1934 *Present :* **Poyser J.**

THE KING *v.* EMMANUEL.

80—D. C. (Crim.) Jaffna, 3,737.

Administrator—Criminal breach of trust of money belonging to estate—Judicial settlement—Penal Code, s. 388.

An administrator may be convicted of criminal breach of trust of money belonging to the estate.

It is not necessary that his accounts should be judicially settled before such a charge could be maintained.

APPEAL from a conviction by the District Judge of Jaffna.

Hayley, K.C. (with him *Croos DaBrera* and *Aluvihare*), for accused, appellant.

M. W. H. de Silva, Deputy S.-G. (with him *E. H. T. Gunasekere, C.C.*), for Crown, respondent.

Cur. adv. vult.

[1] *8 C. W. R. 50.*

February 9, 1934. POYSER J.—

The accused has been convicted of criminal breach of trust of a sum of Rs. 2,575 being the proceeds of sales of cloth belonging to the estate administered in D. C. Jaffna, Testamentary Cases Nos. 5,828 and 5,870.

The accused up to August 1, 1929, was the Secretary of the District Court of Jaffna. On that date he was transferred to the District Court of Kurunegala in the same capacity. On August 31, 1926, the accused was appointed under section 520 of the Civil Procedure Code administrator of the estate of a deceased person called Mathan Lal, and it is in connection with the administration of this estate that the charge was brought against the accused. Mathan Lal and his brother Baboo Lal carried on business in Jaffna. Baboo Lal died on April 10, 1925, and Mathan Lal died on May 8, 1925. Their estates were administered in D. C. Jaffna, No. 5,828 and 5,870, but the connection between the brothers' affairs being close for all practical purposes. D. C. case No. 5,828, was absorbed in D. C. case No. 5,870. The accused was appointed administrator of both estates, but for the purposes of this case it is only necessary to consider D. C. No. 5,870.

The indictment framed against the accused charged him with criminal breach of trust in respect of the proceeds of cloth sold between December 30, 1928, and January 13, 1929. The indictment, however, was amended during the course of the trial by substituting the date November 14 for January 13.

The estate the accused was called upon to administer was a substantial one, in value over Rs. 500,000. It consisted of both movable and immovable property and included a number of debts due to the estate in connection with which the accused, as administrator, filed a number of actions.

There were also a considerable number of liabilities and various actions were brought against the estate.

Among the assets of the estate was a quantity of cloth which was sold by the accused by auction from time to time, and it is in respect of these sales that the charge against the accused of criminal breach of trust arises.

The accused was originally charged in the Police Court with criminal breach of trust in respect of the sums of Rs. 341, Rs. 300, and Rs. 790. These offences were alleged to have been committed in May and June, 1929, and he was also charged under sections 189 and 190 of the Penal Code with making a document containing false statements.

The indictment sets out different charges against the accused, but it was conceded, having regard to the case of *King v. Vallayan Sittambaram*[1], that the Attorney-General could frame a charge in respect of any offence disclosed in the preliminary inquiry.

It appears from the evidence that the accused did sell cloth on the dates specified in the indictment for the sum of Rs. 5,575 but out of that amount only Rs. 3,000 was paid in to the credit of the estate on January 12, 1929.

The learned Judge does not examine in detail the evidence in regard to these sales, as counsel for the accused at the trial admitted that such

[1] *20 N. L. R. 257.*

sales had in fact taken place. According to the Judge he repeatedly emphasized that he did not question the fact that the alleged sales took place.

However, on appeal counsel for the accused does not admit this point and argues that the sales have not been proved.

The evidence as to the sale of cloth was as follows:—The witness Mustafa stated that on December 31, 1928, he purchased from the accused cloth belonging to the estate of Mathan Lal for Rs. 1,060, and on January 8, 1929, he similarly purchased cloth for Rs. 500, he produced his account books to corroborate his evidence.

The witness R. B. Letchiram purchased cloth for Rs. 782.50 on December 28, 1928. This sale was admitted.

A. N. Motilal stated that he purchased cloth for Rs. 587.50 from the accused on December 31, 1928.

Evidence was also given that cloth was purchased by the Nadarajah Stores from the accused on January 4 and 7, 1929, for Rs. 1,120 and Rs. 1,525, respectively. The payments for these purchases were made by cheques which were produced in evidence.

I do not think there can be any doubt in regard to the purchase by Mustafa on January 1, 1929, and the purchases made by the Nadarajah Stores, Motilal, and Letchiram.

The only purchase that can possibly be questioned is that of Mustafa on December 31, 1928. Mustafa definitely states that he purchased cloth on this date from the accused for Rs. 1,060 but his books describe the purchase as being through "A. N." These letters refer to the firm of Motilal and it was suggested that the purchase was made from them and not the accused.

There is no corresponding entry in Motilal's books and it appears from the evidence that there was a joint purchase by Mustafa and Motilal from the accused on December 31, 1928, and it may be that cloth to the value of Rs. 1,060 was purchased by Motilal on Mustafa's behalf and paid for by the latter.

There is however no doubt in my view that Rs. 1,060 was paid to the accused on that day either by Mustafa or Motilal, but giving the accused the benefit of any doubt that may exist, or even conceding that there was only adequate proof of the misappropriation of a sum of Rs. 1,515 the accused is not entitled to an acquital on that account and his counsel does not suggest that he is.

The next step in the prosecution case was to prove that the accused had misappropriated part of the money he had received from the sales of cloth, and to establish this it was necessary to examine not only the payments into the Kachcheri to the credit of the estate but also the accounts submitted by the accused.

As previously stated the accused was transferred to Kurunegala on August 1, 1929, and the actual administration of the estate by him came to an end about this time, although his appointment as administrator of the estate was not terminated.

The last deposit to the credit of the estate by the accused was on January 12, 1929. There was no deposit between then and November 2, 1929, when a deposit was made by K. Ratnasingham who succeeded the accused as Secretary of the Jaffna District Court, and was appointed co-administrator in October, 1929.

In regard to the payments into the credit of the estate it has been proved beyond any question that between December 30, 1928, and January 12, 1929, that the only sums paid into the credit of the estate were Rs. 3,000 and Rs. 329.50, both payments being made on January 12, 1929. The latter amount has been shown to be a payment for rent from one R. V. Samuel.

As previously stated, the prosecution during the course of the trial obtained leave to amend the indictment by substituting the date Novemeber 14 in place of January 13. The reason for this amendment was that it was appreciated that the accused might, as administrator, be entitled to retain monies in his hands. The accused was originally ordered to bring all monies realized by him into Court, but on February 1, 1927, he obtained permission of the Court to retain the income of the estate in his hands for the upkeep of properties and other matters connected with the estate.

Consequently it was necessary for the prosecution, as there was some doubt of the effect of the order of February 1, 1927, not only to prove that the money in question was not deposited in the Kachcheri about the time the sales were made, but also to prove that the accused has not accounted for the sum in question in any other way and that he had in fact misappropriated it.

To prove that the accused did misappropriate this sum of money the prosecution made a detailed examination of the accounts submitted by the accused. In this connection it appears that in 1929 inquiries began to be made into the accused's administration of this estate and he was called upon to submit a final account for June 25, 1929 (P. 16).

Actually he did not file his final account till November 13, 1929, and it was for that reason the indictment was amended.

I do not think the amendment of the indictment in any way prejudiced the accused as he was given an opportunity of having the witnesses recalled if he so desired. The case of *Queen v. B. Sinno Appu*[1] lays down that an amendment to the indictment should not be refused by the Judge unless it is likely to do a substantial injustice to the accused.

In the accounts filed by the accused on November 13, 1929 (P. 23), there appears Schedule "L" which is a statement of the deposits made to the credit of the estate up to September, 1929.

Schedule "L" shows that an amount of Rs. 130,780.41 was deposited to the credit of the estate. This amount was in fact deposited at the Kachcheri. In this schedule a number of items are set out as receipts from the sale of stock which have been conclusively proved to have been receipts from other sources, e.g., item 39, Rs. 662.50 is described as the proceeds of sale of stock, but it appears the amount was received from the Police Magistrate, Jaffna (P 14), item 64 sets out a sum of

[1] *7 S. C. C. 51.*

Rs. 11,325.98 as being received from the sale of stock but it is proved by the evidence of Ratnasingham that this amount did not include any sum arising from the sale of stock but was derived from other sources.

In this schedule no dates were assigned to the various items, and the Judge has found not only that the account was false but that it was without doubt proved that the sum of Rs. 2,575 received from the sale of cloth had not been accounted for but had been dishonestly retained by the accused.

The evidence amply supports this finding, a most careful and detailed examination of the accounts was made at the trial and I agree with the Judge that the omission to include this sum in the accounts could not have been due to an oversight.

In fact it was not argued at the trial that this amount was omitted by an oversight—the argument was that the accused was entitled to retain this sum in his hands.

There is however a further point in connection with P 23. An amount of Rs. 5,200 is shown as money in hand derived from the sale of cloth. It was necessary for the prosecution to also establish that the sum of Rs. 2,575 was not included in this amount.

The Judge deals with this point in detail and finds that the sum of Rs. 2,575 could not possibly be included in the amount of Rs. 5,200. In regard to this point I think it is only necessary to refer to the accused's own statement on January 10, 1930 (when his accounts were being inquired into in the District Court), he then stated that this sum of Rs. 5,200 represented the value of a sale which took place as he was about to leave Jaffna, viz., in August, 1929, and as the Judge points out there is no reason why his own statement in regard to the Rs. 5,200 should not be accepted.

A number of points were taken in appeal on behalf of the appellant. It was argued that the accused did not have a fair trial and that it was unjust and improper to investigate the accounts of the estate in a criminal trial and that the trial in fact resulted in a general investigation of the accused's accounts.

There no doubt was a general investigation not only of the accounts produced by the accused but also of all other accounts and documents connected with the administration of the estate, but this investigation was I consider necessary not only to prove the case for the Crown but also necessary in fairness to the accused.

Further, the action of the prosecution as regards this investigation is supported by authority. In the case of *King v. Vallayan Sittambaram* (*supra*), the following passage occurs in the judgment of Bertram C.J. at page 262 :—

> "It often happens in charges of criminal breach of trust or other forms of fraud that an inquiry instituted into a specifi charge naturally and properly travels beyond the actual facts charged. It may be necessary to go into other items than those under consideration, and into the whole system and course of business out of which the charge originates".

In the case it was not sufficient to prove that the sum of Rs. 2,575 had not been paid to the credit of the estate, it was also essential to prove that the sum was not accounted for in any other way, and had in fact been dishonestly retained by the accused, and that could only be done by a detailed examination of the whole administration of the estate.

Various passages in the judgment were criticised, in particular, a passage where the learned Judge points out that whatever basis is taken into calculation, the accused has not accounted for more than Rs. 34,642.45 as the value of cloth sold by him and according to the accused himself he realized something over Rs. 60,000.

It was suggested that the prosecution had set out to prove offences other than those charged and that sections 14 and 15 of the Evidence Ordinance did not justify such proof.

I agree that these sections would not permit of the proof of offences other than those charged, but as I previously pointed out a detailed examination of the whole administration of the estate was necessary to prove the offence with which the accused was charged, and if such examination did prove that a greater sum had been misappropriated than was set out in the indictment, it is no ground for the holding that the evidence necessary for such examination was wrongfully admitted.

The fact that the learned Judge described P 23 as a false document was also criticised. There is no doubt that it was a false document. I agree with counsel for the appellant that the fact that the accused had made entries in this account under the wrong headings is not necessarily proof of dishonesty, but the point is whether the sum of Rs. 2,575 was in fact ever paid to the credit of the estate whether under a right or wrong heading, the prosecution has proved that it was not.

A further point taken on behalf of the accused was that until the estate accounts are judicially settled under section 725 of the Civil Procedure Code no criminal liability will attach to the accused. I do not agree with this contention, the accused did present a petition for judicial settlement after he had filed his accounts in November, 1929, but no final action appears to have been taken on this petition.

On the other hand there were various inquiries into the administration of the estate and the accounts during 1930 and the accused was ordered to bring into Court a sum of over Rs. 40,000 and this order was upheld by the Supreme Court on appeal. This fact was brought out at the trial by counsel for the defence to establish the fact that there had been no judicial settlement of the accused's accounts.

This point was raised at the trial and the Judge held that it was not necessary for the Crown, assuming there had been no judicial settlement, to wait until that stage had been reached before it could prosecute the accused for the offence of criminal breach of trust if he had committed that offence, and I entirely agree with the trial Judge's finding on this point.

It was also argued on behalf of the accused that he could not be convicted of criminal breach of trust as he was not entrusted with the dominion over property but had the sole control of the property of the deceased, and therefore could not be said to have been entrusted with it.

There do not appear to be any reported cases of criminal breach of trust by an executor or administrator. Other cases of criminal breach of trust were cited, of which I think it is only necessary to refer to the following: *Nurul Hassan v. Emperor*[1]. In this case the accused was employed as agent by the complainant to collect on his behalf the taxes of the Union Committee. He was to receive as remuneration 10 per cent. of the collections and was to hand over the collections less his remuneration to his master or pay the money into the Treasury. It was alleged that while he was in charge of the collections he failed to account for certain sums of money collected by him. It was held that in such cases the nature of the trust should be established and that as the accused was entitled to deduct his remuneration from the collections, and as no period was fixed for payment into the Treasury, a charge of criminal breach of trust could only be maintained after an adjustment of accounts, the mere fact that he retained the sums collected not being conclusive proof of criminal breach of trust.

This case is distinguishable, a period was fixed for the payment of the sums the accused had received and an account was filed after the accused had ceased to act as administrator.

I think there is no doubt that if the prosecution had been instituted before there had been any examination of the accounts the accused would have been entitled to an acquittal, but it is only after the accused had ceased to take any part in the administration of the estate and his accounts had been examined that proceedings were taken.

The case of *Buchanan v. Conrad*[2] lays down that the mere failure to pay over sums received by a clerk or servant for the employer does not in itself constitute the offence of criminal breach of trust under the Penal Code. It is not sufficient to prove a general deficiency in accounts but there must be evidence of some specific sums having been misappropriated or converted to the defendant's use.

In this case there was evidence of the misappropriation of a specific sum, and the fact that the evidence proving the misappropriation of the specific sum also was evidence to the effect that there was a general deficiency is no ground for holding the accused to have been wrongfully convicted of the misappropriation of a specific sum.

The question of whether an administrator can be convicted of criminal breach of trust in respect of monies coming into his hands is, in my opinion, conclusively decided by the Penal Code itself.

The first illustration to section 388 is:—

> "A, being executor to the will of a deceased person, dishonestly disobeys the law, which directs him to divide the effects, according to the will, and appropriates them to his own use. A has committed criminal breach of trust."

In this case, in my opinion, it has been proved beyond all reasonable doubt that the accused did dishonestly disobey the law and appropriate to his own use money belonging to the estate.

The appeal is dismissed.

Affirmed.

[1] *56 Indian Cases 669.*

[2] *2. Cey Law Rep. 135.*