1970 *Present :* Weeramantry, J.

R. V. RANASINGHE, Appellant, *and* B. WIJENDRA
(Inspector of Police), Respondent

S. C. 333/70—J. M. C. Colombo, 44232

Penal Code—Section 386—Offence of criminal misappropriation—Taking of property from another person—Requirement that it should be initially innocent.

A person who, at the time he takes over property from the possession of another person, already entertains a guilty state of mind is not liable to be convicted of the offence of criminal misappropriation under section 386 of the Penal Code.

The accused-appellant, who was a participant in a scheme of fraud with an unknown person in order to cheat a third party S, received a sum of Rs. 20 from S so that he could deliver it to the unknown person in pursuance of the scheme.

Held, that the accused was not liable to be convicted of criminally misappropriating the money, inasmuch as he took it initially from S with a guilty mind.

Attorney-General v. Menthis (61 N. L. R. 561) distinguished.

APPEAL from a judgment of the Joint Magistrate's Court, Colombo.

P. Ramanathan, for the accused-appellant.

T. Wickremasinghe, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

October 9, 1970. WEERAMANTRY, J.—

The accused-appellant in this case has been charged on two counts. On the first count he is charged with having aided and abetted an unknown person to deceive one Somapala by falsely representing to him that that person was in possession of three cartons of cigarettes available for sale and that he (the unknown person) was at Ceylinco building with the cigarettes, thereby dishonestly or fraudulently inducing Somapala to deliver to the accused a sum of Rs. 20/–, an offence punishable under section 403 of the Penal Code.

On the second count he was charged with dishonestly misappropriating this sum of Rs. 20/– belonging to Somapala thereby committing an offence punishable under section 386.

Somapala, whose evidence has been accepted by the learned Magistrate, has stated that on the day in question a person whom he had known earlier told him that he could buy cigarettes at a reduced rate through the account of a person who was running a canteen and suggested that Somapala should give him some money with which cigarettes could be so purchased for Somapala. Acting on this representation Somapala borrowed Rs. 20/– and took it to the Ceylinco building where that person brought the accused to him. The accused at that time had a parcel in his hand. The accused gave him the parcel and Somapala gave the accused a sum of Rs. 20/– consisting of two ten rupee notes. Somapala took the parcel away and on opening it, found it to contain cardboard boxes filled with pieces of paper.

The position of the accused was that he had met one Perera at Ceylinco House and that Perera had given him a parcel to hold it for a while. He waited for about five minutes holding the parcel and then Perera asked for the parcel and handed the parcel to Somapala. He denied any knowledge of the fraud.

It is difficult to understand why the accused who was according to his own evidence a businessman earning an income of Rs. 400/– per month from the sale of stationery, should waste his time holding a parcel for Perera not knowing what it contained or the nature of the transaction. The learned Magistrate has quite rightly accepted the version of the prosecution and rejected the accused's story.

The only question which arises for consideration upon this appeal is a question of law raised in regard to the second count. It is submitted that the charge of misappropriation cannot be maintained upon these facts inasmuch as misappropriation presupposes an initial innocent taking with a guilty state of mind following only thereafter. Upon the facts of this case on the other hand it seems clear that at the time the accused received the sum of Rs. 20/– he was already a guilty participant in the scheme of fraud.

There are conflicting authorities on this point.

In 1902 Middleton J. held [1] that before there could be a conviction under section 386 of the Penal Code there must first be an honest possession of the property and then a subsequent change of intention. This view was repeated in 1914 by Pereira J.[2] who observed that there could be no criminal misappropriation unless the possession of the thing alleged to have been appropriated was come by innocently and retained by a subsequent change of intention. For many years thereafter the correctness of this view of the law would appear to have been assumed, for we see that in 1960 Sinnetamby J. with whom Weerasooriya J. agreed, stated that to constitute misappropriation the authorities seem to suggest that there must be an initial honest possession followed by a dishonest conversion.[3] It was not necessary however for the purposes of that case to consider this question further. However, Sinnetamby J. sitting alone in a case decided a week later, went into the matter in somewhat greater detail and concluded that in order to constitute criminal misappropriation of property it was not necessary that there should be an initial innocent taking followed by a subsequent dishonest change of intention.[4] He held that if the initial taking of the property was itself dishonest, then too the offence was made out.

The case before Sinnetamby J. was a case of the misappropriation of cattle which according to the facts as found by the Magistrate had been let loose by the herdsman to whom they had been entrusted by the owner. At the time they were taken by the accused they were grazing on pasture land at 10.45 p.m. and Sinnetamby J. observed that the cattle may well have strayed at the time they were taken possession of by the accused. They could not therefore be said to have been in the possession of the herdsman at the time the accused took them, for there was nothing to show that the pasture land was enclosed or was under the control of the herdsman or was even the private property of the owner or the herdsman. Consequently this was a case where the cattle had not been taken from the possession of any person and what Sinnetamby J. held was that "if the initial taking of the property *not in the possession of anyone* is dishonest then too the offence of criminal misappropriation is made out".

The present case is not a case where the sum of Rs. 20/- was not in the possession of anyone at the time it was taken. The judgment of Sinnetamby J. does not therefore assist us in deciding a case such as the present. Where, as in the present case, a person at the time he takes over property from another already entertains a guilty state of mind, the question still arises whether the offence of criminal misappropriation is committed at all. Other offences such as theft or cheating may well be committed in such circumstances, and in accordance with the principles

[1] *Georgesy v. Seyado Saibo (1902) 3 Browne 88.*

[2] *Kanavadipillai v. Koswatte (1914) 4 Bal. N. 74.*

[3] *Gratien Perera v. The Queen (1960) 61 N. L. R. 522.*

[4] *Attorney-General v. Menthis (1960) 61 N. L. R. 561.*

accepted and assumed in our case law until the decision in *Attorney-General v. Menthis*, I would incline to the view that one of such offences rather than the offence of criminal misappropriation is the offence committed in this case.

It would appear that the offence of dishonest misappropriation of property was created in our Penal Code by way of a conscious departure from the principles then prevalent under the English criminal law. Dishonest misappropriation was a new offence which, as Gour observes[1], was carved out of theft, and laid down a rule at variance with the English law which looks only to the intention at the time the property is obtained[2]. Under English law an innocent taking followed by conversion consequent on a subsequent change of intention did not fall within the ambit of the offence of larceny. Moreover, according to the English law if the original intention was innocent a subsequent dishonesty would be insufficient to convert the legal possession into an illegal one so as to attract even any other head of penal liability. If the case was not one of guilty taking initially, it was regarded as one of non-criminality—that is the act constituted either a theft or was not punishable criminally at all and was a purely civil wrong.[3] In the words of Kenny[4]: "Under the ancient principle a taking could not be larceny if the intention to steal was not formed until later."

The English law ran into a degree of confusion in consequence of the fact that taking meant the acquisition of possession, for it became entangled in the complex question of what constitutes legal possession. The inconsistencies resulting from this position are illustrated by Kenny who refers to a number of cases where seemingly opposed decisions were reached owing to the difficult legal questions involved in determining whether there was there an innocent acquisition of possession. For example in *Carturight v. Greene*[5] the purchaser at an auction of a bureau which, unknown to both vendor and purchaser, contained money in a secret drawer was held to have obtained legal possession of the money, but forty years later in *Merry v. Greene & Dewes*[6] a purchaser at an auction of a bureau was treated as not acquiring possession of the money discovered in a secret drawer.

There were several similar conflicts leading to a somewhat bewildering state of the law. Indeed the resulting anomalies in the English law were so great that they have not in fact been fully corrected, as Sinnetamby J. points out in *Attorney General v. Menthis*, even by the Larceny Act of 1916. In *Attorney General v. Menthis* reference is made to the English case of *Maynes v. Cooper* [7] as exposing the unsatisfactory

[1] *Indian Penal Code, 8th ed. Vol. 4, p. 2824.*
[2] *Ibid p. 2825 ; Ratanlal & Thakore, Law of Crimes, 20th ed., p. 1024.*
[3] *Ratanlal & Thakore, ibid ; Gour, Indian Penal Code, 8th ed., Vol. 4, p. 2825.*
[4] *19th ed., s. 289.*
[5] *(1802) 8 Ves. 405.*
[6] *(1841) 10 L. J. M. C. 154.*
[7] *(1956) 1 All E. R. 450.*

state of the English law even at this date. In that case the recipient of an extra sum of money which had somehow found its way into his pay packet appropriated it upon subsequently forming a dishonest intention. It was held however that the offence of larceny had not been committed and much academic discussion followed upon that decision. Indeed such cases were condemned as a public scandal because the Courts were reluctantly compelled to allow dishonesty to go unpunished. [1]

It is not unreasonable to infer that the deliberate departure from the principles of English law, represented by the creation of this offence of criminal misappropriation, was the result of a consciousness of the inadequacy of the existing English law and the existence of a lacuna in regard to cases of innocent taking followed by a subsequent dishonest intention. Such inconsistencies as those revealed by *Cartwright v. Greene* and *Merry v. Greene & Dewes* must also have been known at the time the Indian Penal Code was presented to the Legislative Council in 1856 and passed in 1860, and certainly long before our Penal Code was passed in 1883. All these considerations would serve to indicate that the offence contemplated by section 386 was one of innocent taking followed by a subsequent dishonest intention, the case of an initial dishonest taking having already been provided for by the offence of theft.

This indeed would appear to be the understanding of this offence in India as well. Thus Ratanlal & Thakore [2] 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.

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 [3]: " 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 [4] 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

[1] *See (1956) 72 L. Q. R. at 183.*

[2] *Law of Crimes, 20th ed. p. 1023.*

[3] *5th ed. p. 1345, s. 4712.*

[4] *Ibid, s. 4713.*

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[1] 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.

It is my view upon a review of all the authorities that in the case of a charge of criminal misappropriation where the property is taken from the possession of another, such initial taking must be innocent, for this is the feature which marks out this offence from the offence of theft and other offences which may be committed. To view this matter otherwise may result in obscuring the line of demarcation between criminal misappropriation and such offences as theft and cheating. In the present case since the initial taking was with a guilty mind I consider that the offence of criminal misappropriation has not been made out and I therefore set aside the conviction on this count. The fine of Rs. 50/- or three weeks rigorous imprisonment on count one will stand and so also will the term of one year's rigorous imprisonment under the Prevention of Crimes Ordinance.

Conviction on 1 st count affirmed.
Conviction on 2 nd count set aside.