1901.
December 10.

KING *v.* RAGAL.

D. C., Batticaloa. 1,626/2,244.

Ordinance No. 22 of 1889—Having dominion of money as public servant—Postmaster failing to produce money—Smallness of amount not produced—Criminal breach of trust—Proof of dishonesty—Meaning of "forthwith."

The essence of the offence constituted by section 1 of Ordinance No. 22 of 1899 is dishonesty. The Ordinance did not intend to make a person criminal who had no guilty or criminal intent. Its object was to facilitate proof of dishonesty by deeming that public servant to be dishonest who, on being required to account for the money shown by his accounts to be due from him, could not within a reasonable time pay or produce it, or account for the shortage, by showing for instance that thieves had broken into his safe.

Failure to produce "forthwith" means within a reasonable time.

To justify a conviction there must be direct evidence of dishonesty or such conduct on the part of the accused as would lead to the inference of dishonesty or dishonest intent.

The mere failure on the part of a postmaster to produce a small balance of Re. 1.38 shown in the cash book kept by him cannot be treated as a criminal breach of trust. In law, shortage of a small sum of money is not in itself evidence of dishonesty.

It is evidence of dishonesty if a public servant, entrusted with money, being called upon to produce it, says: "I had the money I cannot "explain what has become of it," and it is a sum which he cannot replace.

THE facts of this case and the arguments in appeal are set forth in the judgment of the Chief Justice.

Dornhorst and *W. H. Jayawardene* appeared for accused, appellant.

Walter Pereira, Acting S.-G., for respondent.

10th December, 1901. BONSER, C.J.—

This is an appeal by a man who is the Postmaster in an out-of-the-way part of the Island against a conviction by the District Court of Batticaloa, which found him guilty of two offences—first, that he, having dominion of money in his capacity as a public servant, viz., as Postmaster at Kalkuda, did commit criminal breach of trust by failing to produce, when required to do so by the Head of his Department, Mr. H. L. Moysey, Postmaster-General, the sum of Re. 1.38½, balance shown in the cash book kept by him as such public servant, and for that he was sentenced to undergo rigorous imprisonment for three months; and the second offence was that he did on the 16th December, 1900, at Kalkuda, having dominion over property in his capacity as a public servant, and being entrusted with certain property, viz., Rs. 2.80, did commit

criminal breach of trust in respect of such property by dishonestly misappropriating the same, and for that he was sentenced to undergo rigorous imprisonment for three months.

Now, the 1st thing that strikes one is the small amount at stake. Of course it may be that these were simply amounts selected out of a large number of defalcations, and that evidence was given of a large number of defalcations, to show that the man was dishonest in respect of these particular sums of money. But that is not the case here, and the only suggestion of dishonesty was in respect of these two small sums.

As regards the conviction on the first count, in respect of Rs. 1.38½, the District Judge based it upon the provisions of Ordinance No. 22 of 1889. Now, that Ordinance runs as follows:— "Whoever, being entrusted with or having the dominion of "public money in his capacity as a public servant, fails forthwith "to pay over or to produce, when required to do so by the head of "his department or by the Colonial Secretary, the Auditor-"General, Assistant Auditor-General, or any officer specially "appointed by the Governor to examine the accounts of his "department, any money or balance of any money shown in the "books or accounts or statements kept or signed by him to be "held by or to be due from him as such public servant, or to duly "account therefor, shall be guilty of the offence of criminal "breach of trust, and shall on conviction be subject to the penalty "provided by section 392 of the Ceylon Penal Code." It was sought to be argued that this Ordinance altered the law in respect of criminal breach of trust in its most essential particular. To constitute the offence of criminal breach of trust, you must find dishonesty. That is the essence of the offence, dishonesty. In my opinion, this Ordinance did not intend to make a man a criminal who had no guilty or dishonest intent: it simply intended to facilitate proof of dishonesty, which it is often difficult to prove. Of course, if, as in many cases it occurs, a person has falsified his accounts, then you have at once evidence of dishonesty, but a mere shortage of money is not in itself any proof of dishonesty. The object of the Ordinance evidently was this, that if a public servant was required to account for the money, and could not within a reasonable time—"forthwith" must bear that meaning—pay or produce the money shown by his accounts to be due from him, he is to be deemed dishonest, unless he can account for the shortage. Of course, if he can, for instance, show that thieves have broken into his office and stolen money from his safe, that would be an answer. But if all he can say is "I had the money and I cannot give any explanation

1901. *December 10.*

BONSER, C.J.

of what has become of it," and it is a sum which he cannot replace, then there is evidence to satisfy a reasonable man that he has taken the money without any reasonable prospect of paying it back, which of course would be a dishonest act. But that a man who is found to have in his safe, when he is suddenly pounced upon, five cents less than his account shown to be due by him, and can give no explanation of the five cents than that he has taken it, should be made a criminal is revolting to one's idea of justice.

The Acting Solicitor-General, who appeared to support the conviction, candidly admitted that there was no direct evidence of dishonesty on the part of this man in respect of this charge, nor was there any conduct on his part from which dishonesty or dishonest intent could be inferred. That being so, I hold that the mere shortage of a trifling amount like this, which could be replaced any moment, is not a dishonest misappropriation of money. I do not overlook the fact that he told Mr. Moysey that he had no more money in his possession than what was in his safe. But a man in his position must have credit and friends, and would have no difficulty in raising a trifling sum like Re. 1.38½.

Then, as regards the other charge, the criminal misappropriation of Rs. 2.80, there was no charge for that count under Ordinance No. 22 of 1889, and the case rests entirely upon the general law. The facts of this case appear to be as follows:—Mr. Moysey came at daybreak on a Monday morning (December 17, 1900) and examined this man's accounts. The previous day, the appellant had delivered out to the consignee a value-payable parcel and had received from him the sum of Rs. 2.80, which of course had to be remitted to the sender of the parcel. The only evidence of dishonest misappropriation of this Rs. 2.80 was that he could not produce to Mr. Moysey either the Rs. 2.80 or parcel, and his admission that he had received this sum of Rs. 2.80 and the fact that the receipt of the money was not entered in his books. The explanation given by the appellant was this: "The parcel was "delivered out by me on a Sunday, and I was not bound to deliver "out parcels on a Sunday, because the Post Office is not open for "such transaction on that day, but to oblige the consignee I gave "the parcel and took the money, and as it was a Sunday I did "not enter it into my accounts. Before I could enter it on "Monday, Mr. Moysey came at daybreak."

It seems to me that that is a satisfactory explanation, that the absence of the entry in his book is satisfactorily accounted for, and that no presumption of fraud could be drawn from it. The Acting Solicitor-General frankly and candidly admitted that that

1901.

December 10.

BONSER, C.J.

was so. In law, the fact that he was short of a small sum of money was not in itself evidence of dishonesty. Therefore the conviction on this count was wrong. It may be the Postmaster committed a breach of the departmental regulations for which he may be departmentally punished, but that is quite a different thing from an offence against the criminal laws.

The conviction is quashed.