

BASNAYAKE
v.
OFFICER IN CHARGE
SPECIAL CRIMES DETECTION UNIT
ANURADHAPURA

COURT OF APPEAL
P. R. P. PERERA J.
C.A. NO. 808/80
M. C. NO. 2660 KEBETTIGOLLAWA
NOVEMBER 23, 1987.

Criminal Law — Criminal breach of trust — Inference of dishonesty — Explanation — Burden of proof — S. 391 of the Penal Code.

The 1st accused-appellant in his capacity as cashier of the Kebittigollawa M.P.C.S. Ltd. received between 20.6.1975 and 1.7.75 a total of Rs. 30, 808/38 but on the Police opening the safe in the presence of the official of the Society found the cash in short by Rs. 14, 166/72. The 1st accused-appellant had custody of the key of the safe but the safe was also secured with a padlock, the key of which was in the custody of Piyaratne who was the 2nd accused in the Magistrate's Court. Both the appellant and Piyaratne were charged with the offence of criminal breach of trust of Rs. 14,166/72. Although both the keys in the possession of the two accused had to be used for opening and closing the safe as at the date of the commission of the offence the padlock arrangement was not in use as the padlock was out of order. The 2nd accused was acquitted but the 1st accused was convicted under s. 391 of the Penal Code.

Held

The inference of dishonest misappropriation or conversion is an essential ingredient of the offence under s. 391 of the Penal Code.

The Court can rightly take into account the accused's failure to give evidence by way of explanation. By this no burden was being cast on the accused.

APPEAL from judgment of the Magistrate of Kebittigollawa
E. R. S. R. Coomaraswamy, P.C. with *Shanaka de Livera* for 1st accused
 —appellant.

Mrs. Kumudhini de Silva, State Counsel for complainant — respondent

April 29, 1988

PERERA J.

The appellant in this case together with one Piyaratne was charged with having committed the offence of criminal breach of trust of Rs. 14,166/72 cts entrusted to him in his capacity as

cashier of the Kebittigollawa M. P. C. S. Ltd., between 20.6.'75, and 1.7.'75 — an offence punishable under section 391 read with section 32 of the Penal Code. After Trial, the learned Magistrate found the accused/appellant guilty of the charge and sentenced him to a term of one year's Rigorous Imprisonment, and a fine of Rs. 1,000/-. The appellant was sentenced to a further term of 12 months Rigorous Imprisonment in default of the payment of the fine. Piyaratne, the second accused, was acquitted of the charge. It is against this conviction and sentence that the present appeal has been lodged by the appellant.

According to Wijesundera, the Chairman of this M.P.C.S., who was also the Assistant Government Agent, at this time, he was informed by the Manager of the Co-operative Society, on 1.7.'75, that the appellant who was the cashier of the Society, and who had the custody of the safe keys, had not reported for work from the 28th June 1975, resulting in the transactions of the Society being adversely affected. He then directed the Manager, to complain to the Police. This witness has stated that according to the rules of the Society, at the end of each day, all the cash and cheques collected had to be entered in a document known as Form 11, by the cashier. This form is countersigned by the Accountant and lodged in the safe by the cashier until the following morning when it is deposited in the People's Bank Branch at Kebittigollawa. There were two keys to this safe. One key is the actual key to the safe, while the other was used to lock the padlock on the iron hoop across the safe. The key to the safe was in the custody of the appellant while the other key was with the second accused — Piyaratne, who has since been acquitted. Ordinarily it was necessary for both the appellant and Piyaratne to be present when the safe is opened, in view of this arrangement.

It is the evidence of this witness, that he examined the books of the Co-operative Society and found that the last date on which the collections of the Society had been deposited in the People's Bank was on 24.6.'75. He therefore held an inquiry and decided to summon the Police to investigate into this matter. In the course of his inquiry this witness discovered that as at 24.6.'75

there should have been in the safe a sum of Rs. 10,996/70 cts. As the appellant had not reported for work, the Manager of the Rural Bank, had acted for the appellant from the afternoon of 25.6.'75 up to 27.6.'75 as cashier. A sum of Rs. 16,428/88 cts. had been collected during this period and had been handed over to the appellant who had reported for work on 28.6.'75. On 28.6.'75 according to the books of the Society, the appellant had collected a further sum of Rs. 3,261/25 cts. Further, according to document 'P2', which was the Salary Abstract of an employee by the name of Karunaratna, a sum of Rs. 121/55 cts. had been handed over to the appellant by the Manager of the Society. It is in evidence that Karunaratna had not been paid for the month of June 1975. Thus the total amount of money that should have been in the custody of the appellant according to the documents maintained by the Society as at 1.7.'75, was Rs. 30,808/38 cts.

Upon the complaint made to the Police, by the Manager of the Society on 1.7.'75, the Police had arrived on the scene around 10.30 p.m. The Manager, had after a search found the key to the safe in the appellant's drawer, which he had opened with a duplicate key which was in his custody. The Police, thereafter in the presence of the Manager and several other co-operative officials had opened the safe that night, and found a sum of Rs. 16,641/66 cts. both in cash and cheques. The appellant had not reported for work on this date. There was therefore a shortage of Rs. 14,166/72 cts. as alleged in the charge.

It would be safe to presume on the evidence of this witness that at the time this offence is alleged to have been committed the safe in question was locked only with the key which was in the custody of the appellant, as the padlock which was used in addition to lock this safe, had been found to be defective. This position is supported by Inspector Abeyasinghe who investigated into this offence. The evidence set out above is substantially supported by the Manager of the Co-operative Society, Abeyratne. Abeyratne has also produced marked 'P1', the attendance register maintained at this Co-operative Society. According to this register the appellant and the second

accused has reported for work on 24. 6. '75. On 25. 6. '75, both the appellant and the second accused had reported for work, but the appellant has not indicated the time of departure. On 26. 6. '75 and 27. 6. '75, while the appellant had not reported for work, the second accused had reported for work. On the 28th June, which was a Saturday, the appellant and the second accused had reported for work but both had not recorded their time of departure. The 29th June 1975, was a Sunday, and was thus a non working day. On the 30th June 1975, and on the 1st July 1975 the appellant had once again failed to report for work.

The Manager of the Rural Bank one Tikiri Banda, who has also testified in this case, has stated, that he acted for the appellant at the Society in the afternoon of the 25th June '75, and on the 26th and 27th June 1975. He had collected a sum of Rs. 16,428/88 cts for these three days, and had handed over this sum of money to the appellant when he reported for work on 28th June 1975. This witness had produced marked 'P8', a receipt from the appellant acknowledging receipt of this money from this witness.

Witness Premaratne Fernando, a Co-operative Inspector who had been nominated to hold an inquiry by the Co-operative Department, has testified to the effect that he had examined the books of this Society for the period 20.6.'75 up to 28.6.'75 and that a shortage of Rs. 14,045/17 cts. was discovered by him. He has produced his report marked 'P9'.

Further, the Manager of the People's Bank Kebittigollawa has stated that the Bank was open for business on 25.6.'75 and that no deposits have been made to the credit of the M.P.C.S. Kebittigollawa, on this date.

It is also relevant to note that the Manager of the M.P.C.S. has stated specifically that the collections of the Society in the course of its day to day transactions which is in the custody of the cashier is not utilised under any circumstances to meet any expenditure incurred by the Society. The prosecution has also

produced marked 'P5' a document signed by the appellant and the second accused certifying that a sum of Rs. 10,996/70 cts. has been lodged in the safe on 24.6.75.

At the close of the prosecution case, the appellant was called upon for his defence and he gave no evidence. The real question therefore that this Court has to decide is whether the above material is sufficient to establish dishonest misappropriation or conversion to his own use, money which was entrusted to him while he functioned as cashier of this society.

Learned President's Counsel, contended on behalf of the appellant that in a charge of criminal breach of trust, it is not enough for the prosecution merely to prove that the servant who is charged has not accounted for all the money that he has received and for which he was bound to account, for there may be other explanation for the deficiency besides dishonesty, and the prosecution must prove circumstances from which dishonesty could be inferred.

When one looks at all the facts proved in the instant case there can be no doubt that the inference of dishonest misappropriation or conversion could easily be drawn. They are not capable of any innocent explanation, nor has the appellant at any stage attempted an explanation. Moreover this seems to be a case where the Court can rightly take into account the accused's failure to give evidence. This is not to put the burden on the accused. The prosecution has placed sufficient evidence in the light of which the Court could justifiably draw an adverse inference from the appellant's failure to give evidence. I therefore see no justifiable reason to interfere with the finding of the learned Magistrate in this case. I affirm the conviction and sentence. The appeal is accordingly dismissed.

Appeal dismissed.