WALGAMAGE

v.

THE ATTORNEY-GENERAL

SUPREME COURT
FERNANDO, J.
KULATUNGA, J. AND
GOONEWARDENE, J.
SC APPEAL NO. 38/90
CA NO. 126/85
MC MATARA NO. 5/83
3RD DECEMBER 1990, AND
17TH JANUARY AND 3RD MARCH 1991

Penal Code - Criminal misappropriation and Criminal breach of trust - Sections 386 and 388 of the Penal Code - Whether an innocent taking in the first instance is essential to constitute the offence - Meaning of "entrustment" in criminal breach of trust.

The appellant was the Manager of a Rural Bank functioning in the premises of a multi-purpose co-operative Society ("M.P.C.S"). The Bank accepted savings deposits and granted small loans, and also carried on the business of a pawn broker. According to prescribed operating procedures, its cash balance at any given time should not have exceeded Rs. 5000/-. Whenever the Bank required cash, on the request of its cashier the appellant prepared a voucher and submitted it to the Manager M.P.C.S. for approval. Upon approval, a cheque drawn in the name of the appellant was issued. The appellant would endorse it and present it to the cashier M.P.C.S. who would pay cash. The appellant was expected to hand over the cash to the cashier of the Bank. Fourteen cheques for Rs. 5000/- each had been issued, and in respect of ten of these, the M.P.C.S. cashier had paid cash to the appellant, which he had not handed over to the Bank's cashier. The appellant was convicted of criminal breach of trust in respect of the said sum of Rs. 50,000/-.

It was argued on behalf of the appellant that the offence of criminal breach of trust had not been made out because :

(a) there had been no initial taking bereft of a dishonest intention, the offender being already in possession at the time the offence was committed.

(b) there had been no entrustment (of property) on the basis of true consent.

Held :

(1) Ex facie section 386 of the Penal Code does not impose a requirement that the initial taking must be innocent, but only that a dishonest intention must exist at the time of misappropriation or conversion. Insistence upon an initial innocent taking amounts to adding a further ingredient, which is not a permissible principle of interpretation.

Per Fernando, J.

> "Illustrations (b), (c) and (f) to explanation 2 to section 386 are against learned President's Counsel's contention that criminal misappropriation deals with cases where the offender is already in possession, for they show that a person who finds property not in the possession of any one, and immediately misappropriates it is guilty of that offence."

2. In the instant case there was an entrustment of property within the meaning of section 388.

Per Fernando, J.

> ""entrustment" does not contemplate the creation of a trust with all the technicalities of the law of trust; it includes the delivery of property to another to be dealt with in accordance with an arrangement made either then or previously."

Cases referred to :

1. *A.G. v. Menthis* (1960) 61 NLR 561
2. *Ranasinghe v. Wijendra* (1970) 74 NLR 38
3. *King v. Kabeer* (1920) 22 NLR 105
4. *Rajendra v. State of Uttar Pradesh* AIR (1960) Allahabad 387
5. *Ram Dayal* (1886) P.R. No. 24 1886
6. *Shamsooudur* (1870) 2 N.W.P. 475
7. *Raza Husain* (1905) 25 A.W.N. 9, 2 Cr.L. 394
8. *Mc Iver* (1935) 69 M.L.J. 681
9. *Stickney v. Sinnatamby* (1886) 5 Tamb 112
10. *Peries v. Anderson* (1928) 6 Times 49
11. *Georgesy v. Saibo* (1902) 3 BR. 88
12. *Kanavadipillai v. Koswatta* (1914) 4 Bal. N.C. 74
13. *R. v. Suppaih* (1901) 5 NLR 119
14. *S.C. 61 P.C. Chilaw 29737; 4. 3. 1910. 6 C.L. Revision 137, 153*
15. *Gratiaen Perera v. The Queen* (1960) 61 NLR 522

APPEAL from the judjement of the Court of Appeal reported in (1990) 2 Sri LR 212

D.S. Wijesinghe, P.C., with *Ananda Malalgoda, Nihal Somasiri* and *M.D. Dharmadasa* for accused-appellant.

A.R.N. Fernando, S.S.C. for Attorney General.

Cur. adv. vult.

July 10, 1991.

FERNANDO, J.

Special leave to appeal was granted in this case in view of conflicting decisions (in *A.G. v. Menthis*,[1] and *Ranasinghe v. Wijendra*,[2] and the decisions cited therein) upon the question whether to constitute the offence of criminal misappropriation or criminal breach of trust it is essential that the initial taking be innocent.

The Appellant was convicted of criminal breach of trust, in respect of a sum of Rs. 50,000/- while being employed as Manager of a Rural Bank. The Rural Bank accepted savings deposits, and granted small loans, and also carried on the business of a pawn broker. According to prescribed operating procedures, its cash balance at any given time should not have exceeded Rs. 5,000/-. If the Bank required cash, a sum not exceeding Rs. 5,000/- at a time was obtained from the Multi-Purpose Co-operative Society ("M.P.C.S.") within whose premises it functioned. The Bank's cashier would make an oral request for cash to the Appellant, who would prepare a voucher for that purpose, and submit it to the Credit Manager of the M.P.C.S. The latter was expected to satisfy himself that cash was actually required, and would then authorise a cheque to be drawn for the stipulated amount, in the name of the Appellant. A cheque would then be prepared, and duly signed, and delivered to the Appellant, who would endorse it; his endorsement would be authenticated by the Accountant, and the cheque would then be presented to the cashier of the M.P.C.S., who would pay cash. The Appellant was expected to hand over the cash to the cashier of the Bank.

Fourteen vouchers for Rs. 5,000/- each were prepared by the Appellant, at times when the cashier had not required cash, and had made no request for cash; the Credit Manager had approved the vouchers and sanctioned payment without due care. Fourteen cheques for Rs. 5,000/- each had been issued, and in respect of ten of these, the M.P.C.S. cashier had paid cash to the Appellant, which he had not handed over to the Bank's cashier. The Appellant was found guilty by the High Court of Matara of criminal breach of trust under section 391 of the Penal Code, and was sentenced to two years R.I., and a fine of Rs. 50,000/- (in default 1 1/2 years R.I.). The Court of Appeal while upholding the conviction, suspended the prison sentence for a term of five years, and affirmed the fine and default sentence, with appropriate directions to the High Court.

If there was an "entrustment", it was not merely of the cheque but also of the cash obtained in exchange. In *King v. Kabeer,*[3] a jail guard was entrusted with a railway warrant, and instructed to accompany a prisoner who had served his sentence to the railway station, to receive a train ticket in exchange for the warrant, and to give him the ticket. Having obtained the ticket the jail guard sold it. De Sampayo, J., upheld an acquittal on a charge of criminal breach of trust in respect of the warrant. The trust in respect of the railway warrant was to deliver it to the proper officer at the railway station and to receive a ticket in exchange; although it was true that he had failed to perform the further duty of handing the ticket to the prisoner, that had no immediate connection with the trust in respect of the warrant. That case is distinguishable: there was no charge of criminal breach of trust in respect of the *ticket*, and in any event, the ticket was not "entrusted" by the prison authorities, but handed over by a third party, the railway officer. In the present case, the Bank had an arrangement with the M.P.C.S. whereby the latter would provide cash to designated officers of the Bank. The M.P.C.S., through one or more of its officers, provided cash, and as part of its internal procedure (and it is immaterial

whether this was made known to the Bank or not) first issued a cheque through one officer, and cash upon presentation of the cheque to another officer. That transaction cannot be separated into two distinct components: the delivery of a cheque subject to a "trust", and the delivery of cash in exchange for the cheque, free of such "trust". In pursuance of an arrangement with the Bank, the M.P.C.S. through its officers caused cash to be delivered to the Appellant, and it was part of the arrangement that this sum was "entrusted" to the Appellant to be handed over to the Bank's cashier. It is true that the officers of the M.P.C.S. did not themselves, personally, "entrust" the cash; they were no more than the hands which delivered the cash, there being an entrustment by the legal *person*, namely the M.P.C.S., whose business organisation they served.

It is possible that the Appellant had no dishonest intention on the first occasion (and perhaps even on the second) when he obtained cash in this way; it may well be that he obtained cash in anticipation of requests by the Bank's cashier in order to expedite the Bank's business, by immediately responding to a request for cash without having to spend time in going through the process of approval, documentation, and payment. But the sum obtained on the first occasion was not actually paid to the Bank's cashier. Hence it is reasonable to conclude that at least on the subsequent occasions, he had a dishonest intention at the outset. Learned President's Counsel submitted that the Prosecution evidence thus established the offence of cheating; and that criminal breach of trust had not been made out because :

(a) there had been no initial taking bereft of a dishonest intention, and

(b) there had been no entrustment: because a trust implies confidence reposed by one person in another, and it is of the essence of confidence that it must be freely given and that there must be a true consent; there is no true consent, if consent is obtained as a result of a trick.

In support of his contention that the initial taking must be innocent, and that a dishonest intention must be formed subsequently, learned President's Counsel advanced three arguments. He conceded that *ex facie* section 386 does not impose such a requirement, but only that a dishonest intention must exist at the time of misappropriation or conversion to the offender's own use. Insistence upon an initial innocent taking amounts to adding a further ingredient, namely "whoever *having obtained possession of any movable property without a dishonest intention, thereafter* dishonestly misappropriates or converts to his own use such movable property . . ." His first submission was that in respect of offences against property there are clear lines of demarcation in the Penal Code between those where the victim is in possession at the time the offence is committed (such as theft and cheating) and those where the victim is out of possession the offender being already in possession (such as criminal misappropriation and criminal breach of trust); all these offences are intended to be self-contained without any overlapping, so that the same act could not constitute both cheating and criminal misappropriation. He urged that "it is an established principle that criminal laws must be construed narrowly or *in favorem vitae aut libertatis*", citing Maxwell (Interpretation of Statutes, 12th Edition, p. 245):

> "Similarly, statutes dealing with jurisdiction and procedure are, if they relate to the infliction of penalties, strictly construed: compliance with procedural provisions will be stringently exacted from those proceeding against the person liable to be penalised, and if there is any ambiguity or doubt it will, as usual, be resolved in his favour. This is so even though it may enable him to escape upon a technicality."

Secondly he contended that the Indian Courts had consistently taken this view; the decision in *Rajendra v. State of Uttar Pradesh*,[4] cited in the Court of Appeal judgment was not in line with the Indian trend.

In support of these two contentions reference was made to the observations of Weeramantry, J., in *Ranasinghe v. Wijendra(Supra)*

> "This indeed would appear to be the understanding of this offence in India as well. Thus Ratanlal & Thakore begin their comment on this section with the observation that "criminal misappropriation takes place when the possession has been innocently come by, but where, by a subsequent change of intention, or from the knowledge of some new fact with which the party was not previously acquainted, the retaining becomes wrongful and fraudulent. The offence consists in the dishonest misappropriation or conversion, either permanently or for a time, of property which is already without wrong in the possession of the offender." The authors go on to point out that in this respect the Penal Code is at variance with the English law according to which the intention of the accused only at the time of obtaining possession is taken into account.
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> So also the original texts of the Penal Law of India by Sir Hari Singh Gour himself would appear to draw this distinction. It is there stated: "The question whether the act is theft or misappropriation depends upon when the dishonesty began - was it before or after the thing came into possession. This is a point of division as much between the two offences of theft and criminal misappropriation in the Code, as between criminal misappropriation and a civil wrong under English law." This absence of wrongful initial taking is stressed again for he observes in a later passage that in theft the initial taking is wrongful but in criminal misappropriation it is indifferent and may even be innocent but becomes wrongful by a subsequent change of intention or from knowledge of some new fact with which the party was not previously acquainted. The word "indifferent" in this passage would appear to refer to a neutral state of mind - that is where the doer has not affirmatively formed a wrongful intention at the time of taking.

> Later editions of this celebrated work by other editors seem to depart however from the view of the distinguished author, for the 8th edition states that it is difficult to say that misappropriation cannot be committed if the accused had a dishonest intention at the moment of taking possession of the article. I would prefer on this point to follow the view expressed by Sir Hari Singh Gour himself. "(pp 42-43)"

Thirdly he urged that the *cursus curiae* in Sri Lanka was to regard innocent initial taking as an indispensable ingredient of criminal misappropriation, except for a brief interlude of ten years between *A.G. v. Menthis* and *Ranasinghe v. Wijendra(Supra)* this was the view expressed by professor G.L. Peiris (Offences under the Penal Code, p 460).

Neither the Penal Code nor any other statute lays down a principle of interpretation that the there is no offences in the Penal Code must be presumed not to overlap. It is because the Criminal Procedure Code of 1898 recognised that there may be such overlapping that section 180(2) (corresponding to section 175(2) of the present Code of Criminal Procedure Act) provided that:

> "If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished the person accused of them may be charged with and tried at one trial for each of such offences . . ."

The first illustration to that section demonstrates that the same act could constitute the offence of causing hurt as well as of using criminal force. The principle that penal statutes are to be strictly construed does not apply where a statute is clear and unambiguous. I am therefore of the view that the suggested principles of interpretation cannot be applied so as to introduce an additional ingredient into the definition of an

offence. It is unnecessary to consider when and how those principles could be utilised to resolve an ambiguity, because we are here concerned not with an ambiguity but with the imposition of an additional ingredient through interpretation. It is true that at the time the Penal Code was enacted in India larceny in English law did not include cases where property was taken without a dishonest intention; probably the offence of criminal misappropriation was intended to cover such cases. However, the definition actually adopted to give effect to that intention covers not *only* such cases, but extends also to cases where a dishonest intention existed at the outset. Illustrations (b), (c) and (f) to explanation 2 to section 386 are against learned President's Counsel's contention that criminal misappropriation deals with cases where the offender is already in possession, for they show that a person who finds property not in the possession of any one, and immediately misappropriates it is guilty of that offence. This explanation, is not an exception to, or an extension of, the section, but namely illustrates the principle contained therein. It serves to emphasise that all that is required is dishonesty at the time of the act of misappropriation or conversion.

The position in India is by no means consistent. Gour's view has not been acted upon in many instances. Cases referred to in the Commentaries on the Indian Penal Code include the following:

> "A Hindu girl having picked up a gold necklet and made it over to a sweeper girl, the accused, the brother of the finder, represented to the latter that the necklet belonged to a person of his acquaintance and thus got possession of it from her. On inquiry by a police constable a few hours later, he repeated the representations, but afterwards gave up the necklet. These representations were found to be untrue to the knowledge of the accused. It was held that he had committed this offence (criminal misappropriation)." *Ram Dayal,*[5].

"Where money is paid to a person by mistake, and such person, either at the time of the receipt or at any time subsequently, discovers the mistake, and determines to appropriate the money, that person is guilty of criminal misappropriation." *Shamsooudur*,[6].

"A and B were about to travel by the same train from Benares City. A had a ticket for Ajudhia. B had two tickets for Benares Cantonment. A voluntarily handed over her ticket to B in order that he might tell her if it was right. B under the pretence of returning A's ticket, substituted therefore one of his own, and kept A's ticket. It was held that the offence committed by B was that of criminal misappropriation rather than that of cheating." *Raza Husain*,[7].

"Even though the accused when they induced the complainant to part with certain properties had the intention of deceiving him, a subsequent misappropriation by them of the property to their own use would amount to criminal breach of trust. The fact that there was a complete offence of cheating when the property was received would not prevent the accused being guilty of the offence of criminal breach of trust." *Mc Iver*,[8].

[Ratanlal and Thakore, Law of Crimes, 22nd ed, pp 1040, 1041, 1045, 1051; Gour, Penal Law of India, 10th ed, pp 3450, 3459, 3460]

In view of such decisions it is not suprising that the present edition of Gour's work (at p. 3453) states :

"The argument that criminal misappropriation cannot be committed if the accused had dishonest intention at the time of taking possession of the article, cannot be accepted."

The first of the local cases relied on as establishing a cursus curiae is *Stickney v. Sinnatamby*,[9]. There, upon being asked for his gun by the accused, the complainant voluntarily parted with it. The accused ran away with it. It was held that the accused was wrongly convicted of theft and that he could not be convicted of cheating as there was no dishonest or fraudulent inducement to the complainant to deliver the gun. The conviction was altered to criminal misappropriation. In *Peries v. Anderson*,[10] the Appellant gave his chauffeur an identifiable 25-cent coin, and sent him to a boutique to buy cigarettes. The chauffeur placed the coin on the table, whereupon it rolled into the drawer, but the salesman denied receipt of the money and refused to give the cigarettes. When this was told to the Appellant, he insisted on searching the drawer, and found the coin; he then took the salesman to the Police Station, using some degree of force or compulsion. The Appellant was charged for that offence, and the question was whether he could justify the arrest of the salesman on the basis that the salesman had committed a cognisable offence. It was held that the salesman had not committed theft as :

> "there was no taking of the property from (the chauffeur); . . . there was nothing dishonest in the manner in which he acquired possession of it, but the dishonesty occurred when he denied the receipt of the money. This offence therefore was dishonest misappropriation."

These decisions are not authority for the principle that if a dishonest intention exists at the time possession is acquired, there can be no conviction for criminal misappropriation.

In *Georgesy v. Saibo*,[11] the payee of a cheque, having endorsed it, put it into an envelope with a letter addressed to his banker requesting that the proceeds be placed to his credit. The accused having come into possession of the cheque, endorsed it in favour of a Chetty who thereupon paid him the amount of the cheque, less his commission. The accused was found guilty under section 394 of dishonestly receiving stolen

property. It was held in appeal that there was no definite evidence that the cheque had been stolen, for it might have been lost in the post. Faced with an imminent acquittal, Counsel suggested that the Court should consider whether the accused could be convicted of criminal misappropriations. Middleton, j., having held that on the evidence the only inference was that the accused had come dishonestly by the cheque, observed:

> "Now all the cases which have been decided by the Indian Courts point to the conclusion that in order to constitute the offence of criminal misappropriation there must be first an innocent possession . . . and then a subsequent change of intention. If I find that the man dishonestly came by the cheque, as I do, although that would put him in a worse position morally than if he had come by it in such a way as would make him amenable under section 386, yet I am bound to confess that it is impossible to meet the weight of authority that has been put before me, and to say that the original misappropriation constitutes an offence under section 386."

However, neither the names nor the references of the Indian decisions are set out in the judgement. In *Kanavadipillai v. Koswatta*,[12] the accused asked a boutique keeper for a box of matches, and having obtained it, gave a five rupee note. The boutique keeper said he had no change and gave back the note. The accused took the note and the box of matches "to the railway station, there got the note changed, and was returning when he met the constable and the complainant." Although it was observed that he should not have been convicted of criminal misappropriation, as that offence requires an initial innocent acquisition of possession, yet it was held on the facts that there was no appropriation or conversion to his own use by the accused, nor an intention to cause wrongful loss to the complainant. These two decisions do not discuss the provisions of section 386, and state the proposition that criminal misappropriation requires an initial innocent possession almost as if it were axiomatic. *Georgesy v.*

Saibo(Supra) referred to this proposition only in reference to the invitation to convict the accused on a different charge, and *Kanavadipillai v. Koswatta(Supra)* could have been determined, on the facts, without any reliance on this proposition.

On the other hand, in *R. v. Suppaiya,*[13] it was held that a servant who receives money on behalf of his master and enters the amount received in his master's book, but afterwards denies the receipt of the money is guilty of criminal breach of trust. Although the judgement does not consider whether the dishonest intention should have been formed after receiving the money, yet the contention for the prosecution on appeal was that "the original taking *was with dishonest intention.*" Clearly, the Court did not consider this to negative criminal misappropriation. In the sixth volume of the Ceylon Law Review there is a note of a decision that:

"It is not enough in a case of criminal misappropriation of property to say that the accused must have known *at the time he took the property* that it belonged to the complainant. There must be undoubted proof of such knowledge on the part of the accused."[14]

Thus it can hardly be said that by 1960 there was a clear, definite and consistent line of authority on this point. In *Gratiaen Perera v. The Queen,*[15] Sinnetamby, J., stated that "the authorities seem to suggest that there must be an initial honest possession followed by a dishonest conversion" but it was not necessary to decide the point; when it did become necessary, a week later, he held in *A.G. v. Menthis,(Supra)* that if the initial taking of property, not in the possession of anyone, was dishonest, the offence was made out.

In *Ranasinghe v. Wijendra,*[2] Weeramantry, J., distinguished *A.G. v. Menthis*[1] as applicable only to the taking of property *not in the possession of anyone.* Relying on *Georgesy v. Saibo*[11] and *Kanavadipillai v. Koswatte,*[12] and Gour's views as to the demarcation between theft and criminal

misappropriation, he held that for the latter offence an initial innocent taking was essential. *R. v. Suppaiya(Supra)* does not appear to have been cited.

With much respect to that distinguished Judge, I regret that I am unable to agree. The plain language of section 386 imposes no such requirement; the Penal Code does not contain any rigid demarcation between offences; the *cursus curiae* in India and Sri Lanka does not reveal an emphatic and uniform insistence on such a requirement. Section 388 is even plainer: it refers to an ingredient of "entrustment" (which is anterior to and distinct from the dishonest misappropriation, conversion, use or disposal which is another ingredient), but does not require that there be an innocent intention at the time of entrustment. The Appellant's first contention therefore fails.

The Appellant's second contention is based upon the assumption that the M.P.C.S. and its officers were induced to entrust each cheque to him by a trick. The arrangement between the Bank and the M.P.C.S. was that upon a voucher being submitted, a cheque would be issued to the Appellant; the M.P.C.S. was not required to inquire into the motives of the Appellant or whether the Bank actually needed cash; the operative cause of each cheque being entrusted to the Appellant was the submission of vouchers in due form. Thus even if it be correct that an entrustment induced by a trick will not satisfy section 388 - and I express no opinion as to whether that is an inflexible rule - that question does not arise here. "Entrustment" does not contemplate the creation of a trust with all the technicalities of the law of trust; it includes the delivery of property to another to be dealt with in accordance with an arrangement made either then or previously. That was the case here.

I therefore dismiss the appeal and affirm the order of the Court of Appeal.

KULATUNGA, J. - I agree.

GOONAWARDENE, J. - I agree.

Appeal dismissed.