[IN THE PRIVY COUNCIL]

1948 *Present :* **Lord Simonds, Lord Normand, Lord Oaksey, Lord MacDermott, Sir Madhavan Nair**

THE KING *v.* CASPERSZ

PRIVY COUNCIL APPEAL, NO. 2 OF 1948

S. C. 129—D. C. (Criminal) Trincomalee, 293

Penal Code—Criminal breach of trust—Intention to cause wrongful gain or wrongful loss—Motive not relevant—Sections 21, 22, 388 and 392.

Accused, an executive engineer, was put in charge of work on a road which was of great urgency and in which speed was more important than cost. Complaints were made by the overseers that they were losing money on the work for the reason that they had to pay their labourers more than they were getting from the Public Works Department. In order to placate the overseers the accused instructed them to insert items in their bills for work which was not done, and made payments accordingly.

Held, that the accused was guilty of criminal breach of trust. The fact that the accused may have thought that he was acting in the interests of the country was relevant only on the question of sentence.

APPEAL from a judgment of the Supreme Court reported in *(194*
47 N. L. R. 165.

L. M. D. de Silva, K.C., with *R. K. Handoo,* for the appellant.

Sir David Maxwell Fyfe, K.C., with *Frank Gahan,* for the Crown.

June 2, 1948. *Delivered by* LORD OAKSEY.—

This is an appeal from a judgment of the Supreme Court of Ceylon dated March 7, 1946, which affirmed the conviction of the appellant by the District Court of Trincomalee on November 13, 1945, but substituted for a sentence of six months' rigorous imprisonment a fine of Rs. 500 and imprisonment till the rising of the Court. The appellant paid the fine and served the sentence of imprisonment.

At the conclusion of the arguments their Lordships announced that they would humbly advise His Majesty that the appeal should be dismissed, and they now state their reasons.

The charge against the appellant was that between April 10 and May 19, 1944, he, being entrusted as executive engineer at Trincomalee of the Public Works Department with money to pay overseers for rubble

bottoming on specified parts of the Trincomalee-Batticaloa road, commtted a criminal breach of trust in respect of Rs. 6,218·48 out of such money.

The charge was under section 392 of the Penal Code and the following sections of the Code are material :—

" 21.—(1) ' Wrongful gain ' is gain by unlawful means of property to which the person gaining is not legally entitled.

(2) ' Wrongful loss ' is the loss by unlawful means of property to which the person losing it is legally entitled.

. . . .

22. Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing ' dishonestly '.

388. Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, *or wilfully suffers any other person so to do, commits ' criminal breach of trust '*.

Illustrations.

. . . .

(*c*) A, residing in Colombo, is agent for Z, residing in England. There is an express or implied contract between A and Z that all sums remitted by Z to A shall be invested by A according to Z's direction. Z remits 10,000 rupees to A, with directions to A to invest the same on mortgage of coffee estates. A dishonestly disobeys the directions, and employs the money in his own business. A has committed criminal breach of trust.

(*d*) But if A, in the last illustration, not dishonestly but in good faith, believing that it will be more for Z's advantage to hold shares in a company, disobeys Z's directions and buys shares in a company in Z's name instead of investing the money on mortgage, here, though Z should suffer loss, and should be entitled to bring a civil action against A on account of that loss, yet A, not having acted dishonestly has not committed criminal breach of trust.

392. Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

The evidence for the prosecution established the following facts :—

In January, 1944, the appellant, as the executive engineer at Trincomalee, was put in charge of the work on a three-mile stretch of the

Trincomalee-Batticaloa road, a narrow existing road which had to be improved as part of a plan for improving the China Bay road. For military reasons the work was of great urgency, and speed was more important than cost. For these reasons the work was started in January, 1944, before the usual estimate was drawn up and approved. On February 11, 1944, the appellant submitted an estimate for the work, and was notified on February 26 that the estimate was approved. The estimate provided for an expenditure of Rs. 16,228·84 on rubble bottom. The method by which such work was done was as follows : overseers, who were registered government servants with pension rights, employed the necessary labourers who were paid at rates approved by the government. Periodically the overseer prepared a bill for the work done by labourers employed by him. The measurements and amounts were checked by the executive engineer and if necessary the bill was corrected. A voucher was then prepared in the office and certified as correct. The head clerk and engineer then signed a cheque which was paid to the overseer. At the time of the work in question there was an acute and increasing shortage of labour in Ceylon especially in Trincomalee, and threats were used to force overseers to bring labourers to Trincomalee for the work. At the instance of the appellant a 100 per cent. increase in rates was sanctioned by the Government, but nevertheless the shortage persisted. The overseers doing the work were from the commencement grumbling that they were losing because, so they said, they were paying their labourers more than they were getting from the Public Works Department. Complaints were made to the appellant, who procured the overseers to insert items in their bills for rubble bottom, although in fact no rubble bottoming was done.

On various dates from April 6, 1944, to May 18, 1944, the overseers submitted ten bills in which claims were made in respect of rubble bottom. Each bill was supported by a form attached thereto purporting to show the measurements of the work. In seven of the bills so submitted the quantity of rubble bottom was altered, indicating that the measurements had been checked by the executive engineer. The measurement forms were correspondingly altered. In the other three bills (as also in some of the seven bills) there were alterations not relating to rubble bottom. Most of the alterations were made by the appellant but some were made by a young engineer, H. K. Melsom, who was on probation, and in March, 1944, had been sent to study the work under the appellant. Melsom knew that no rubble bottom was laid, and when for the first time he saw a bill with a claim for rubble bottom he mentioned to the appellant that no rubble bottoming had been done. The appellant, however, instructed him to reduce the quantities and to pay, as the rates were low and as the overseers had to overcome their difficulties. Later Melsom refused to certify bills with items for rubble bottom, but the appellant then showed him a letter from the Minister saying that the cost of the work on the roads was of secondary importance. Sums amounting in all to Rs. 6,218·48 were by the appellant's authority paid out of the public funds entrusted to the appellant to overseers in respect of rubble bottom which to the appellant's knowledge had not been laid.

Acting on information the superintending engineer made investigations in May, 1944, and the appellant, on being questioned, took full responsibility. He asked for advice, and the superintending engineer advised him to recall the money paid for rubble bottom and to credit the revenue. The appellant then demanded repayment from the five overseers who had received payments for rubble bottom. Three of them refunded to the appellant the amounts received, but two refused to do so. The appellant, however, paid to the credit of the Government Rs. 6,224·03 expressed to be recovered on account of overpayments, and the appellant caused the chief clerk to make out receipts which purported to show repayments from each of the five overseers. The Director of Public Works received from the superintending engineer a report on the irregular payments, and on July 13, 1944, the Director of Public Works read this report to the appellant and recorded the appellant's answers to questions based on the report. The record was signed by the appellant. The report stated that the appellant admitted that he was solely responsible for the payments to the overseers for foundation work which had not been done, the appellant's only motive being to assist the overseers in their inconveniences and losses. The appellant stated to the Director of Public Works that his reasons for making payments for work not done were that he had been instructed to get the work done as quickly as possible by paying anything and anyhow so long as it was reasonable ; that the overseers did not cover their costs, and so when they appealed to the appellant for permission to charge this item, the appellant gave permission ; that the appellant's sole purpose was to get the work done, and in that he succeeded until relieved of the work ; and that there was no collusion between the appellant and the overseers. The Director of Public Works did not consider that the appellant took the money himself, and the appellant was not suspended or prosecuted until late in 1944.

The appellant did not give evidence, except after conviction in mitigation of sentence.

The learned Judge of the District Court convicted the appellant. In his judgment he set out the facts and stated that the defence relied on the statements of the appellant and the evidence of the overseers to show that the appellant had no dishonest intentions. One view of the alterations in the measurement forms was that the appellant thought that the overseers were charging too much as losses, while another view was that the appellant was impressing the head office and the audit with the genuineness of the rubble bottom items. There was no evidence that the amount of the losses was agreed, and no method was mentioned of how the losses were assessed. Accordingly, the learned Judge felt constrained to hold that the alterations were to show that the items were genuine, especially as there was no relationship between the alleged losses and the amounts expended. He felt forced to come to the conclusion that the appellant had criminally misappropriated funds entrusted to him as a public servant.

The reasons of the Supreme Court for affirming the conviction were given by Mr. Justice Cannon, who pointed out that the appellant did not contest the irregualr payments but relied on the explanation given to the superintending engineer, and on the urgency of the work. Mr. Justice Cannon interpreted the word " misappropriated ", used by the District Judge, as

"misapplied," and went on to consider the meaning of "dishonest" which in the Penal Code appeared to him to have nothing to do with probity. He thought that there could be no doubt that the appellant knew quite well that he was causing wrongful gain to the overseers and wrongful loss to the Government, and that the evidence of the Government's attitude towards cost must have indicated to the appellant that requests for necessary increases would have been dealt with quickly and sympathetically. Other evidence in the learned Judge's opinion confirmed the view that the appellant was not acting *bona fide*. Accordingly the conviction was confirmed but the sentence reduced.

Before their Lordships' Board Mr. de Silva in an able argument for the appellant contended that the appellant was not guilty of a criminal breach of trust within the meaning of the Penal Code. He relied upon the illustrations to section 388 and contended that the evidence for the prosecution showed that the appellant did not intend to cause wrongful gain to the overseers or wrongful loss to the Government and that though the falsification of the bills and forms might be considered unlawful means within section 21 yet the overseers were legally entitled within that section to be indemnified by the Government for the losses they had sustained in paying their workmen. He further contended that the onus of proving that the appellant knew that the overseers were not legally entitled to the money paid them by him rested upon the prosecution and had not been discharged and that the deception practised by the appellant was not sufficient to prove dishonesty since deception may honestly be employed to achieve lawful and desirable ends.

Their Lordships are unable to accept these arguments. In their opinion there was unchallenged evidence to show that the appellant intended to cause wrongful gain to the overseers and wrongful loss to the Government within the meaning of the Code. The means adopted by the appellant were undoubtedly unlawful and in their Lordships' opinion there was no evidence that the overseers were legally entitled to be indemnified by the Government for their alleged losses. It is true that the prosecution called some of the overseers who stated that they had made losses but no evidence was given that their contracts with the Government either expressly or impliedly provided for indemnification from loss. The argument that the overseers were legally entitled to indemnify themselves against loss by putting forward false accounts in order to obtain payment for work which they had not done cannot be entertained.

The fact that the appellant may have thought that he was acting in the interests of the country in getting the work done has been properly taken into account by the Supreme Court of Ceylon in reducing the sentence.

It was not suggested before their Lordships that the appellant had suffered from the fact that the Judge who committed him sat on the Bench with the Judge who tried him but their Lordships agree with the Supreme Court that such a practice is undesirable.

For these reasons their Lordships have humbly advised His Majesty that the appeal should be dismissed.

Appeal dismissed.