and proceedings of this case, and directed notice to issue to the complainant requiring him to show cause why the conviction and sentence should not be quashed.

Branson, for the complainant.—This is not a case in which this Court will interfere in the exercise of its revisional powers. The Magistrate's decision rests entirely on the appreciation of evidence. The accused knew that the complainant was in Bombay and attending his office as usual. The Magistrate has found, as a fact that the alleged oral agreement to pay Rs. 5,000 is not proved. He has also found, as a fact, that the complainant did tender Rs. 3,000, but it was not accepted. How can the accused then justify his imputation that the complainant had misappropriated the money and absconded? The attempt at justification has completely failed.

Inverarity, for the accused.—This is one of those exceptional cases where this Court can, and does, interfere in the interests of justice. The Magistrate has dealt with the case in a most unsatisfactory manner. He has omitted from consideration the material facts of the case which prove our good faith and our [355] justification for the alleged defamatory imputations. The complainant as well as his partner admit that when they

1890
AUG. 5.
REVISIONAL
CRIMINAL.
15 B. 351.

could not get the vessel docked, Mr. Slater insisted on payment of Rs. 5,000 instead of the Rs. 3,000 previously agreed upon. They agreed to pay this sum out of the earnings of the ship, out of the freight and passage-money collected by them. It is in evidence that the complainant promised to pay the money on the evening of the 9th April, on which day the vessel sailed. He broke this promise. Thereupon Mr. Slater sent for him five or six times, and wrote to him, demanding immediate payment of the sum of Rs. 5,000. But the complainant neither called at Mr. Slater's office, nor paid in the amount. Then it was that Mr. Slater wrote the letter of the 12th April, 1890, to the complainant's partner. In writing that letter he acted in good faith, and for the protection of the Bank's interests. The case, therefore, falls under exceptions 9 and 10 to s. 499 of the Indian Penal Code. The imputation complained of was made in the Bank's interest and in the interest of the complainant's partner. It is not necessary for the accused to substantiate his imputation. It is sufficient if he proves that he had good reason to believe what he stated to be true.

JUDGMENTS.

BIRDWOOD, J.—The applicant was convicted by the Presidency Magistrate, under s. 500 of the Indian Penal Code, and sentenced to pay a fine of Rs. 200, or, in default of payment, to undergo simple imprisonment for two months. No appeal lies from that decision, as the fine was not in excess of Rs. 200. The application for setting it aside is made under s. 439 of the Code of Criminal Procedure.

The defamatory imputation charged against the applicant is contained in a letter which he wrote, as Agent of the Bank of Bengal, on the 12th April last, to Haji Abdul Latiff Baladina, the partner of the complainant, Haji Jusub Pirbhoy, and is in the following terms:—"Haji Jusub Pirbhoy has misappropirated the Rs. 5,000 which were to have been paid to the Bank for allowing the 'Tanjore' to go to Jeddah, and is keeping out of the way." The letter goes on to say, "Please recover the money and pay it in, according to your promise. I have put the [356] matter, so far as Jusub is concerned, into the hands of Messrs. Craigie, Lynch and Owen."

It is not disputed by the complainant that the steam-ship "Tanjore," referred to in this letter, was mortgaged by him and Baladina, who are the joint owners, to the Bank of Bengal, before March last, for Rs. 50,000. The mortgage has not yet been paid off. The owners wished to send her to Jeddah with pilgrims; and the complainant obtained the applicant's permission to their doing so, on or about the 8th March, on condition of his paying Rs. 3,000 to the Bank and getting the vessel docked. The owners were unable to get her docked, and the applicant, in his examination, says that, on the 3rd April, he told them that he would require Rs. 5,000, instead of Rs. 3,000, to allow the vessel to go to Jeddah; and that, after at first demurring to this, the complainant had a conversation with Baladina, and agreed to pay the Rs. 5,000. The applicant says that he considered the original document cancelled, as the vessel had not been docked, and that it was on that account that he made the fresh agreement. He says, further, that the complainant came to his office on the 7th April and told him that the vessel was nearly ready to sail, and expressed his willingness to pay Rs. 3,000 at once in cash, and to give his cheque for Rs. 2,000. The applicant says that he refused the cheque, and told the complainant that he must pay the amount in cash; and that he also

1890
AUG. 5.

REVISIONAL CRIMINAL.

15 B. 351.

questioned him about a guarantee of the vessel which the complainant had promised on the 3rd April to try to procure, and that the complainant replied that he was trying to arrange for it.

The complainant denies that he ever promised to pay the applicant Rs. 5,000; and the Magistrate finds that the applicant has been unsuccessful in his attempt to prove the alleged agreement as to the payment of Rs. 5,000. The Magistrate gives no reasons for this finding, and it appears to us to be obviously wrong. In his examination-in-chief the complainant denies that there was any talk about the payment of Rs. 5,000. In cross-examination, however, he admits that the applicant said that he would not allow the ship to go to Jeddah unless Rs. 5,000 were paid. He adds: "I mentioned nothing in the examination-in-chief [357] of my interview with Mr. Slater on the 3rd April, 1890. I did not remember this fact and, therefore, did not mention it." It is impossible to accept this explanation as true. His deliberate denial in his examination-in-chief of the circumstance that the applicant demanded Rs. 5,000 from him on the 3rd April shows that his evidence ought not to be preferred to the full and detailed statements contained in the applicant's examination, which is a part of the record, and ought, if believed, to be accepted as true and acted on. But that examination does not stand alone The complainant's partner, Baladina, and Mr. McKewan were present at the interview of the 3rd April. The former witness gave his evidence in a very shifty and unsatisfactory manner. He distinctly admits, however, that there was an interview, as alleged by the applicant, and that he himself agreed to pay Rs. 5,000 "from the earnings of the ship," and that the complainant was sitting by him at the time, though he immediately afterwards says that he does not know whether the complainant was there at the time, or whether he had left. He also says that he had a conversation with the complainant about the payment of the Rs. 5,000, but that he did not agree to the proposal to pay that sum. He concludes by saying that he himself is bound to pay Rs. 5,000; and that he has spoken to and pressed the complainant to pay. Evidence of this kind in no way lessens the weight of the clear and consistent statements made by the applicant. Mr. McKewan was attending to his own business during the interview (which took place in the Bank office) and does not profess to remember the details of the conversation, which was carried on partly in English and partly in Hindustani; but he remembers that Mr. Slater refused to listen to any proposal for the payment of a smaller sum than Rs. 5,000, and that Mr. Slater told him after the interview that "they" (that is, Baladina and the complainant) had agreed to pay Rs. 5,000, "if the ship were allowed to go to Jeddah." The complainant admits that he went to the applicant's office on the 7th April; but denies that he offered to pay Rs. 3,000 and give a cheque for Rs. 2,000. He does not say what took place then. There seems to be no ground for believing his denial rather than the applicant's account of the interview of that date. It is a [358] part of the case for the defence, that the complainant promised the applicant on board the steamer on the 9th April—the day on which she sailed—to pay Rs. 5,000 in the evening. The complainant does not deny that he made this promise, but professes not to remember it.

On a consideration of all the evidence relating to this alleged agreement to pay Rs. 5,000 instead of paying Rs. 3,000, and docking the vessel, we have no hesitation in accepting the statements of the applicant as strictly true. It is necessary thus to discuss this part of the case in detail,

1890
AUG. 5.
REVISIONAL
CRIMINAL.
15 B. 351.

as the Magistrate's decision, as to the good faith of the applicant in writing the letter of the 12th April, depends, apparently, to some extent on his finding as to this agreement. The decision as to the good faith of the applicant is a decision on a question of fact. Ordinarily, such a decision would not be disturbed by this Court in the exercise of its revisional jurisdiction. But the present case must be treated as one of those exceptional cases in which our interference is necessary, in the interests of justice; for, not only has the Magistrate approached the consideration of the question whether the applicant made the imputation that the complainant had misappropriated the sum of Rs. 5,000 in good faith, on the assumption, which we find to be clearly wrong, that no agreement as to the payment of that sum was established by the evidence, but he has also dealt with this very important issue on a wrong principle, and without reference to the particular circumstances relied on by the applicant as showing that his letter was written in good faith for the protection of his interest. These circumstances may now be referred to. They are established partly by the examination of the applicant and partly by the evidence of the shroff of the Bank. On learning, on the 9th April, that the "Tanjore" was to sail on that day, the applicant went to the Prince's Dock and met the complainant there, and asked him for the Rs. 5,000, and the complainant said that he would pay him the money that evening, as it was at his office. He also gave the names of two men—Jumal Mahomed and Suleman Easau—who were willing to stand guarantee, and their names were noted by the applicant on the back of a letter. The complainant did not pay the money on the 9th April, and on the [359] 10th the applicant wrote to him and demanded payment of Rs. 5,000. He adds: "On 10th, 11th and 12th I sent a messenger for complainant five or six times and went to his office myself; but I neither saw nor heard of him. I was then afraid I was going to lose my money." The applicant wished at the hearing to put in an affidavit to the effect that this answer was not taken down correctly by the Magistrate; and that what he really said was that he did not hear "from" the complainant. It was quite clear that he heard of him from the shroff, for on the morning of the 11th April the shroff found the complainant at his office and told the applicant that he had seen him. The complainant then told the shroff that he had received the applicant's letter and would call as requested. But he did not call on that day, nor before the letter of the 12th April was written. We do not think it necessary to call for an affidavit from the applicant as to the alleged error in the record, and for a report from the Magistrate on any such affidavit, as we can dispose of the case on the evidence as it stands. After the applicant had written his letter of the 12th April to Baladina, the complainant tendered the sum of Rs. 3,000 to the applicant's solicitors, whereupon the applicant wrote the following letter to Baladina on the 13th April:—"Haji Jusub Pirbhoy has through his solicitors) tendered Rs. 3,000 on account of the 'Tanjore'; so I withdraw the statement I made about him in my letter of yesterday. But you are aware that both you and he promised to pay us Rs. 5,000 to let her go to Jeddah, and I advised my head office accordingly. I call upon you to keep your promise, and trust you will not behave as Jusub has done in this matter." Now, with reference to this letter, the Magistrate says: "Although Mr. Slater afterwards withdrew the imputation which he made against the complainant, his attempt of justification now of the expressions used by him is inconsistent with his previous action of withdrawal. The allegations

that complainant had misappropriated the money which was to have been paid to the Bank of Bengal, and that he was keeping out of the way, have not been substantiated." And in this view of the case, having already found that the agreement as to the payment of Rs. 5,000 was not proved, the Magistrate records his decision that the imputations had been made by [360] Mr. Slater "without due care and caution being exercised by him, and are injurious to the complainant's reputation." Now, no doubt, after withdrawing the imputation, the applicant would find it very difficult to justify it in the sense of showing that it was true in fact; but, in order to substantiate his defence under the ninth exception to s. 499 of the Indian Penal Code, it is sufficient for him to show that he made the imputation in good faith for the protection of his interest.

Having regard to the definition in s. 52 of the Code, the question for consideration is whether the applicant acted with due care and attention for the protection of his interest; and in dealing with this question the Court can safely be guided, and ought to be guided, by the principles laid down by the Courts in England. This is not a case of mere delay on the complainant's part in paying a debt. The applicant would never have allowed the "Tanjore" to sail on the 9th April if the complainant had not promised to pay him Rs. 5,000 on the evening of that day, and if he had not believed that promise. The complainant said he had that money then in his hands. The money was to be paid from the fares of passengers and from freight received by the complainant. As soon as the money came into his hands, he was not the owner of it, but a trustee, and his retention of the money after the 9th April was in breach of his trust. He did not pay the money on the 10th, and the Bank had then lost its immediate hold of the security for the advance of Rs. 50,000 made to the complainant and Baladina—for the ship sailed on the 9th. He never came to the applicant's office on the 11th, though he admitted to the shroff that he had received the applicant's letter of the 10th April. After sending five or six times for him between the evening of the 9th and the morning of the 12th April, and not obtaining a payment which ought, under no circumstances, to have been delayed beyond the evening of the 9th the applicant had surely ground for the strongest suspicions against the complainant. We have no doubt that he honestly believed, on the 12th April, that the complainant was keeping out of his way, and was appropriating the money to purposes other than he was bound to appropriate it to; and this was in effect the imputation he made in his letter of the 12th April. It [361] cannot be said that he acted without due care and attention; and the real question in the case—a question not discussed at all by the Magistrate—is whether he really said in that letter more than was necessary for the protection of his interest; and in dealing with that question, it is necessary to remember that the letter was addressed, not to a newspaper, for publication to the whole world, nor to a person in no way connected with the transaction between the complainant and the applicant, but to the partner of the complainant in the very transaction to which the letter related. In *Hancock* v. *Case* (1) Cockburn, C.J., observed that "the question of privilege will depend on the whole character of the case as it appears upon the whole evidence." In the present case the Magistrate has dealt with it on considerations arising out of a part of the case only. By taking a wrong view of the effect of the applicant's

(1) 2 F. & F. 714.

1890
AUG. 5.
REVISIONAL CRIMINAL.
15 B. 351.

withdrawal on the 13th April of the imputation contained in his letter of the 12th, he has practically excluded from his consideration the material circumstances which preceded the despatch of the letter of the 12th April, from which he ought, we think, to have drawn the inference that the applicant wrote that letter in good faith. In *Toogood* v. *Spyring* (1) Mr. Baron Parke laid down the following rule:—"In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned."

In the present case, the letter was written in the conduct of the applicant's own affairs, in a matter in which not only he was interested, but in which the person to whom the letter was sent was also interested. And the question would then remain whether the publication was fairly made. In such a case, we can see no unfairness in the applicant stating exactly what he believed to be the case. He believed that the complainant [362] was purposely keeping out of his way, in order to avoid payment of the money, the punctual payment of which was the condition on which the "Tanjore" had been allowed to leave Bombay. By saying that he was keeping out of the way, he did not, we think, mean to imply that the complainant had absconded. He simply meant that he had not come to his office to pay the money; that he was avoiding him; and that the money had not been appropriated to the only purpose to which it could be lawfully appropriated. If that money was not paid by the complainant, then Baladina would be liable, as his partner, to pay it. It was clearly necessary that Baladina should know all the circumstances as they presented themselves to the applicant's mind, in order that he might either put pressure on the complainant, or himself at once discharge the liability resting on the partners in respect of the money they held in trust. In such a case, any milder language than was actually used might have failed to convey the writer's meaning, and perhaps the best indication of the necessity for the language actually used is found in the fact that, immediately after the letter was sent, a tender of Rs. 3,000 was made by the complainant. In *Hamon* v. *Falle* (2) their Lordships of the Privy Council said: "The effect of the defence thus pleaded is clear that the defendants acted in good faith and without any malice towards the plaintiff, without any desire to injure him, and in the honest belief that the information they had received was sufficient to justify the course which they took. Their Lordships are of opinion that such a defence, if proved, is a sufficient answer to the *prima facie* cause of action disclosed by the declaration."

These remarks have an application to the present case, in which there is no ground for the suggestion that the applicant was actuated by malice to make an unjust and mischievous imputation against the complainant, or by a desire to injure him in any way. The information given by his shroff, on which he acted, was believed by him, and was clearly entitled to credit, and furnished a sufficient motive and reason to justify the communication made to Baladina. In *Robertson* v. *N'Dougall* (3) [363] it was said: "If an individual, unauthorized, publishes reflections

(1) 1 C. M. & R. 193. (2) L.R. 4 Ap. Ca. 250. (3) 4 Bing. 679.

1890
AUG. 5.

REVISIONAL CRIMINAL.

15 B. 351.

on a man's character, and injury results from the publication, the law does not enquire into his motives. But if, in the performance of a duty, he makes charges honestly, even though he express himself with warmth, he is excused; for the law has respect to human infirmity: he must, however, confine himself to what the occasion requires, for if he goes beyond it, imputing base motives, he is not excused, unless he justifies himself by showing the truth of his assertions." And again at pp. 679, 680 of the Report: "What occasion had the defendant to introduce the latter branch of the sentence? It could only be malicious; that is, in the legal sense of the term; in other words, mischievous and unjust: and, if so, the jury were not authorized to find the verdict they have found." In the present case, the circumstances clearly do not justify a finding that the imputation was malicious in the legal sense. In *Tuson* v. *Evans* (1) it was said: "Some remark from the defendant on the refusal to pay the rent was perfectly justifiable, because his entire silence might have been construed into an acquiescence in that refusal, and so might have prejudiced his case upon any future claim; and the defendant would, therefore, have been privileged in denying the truth of the plaintiff's statement. But, upon consideration, we are of opinion that the learned Judge was quite right in considering the language actually used as not justified by the occasion. Any one, in the transaction of business with another, has a right to use language *bona fide*, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly, or by its consequences, be injurious or painful to another; and this is the principle on which privileged communication rests; but defamatory comments on the motives or conduct of a party with whom he is dealing, do not fall within that rule. It was enough for the defendant's interest, in the present case, to deny the truth of the plaintiff's assertion: to characterise that assertion as an attempt to defraud, and as mean and dishonest, was wholly unnecessary. This case, therefore, was properly left to the jury: and there will be no rule."

[364] In the present case, as we have already said, it would scarcely, have been possible for the applicant to say less than he did if he wished to convey in precise terms his real impressions regarding the complainant's conduct to a person who was entitled to full information on the subject. In *Denman* v. *Bigg* (2) it was held that a creditor of the plaintiff might comment on the plaintiff's mode of conducting his business to the man who was surety to the creditor for the plaintiff's trade debts. Lord Ellenborough said: "I am inclined to think that this was a privileged communication. Had the defendant gone to any other man and uttered these words of the plaintiff, they certainly would have been actionable. But Leigh, to whom they were addressed, was guarantee for the plaintiff; and the defendant had promised to acquaint him when any arrears were due. He therefore had a right to state to Leigh what he really thought of the plaintiff's conduct in their mutual dealings; and even if the representations which he made were intemperate and unfounded, still if he really believed them at the time to be true, he cannot be said to have acted maliciously, and with an intent to defame the plaintiff. To be sure, he could not lawfully, under colour and pretence of a confidential communication, destroy the plaintiff's character and injure his credit; but it must have the most dangerous effects, if the communications of business are to be beset with actions of slander. In this case the defendant seems to have been

(1) 12 A. & E. 736.

(2) 1 Camp. 269 (270).

1890
AUG. 5.
REVISIONAL
CRIMINAL.
15 B. 351.

betrayed by passion into some unwarrantable expressions. I will, therefore, not non-suit the plaintiff; and it will be for the jury to say, whether these expressions were used with a malicious intention of degrading the plaintiff, or, with good faith, to communicate facts to the surety, which he was interested to know." These remarks have a distinct application to the present case. We think that the communication made by the applicant to Baladina was privileged, under exception 9 to s. 499 of the Indian Penal Code. And that in all the circumstances of the case the applicant cannot be justly convicted of having exceeded his privilege. We reverse the conviction and sentence, and direct that the fine be refunded.

[365] CANDY, J.—I entirely concur with the judgment just delivered, which is a considered judgment after we had examined the various authorities to which allusion has been made. But as the case is of some importance, I will state briefly the reasons which, independently of those authorities, have convinced me that it is necessary, in the interests of justice, for this Court to reverse the finding and conviction recorded by the Magistrate. There are two important questions for consideration in this case: first, whether the Magistrate having found, as a fact, that the accused had acted without due care and caution, this Court can, in revision, interfere with that finding; second, whether the words used by the accused were an honest expression of opinion warranted by the circumstances of the case, or whether the accused was betrayed into some unwarrantable expression to which the law will impute malice. On the first point I have no doubt that this Court is bound to interfere, even though no appeal lies, if it is clear on the face of the proceedings that the Magistrate approached the case from an entirely wrong point of view. *In the matter of the petition of Shibo Prosad Pandah* (1) the Magistrate had convicted the accused of defamation, and the Sessions Judge had confirmed that conviction; but the High Court, sitting in revision, set aside the conviction and sentence, on the ground that the true question which arose for determination had not been considered in the case, the Magistrate and Sessions Judge having failed to see that in dealing with the question of good faith the proper point to be decided is not, whether the allegations put forward by the accused in support of the defamation are in substance true, but whether he was informed and had good reason, after due care and attention, to believe that such allegations were true. That is exactly what has happened in the present case. So, too, in *Queen-Empress* v. *Purshotam Kala* (2) this Court interfered, in revision, in a case in which no appeal lay, the Magistrate having found contrary to the evidence, and having omitted to notice that the imputation complained of was made in good faith, without any malice and was protected by exception 9 to s. 499 of the Penal Code.

[366] Now, in the present case, the Magistrate's judgment is succinct and there can be no doubt as to the reasons of his finding. He held that the imputations had been made by the accused without due care and caution, because the accused had unsuccessfully attempted to prove that a verbal agreement had been entered into with the complainant for the payment of Rs. 5,000, after Ex. A had been executed (for the payment of Rs. 3,000, as well as all expenses of the steamer, being docked, repaired, &c.), and because his attempt of justification was inconsistent with his previous action of withdrawal. It is evident, on a perusal of the record,

(1) 4 C. 124. (2) 9 B. 269.

1890
AUG. 5.

REVISIONAL CRIMINAL.

15 B. 351.

that the Magistrate was wrong in both his reasons. It is abundantly clear from the admissions of the complainant, and of his partner Baladina, that, when it was found that the steamer could not be docked, the accused insisted on the payment of Rs. 5,000 before the steamer could be allowed to leave Bombay for Jeddah, and the complainant and the accused accepted those terms. But even if it be assumed that the accused is unable to legally prove that the terms of the original agreement as to payment of the Rs. 3,000, &c., were subsequently varied by the alleged oral agreement as to payment of the Rs. 5,000, the defamation is not thereby established. The complainant does not say: "If the accused had stated that I had misappropriated Rs. 3,000, it would not have been defamation; but as he stated that I had misappropriated Rs. 5,000, it is defamation, because I promised to pay Rs. 3,000, and not Rs. 5,000." But the foundation of the present charge of defamation is that the accused stated that the complainant had misappropriated the money which he was bound to pay. Therefore, apart from the question as to the exact figures of that sum, the sole point for consideration was, and is, whether the accused had good reason, after due care and attention, to make that statement.

Again, the Magistrate omitted to notice that, though the accused may have failed to prove that his allegations were true in substance, yet he may have had good reason at the time for making them. The question is not whether the accused successfully or unsuccessfully attempted to prove the subsequent oral agreement, or whether, as a fact, the complainant had misappropriated [367] the money, or was keeping out of the way, but, whether, in the admitted circumstances of the case, the accused had good reason for making the allegations complained of. If, to use the Magistrate's expression some "misunderstanding" arose as to the exact sum to be paid before the steamer should leave Bombay, then no malice can be imputed to the accused, because he demanded Rs. 5,000. So, too, no malice can be imputed to him, because when he found that an offer was made to pay Rs. 3,000, he, on the 13th April, withdrew the statement made about the complainant in his letter of 12th April. There was no inconsistency here. What the accused, in effect, said to Baladina was: "You and your partner agreed to pay me Rs. 5,000 as a condition precedent to the steamer being allowed to leave Bombay: this money was to be paid from the passage money and freight, which have been collected by the complainant; but the steamer has sailed, and the complainant has not sent me any money, nor will he answer my letters, or come and call on me, as requested. Therefore, as you are both responsible for the payment, I inform you of these facts. Please recover the money, and pay it in according to your promise." Then, on the next day, when the accused received from the complainant's solicitors an offer to pay some money, he at once wrote to Baladina, and in effect said: "The complainant has at length replied to my communication, and says he is willing to pay in Rs. 3,000; so I withdraw the above statement; but I still maintain that the sum to be paid is Rs. 5,000, and I hold you responsible for that sum." Instead of there being anything inconsistent or malicious in the above conduct, it shows utter absence of malice, and was clearly justified by the facts; while, on the other hand, the action of the complainant in laying the criminal information on the 14th April, stating that no apology had been tendered to him, when in fact none had been demanded, and suppressing all mention of the fact that the accused had asserted a right to receive Rs. 5,000 before the steamer sailed, shows that the bad faith was in the complainant and not the accused. The Magistrate has altogether failed to notice that whatever was

1890 AUG. 5. REVISIONAL CRIMINAL. 15 B. 351.

the exact sum to be paid, there was a distinct breach of trust on the part of the complainant and Baladina. They promised not to let the steamer leave [368] Bombay till a certain sum was paid. The steamer sailed without one pie being paid. Baladina admits that he pressed the complainant to pay Rs. 5,000, and that the complainant collected the passage money and freight, and spent the same without one pie being paid to the accused. Under these circumstances, there can be no doubt as to the answer to the second question, noted at the commencement of this judgment. The accused was naturally irritated at the way in which he was being treated by the complainant; but if he went beyond the bounds of fair criticism, and used expressions which were not warranted by the facts, he must suffer the consequences. In a matter of this kind the accused is entitled to insist on the fair ordinary sense being attached to his expressions. Misappropriation is wrong appropriation. As long as no money was paid or offered by the complainant, who had collected the passage money and freight, though the steamer had left Bombay, so long was the accused justified in asserting that the money, which was to be paid as a condition precedent to the steamer leaving Bombay, had been wrongly appropriated. As long as the complainant paid no heed to the letters and messages from the accused, so long was the accused justified in asserting that the complainant was keeping out of the way. He did not mean that the complainant was absconding or evading service of legal process. He evidently meant, what was a fact, that the complainant was keeping out of his way.

For these reasons I am of opinion that the accused has been wrongly convicted.

Conviction and sentence reversed.

Attorneys for applicant:—Messrs. *Craigie, Lynch and Owen.*

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15 B. 369.

[369] APPELLATE CRIMINAL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

QUEEN-EMPRESS *v.* BALYA SOMYA AND ANOTHER.*

[9th October, 1890.]

Indian Penal Code (Act XLV of 1860), s. 411—Retaining stolen property—Charge to the jury—Misdirection.

The accused were charged with retaining stolen property under s. 411 of the Indian Penal Code (Act XLV of 1860). The Sessions Judge in his charge to the jury merely directed them to find whether the property was stolen, and whether it was retained by the accused.

Held, that the charge was defective and amounted to a misdirection. The Sessions Judge should have directed the jury to find (1) whether the property was stolen, (2) whether it was dishonestly retained, and (3) whether the accused knew or had reason to believe the same to be stolen property. Unless these questions were found by the jury in the affirmative the accused could not legally be convicted of an offence under s. 411 of the Indian Penal Code.

[F., 25 C. 711 (713); R., 10 Bom.L.R. 565=8 Cr.L.J. 36.]

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* Criminal Appeals, Nos. 311 and 319 of 1890.