1975 *Present :* **Rajaratnam, J., Vythialingam, J., and Ratwatte, J.**

K. R. KARUNARATNE, Accused-Appellant *and* THE STATE, Complainant-Respondent

S. C. 29/72—D. C. (Crim.) Negombo 4687/14942

Admission—Proof against the accused—False statement—Can it amount to an admission—Evidence Ordinance S. 17.

Where the accused-appellant was charged with criminal breach of trust and the prosecution sought to prove as against the accused a false statement (P3) made by the accused, two matters arose for consideration, namely (*a*) the truth of the contents of the statement and (*b*) the fact that such statement was made by the accused.

Held : that if the prosecution relied on the truth of such a statement it is prevented from doing so by the rule against hearsay, unless it sought to prove it under section 17 of the Evidence Ordinance. The hearsay rule is offended only when the prosecution relies on its truth but the rule is not offended when the prosecution seeks to prove the fact that such a statement was made by the accused. Thus, the proposition that statements which are false cannot be regarded as admissions within the meaning of section 17 of the Evidence Ordinance is limited to a situation where the prosecution leads evidence of a statement as an admission under section 17 of the Evidence Ordinance, but does not apply where the prosecution leads it as an item of evidence relating to the subsequent conduct of the accused under section 8 of the Evidence Ordinance.

Queen v. Wilegoda 60 N.L.R. 246 distinguished.

Sentence—Offence committed ten years ago—Considerations applicable in suspending sentence

Held by Rajaratnam, J. and Ratwatte, J. (Vythialingam, J. dissenting) that while the trial judge was right in sentencing the accused to a term of two years rigorous imprisonment and to pay a fine of Rs. 1000 and that even if the provisions relating to the suspension of sentences were in operation at that time and the case was concluded in due time, this was not a case where the sentence would have been suspended, having regard to the gravity of the offence. But, on the other hand, when a deserving conviction and sentence have to be confirmed ten years after the proved offence the judge cannot disregard the serious consequences and disorganisation that it can cause to the accused's family.

Therefore the delay of 10 years to finally conclude the case is a very relevant circumstance to be taken into consideration and in the circumstances of the case a suspended sentence is appropriate.

Per VYTHIALINGAM, J. :

" In the instant case the essential question is, is the strain that the accused would have undergone during these ten years when the charge was hanging over his head such as to outweigh the demands of public policy that for this type of offence and this class of offender a deterrent sentence of immediate imprisonment should be imposed ".

APPEAL from a conviction by the District Court Negombo.

V. S. A. Pullenayagam with *M. Nazeem* for accused-appellant.

Tilak Marapona, Senior State Counsel for the Attorney-General.

Cur. adv. vult.

October 11, 1975. RAJARATNAM, J.—

In this case the accused-appellant was charged with having between the 25th May, 1965 and 29th May, 1965 committed criminal breach of trust of a sum of Rs. 9,450.84 entrusted to him in his capacity as a Cashier of the Co-operative Wholesale Establishment, Minuwangoda, an offence punishable under s. 389 of the Penal Code.

According to the prosecution the accused was a Cashier of the C. W. E. Stores. One Dayananda de Silva was the Manager of the stores and he went on leave on 25.5.65. He made the necessary log entries and handed over the depot keys to the accused. The accused acted as the Manager during the absence of Dayananda de Silva. The cash collection, whether the accused was acting as the Manager or not, was always the responsibility of the accused cashier.

On 25.5.65 the cash collection acknowledged and signed by the accused was Rs. 7,714.19 and on 26.5.65 the cash collection had been Rs. 1,159.14 which also had been acknowledged and signed by him. On 27.5.65 the collection was Rs. 2,035.88 which also had been acknowledged and signed by the accused. The 28th May was a holiday. On an admission made by the accused which had been proved against him the prosecution proved that he had kept a sum of Rs. 9,587.37 in the iron safe on the 27th at about 2 p.m. By this admission which was produced as a document marked P3 the accused has acknowledged the fact that he had in his custody a sum of Rs. 9,587.37 which he put into the iron safe. The 28th being a holiday the accused came back to the stores only on the 29th and discovered according to him when he opened the safe all the money missing except for a sum of Rs. 136.53.

The prosecution further sought to prove through two watchers who were called as witnesses that no one had entered the premises after the accused left on the 27th till the accused re-entered the premises on the 29th morning. There is in evidence that the seal with which the door was sealed was intact. The Police who went for the investigations found no signs of anyone entering the premises. So that if the prosecution evidence led through the watchers and the Police is accepted there was no likelihood of anyone having made an entry into the premises on the 27th or 28th after the accused left the premises with the keys of the iron safe and the door. The only question left for the Court to decide is whether there was a reasonable possibility of anyone entering

the premises and removing the money in which case the accused could not be held responsible for the loss of the money. If the prosecution over-ruled this possibility on the evidence led then on the admission made by the accused in P3 the following facts have been established by the prosecution :—

(1) The accused made a statement that the sum specified was put into the iron safe.

(2) This alleged sum except for a small amount of Rs. 136.55 was not found in the safe on the 29th.

(3) No person, not even the accused, could have entered the premises and taken the sum of Rs. 9,450.84 which was missing out of the safe, that is to say, a theft in relation to this amount could never have taken place.

There is no question that the prosecution proved the 1st and the 2nd facts mentioned above. The question arises whether the prosecution proved the 3rd fact, that is, the impossibility of anyone including the accused taking this money out of the iron safe between the 27th and the 29th. If the prosecution succeeded in proving this fact then the question arises whether the prosecution has proved its case of criminal breach of trust against the accused since he made a false statement in P3. The prosecution relied on the three circumstances enumerated above.

Learned Counsel for the appellant made two submissions, the first submission was that the prosecution did not over-rule the possibility of a theft or burglary on the evidence before Court between the 27th and 29th. His second submission was an alternative submission that even if the prosecution proved for purpose of argument this fact that there could not have been a theft or burglary yet having relied on an admission made by the accused that he placed the specified sum of money in the iron safe they were confined to rely on the truth of that statement. Therefore the prosecution could not be thereafter heard to say that they were relying on the falsity of this admission. Mr. Pullenayagam appearing for the accused-appellant put his case so high on this point as to say that the prosecution for all its trouble only proved that the accused could not have mis-appropriated this sum of money as on their own case the accused put the money into the safe on the 27th and thereafter no one, not even the accused, could have removed this money before the 29th morning when it was

discovered in the presence of others that this sum of money was missing. He cited the case of *Queen v. Wilegoda,* 60 NLR 246 where it was held that statements which are false cannot be regarded as admissions within the meaning of s. 17 of the Evidence Ordinance. It is, however, established in law that where a statement is proved against the party making an admission under s. 17 of the Evidence Ordinance the party affected by such admission can elicit the contents of the full statements such as will explain or afford the context of such a statement. The prosecution in such a case may rely on a portion of a statement without relying on the other portion of the statement and there could be different degrees or credibility attached to the contents. We have considered the judgment in *King v. Edwin,* 48 NLR 337, and the observations of Cross on Evidence, 3rd Edition at page 434.

In this case quite apart from the admission being proved under s. 17 of the Evidence Ordinance, it has not been challenged. It is an admitted fact that the accused had made such a statement. When he was questioned by the authorities, he made a statement that he had placed the money inside the iron safe. This statement has two matters for consideration :

(*a*) the truth of the contents of such a statement, and

(*b*) the fact that such a statement was made by the accused. If the prosecution relied on the truth of such a statement it is prevented from doing so by the rule of hearsay unless it sought to prove it under s. 17 of the Evidence Ordinance. On the other hand the prosecution can rely on the fact that such a statement was made by the accused as a circumstance relating to his subsequent conduct. In our view the hearsay rule is offended only when the prosecution relies on its truth but that rule is not offended when the prosecution seeks to prove the fact that such a statement was made by the accused and also that such a statement could not be true in view of the other evidence that is to say the evidence that the money was not there, and no one including the accused could have taken it. The prosecution case to sum up was that the accused made a false statement when the iron safe was opened and the money

which was in his custody was not found, no one ever having had any access to it and there being no possibility of a theft. It is our considered opinion that the decision in *Queen v. Wilegoda* has to be limited where the prosecution leads evidence of a statement as an admission under s. 17 of the Evidence Ordinance, but not where it leads it as an item of evidence relating to the subsequent conduct of the accused under s. 8 of the Evidence Ordinance. The submission of learned Counsel for the appellant therefore that the said admission had to be relied upon as a true admission and as part of the prosecution case as the truth must fail when the prosecution could have led it as subsequent conduct of the accused.

The only question now is whether the iron safe could have been tampered with during the relevant time between the 28th and the 29th. The evidence of the watchers and the Police has been accepted by the trial Judge after due consideration and the accused has chosen to remain silent without himself helping the Court with regard to the security measures prevailing in the depot. The seal on the door lock was found intact and the police found no signs of any one having entered the premises and the Police stated that " the cobwebs and the dirt near the windows were untouched ". The locks were not a production and neither key was produced but according to the prosecution the seal on the door lock was intact. The trial Judge satisfied himself on the evidence that no one, that is including the accused in the circumstances, could have entered the premises and spirited away the cash, in which case the necessary inference is that the accused did not place the cash which he said he did place in the iron safe on the 27th. His conduct in making that statement which was revealed to be false by the subsequent discovery of the money being not found in the iron safe when no one could have forced an entry between the 27th and 29th and the keys being in the custody of the accused during this time clearly point the finger of guilt to the accused and the Court made the necessary inference from these

circumstances. The accused himself gave no evidence. We therefore hold that the charge against the accused has been proved beyond reasonable doubt. The conviction therefore is affirmed.

The question of sentence caused me great anxiety in view of the fact that the proved offence has been committed sometime in May 1965 more than 10 years ago. The conviction in this case was in August 1972 more than 7 years after the proved offence. The inquiry and the trial in this case must have caused hardship and unhappiness in the home of the accused for the last 10 years till the final determination had been arrived at by this Court. But at the same time we have to be mindful of the fact that the accused has been guilty of a very despicable and anti-social act in defrauding a co-operative Society.

Learned trial Judge was quite right in sentencing him to serve a term of 2 years rigorous imprisonment and to pay a fine of Rs. 1000/-. Even if the provisions regarding the suspension of sentences were in operation at that time, and if the accused came up before him in due time I am certain that this was not a case where the sentence would have been suspended by the Judge in view of the correct view he formed with regard to the gravity of the offence. But on the other hand when a deserving sentence has to be confirmed 10 years after the proved offence I cannot dis-regard the serious consequences and disorganisation that it can cause in the accused's family. If there was a final determination of this case within a reasonable time, the accused by now would have served his sentence and come out of prison to look after his family. I find, however, that the charge had been hanging over this accused for the past 10 years till it reached a conclusion before us. The effect and consequences of this sentence cannot be totally dis-regarded when the sentence is imposed 10 years after the proved offence. Under the Administration of Justice Law this situation could and would never arise with the abolition of non-summary inquiries.

The plaint in this case was filed on the 30th September 1965 and the accused was ultimately committed to trial after complying with the instructions of the Attorney-General in December 1967. The long delay in the non-summary inquiry was due to the defects under the old Law. I find that the accused has in no way been the cause of the delay in the non-summary proceedings. Thereafter an indictment went out against the accused in December 1971. The accused pleaded not guilty on the first date of trial and the Crown Proctor begged for a postponement as the prosecution was not ready. In May 1972 the trial was taken up and postponed and in June 1972, on the 3rd date of trial, the prosecution asked for a date as the Registrar of Finger Prints was on medical leave. On the 4th date in Juy 1972 the Court has journalised that it had not had the time to take up this case as there was another case part-heard. On the 5th date of trial, the case was concluded at last when the accused was found guilty. The accused was convicted and sentenced in August 1972. So that I find that the accused was compelled to go through a non-summary inquiry and trial through no fault of his for 7 years. After that the accused filed a petition of appeal.

This appeal came up in May 1973 for the first time when learned Counsel for the State moved for the appeal to stand out. In February 1974 when the appeal was listed a second time the Senior State Counsel appearing for the prosecution stated to Court that he had not been furnished with the brief in this case and the case was again re-listed but was not reached. The 4th date of listing, I find, is the only occasion on which the postponement was due to the appellant and that was when his counsel fell ill. On the 5th and the 6th occasions the appeal was not heard due to no application made on behalf of the appellant.

At this stage therefore the delay of 10 years to finally conclude this matter is in my view a very relevant circumstance to be taken into consideration before allowing the sentance of 2 years imprisonment to operate immediately. I am not aware of any case where an accused person has been kept in suspense for so long a period due to no fault of his own. The accused has always been present in Court and ready to receive justice at the hands

of Court. He has made no contribution to the delay. If there has been such an earlier case I should imagine there would have been better reasons for the delay. The fact that I am unable to lay my hands on any precedent does not deter me from considering this delay in the circumstances of this particular case as a relevant factor for the imposition of an appropriate sentence.

Under s. 2(b) and (d) of the Administration of Justice Law there should be fairness and justice in the administration and determination of a judicial proceeding. The circumstance of delay in this particular case is not without significance or relevance for consideration before the imposition of a just sentence. A just sentence is not always a lenient sentence. It is far from my mind to impose a lenient sentence in this case. But it has become my concern to impose a just sentence in this case. No doubt the accused was sentenced in 1972. This sentence, however, will be affirmed only today when s.239, subsection (1) provides that " a Court which imposes a sentence of imprisonment on an offender for a term not exceeding 2 years for an offence may order that the sentence shall not take effect unless during a period specified in the order being not less than 5 years from the date of that order (hereinafter referred to as the " operational period ") such offender commits another offence punishable with imprisonment (hereinafter referred to as " subsequent offence "). It is true that this imperative provision does not bind this Court at this stage. On the other hand the circumstances in this case make it obligatory for the conscience of this Court to review the sentence passed by the original Court. The accused has been made to wait for justice for 10 years and all his dependants too. Though it is not obligatory it would not be inappropriate nevertheless in the circumstances of this case to deal with the offender in terms of s.239(1).

I am therefore of the view that the sentence of 2 years rigorous imprisonment should be suspended for an operational period of five (5) years from the date of the communication of this order to the accused in the trial Court. The fine of Rs. 1000 will stand to be recoverable under the provisions of the law. Subject to the suspension of the jail term in terms of this order the conviction is affirmed and the appeal is dismissed. The trial Court is directed to comply with the terms of s.239(4) and (6).

VYTHIALINGAM, J.—

I have had the advantage of reading the judgment proposed by my brother Rajaratnam, J. and I agree that the conviction and sentence should be affirmed. But I regret that I am unable to agree that the sentence of two years' rigorous imprisonment should be suspended for an operational period of five years.

The accused was convicted and sentenced by the District Judge of Negombo on 10.8.1972. The power to suspend a sentence of imprisonment was first introduced by Law No. 9 of 1972 which was certified on 22.11.1972 but was brought into force by notification in the Gazette only with effect from 1.3.1973. This law amended the old Criminal Procedure Code to make provision for the imposition of suspended sentences. The Criminal Procedure Code itself as amended was repealed by the Administration of Justice Law No. 44 of 1973 and replaced by a new Criminal Procedure Code, which re-enacted the provisions in regard to the imposition of suspended sentences by sections 239 to 241.

The trial Judge could not have availed himself of these provisions at the time he convicted and sentenced the accused as they were not in force at that time. However, it is clear from the reasons he has given for the sentence that even if the power to suspend the sentence had been available to him at that time he would not have exercised the discretion to do so. In his order he has said "Cases of this type involving misappropriation of large sums of money belonging to public institutions by unscrupulous officials are often difficult to prove and where proved must be severely punished in the public interest. I see no circumstances in this case in mitigation of sentence. The fact that the accused had no previous convictions is of no avail in a case of this type where the embezzlement of money belonging to a public institution is involved. I have considered the factors urged on behalf of the accused by his Counsel but am unable to take a lenient view."

He accordingly sentenced the accused to a term of two years' rigorous imprisonment and to a fine of Rs. 1,000/- in default to a further period of six months' imprisonment. It cannot be said that in doing so the trial judge has misdirected himself or gone wrong in principle. Nor, having regard to the nature of the offence, is the sentence in any way inappropriate so as to call for interference by this Court with the exercise of the trial judge's discretion.

Under Section 239 of the Administration of Justice Law where a court imposes a sentence not exceeding six months, suspension is mandatory except in the circumstances specially provided for in section 239(a) to (e) or where the Court is of the opinion that, for reasons to be stated in writing, it would be inappropriate in the circumstances of the case to deal with the offender in this way by suspending the sentence of imprisonment. Where the sentence of imprisonment is more than six months but does not exceed two years the Court may suspend such sentence. If the sentence is more than two years the question of suspension does not arise at all.

It will be seen that the court must in the first instance decide that it is a fit case for the imposition of a sentence of imprisonment and then decide on the length of the term of imprisonment. The question of suspension will only arise thereafter and will depend on the length of the term of imprisonment. In England suspension although also of recent origin, has been in existence for eight years now and English decisions will be a useful guide, particularly so, as there are as yet no decisions of our courts on this point. In the case of *Rex Vs. O'Keefe* (1969, 1 All E. R. 426) Lord Parker, C.J. pointed out. where the Act is almost identical with ours, at page 428 " ..... it seems to the Court that before one gets to a suspended sentence at all, the Court must go through the process of eliminating other possible courses such as absolute discharge, conditional discharge, probation order, fines and then say to itself: this is a case for imprisonment, and the final question, it being a case for imprisonment, is, immediate imprisonment required or can I give a suspended sentence?"

There are therefore three stages at which decisions have to be made. The first or primary decision involves a choice of two conflicting penal objectives which today exist side by side. The first is that which takes into consideration the offender's culpability and is based on the demands of public policy and on concepts of retribution and general deterrence. The other is based on the claims of the offender, his character and needs and the possibility of his reform. Here the choice is which of the individualised measures like probation, conditional release, borstal etc. would be most appropriate to the offender.

Where the primary decision is not in favour of an individualised approach then the amount of the fine or the length of the sentence where imprisonment is decided on has to be determined. This secondary decision of fixing a sentence appropriate to the offender's culpability is loosely and for convenience referred to as the tariff. Here, one would take into consideration all the aggravating factors as well as all the mitigating circumstances, such as age, good character etc. in arriving at the length of the term of imprisonment. When this has been done the third question arises: Is it a fit case where the sentence of imprisonment should be suspended? What are the factors which should be taken into consideration in deciding this question?

If the factors to be taken into consideration at this stage of the process are the same as those considered at the first stage when individualised measures were rejected then the process becomes circular and the judge is back where he started from. If they are the same as those considered in the second stage in the calculation of the length of the sentence of imprisonment or between fine and imprisonment such as mitigating factors then is it proper to give double weight to a particular factor ? If the length of the sentence of imprisonment makes a substantial allowance for the offender's good record then can the same factor be used to justify suspension? In England the solution is not yet clearly established.

But D. A. Thomas in his *Principles of Sentencing* points out at page 228 "The factors which determine whether to suspend the sentence are not yet clearly established, but it appears that the process is essentially one of eliminating cases where the sentence must be ordered to take effect immediately, rather than looking for positive factors justifying suspension. This approach to the question is an inevitable consequence of the decision process imposed by the present statutory framework; long before the question of suspension has been reached the court has considered and rejected the claims of the offender in positive terms to individualised treatment".

The first person to be eliminated in this process on the basis that an immediate sentence of imprisonment is necessary is of course our friend the "bad man" who has been in and out of prison. For, if one of the objectives of suspension is, as pointed out by the Law Commission, in their memorandum to the Hon: Minister "that imprisonment with its obviously criminal associations should not bring a non-criminal offender within its ambit (*Dr. G. L. Peiris, Criminal Pro: under the Administration of Justice Law* 478) then there is no point in suspending a sentence if a man has already shown by his conduct that prison is not a deterrent. This however is not a rule of thumb. A previous sentence of imprisonment sometime ago or where a person has shown by his conduct that he has turned over a new leaf and that the instant offence is an isolated recurrence of his previous conduct, should not be a disqualification for suspension. For a discussion of this aspect see *The Suspended Sentence for Ex Prisoners by K. L. Soothil* (1972 Criminal Law Review 535).

Thomas points out at pages 229, 230 "within the remaining category of offenders there are several kinds of cases where the Court usually considers an immediate sentence necessary. The Court has refused to order suspension of a sentence for what amounted to a series of offences rather than an individual one ; in cases where the offence exhibits a degree of careful premeditation, or where the offence amounts to a serious breach of trust. The Court is also reluctant to order suspension where the length of the term of imprisonment imposed already makes substantial

allowance for mitigating factors, which are urged as a basis for suspension. Sentences have not generally been suspended in cases involving violence, particularly where the victim was a stranger to the offender or a public servant ; but there are a few exceptions.

"The kind of offender left at the end of this process of elimination is typically a man of good character possibly with one or two minor convictions, who is not considered a suitable person for probation and who has committed a more or less isolated offence of a moderately serious nature." This passage adequately summarises the attitude of the English Courts to the question as to the circumstances in which a sentence of imprisonment may properly be suspended. I would adopt this as the correct approach under our law as well. The accused in this case has no previous convictions and is apparently a man of good character. The offence is also an isolated one. These are in his favour. But it is impossible for me to regard the offence as being only of a moderately serious nature. It is an extremely serious offence involving a position of trust and in respect of public funds.

At the time of the offence the accused was the cashier of the Minuwangoda Co-operative Stores and he used to act for the Manager when the latter went on leave. In this country the Co-operative Stores handles the distribution of essential foodstuffs and other necessary consumer goods. They were established under government control and supervision to secure an equitable distribution of hard to get essential commodities to the ordinary people at fair prices. Profits are necessarily minimal. When trusted officials help themselves to such a large sum as Rs. 9,450.84 it is bound to hit the people very hard and to dislocate the distributive system. In these circumstances an immediate sentence of imprisonment is called for as much in the interests of the safety of public funds as for protection of society and also as a deterrent to others in similar positions and of a like mind.

Criminal breach of trust and misappropriation specially of public or semi public funds by persons in positions of trust have always been treated as very serious offences meriting immediate punishment. *Rex Vs. Rendall,* 1973 Criminal Law Review, 585 was a case of a postman who committed theft of registered packets and who had no previous convictions. He was sentenced to one year's imprisonment on each of two counts consecutively. The Court of Appeal in refusing to interfere said that offences were very easy to commit and difficult to detect. They involved a grave breach of trust, eroded public confidence in a public service and caused at the least disappointment and sometimes distress or worse to those directly affected. The amounts involved were small, £185 and £15 but the Court said that this was not necessarily a conclusive yardstick to the appropriate sentence.

In *Rex Vs. Williams* (1972 Crim. Law R. 651) the accused was a Railway porter who pleaded guilty to several offences including three of opening a mail bag. He also had no previous convictions and was sentenced to four years' imprisonment. Here again the Court of Appeal refused to interfere saying that a railway porter was as much a trusted servant as a postman. Stealing and rifling mailbags was a very serious offence and a stern sentence would always be imposed. Despite his previous good character, his contrition and the distress caused to his family the sentence was not out of scale. The Court said that it was the sort of sentence to be expected for this type of crime. In both cases a plea for a suspension of the sentence was rejected.

In the case of *Rex Vs. Bazeley,* 1969 Crim. L. Review a postman who pleaded guilty to three counts of stealing postal packets and asked for 54 other cases to be taken into account and who had no previous convictions was sentenced to two years' imprisonment. In refusing a plea for suspension the Court observed that it was always tragic when a public servant loses his good character, job and pension because of criminal stupidity, but it has always been recognised that that is no ground for not imposing a severe sentence. The sentence was lenient and there was no question of suspending it.

In this country too criminal breach of trust by persons in positions of trust has always been regarded as an extremely grave offence requiring exemplary punishment. Our Penal Code gives recognition to this by providing for an increase in the maximum sentence imposeable accordingly as the trust increases. Section 388 which applies to all members of the public provides for a maximum of three years' imprisonment. In section 390 and 391 which apply to a carrier, wharfinger or warehouse keeper and to a clerk or servant the maximum is seven years while in section 392 which applies to a public servant, banker, merchant, factor, broker, attorney or agent the maximum is ten years.

Referring to these sections Lord Parker said in the Privy Council in the case of *Cooray Vs. The Queen*, 54 N.L.R. 409 at 412 " It will be observed that the widest and most general provision is that contained in section 388 in as much as it applies to all members of the public. On the other hand sections 390 to 392A apply to limited classes, treat their behaviour as more heinous and impose a heavier penalty." The accused in that case was convicted under section 392 and was sentenced to five years' imprisonment. It was held by the Privy Council that he was not an agent and therefore the conviction under section 392 was wrong. But the Privy Council substituted a conviction under section 389 and sentenced him to three year's rigorous imprisonment. He was the President of a Co-operative Union and also of the Depot at Moratuwa and had misappropriated Rs. 57,000 from the Depot by substituting his own cheques which were not cashed.

In the instant case the accused had also been charged under Sec. 389 although as a servant of the Society he could have been charged under Section 391. The principles which should guide a court in assessing the sentence which should be imposed on an accused were laid down by Basnayake, A.C.J. in *The Attorney-General Vs. H. N. de Silva,* 57 N.L.R. 121. That was a case in which an employee of the Food Control Department had forged certain documents to enable certain non-nationals to obtain residence permits. The trial judge bound him over under section 325 of the Criminal Procedure Code. The Attorney-General appealed against the order although it is rare for him to do so.

Basnayake, A.C.J. said at page 123 " It is clear that the learned District Judge has only looked at one side of the picture, the side of the respondent, his age, his youth, his previous good character, that he has lost his employment and will not be taken into the Clerical Service even though he has passed the qualifying examination. These are certainly matters to be taken into account; but not to the exclusion of others which are of greater importance. He has failed to take into consideration the gravity of the offence and the circumstances in which it was committed, the degree of deliberation involved in it, the trusted position which the respondent held, the punishment provided by the Code for the offence, and the reprehensible conduct of the respondent after the offence was detected showing his criminal mind. "

Frauds, thefts, criminal breach of trust and criminal misappropriation by employees in Co-operative Societies which are established to relieve the public of the hardship occasioned by shortage of essential commodities are frequent, wide spread and difficult to detect. The Courts should not give these employees the impression that when they commit these offences they can get away with it by getting a suspended sentence and going scot free, provided they do not commit another offence during the operational period. In England the position is quite different from the position in Sri Lanka in this respect because section 39(7) of the English Act provides that a suspended sentence which has not been actuated during the operational period, shall be treated as a sentence of imprisonment for the purposes of all enactments and instruments made under enactments except any enactment or instrument which provides for disqualification for or loss of office or forfeiture of pensions of persons sentenced to imprisonment.

Thus Parker, C.J. said in **O'** *Keefe* (supra) that a suspended sentence is a sentence of imprisonment and ranks as a conviction unlike a probation order or a conditional discharge. Then again in *Rex Vs. Mark* (1975) Crim. Law Review 112 a woman of 25 pleaded guilty to three counts of stealing from shops goods worth £15. She had no previous convictions and was

sentenced to six months' imprisonment which was suspended for two years and fined £250 so that " she did not get away with it altogether ". On this point the Court of Appeal said that it was incorrect to regard a suspended sentence as getting away with it altogether. It was a sentence of imprisonment which went on a person's record.

Under our law however section 239(5) provides that " If the offender does not commit a subsequent offence during the operational period the suspended sentence imposed on the offender shall be deemed, for all purposes, never to have been imposed. " In these circumstances it will not rank as a sentence of imprisonment at all though probably the conviction will remain but without any penalty being imposed. Such a situation is of course possible. In the case of S. *Ramcharen Vs. The Queen.* (1972 Crim. Law R. 581) the accused was convicted of a felony and fined. The appeal court held that the judge had no power to impose a fine and substituted a sentence of imprisonment. The Privy Council held that the trial judge had no authority under the law of Trinidad and Tobago to impose a fine and also that there was no authority for the order made by the Appeal Court for imposing a sentence of imprisonment. If the sentence was unlawful the judgment must simply be reversed. The matter could not be remitted to the trial Court as it was functus. The Privy Council said that the result of quashing the imprisonment was that the appellant went free but the conviction stood.

There are also certain other features which ought to be taken into consideration when the court is asked to take a merciful view. Here is no man of penitent soul and contrite heart. On the day the money was found to be missing the accused made a statement P3 to the Internal Audit Clerk where he stated that the Manager was not on good terms with him and that he suspected him of having burgled the store. The Manager was also cross-examined on the basis that he could have got duplicate keys and seals made. The acccused's counsel in his address also suggested that the Manager could have got duplicate keys made and taken the money. The accused had tried to put the blame on an innocent man.

The offence also shows premeditation and planning. The accused had to wait till the manager was on leave, as then he would have the keys to the building to-gether with the keys of the safe which were always with the accused and also shift the blame. He had also to wait till sufficient money was collected in the store to make a haul. The evidence is that the co-operative department collected the cash on the 25th and the officers would come again only after two or three days. The accused was in sole charge on the 26th and 27th when monies were accumulated by sales. The 28th was a holiday and the money was found missing on the 29th. No part of the money has ever been recovered. While these are not factors which one would take into consideration in sentencing the accused to a longer term than the norm, nevertheless it would be correct to take them into consideration in refusing to take a merciful view.

The only ground that has been urged for the suspension of the sentence is the delay of ten years between the date of the offence and the final disposal in appeal of the case. That the accused has had to undergo great anxiety and considerable strain over such a long period is certainly most deplorable. The offence was committed between 27.5.1965 and 29.5.65. Non summary inquiry was completed and the accused was committed to stand his trial in the District Court on 27.12.1967 and the record was forwarded to the Attorney-General. The indictment, however, was forwarded only four years later, which certainly shocks the conscience. Sentence was passed on 10.8.1972 when Counsel for the accused pointed out that the accused had to bear the strain for seven years. The trial judge said that he took this submission into consideration.

The accused was not in custody at any time during this period. Nor is it his position that he was handicapped by the delay in putting forward his case as fully as he could. Delays of this nature though, happily very rare, are not at all that unknown in Sri Lanka. Recently a case came up in appeal in October, 1975 where the offence was committed on 6.11.1964 eleven years earlier. However, delays of this nature are generally regarded as mitigating factors.

In Whitefield the appellant was sentenced to a total of six years for offences including offences of incest committed ten years previously. The court said that "it does not desire to encourage the wholly mistaken belief in the mind of anybody that offences such as these can be regarded other than in a most grave manner, but having regard to the lapse of time since the incest offences were committed" the sentences on those counts were reduced — Thomas (supra) 198, Note 1.

Delay of a much shorter period was also taken into consideration in *R. Vs. Sanders* (1972 Crim. L. Rev. 658) in suspending a sentence of imprisonment. The appellant pleaded guilty to three counts of making a false statement in an account and balance sheet and three of publishing fraudulent statements and was sentenced to two years' imprisonment. He had no previous convictions. Three and a half years passed between his making a full disclosure to the receiver and the police seeing him and a further year before proceedings against him were started. Although it was held that it was a grave case meriting a sentence in excess of two years, yet having regard to the delay in prosecuting him the sentence was suspended for two years.

The court however treated it as a wholly exceptional case, and there were other mitigating factors. He had made a full disclosure and had pleaded guilty. He had been led into trouble in the first place by dishonesty on the part of his employees and a disastrous trading year in 1961. During the period the case was pending he had lived and worked honestly. The decision in that case must therefore rest on its own peculiar facts. In the instant case the essential question is, is the strain that the accused would have undergone during these ten years when the charge was hanging over his head such as to outweigh the demands of public policy that for this type of offence and this class of offender a deterrent sentence of immediate imprisonment should be imposed ? I do not think it does, for the reasons I have already given Public condemnation of conduct so grave is unavoidable— see *R. Vs. Pottinger* (1974) Cr. L. R. 675. In the result I would dismiss the appeal and affirm the conviction and sentence.

I have proceeded on the basis that even though the trial judge did not, at the time he passed the sentence, have the power to suspend the sentence of imprisonment, yet we have the power to do so by reason of a later amendment to the law providing for an altered form of sentence. However there appears to be some doubt in regard to this. See for example *C.J.C. Foreign Exchange Offences 21st case No. 11/75 — 19th August,* 1975.

However as this matter was not argued before us I reserve the decision on this point for a more appropriate occasion.

Ratwatte, J.:

I have had the advantage of reading the judgments of both my brothers, Rajaratnam, J. and Vythialingam, J. and I agree that the conviction should be affirmed.

I have given much thought to the question of the sentence in this case. I agree that, in cases of this nature where offences are committed in respect of public funds by persons in positions of authority or trust, the Courts should not take a lenient view and that such offences are as stated by Vythialingam, J., serious offences meriting immediate punishment. One of the principles underlying the imposition of sentence in such a case is that the sentence should act as a deterrent. But in the instant case the offence was committed over ten years ago. Rajaratnam, J. has dealt fully with that aspect of the matter and I concur with the reasons given by him for suspending the sentence of two years' imprisonment for an operational period of five (5) years, in terms of section 239 (1) of the Administration of Justice Law, No. 44 of 1973.

Vythialingam, J. states in his judgment that there seems to be some doubt as to whether the Appeal Court has the power to suspend a sentence of imprisonment imposed by the trial Court before the new law came into operation. The provisions of section 239 of the Administration of Justice Law, are procedural in nature. The Appeal Court when it affirms a conviction can either affirm the sentence or vary the sentence by reducing or enhancing it. This case will reach finality only when the Appeal Court disposes of the appeal, and in my view, when we are considering the question of sentence in this case, we have the power to suspend the sentence of imprisonment. I, therefore, agree with the order made by Rajaratnam, J. as regards the sentence in this case. The fine imposed stands but the sentence of two years' rigorous imprisonment will be suspended as per Rajaratnam, J's. order. Subject to the suspension as aforesaid, the appeal is dismissed.

Conviction affirmed. Sentence varied.