[COURT OF CRIMINAL APPEAL]

1951 *Present :* **Nagalingam J. (President), Gratiaen J. and de Silva J.**

M. E. A. COORAY, Appellant, *and* THE KING, Respondent

Appeal 56 with Application 117 of 1950

S. C. 25—M. C., Colombo, 43,770

Court of Criminal Appeal—Criminal breach of trust—Conviction of accused—Verdict of jury challenged on ground of uncertainty—Should sum misappropriated have been specified?—Several separate sums involved in charge—Joinder of offences—Power of trial Judge to put questions to jury in regard to their verdict—Meaning of word " agent " in Penal Code, s. 392—Accomplice—Always a competent witness—Effect of " quashed conviction "—Criminal Procedure Code, ss. 168 (2), 179, 247, 248—Evidence Ordinance, s. 133—Court of Criminal Appeal Ordinance, No. 23 of 1938, s. 5 (2)—Penal Code, ss. 389, 392.

The appellant was charged under section 392 of the Penal Code with committing criminal breach of trust in the way of his business as an agent. Omitting irrelevant words the charge was " that between 1st May, 1947, and 30th April, 1948, you being entrusted with a sum of Rs. 155,557.93 to be deposited to the credit of the Union (a Co-operative establishment) did commit criminal breach of trust in respect of the said sum ". In the course of the trial the prosecution narrowed down the sum in respect of the charge to Rs. 94,976.93, which was the aggregate of not less than twenty cheques. The Jury found the appellant guilty of criminal breach of trust in respect of " a sum of about Rs. 57,500 ". There were numerous ways of combining the twenty cheques to arrive at the figure of Rs. 57,500.

Held, (i) that the verdict of the Jury could not be said to be vague on the ground that it did not specify the exact amount that had been misappropriated. The Jury need not have mentioned any sum at all in their verdict.

(ii) that each of the cheques could not be said to be the subject of a separate offence. Where a charge of criminal breach of trust has been framed in terms of section 168 (2) of the Criminal Procedure Code, the gross sum specified in the charge, although it is made up of different particular sums, must be regarded as relating to one single offence in respect of the aggregate sum specified and not as constituting several charges or even one charge in respect of several offences.

(iii) that as the verdict was clear and unambiguous it was not competent for the trial Judge to have asked the Jury as to how they arrived at the figure of Rs. 57,500. Neither section 248 nor section 247 of the Criminal Procedure Code permitted such questions.

(iv) that the agent contemplated in section 392 of the Penal Code need not be a person who carries on the business of a general agent. A casual agency came within the scope of the section.

Held further, (*a*) that where the Court of Criminal Appeal quashes a conviction under section 5 (2) of the Court of Criminal Appeal Ordinance and does not order a new trial, the order quashing the conviction does not have the effect of leaving the proceedings yet pending against the accused person. *Dharmasena v. The King* (*1950*) *51 N. L. R. 481* considered.

(*b*) that an accomplice can be called by the prosecution as a witness even while a charge is yet pending against him.

APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

Dingle M. Foot, with *Colvin R. de Silva*, *M. M. Kumarakulasingham*, *K. C. de Silva*, and *M. L. de Silva*, for the accused appellant.—

First ground of appeal: The verdict of the Jury at the retrial was bad on the face of it. From the verdict it was impossible to say of which offences Cooray had been convicted and of which he had been acquitted. The verdict of the Jury was that the accused was guilty of criminal breach of trust in respect of " a sum of about Rs. 57,500 ". That verdict did not constitute a proper verdict. There had never been a good trial in this case because there was no definite charge on which the accused had been convicted. The trial had not been properly concluded since the verdict was indefinite. Although the offences are aggregated under section 168 (2) of the Criminal Procedure Code there is still an offence in respect of each separate cheque. Section 168 (2) is merely an exception to the general rule in section 179. The trial judge had not distinguished the offences. He had asked the Jury to look at the sum total and not the separate offences of which the total was made up—see the judgment of Gratiaen J. in *The King v. M. E. A. Cooray* [1]. There must be a definite finding of a certain definite sum traced to the accused and clearly shown to have been misappropriated. See *Mohan Singh v. Emperor* [2]; *Khirode Kumar Mookerjee v. Emperor* [3]. A contrary view is stated in *Emperor v. Byramji Jamsetji Chaewalla* [4] and *Wazir Singh v. Emperor* [5], but it is not clear whether these cases dealt with a number of separate and distinct charges or one charge. See also *King v. Cooper and Compton* [6]. Section 168 (2) is really not ambiguous but even if it is ambiguous—in view of the conflicting Indian decisions—It is submitted that the doubt must be resolved in favour of the accused. As regards the propriety of the Judge putting questions to the Jury see *Khirode Kumar Mookerjee v. Emperor* (*supra*) and *The King v. Albert Disney* [7].

Second ground: At the first trial Bandaranayake gave evidence, appellant did not. The evidence of Bandaranayake was treated as that of an accomplice. An accomplice should not be called as a witness unless he has nothing to hope or fear—see sections 283, 284 of the Criminal Procedure Code. The position in England is the same. Nothing should affect the mind of an accomplice or co-accused, when he gives evidence. See *Grant's Case* [8]. It is clear that when a man is in jeopardy, he must not be called on to give evidence for the prosecution. In the present case Bandaranayake had been called upon to repeat evidence he had given when he was in peril. In effect the general rule was circumvented. Even at the second trial Bandaranayake was still in peril because no formal acquittal was entered against him at the first appeal. At the first trial he was charged with conspiracy to commit criminal breach of trust and with aiding and abetting Cooray to do so. He had been

[1] *(1950) 51 N. L. R. 433 at p. 442.*
[2] *(1920) A. I. R. Allahabad 274.*
[3] *(1925) A. I. R. Calcutta 260.*
[4] *(1928) A. I. R. Bombay 148.*
[5] *(1942) A. I. R. Rangoon 89.*
[6] *(1947) 2 A. E. R. 701.*
[7] *(1933) 2 K. B. 138.*
[8] *(1944) 30 C. A. R. 99 at p. 105.*

acquitted on the latter but not on the former, in which the conviction was only quashed. There is a distinct difference between " acquitting " a person and " quashing " a conviction. In the latter case he could still be tried on a fresh indictment—See the Privy Council decision in *King v. Dharmasena* [1].

Third ground: The trial Judge misdirected the Jury regarding the evidence given in connexion with the charges relating to the Piliyandala depot. He should have asked the Jury to ignore that evidence.

Fourth ground: The trial Judge misdirected the Jury when he invited them to consider whether the Manager had power under the Rules of the Co-operative Central Bank to give credit in the way he did. It was not the sort of question to be put to the Jury. It was a question of law.

Fifth ground: The prosecution failed to show that the cheques, which are the subject-matter of the charges, represented the deficiencies of monies of debtors. The evidence of the accountant was inadmissible. Two of the jurors with special qualifications were treated in a different way from the others. The Jury was not directed as to which evidence was admissible and which was not.

Sixth ground: The accused was convicted under section 392 of the Penal Code on the basis that he was an " agent ". It was not suggested that accused was a professional agent. The word " agent " in section 392 must be read *eiusdem generis* with " banker, merchant, factor "—See *The Queen v. Portugal* [2] ; Queen *v. Kane* [3] ; *Archbold, 32nd ed., p. 685.* A contrary view is stated in *Gour's Indian Penal Code, 5th ed., p. 1388,* but no authority is cited in support.

R. R. Crossette-Thambiah, K.C., Solicitor-General, with *R. A. Kannangara* and *S. S. Wijesinha*, Crown Counsel, for the Crown.—

First ground: A charge framed in accordance with section 168 (2) of the Criminal Procedure Code is deemed to be a charge of one offence, not of several offences. There is one offence throughout the trial up to verdict—*Emperor v. Prem Narain* [4]. As regards the duty of a Judge to elucidate the verdict of a Jury the position in Ceylon is different from that in India, as the section in the Indian Criminal Procedure Code is different. The judgment of Mukerji J. in *Khirode Kumar Mookerjee v. Emperor* (*supra*) can therefore be distinguished. In the present case the verdict was clear to the Judge—the accused was guilty of appropriating a substantial part of the money. In *R. v. Larkin* [5] it was held that where the verdict is plain and unambiguous it is most undesirable that the Judge should ask the Jury any further question about it. See also *Chitaley's Indian Criminal Procedure Code, Vol. II, 1949 ed., pp. 70, 71 ; Queen v. Hari Prasad Gangooly* [6] ; *Derajtullah Sheikh v. Emperor* [7] ; *Regina v. Thomas Wright* [8].

Second ground: As regards the admission of Bandaranayake's evidence, even if the evidence was improperly received the onus is on appellant

[1] *(1950) 51 N. L. R. 481.*
[2] *(1885) 16 Q. B. D. 487.*
[3] *(1901) 1 K. B. 472.*
[4] *(1931) A. I. R. Allahabad 267.*
[5] *(1942) 29 C. A. R. 18.*
[6] *(1870) 14 Suth. W. R. 59 at p. 64.*
[7] *(1930) 31 Cr. L. J. 1150.*
[8] *169 E. R. 1070.*

to show a miscarriage of justice—section 5 (1) of the Court of Criminal Appeal Ordinance, No. 23 of 1938. As regards the meaning of the expression " miscarriage of justice " see the judgment of Lord Macmillan in *Abdul Rahim v. Emperor* [1]. The appellant must satisfy that there has been a failure of justice, that is that an innocent man has been convicted—*R. V. Haddy* [2] ; *Stirland v. Director of Public Prosecutions* [3]. There is an exception to this sule when evidence of bad character has been led. In such a case it is a fundamental wrong and beyond controversy. Further, in view of section 167 of the Evidence Ordinance the onus of proving failure of justice due to improper admission of evidence is on appellant. The English law on this point is different. It is also submitted that Bandaranayake was never in peril at the second trial. In regard to the effect of the term " quashing " one must consider section 5 (2) of the Court of Criminal Appeal Ordinance, No. 23 of 1938. The order in the judgment has no place in the Ordinance and really means in law an acquittal. As to the effect of " quashing " a conviction see *King v. Emanis* [4]. Regarding the evidence of an accomplice see *Archbold, 32nd ed., p. 463* for the English practice. In Ceylon sections 30 and 133 of the Evidence Ordinance are applicable. See further *Rex v. Ukku Banda* [5]; *Police Vidane, Kandana, v. Amaris Appu* [6]; *Iyer v. Hendrick Appu* [7]; *Queen Empress v. Maganlal and Motilal* [8]; *Windsor v. Rex* [9].

Third ground: With regard to the direction of the Judge in recpect of the evidence relating to the Piliyandala charges it is submitted that there is no misdirection as the Judge in effect asked the Jury to use that evidence only to test the other evidence when considering the manner and intention of the accused in acting as he did in connexion with the Moratuwa funds.

Fourth ground: With regard to the ground that the Judge misdirected when he said that it was for the Jury to say that giving of credit was necessary for the discharge of the Manager's functions, the summing-up clearly shows that the Judge directed the Jury to consider the question whether Bandaranayake carried out a certain practice and whether the accused knew that he had that power. The Judge directed the Jury that is the accused openly and in good faith complied with normal procedure then that would negative dishonesty.

Fifth ground: The Crown only relied on the cases covered by cheques for the charge in the indictment. The sole question of fact was whether the sum stated to be misappropriated can be related to the cheques. The sales-journal was produced in evidence. There was no evidence that could not be tested and therefore there was no hearsay evidence admitted.

Sixth ground: With regard to the correct construction of section 392 of the Penal Code it is aubmitted that the agency contemplated in this section involves not business but a course of conduct—see *Gour's Indian Penal Code, 5th ed.*, p. 1388 ; *Lolit Mohan Sarkar v. The Queen Empress*[10];

[1] *(1946) A. I. R. (P. C.) 82.*
[2] *(1944) 1 K B. 442.*
[3] *(1944) A. C. 315.*
[4] *(1940) 41 N. L. R. 529.*
[5] *(1923) 24 N. L. R. 327.*
[6] *(1923) 25 N. L. R. 400.*
[7] *(1932) 34 N. L. R. 330.*
[8] *(1889) I. L. R. 14 Bombay 115.*
[9] *L. R. (1865) I. Q. B. 390.*
[10] *(1894) 22 I. L. R. Calcutta 313.*

and the case of *Muttusamipillai* [1]. The fact that the word " other ", found in the corresponding section of the repealed English Larceny Act, is omitted in our section makes all the difference. Our section catches up every type of agent. If on a single occasion the accused acted as agent then he is guilty even if on other occasions he did not act as agent, because section 392 of the Penal Code must be construed with section 168 (2) of the Criminal Procedure Code. There is only one offence. With regard to the application of *eiusdem generis* rule see the judgment of Lord Esher in *Anderson v. Anderson* [2]. Where the words of a statute are clear no rule of construction is necessary. See the judgment of Viscount Simon L.C. in *National Association of Local Government Officers v. Bolton Corporation* [3].

Dingle M. Foot, with permission of Court.—On the first ground, it is submitted that the Court of Criminal Appeal should not enter into a surmise as to the meaning of the verdict. No one can say how the Jury arrived at the figure.

On the last ground, it is submitted that the construction of section 392 of the Penal Code is concluded by authority, namely the decision in *The Queen v. Portugal* (*supra*). An English statute and a similar Colonial statute should be interpreted in the same way—see the Privy Council decision in *Nadarajan Chettiar v. Tennakoon* [4]. The omission of the words " or other " and the insertion of the words " in the way of business " in the Ceylon section can make no difference. The Legislature merely made it more clear that the section dealt with a class of professional men.

Cur. adv. vult.

July 24, 1951. NAGALINGAM J.—

The appellant was convicted by the unanimous verdict of the Jury of the offence of criminal breach of trust and has been sentenced to undergo a term of five years' rigorous imprisonment.

The material facts lie within a narrow compass. The prisoner was the President of a Co-operative establishment, the Salpiti Korale Union, the activities of which consisted in the main of supplying controlled consumer goods to various retail stores within the area of its operation through three wholesale depots established by it at Moratuwa, Piliyandala and Polgasowita. Each of the depots was controlled by a regional or local committee of the Union, and for the purposes of the appeal it is only necessary to note that the appellant was also President of the Moratuwa regional committee. The Salpiti Korale Union had credit facilities extended to it by the Co-operative Central Bank, of which the Union was tended to it by the Co-operative Central Bank, of which the Union was The appellant held an important position in the Co-operative Central Bank ; he was a director as well as a Vice-President of it.

[1] *(1895) 1. Weir 432.*
[2] *L. R. (1895) 1 Q. B. D. 749.*
[3] *L. R. (1943) A. C. 166.*
[4] *(1950) 51 N. L. R. 491.*

The course of business prescribed by the Union to be followed by the officers at its various depots in regard to the collections at the depots was for the collections to be deposited promptly at the Co-operative Central Bank. And with a view to prevent temptation being placed in the way of the officers at the depots who would of necessity have to handle large sums of cash if ordinary business practice was followed, it was expressly provided that cash in excess of Rs. 100 was not to be accepted at the depots, but that the retail stores were to make payments at the depots either by means of cheques or money orders.

At the relevant period the witness Ranatunga was the manager of the Moratuwa depot and the brother of the prisoner, Leo Cooray, of the Piliyandala depot. As the Polgasowita depot transactions have no bearing on this case, no reference is made to it.

The appellant as President of the regional committee at Moratuwa it was who gave charge of the Moratuwa depot to the Manager, Ranatunga, on appointment and Ranatunga appears to have followed strictly at first the instructions given to him with regard to the nature of payment he could accept for sales, namely, only cheques or money orders subject to the exception noticed above. It would, however, appear that after the lapse of a little time the appellant instructed Ranatunga to collect large sums of cash, the amount of which was fixed sometimes by the appellant sending to Ranatunga one of his own cheques the amount on which would be an indication as to the amount to be collected in cash and on other occasions mere oral instructions would be issued by the appellant to Ranatunga to collect cash during the day and at the end of the day the appellant would give a cheque of his own in lieu of the cash he took over from Ranatunga. Ranatunga following the usual practice would enter in the paying-in slips to the Bank the particulars of the cheques he had received including those from the appellant. The appellant more often than not took from Ranatunga the paying-in slips and the cheques including his own cheques for the purpose of depositing them at the Co-operative Central Bank, and in fact did deposit them. On one or two occasions the appellant himself wrote or caused to be written the paying-in slips that were handed at the Bank with his cheques.

The Co-operative Central Bank had an account with the Bank of Ceylon to which it sent all the cheques received by it for collection. The appellant using his official position as Vice-President of the Bank contrived to have his cheques that he deposited to the credit of the Union at the Co-operative Central Bank to be withheld by the Manager of the latter bank from presentation at the Bank of Ceylon. In the case of some of the cheques no presentation had been made for several months. The President of the Co-operative Central Bank some time later on discovering that the Co-operative Central Bank had to pay to the Bank of Ceylon large sums by way of interest on its overdraft account started investigations and ascertained that several cheques of the appellant, in fact no less than over thirty in number, had been withheld from presentation for several months. The President reported this state of affairs to the Registrar of the Co-operative Societies and the law was thereafter set in motion and resulted in this prosecution being launched against the appellant.

In regard to the transaction at the Piliyandala depot, as the evidence of Leo Cooray, the brother of the appellant, did not sustain the charge of criminal breach of trust the Crown did not pursue the charge in respect of the sums alleged to have been misappropriated out of the funds collected at the Piliyandala depot but in regard to which too there was evidence that certain cheques of the appellant had been deposited to the credit of the Union in settlement of those collections.

There was both oral and documentary testimony placed at the trial establishing a *prima facie* case against the appellant, but he neither gave evidence himself nor called any witnesses on his behalf.

Several grounds of objection against the conviction and sentence were formulated in the petition of appeal but at the hearing Mr. Foot appearing for the appellant confined his submissions to five of them and abandoned the others. I shall deal with these objections in the order in which they were presented by Mr. Foot.

The first point taken was that the verdict of the Jury was void for uncertainty or bad for vagueness. This objection is based on the circumstance that while in the indictment the prisoner was charged with having committed criminal breach of trust of a sum of Rs. 155,576/93, and while the prosecution during the course of trial narrowed down the sum in respect of the charge to Rs. 94,976/93, being the amount committed criminal breach of trust of by the appellant out of the funds of the Moratuwa depot, having abandoned the sum in respect of the Piliyandala depot, the Jury found the prisoner guilty of criminal breach of trust in respect of " a sum of about Rs. 57,500 ".

In the first place it is contended that the verdict does not specify an exact amount but refers to an indeterminate amount by qualifying the figure 57,500 by applying the word of uncertainty " about " to it and for that reason the verdict is bad in the first instance. Mr. Foot however did not argue, probably because of the manner in which the objection had been formulated in the petition of appeal, that the learned trial Judge's direction to the Jury:

> " If you can find after your examination of the whole of the evidence that he did commit criminal breach of trust or did dishonestly misappropriate, not the entire sum alleged by the Crown to have been misappropriated but some lesser sum, if that fact is proved to you beyond reasonable doubt, then even though you may not be able to answer with any degree of accuracy the precise sum, but having made every allowance to the accused you still are convinced that he had dishonestly misappropriated a portion of the sum alleged in the indictment, then he would be guilty "

or again:

> " Once again I may say, it does not seem to me that it is very important to determine what is the precise figure which went into his hands, or if he did appropriate any money, what was appropriated by him "

constitutes a misdirection. But if his argument founded on the inexactness of the figure found by the Jury to have been the subject of the offence

is sound, it must follow that as the Jury had brought in a verdict in accordance with the direction given by the learned trial Judge, the direction of the learned trial Judge amounted to a misdirection in law.

We think the direction of the learned trial Judge on this point was in conformity with law and the verdict of the Jury cannot be said to be vague on the ground that the verdict does not embody a precisely exact figure as the sum that has been misappropriated.

In England, the proposition was laid down as early as 1858 in *Regina v. Thomas Wright* [1] by no less than five Judges including Judges of the eminence of Lord Campbell C.J. and Coleridge J. that a verdict of the Jury that the prisoner " stole some money " but without specifying the amount was a good verdict. Mr. Foot however relied upon the Indian case of *Khirode Kumar Mookerjee v. King Emperor* [2] where no doubt Mukerji J. in delivering the judgment of the Court in respect of a charge of criminal breach of trust, observed:

> " There must therefore be a definite finding of a *certain definite sum* traced to the accused in order to form a basis for his conviction. "

Mr. Foot also drew our attention to a later Bombay case, *Emperor v. Byramji Jamsetji Chevalla* [3] where this view was not upheld, but on the contrary it was said by Fawcett J. that:

> " if the evidence is sufficient as to establish that at any rate some property such as money has been misappropriated it seems to me that it is against reason and authority to say that because you cannot specify the exact amount that has been misappropriated the acoused cannot be convicted. "

We find ourselves in agreement with the view expressed in the Bombay case and we hold that a verdit which is specific and definite that the offence has been committed in respect of some sum of money, though that sum may not be ascertained with exactness, is a proper and valid verdict—and is not open to the objection that it is vague and therefore bad. We are further of opinion that the Jury need not have returned a finding as to what the sum was which in their opinion had been committed criminal breach of trust of but a verdict that they found the prisoner guilty was all that was called for.

In the second place Mr. Foot argued that ignoring the presence of the word " about " the finding that the prisoner had committed criminal breach of trust of Rs. 57,500 is vague inasmuch as there were not less than twenty cheques that constituted the aggregate sum of Rs. 94,976/93 of which the sum of Rs. 57,500 formed part and that there were according to Mr. Foot not less than 1,778 ways of combining the twenty cheques to arrive at the figure of Rs. 57,500, and as each of the cheques was the subject of a separate offence the prisoner is now left in doubt as regards the particular offences in respect of which he has been found guilty and of which he has been acquitted.

[1] *1C9 E. R. 1070.* [2] *A. I. R. 1925 Cal. 260.*

[3] *A. I. R. 1928 Bom. 148.*

The foundation on which this argument was raised is the judgment of this Court in this very case when it came up on the prisoner's conviction at the first trial. The passage relied upon is to be found in the report of the case [1] and is as follows:—

> "Whether or not criminal breach of trust of sums amounting to Rs. 161,576.93 was alleged to have been committed in pursuance of a single design (as the prosecution suggests) the fact remains that the charge against the accused according to the evidence involves the alleged commission *not of one offence* of criminal breach of trust but of a *number of such offences* during the period covered by the indictment. To include *all these offences* in a single count was of course permissible under section 168 (2) of the Criminal Procedure Code. It was essential however that the Jury's attention should have been directed to the specific evidence on which the Crown alleged that *each separate* offence had been committed."

I have italicized the words on which special emphasis was laid by Mr. Foot. No doubt this passage lends itself to the comment that the prisoner was called upon to meet a charge not of one offence but of several offences. But this passage occurs in a part of the judgment which stresses the need in this particular case for a clear direction to the Jury in regard to the items that went to make up the aggregate sum of which the prisoner was alleged to have committed misappropriation. My brother Gratiaen delivered the judgment with which my brother Gunasekara, who it may be mentioned is the present trial Judge, agreed. Gunasekara J. does not appear to have understood the judgment in the way in which it has been construed by Mr. Foot. My brother Gratiaen says that he himself did not intend that the passage should be so construed.

We need only observe that where a charge has been framed in accordance with section 168 (2) of the Criminal Procedure Code in respect of either the offence of Criminal Breach of Trust or Criminal Misappropriation by specifying the gross sum misappropriated and though the prosecution may be able—though not necessarily in all cases—to establish the gross sum as having been made up of particular sums yet the charge must be regarded as relating to one single offence in respect of the aggregate sum specified and not to constitute several charges or even one charge in respect of several offences, the number of which would be determined by the fortuitous controlling factor of the adaptability of the aggregated sum to be disintegrated into smaller specific sums.

Apart from the authority relied upon the proposition would seem to be wholly untenable. It would be useful at this stage to examine the terms of the charge. Omitting words irrelevant for present purposes, the charge runs:

> "That between 1st May, 1947, and 30th April, 1948, you being entrusted with a sum of Rs. 155,557.63 to be deposited to the credit of the union did commit criminal breach of trust in respect of the said sum."

[1] *(1950) 51 N. L. R. 433 at 442.*

The ordinary rule in regard to the joinder of charges is laid down in section 179 of the Criminal Procedure Code, which permits of not more than three offences of the same kind committed within the space of twelve months to be included in one indictment, but to this there is an exception created by section 168 (2). The exception is confined in its operation to two classes of offences, (1) criminal breach of trust, (2) criminal misappropriation, and also postulates a period of time not exceeding one year. Subject to these limitations, the effect of the sub-section is that where, to take one of the offences, for the sake of simplicity, it is alleged that several sums of money had been criminally misappropriated on various dates, it would be competent to aggregate the several sums of money misappropriated within the space of one year and to charge the accused person with having committed the offence of criminal misappropriation in respect of that aggregate sum of money without specifying the particular items or the particular dates on which the amounts may have been misappropriated, and the sub-section specifically enacts that a charge so framed is to be deemed a charge of *one offence*. We do not think that the words " within the meaning of section 179 " which follow the words " shall be deemed to be a charge of one offence " have any other effect than that of emphasizing that though what in reality amounts to a number of offences exceeding three have been aggregated together it shall nevertheless not be open to the objection that such an aggregation offends against the provisions of section 179 which, as stated earlier, permits of not more than three separate offences to be included in the same charge.

The charge being then of one offence, it is idle to speak of the conviction of the prisoner on some offences and of his being acquitted on others. In fact the jurors were called upon to try the prisoner upon only one charge and that was in respect of one offence alleged to have been committed by the accused person in that he committed criminal breach of trust of one sum of money between specified dates. In truth the Jury were not and could not have been required to give their verdict on the footing that they were trying a number of offences but they were quite properly invited to and did give their verdict in respect of the one offence with which the prisoner had been charged. They were therefore rightly called upon to find by their verdict whether the prisoner was guilty or not guilty of the one single offence with which the prisoner was charged. The Jury certainly were never called upon to try several offences against the accused, much less to bring verdicts in respect of several charges or several offences against the prisoner. It would therefore be incorrect in these circumstances to speak of any uncertainty in the verdict as regards the offence of which the prisoner was found guilty.

In regard to the contention that the learned trial Judge should have asked the Jury as to how they arrived at the figure of Rs. 57,500 I need only say that such a course would have been entirely outside the province of the Judge, for such a question would seek to ascertain the ground or grounds upon which the jurors came to arrive at their verdict. According to the majority of us it is conceivable, though we do not say it must be so in this case, that the Jurors themselves may each have

differed widely in regard to the quantum which in their individual opinion had been misappropriated by the prisoner but they may all have agreed, arriving by different methods, that at the lowest a sum of about Rs. 57,500 had been misappropriated by the appellant. On this basis they may all therefore have agreed upon their verdict. Section 248 of the Criminal Procedure Code confers and limits the powers of a Judge to question a Jury in regard to its verdict and provides that a Judge is only empowered to ask the Jury such questions as may be necessary *to ascertain what their verdict is.* So that where the verdict is clear and unambiguous such as it is in this case, no occasion arises for a Judge to put any question to the Jurors in regard to the verdict, and if he did so he would run the risk of subjecting such procedure to well founded criticism of an adverse character. See the cases of *Larkin* [1] and *Daragtulla Sheik* [2].

Section 247 of the Criminal Procedure Code expressly provides the nature of the question which the Registrar of the Court should ask the Foreman of the Jury in regard to their cerdict: " Do you find the accused person (naming him) guilty or not guilty of the offence (naming it) with which he is charged? ". The verdict should therefore be one of guilty or not guilty. It need not have been qualified by the addition of the amount which in the opinion of the Jury had been the subject of criminal breach of trust by the prisoner. These added words relating to the amount may, if need be, according to the majority of us, be treated as mere surplusage and ignored, because the verdict is not rendered uncertain or vague by the addition of those words and the verdict that the prisoner is guilty is clear and precise without their addition. These observations of ours however have no reference to the undoubted right that a Judge has to question a Jury with a view to assess the appropriate sentence that he should pass on a prisoner.

We are, however, unanimously of opinion that the verdict is one to which no justifiable exception can be taken.

The next objection taken is to the admissibility of the evidence of the witness Bandaranayake who was the Manager of the Co-operative Central Bank at the relevant dates. In the petition of appeal it is categorically stated that Bandaranayake was not a competent witness. The reason for putting forward this objection is that Bandaranayake was admittedly an accomplice. He was one who stood his trial along with the appellant at the earlier trial in this case and his conviction was quashed by this Court on appeal. Under our law an accomplice is not an incompetent witness. Section 133 of the Evidence Ordinance expressly provides for the reception of the evidence of an accomplice and it goes on to provide that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

Mr. Foot however adopted another line of argument based upon what he said was the English practice. He laid down the proposition rather widely when he said that an accomplice would not under English procedure be permitted to testify against a prisoner unless the accomplice had either been acquitted formally or had been convicted or had received

[1] *(1942) 29 C. A. R. 18*
[2] *Criminal Law Journal of India 1930, p. 1150.*

pardon. He then stressed that where a charge was yet pending against an accomplice he would not be permitted under the English law to be called by the prosecution as a witness as the adoption of such a course would be regarded as unfair by an accused person in as much as it would cause unjusitfiable prejudice to an accused person.

Archbold in his well known work on criminal law deals with the topics raised and lays down proposition which do not entirely support the contention of Mr. Foot. The learned author says [1] that an accomplice is always a competent witness. No words of qualification are added. This, it will be observed, is in accordance with the provision under our law Archbold [2] goes on to consider the circumstances in which one prisoner may give evidence for the Crown against a co-prisoner. He does not say that one accused person is not a competent witness against another but he expressly lays down that where two prisoners are jointly indicted and *one prisoner is not being tried with the prisoner against whom he gives evidence*, his evidence is receivable without objection and he cites *Windsor v. Rex* [3]. The case of *Grant et al.* [4] also adopts this view.

But in fact there is no ground for saying in this case that any proceedings are yet pending against Bandaranayake. He has been acquitted by the order of this Court but the contrary is asserted on behalf of the appellant.

Mr. Foot proceeding on the basis that the conviction against Bandaranayake at the last trial had only been quashed and that this Court had made no further order acquitting him, built up his whole argument. Bandaranayake was put on his trial along with the appellant upon two counts, (1) conspiracy, and (2) abetment of the appellant in committing the offence of criminal breach of trust. In regard to the second count this Court expressly made order acquitting the accused [5]. In regard to the first count the order of this Court was " we quash the conviction to both accused on the charge of conspiracy ". Mr. Foot says that as this Court did not in terms of section 5 (2) of the Court of Criminal Appeal Ordinance, 23 of 1938, direct a judgment of acquittal to be entered in respect of this charge it could not be said that the charge against Bandaranayake in regard to the offence of conspiracy has resulted in an acquittal and relies upon the judgment of Lord Porter in *King v. Dharmasena* [6] where the following observation is made:

> " A quashed conviction however does not acquit the appellant of the crime charged. It merely makes the previous conviction abortive. If it is intended to direct a judgment of acquittal to be entered it must be done in terms. "

I do not think that Mr. Foot's reading of this passage is right. The argument there was that as this Court had quashed the conviction and directed a retrial and as the quashing of a conviction involved an acquittal in view of section 5 (2), the order of retrial was bad. It is in reference to this argument that it was observed that where it is intended to direct judgment of acquittal to be entered against an accused, it must be done

[1] *1949 ed. p. 461.*
[2] *Page 466.*
[3] *L. R. 1 Q. B. 390.*
[4] *30 C. A. R. 99 at 105.*
[5] *(1950) 51 N. L. R. 433 at 441.*
[6] *(1950) 51 N. L. R. 481.*

in terms but that it did not follow that a retrial could not be ordered where a conviction had been quashed. The Ordinance although it recognises that a retrial may be ordered on appeal does not expressly provide the precise form in which that order should be made. In fact it is silent as to what operative words should be employed with regard to the previous conviction where a retrial is ordered.

Would it be proper to direct a retrial without making any specific order with regard to the previous conviction ? Such a course would hardly appear to be right, for it would be open to the objection that the previous conviction stands and that such conviction so long as it stands unreversed would be a bar to the further trial. On the other hand if the phraseology that the conviction is quashed cannot be employed for the reason that that phrase is only applicable in terms of section 5 (2) to cases where this Court directs the acquittal of an appellant, some other formula should be found to indicate that the previous conviction has been got out of the way as a preliminary to a retrial being ordered. Counsel could not suggest any better formula and I could not think of any that the court might say that the conviction is *set aside* and that the Court orders a new trial. But by a quashing of a conviction is meant nothing more nor less than the setting aside of it. The only merit, therefore, in using the words " the conviction is set aside " seems to be that it avoids the use of the phrase " quash the conviction " to which Mr. Foot quite needlessly attaches the notion of the sequel of an acquittal.

K. v. Dharmasena [1] is certainly not an authority for the proposition that where this Court quashes a conviction and does not order a new trial the order quashing the conviction operates to leave the proceedings yet pending against the accused person.

Both on the law and on the fact we are satisfied that not only were there no charges pending against Bandaranayake but that he was a competent witness though an accomplice and that his evidence was properly received at the trial.

The next ground of appeal is that the learned trial Judge failed to direct the Jury that the evidence given in regard to the Piliyandala Depot and which was favourable to the accused should be considered in arriving at a decision in regard to the guilt of the accused in regard to the transactions at the Moratuwa Depot. The passage in the summing-up that is complained of is at page 50 of the typescript but it does not appear to us that the passage admits of this comment. In fact in the next two pages (51 and 52) the learned trial Judge has made it quite clear and indicated to the Jury that in considering their verdict in regard to the Moratuwa Depot they should take into consideration the evidence particularly of Leo Cooray and the evidence of other witnesses in order to determine to what extent the evidence of these witnesses affects the evidence led in respect of the Moratuwa depot so as to create in their minds doubts as regards the alleged commission by the accused of the offence in regard to the Moratuwa funds. This ground we therefore deem to be of no substance.

[1] *(1950) 51 N. L. R. 481.*

Like the last, the fourth ground is also one that relates to the propriety of the charge. It is said that in regard to the question of dishonest intention the learned trial Judge was in error in directing the Jury that the question for them to consider was whether in terms of the Rules of the Co-operative Central Bank the power exercised by the Manager of giving credit, to the extent that it was given, was necessary for the performance of the Manager's functions but that the proper direction was for the Jury to have been asked to decide whether the Manager did in fact exercise the powers following the practice in the Bank in the belief that it was the proper practice. While it is true that at pages 106 to 111 of the typescript the learned Judge has invited the Jury to consider whether the Manager had power under the Rules to give credit in the way he did, at pages 112 to 113 he has also referred to the question whether the accused believed that the Manager did have such powers. It is only necessary to draw attention to the following excerpt from the summing-up (page 112 *et seq.*) :—

> " If you find there was a breach of duty then of course so far as the amount goes it is immaterial except to this extent that *when you come to consider whether the accused may have honestly believed that that power had been given to Bandaranayake*, whether from what he saw going on round him, as Counsel for the defence said, he may have *honestly thought Bandaranayake had been given that power under the* constitution of the Bank . . . . That it to say you have to ask yourselves whether the Crown has explained the possibility and having regard to what the accused saw going on in the Bank even if it was unlawful in the sense that it was contrary to the contract between the Manager and the Bank, even if what the accused saw was contrary to the contract, having regard also to what he saw going on in the Bank, that the Manager was acting in accordance with the contract exercising no more power than was given to him by the terms of the contract. "

We think that the attention of the Jury had sufficiently well been drawn to the possibility of the prisoner having entertained in his mind the belief that, whatever may have been the rules governing the point the Manager, Bandaranayake, had the necessary authority to grant credit as he was shown to have done. This point therefore fails.

The last ground of objection is that as there was no evidence that the prisoner was at any time engaged in business as an agent the conviction under Section 392 of the Penal Code was bad but that at best the conviction should have been under Section 389.

The latter section provides the punishment for the offence of criminal breach of trust in what may be described as its unaggravated form and prescribes a maximum penalty of 3 years' rigorous imprisonment apart from a fine. Section 392 prescribes a maximum penalty of 10 years apart from the fine when the offender commits the offence " in his capacity of a public servant or *in the way of his business as a banker, merchant, factor, broker, attorney, or agent* ".

Mr. Foot contends that the term " agent " must be interpreted in accordance with the rule of *eiudem generis* and that so interpreted the

term " agent " must be deemed to mean a person who carries on business as an agent, i.e., one who holds himself out as being able and willing to carry on the business of an agent inasmuch as the words that precede it, namely, banker, merchant, factor, broker, attorney, all refer to classes of persons who carry on particular avocations. I think there can be little doubt that the terms " banker " and " merchant " must necessarily refer to persons who carry on a regular calling in these special vocations. It would not be possible to regard a person who acts on one occasion for one particular client in regard to any dealings that are commonly performed by a banker or merchant, and to treat such person as a banker or merchant but in regard to the other categories of persons falling under the designations of factor, broker or attorney, it is possible to conceive of and in fact there are many instances where a person acts for another individual in any of those capacities and that too on an only occasion.

In the case of *Lowther v. Harris* [1] a question under the Factors Act arose as to whether a person acting for one principal only and who had no general occupation as agent could be said to be a factor within the meaning of the Act and. Wright J. had no difficulty in answering this question in the affirmative. One transaction may be sufficient, again, to constitute a person a broker and there seems to be no justification for confining the term to a person who carries on the occupation of a broker over a long period of years and in relation to a number of persons. Similarly " attorney " need not necessarily be a term that need be applicable to the class of persons known to English Law as attorneys at law, but certainly is wide enough and is recognised as a term which refers under our law to a person who holds a power of attorney.

Mr. Foot's argument was that not only should the terms " factor " and " broker " be restricted to persons who carry on business in a general way as factors and brokers but that the term " attorney " had to be interpreted so as to give it the special meaning of attorney at law, the term applied to the class of legal practitioners who went under that name in England prior to 1873. The cases of *Queen v. Portugal* [2] and *Queen v. Kane* [3] were cited by him to reinforce his argument that the *eiusdem generis* rule of construction should be applied. It is true that under the now repealed English Larceny Act a similar collocation of words was so construed but there is a very significant variation between the provision of the Larceny Act and our section. The words grouped together in the Larceny Act are, " banker, merchant, factor, broker, attorney *or other agent* " while in our section, it will be noticed the term " other " is significantly omitted. The majority of us have grave doubts that had the word " other " been omitted from the English Statute, the construction would yet have been the same.

Mr. Foot also put forward a further argument based upon emphasis being laid upon the words, " in the way of his business ". Now, the term, " in the way of his business " has been construed by him as the equivalent of " in carrying on the business of " and not as the

[1] *(1927) 1 K. B. 393.*

[2] *(1885) 16 Q. B. D. 487.*

[3] *(1901) 1 K. B. 472.*

equivalent of " in the way of his function " or " in the course of acting as " or even " in the capacity of ". To take a simple illustration, if a man is granted a special power of attorney to sell the land of his principal and remit the proceeds and the attorney sells the land but misappropriates the funds, would it not be correct to say that the attorney had been entrusted with the funds in the way of his business as attorney, that is to say, in the course of the performance of his business as attorney? Mr. Foot's answer is that the attorney has not received monies in the way of his business for the attorney did not carry on a business of a general attorney and a casual acting did not constitute him such within the meaning of the section. We do not think that the construction contended for by Mr. Foot is a sound one. We see no reason to hold that the phrase, " in the way of his business " was intended by the legislature to mean "in carrying on the business" which it might have used if that was the object so as to exclude from the operation of this penal section a case of a broker or attorney who may commit criminal breach of trust of very large assets entrusted to him from being subjected to the same severe penalty to which a person carrying on a regular business may be subjected.

This section has always been construed as applying to all agents excepting to those agents specifically enumerated in Sections 390, 391, and 392. In India too the same view has been taken. Gour [1] commenting on the corresponding section expressly refers to a case such as the present one:

> " If a person requests another to carry a sum of money for payment to another, he is for that purpose his agent so that should he misappropriate the amount he would be liable under this section. "

It is true he cites no authority for this statement but his view is supported by the case of *Muttusamipillai*. [2] That was the case where the prisoner was certainly not carrying on the business of a general agent but nevertheless he was held to have committed the offence as an agent, as it was held that he had misappropriated the articles belonging to a temple while acting as manager of the temple.

Another aspect of this question was lightly touched upon, and that was, assuming that a casual agency came within the scope of the section, whether in the particular case before us it could be said: who was the principal? It is common ground that it was the appellant who appointed Ranatunge manager of the Moratuwa Depot. It was equally common ground that it was he who gave instructions in regard to his functions and duties including those relating to the Manager's deposit of the proceeds of sale realised at the depot. It is therefore said that Ranatunge cannot be regarded as the principal of the prisoner. The majority of us think that there is a fallacy underlying this contention. In the first place the notion of a superior or an inferior officer is entirely foreign to the question of agency. The question really is: What is the legal relationship between the parties? Not, What is their status *inter se*? If Ranatunge who had to bank the proceeds of sale handed the funds to the prisoner to be deposited in the bank and the prisoner undertook

[1] *5th ed. p. 1388, Sec. 4870* [2] *1 Weir 432.*

to carry and deposit the funds, the relationship of principal and agent was thereby constituted, it being immaterial as to whether one was the manager of the depot and the other the President of the Union that ran the depot. Nor do the majority of us think there is any substance in the contention that it was the prisoner who volunteered to carry the funds for deposits. It is important to remember that the prisoner could not have compelled payment of the money to him. The money belonged to the Union and that money had to be deposited to the credit of the Union and that was the instruction to Ranatunge by the prisoner himself.

The majority of us are of opinion that the last ground too is of no avail and the application refused.

In the result, the order of the Court is that the appeal is dismissed, and the application refused.

Appeal dismissed.
Application refused.