

1935

*Present : Drieberg J.*THE KING *v.* E. F. C. LUDOWYKE.110—*P. C. Galle, A 4,032.*

Evidence—Charge of criminal breach of trust—Statements by a deceased person in a confession affecting himself and the accused—Admissibility against accused—Evidence Ordinance, s. 32 (3).

The accused who was assistant sweeps secretary of the Galle Gymkhana Club was charged with criminal breach of trust of moneys belonging to the club.

At the trial the Crown proposed to lead in evidence statements made by H, a clerk (since deceased), who was assistant to the accused, to the Secretary of the club, to the Committee, and the Police.

The statements fell under three groups—

- (a) Admission of misappropriation by him of club money.
- (b) Admission of his having at the request of the accused deposited club money in the accused's account at a bank.
- (c) Statement regarding misappropriation by the accused in which he took no part.

Held, that the statements under heads (a) and (b) were admissible, and that the statement under head (c) was not admissible, under section 32 (3) of the Evidence Ordinance.

THE accused was charged before the Supreme Court with criminal breach of trust of moneys belonging to the Galle Gymkhana Club and with falsification of club moneys.

Schokman, C.C. (with him *H. W. R. Weerasooriya, Acting C.C.*), for the Crown.

M. T. de S. Amarasekera (with him *L. W. de Silva*, instructed by *F. W. E. de Vos, Proctor*), for accused.

March 12, 1935. DRIEBERG J.—

Before opening the case for the prosecution Mr. Schokman desired a ruling on certain matters of evidence he proposed to lead. He said that if this evidence was admissible it was necessary that he should refer to it in opening his case. Mr. Amarasekera objects to this evidence and it was agreed that I should decide on its admissibility at this stage.

They are statements made by Herath, a clerk who assisted the accused ; he died before this prosecution began. They were statements made to Mr. J. E. Perera, secretary of the club, statements made to the committee of the club on February 13, 1933, to the auditor of the accounts of the club, and to the police.

The statements fall into three groups—first, admissions by Herath of misappropriation by him of club money, second, admissions of his having at the request of the accused deposited club money in the account of the accused at the bank in Galle, thirdly, statements regarding misappropriation by the accused in which Herath took no part.

The Crown relied on section 32 (3) of the Evidence Ordinance for the admissibility of this evidence. The evidence of the third class of statements is not admissible, for they affect the accused only and are not against the pecuniary or proprietary interests of Herath nor would they expose him to a criminal prosecution or a suit for damages. The first two groups of statements can be considered together, for the first is an admission of his own criminal acts and the second is an admission of his having aided and abetted the accused in his misappropriation of club money.

Mr. Amerasekera sought to exclude these statements from the operation of section 32 (3) for this reason. On April 4, 1933, the committee of the club considered a charge then pending against Herath and decided to discontinue his services but resolved not to take any action against him and further that his life insurance policy, which I take it he had deposited as security, should be returned to him.

All the statements of Herath which it is proposed to prove were made after this meeting and Mr. Amerasekera contends that as it was there decided not to take action against him, Herath, in making these statements did not imperil his pecuniary or proprietary interests and had secured immunity from a prosecution or an action for damages.

The second part of this argument is obviously wrong. Apart from the question whether the committee had the right to make a final order in the matter, the offence Herath confessed is non-compoundable and he continued to be liable to prosecution though the committee decided not to prosecute him ; this circumstance alone brings his statements within the second part of section 32 (3) and render them admissible.

It is not therefore necessary to deal with the other objections raised by Mr. Amarasekera. On April 4, 1933, the committee dealt with only one matter against Herath, the misappropriation of Rs. 170 out of stand members subscriptions. Further, at a meeting of April 13, 1933, the committee considered other charges against Herath, he was examined, a sub-committee was appointed to inquire into these charges and that sub-committee recommended that he be dismissed, his insurance policy cancelled and that the general committee should decide whether he shall be prosecuted. At the inquiry by the sub-committee on April 13, 1933, Herath made statements compromising the accused and himself.

I declared my ruling on these points at the conclusion of the argument and said that I would give my reasons in writing today.

1935

*Present : Poyser J.*SAMARASINGHE *v.* SAMARASEKERA.78—*P. C. Matara, 3,833.*

Urban District Council—Payment of rates and taxes by candidate of persons nominating him—To avoid objection to nomination—No corrupt motive—Ordinance No. 11 of 1920, s. 36 (2).

Where a candidate for an Urban District Council election deposited a sum of money on account of any rates and taxes due from certain persons, who had nominated him, in order to avoid any objection being raised to the nomination papers and subsequently withdrew the money, no objection having been made,—

Held, that his conduct did not amount to the giving of a gratification within the meaning of section 36 (2) of the Local Government Ordinance, No. 11 of 1920.

A PPEAL from a conviction by the Police Magistrate of Matara.

R. L. Pereira, K.C. (with him *Rajapakse* and *Senanayake*), for accused appellant.

H. V. Perera (with him *S. W. Jayasuriya*) for complainant, respondent.

June 19, 1935. POYSER J.—

The appellant has been convicted, under section 36 (2) of Ordinance No. 11 of 1920, for making a payment to the Urban District Council of the rates and taxes due from certain voters with the object of inducing the said voters to exercise their electoral rights in his favour. There was very little dispute as to the facts which are briefly as follows:—The appellant was a candidate for Ward No. 3 in the Matara Urban District Council elections. On nomination day, November 17, 1934, he went with his nomination papers to the Urban District Council Offices. The appellant had 22 nomination papers but attached particular importance to two of these, viz.:—one in which he was proposed by Karunanayaka and seconded by Coopman, and another one in which he was proposed by Goonewardene and seconded by White. He attached importance to these particular nominations as he considered the above-mentioned persons were the most respectable of those who had signed nomination papers on his behalf.

At the Urban District Council Offices the appellant heard a rumour that his opponent was going to raise an objection to these nomination papers on the ground that the persons signing them were in arrears with their rates and taxes.

The appellant then, after a consultation with the clerk of the Urban District Council, in the course of which the latter suggested a deposit of Rs. 50 in case he himself was in arrears, deposited a sum of Rs. 400 on account of any arrears due by these proposers and seconders. In fact these persons were in arrears with their rates and taxes to the extent of Rs. 311.

When the Assistant Government Agent received the appellant's nomination papers no objection was recorded nor in fact could any objection have been recorded on the grounds that the proposer or seconder were in arrears with their rates or taxes.