

[IN THE COURT OF CRIMINAL APPEAL]

1955 Present : Gratiaen, J. (President), Gunasekara, J., and
K. D. de Silva, J.

REGINA v. C. S. DISSANAYAKE

APPEAL NO. 12 OF 1955, WITH APPLICATION 17 OF 1955

S. C. 16—M. C. Punadura, 28,939

Co-operative Societies Ordinance (Cap. 107), as amended by Act No. 21 of 1949—Section 50B—“Criminal breach of trust”—Burden of proof—“Shall be guilty of the offence”—“Require any person”—Penal Code, ss. 383, 392A.

Section 50B of the Co-operative Societies Ordinance (as amended by Act No. 21 of 1949) reads as follows:—

“50B. It shall be lawful for the Registrar, after the accounts of a registered Society have been audited as provided in Section 17 or after an inquiry or inspection into the affairs of a registered Society has been held under section 35, to require any person, being a person entrusted with or having the dominion of any money in his capacity as an officer or a member or a servant of the Society, to pay over or produce such amount of money or balance thereof which is shown in the books of accounts or statements kept or signed by such person as held or due from him as such officer, member or servant; and if such person, upon being so required, fails to pay over or produce such amount of money or balance thereof forthwith or to duly account therefor, he shall be guilty of criminal breach of trust, and shall on conviction be subject to imprisonment of either description for a term which may extend to ten years and also be liable to a fine.”

Held, that Section 50B does not create a new offence, also designated “criminal breach of trust”, containing elements separate and distinct from the elements of the well-known offence bearing the same name and defined in Section 383 of the Penal Code. The intention of Section 50B of the Ordinance was merely to facilitate, in charges of criminal breach of trust against any officer of a Co-operative Society, proof of dishonest conversion if he has failed to pay over or produce or “duly account for” monies admitted under his own hand to be due by him in his official capacity. In other words, proof of the facts enumerated in Section 50B furnishes *prima facie* evidence—indeed, strong *prima facie* evidence—that the officer concerned had dishonestly converted the funds to his own use and thereby committed the offence of criminal breach of trust. No burden, however, is imposed on the accused person to prove his innocence in such a situation, so that if the Court, upon consideration of all the evidence, is left in reasonable doubt as to whether, for instance, the essential element of dishonesty has been established against him, he must be acquitted. Proof of the facts specified in Section 50B does not give rise to an irrebuttable presumption that the offence of “criminal breach of trust” has been committed.

Held further, that the person authorised by Section 50B is entitled, for reasons of administrative convenience, to nominate some other person to receive the money in question at a suitable time and place.

APPPEAL against a conviction in a trial before the Supreme Court.

M. M. Kumarakulasingham, for Accused-Appellant.

V. T. Thamotheram, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

May 20, 1955. GRATIAEN, J.—

The appellant was the cashier of a Co-operative Society registered under the provisions of the Co-operative Societies Ordinance (Cap. 107), as amended by the Co-operative Societies (Amendment) Act No. 21 of 1949. He was convicted at the Kalutara Assizes of the offence of "criminal breach of trust" in the following circumstances:—

The accounts of the Society had been audited in March 1953 in terms of Section 17 of the Ordinance, and it appeared from books and documents maintained by the appellant as cashier that he was accountable for a sum of Rs. 24,099-39 entrusted to him from time to time in that capacity. A letter P12B dated 11th May 1953 was thereupon addressed to him by the Deputy Registrar of Co-operative Societies (who was admittedly vested by the appropriate Minister with all the statutory powers of a Registrar) "requiring" him "to pay over the said sum of Rs. 24,099-39 on demand by Mr. D. P. Gunawardene, Assistant Registrar of Co-operative Societies". It purported to be a requisition under Section 50B of the Ordinance.

This letter was forwarded to the appellant together with a covering letter P12A dated 13th August 1953 from Mr. Gunawardene calling upon him to hand over the money in question to Mr. Gunawardene at the latter's office at 10 a.m. on 18th May, 1953. No part of the money was, however, paid by the appellant at the specified time, or at any time thereafter. He was in due course charged with criminal breach of trust, punishable under Section 50B of the Ordinance (as amended by the Act of 1949) which reads as follows:—

"50B. It shall be lawful for the Registrar, after the accounts of a registered Society have been audited as provided in Section 17 or after an inquiry or inspection into the affairs of a registered Society has been held under section 35, to require any person, being a person entrusted with or having the dominion of any money in his capacity as an officer or a member or a servant of the Society, to pay over or produce such amount of money or balance thereof which is shown in the books of accounts or statements kept or signed by such person as held or due from him as such officer, member or servant; and if such person, upon being so required, fails to pay over or produce such amount of money or balance thereof forthwith or to duly account therefor, he shall be guilty of criminal breach of trust, and shall on conviction be subject to imprisonment of either description for a term which may extend to ten years and also be liable to a fine."

It is necessary to give a meaning to the words "shall be guilty of the offence of criminal breach of trust". The offence itself has not been separately defined in either the Ordinance or the amending Act. We receive guidance, however, from the interpretation consistently given by the Supreme Court to these identical words in a similar context in Section 392A of the Penal Code (introduced by Ordinance No. 22 of 1889) relating to alleged defalcations by public servants. Section 50B does not create

a new offence, also designated "criminal breach of trust", containing elements separate and distinct from the elements of the well-known offence bearing the same name and defined in Section 388 of the Penal Code. Applying the *ratio decidendi* of the earlier decisions in *The King v. Ragal*¹, *Somanandar v. Uduma Lebbe*² and *Gunasekera v. The King*³, we hold that the intention of Section 50B of the Ordinance was merely to facilitate, in charges of criminal breach of trust against any officer of a Co-operative Society, proof of dishonest conversion if he has failed to pay over or produce or "duly account for" monies admitted under his own hand to be due by him in his official capacity. In other words, proof of the facts enumerated in Section 50B furnishes *prima facie* evidence—indeed, strong *prima facie* evidence—that the officer concerned had dishonestly converted the funds to his own use and thereby committed the offence of criminal breach of trust. No burden, however, is imposed on the accused person to prove his innocence in such a situation, so that if the Court, upon consideration of all the evidence, is left in reasonable doubt as to whether, for instance, the essential element of dishonesty has been established against him, he must be acquitted.

Proof of the facts specified in Section 50B does not give rise to an irrebuttable presumption that the offence of "criminal breach of trust" has been committed. That theory must be rejected if we take as a guide to the interpretation of this penal enactment the particular mischief which the legislature intended to remove (as in cases now covered by Section 392A of the Code) and also pay regard to the earlier construction given by the Courts to the language of the earlier penal statute which meets a precisely similar difficulty of proof where defalcation by a public servant is alleged. Parliament could not have conceived that the stigma of a conviction for "criminal breach of trust" involving liability to a term of imprisonment for 10 years was appropriate to a case where the dishonesty of a man was left in doubt at the end of his trial or was conclusively negated. Nor is there compelling evidence in section 50B of an intention to shift the burden of proof to an accused person charged with an offence of such gravity.

For these reasons the learned Commissioner quite correctly directed the jury that they could not convict the appellant in the present case unless they were satisfied that he had dishonestly converted to his own use the monies admittedly entrusted to him as cashier of the Society. The verdict necessarily implies that his own explanation at the trial of his failure to produce the money was rejected as quite untrue. The evidence accepted by the jury therefore established that he had failed "duly to account for" the shortage in the absence of an explanation, consistent with his innocence, which might reasonably be true. In the result, the Crown discharged the heavy burden of establishing the appellant's guilt. No complaint was made before us to the effect that the verdict was unreasonable.

We were invited by the defence to quash the verdict on the ground that the appellant had only been "required" to produce the money by a

¹(1902) 5 N. L. R. 314.

²(1924) 24 N. J. R. 146.

³(1952) 53 N. L. R. 522.

person who was not authorised by section 50B to call for it. The argument was elaborated as follows :—

- (1) Only the Registrar or an officer duly vested with the statutory powers of a Registrar is authorised to “require” the payment or production of money so as to satisfy the conditions laid down by Section 50B ; and such powers cannot validly be delegated ;
- (2) in addition, the officer authorised by Section 50B must “require” the payment (or production) of the money to (or before) himself and no one else ;
- (3) although the Deputy Registrar was vested with the requisite statutory powers, his letter P12B amounted only to an invalid delegation to Mr. Gunawardene of the power to “require” the payment or production of the money ;
- (4) Mr. Gunawardena alone “required” the appellant to pay the money in terms of P12A ; but the appellant was under no obligation to comply with this demand as Mr. Gunawardene admittedly had no power to take action under Section 50B.

The first of these submissions is certainly correct, but the rest of the argument is without substance. The statutory power of the Deputy Registrar to require the payment of the money in this case is conceded, and his letter P12B, although some parts of it were drafted in unduly legalistic terms, constituted a valid demand for payment under Section 50B. He was of course entitled to “require” that the money should be paid to himself, but he was equally entitled, for reasons of administrative convenience, to nominate some other person to receive the money at a suitable time and place. The words “on demand” in P12B are not indicative in the present context of a decision by the Deputy Registrar to delegate or surrender his statutory powers to Mr. Gunawardene. On the contrary, Mr. Gunawardene’s letter P12A to the appellant was written in accordance with the Deputy Registrar’s wishes and under the authority of P12B which it accompanied. No usurpation by Mr. Gunawardene of statutory powers which he did not enjoy was involved at any stage of the the transaction. The letters P12B and P12A, read together, meant, and were understood to mean, that the Deputy Registrar retained control of the situation throughout and that he had, on his own initiative, directed Mr. Gunawardene to call for and receive the money, if forthcoming, at a very early date at a time and place which was to be notified to the appellant.

It has been brought to our notice that the arguments for the appellant on this issue receive support from an unreported decision pronounced by another learned Commissioner at the Kandy Assizes on 26th May, 1954—*R. v. Jayawardene—S. C. 27/M. C., Polonnaruwa, 11,993*. The reasons set out in our judgment sufficiently explain why we find ourselves unable to adopt the view expressed on that occasion.

We dismiss the appellant’s appeal and refuse his application. The conviction is affirmed.

Conviction affirmed.