1967 *Present:* Tennekoon, J.

N. ROHANA, Appellant, *and* S. SENARATNE (Police Sergeant, C. I. D.), Respondent

S. C. 470/67—M. C. Hambantota, 53269

Criminal breach of trust—Charge—Error in stating date of offence—Effect—Burden of proof—Penal Code, s. 389—Criminal Procedure Code, ss. 6, 168, 171.

Where a person is charged with having committed criminal breach of trust in respect of a certain sum of money on a particular day, it is sufficient for him to show that there is no evidence that he misappropriated any money on that day. Disbelief of evidence given by him at the trial that, on a subsequent date, he gave the money to the person to whom it was due is not a valid reason for convicting him.

APPEAL from a judgment of the Magistrate's Court, Hambantota.

George E. Chitty, Q.C., with *U. A. S. Perera* and *G. Dissanayake*, for the accused-appellant.

Ranjith Dheeraratne, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

October 12, 1967. TENNEKOON, J.—

The appellant was convicted by the Magistrate, Hambantota, of the offence of criminal breach of trust and sentenced to 3 months rigorous imprisonment.

The charge on which the accused was tried was as follows :—

" You are hereby charged that you did within the jurisdiction of this Court at Malpeththawa on the 10th July, 1965, you being entrusted with dominion over property to wit Rs. 91, did commit criminal breach of trust of the same and that you did thereby commit an offence punishable under section 389 of the Penal Code. "

The case for the prosecution was as follows :—

After the General Elections held in March, 1965 and the formation of the present government, certain persons made arrangements for a pinkama the main purpose of which was to offer dana to a number of Buddhist monks and to invoke blessings upon the Prime Minister and his government and transfer merit to the late Mr. D. S. Senanayake and other national heroes. The pinkama was to be financed from collections made from the public of Malpeththawa village. The organising committee consisted of the Rev. Wimalasiri, Edirisuriya, Dharlis, one Simon Appu and the accused. The pinkama was held on 10th July 1965 and the committee of management met after the ceremonies were over to go into the accounts. The accused prepared the statement of accounts P1. There was, after all expenses had been met, a balance of Rs. 232·25. Edirisuriya suggested that of this a sum of Rs. 100 be gifted to " the government " and Rs. 25 be spent on a newspaper publication about the pinkama that had been held. On a suggestion made by the accused the amount of gift to the government was reduced to Rs. 66·00—a figure whose oddity, it transpired in evidence, is explained by the fact that there were 66 U. N. P. members of Parliament in the government. However the evidence does not make clear whether the sum of Rs. 66·00 was to be a gift to the Nation or to the political party or parties which had formed the new government; it is in this latter sense that Edirisuriya used the word " government " when in a letter directed to the Minister of Finance P8 he described himself as " Sympathiser of Government ". The total sum of Rs. 91 was placed in the hands of the accused and he was to go to Colombo on the following day to apply this sum of money in the manner decided upon by the Committee.

The prosecution case then was that the accused had not gone to Colombo on the following day and that he had not then or on any other date either paid Rs. 66 to " the government " or applied the Rs. 25 for the purposes of a notice in the papers.

The prosecution called one Thenuwara, Director of Accounts, of whose evidence the Magistrate says—

> " Witness Thenuwara has testified that no sum whatsoever has been paid by the accused to Revenue (*sic*). Witness Thenuwara was the Director of Accounts at the Treasury, Colombo, and his evidence was not even challenged by the defence. I therefore accept his evidence that this money was never paid to Revenue."

In regard to the question of dishonest misappropriation, the learned Magistrate had this to say :

> " The prosecution has proved that this money has not been paid by the accused to Revenue. There is however no direct evidence that the accused misappropriated this money. However the only irresistible conclusion that could be drawn from the accused's failure to pay the money and his false explanation about handing the money to Ratnasekera is that he had misappropriated it."

The learned Magistrate's inferences from Thenuwara's evidence are somewhat overdrawn ; he failed to notice that it was entirely inconclusive ; it was not the prosecution case that the trust imposed on the accused was to pay the money at Mr. Thenuwara's office. That was perhaps one of the ways in which it could have been discharged. The obligation to pay to " the government " could, because of its very vagueness, have been effected in more ways than one. Indeed the accused understood the trust as meaning that he should pay the money to Mr. Wanninayake, the Minister of Finance. Further when the money came back into the hands of Edirisuriya he enquired of Mr. Wanninayake by PS whether he should pay the money to "you or Mr. Dudley Senanayake, the Honourable Prime Minister, or to any other Officer " and he was informed that he should pay it to the Secretary to the Treasury (P9).

In regard to the Magistrate's reference to Ratnasekera it is necessary to say that the accused stated in evidence (and he had also said so before when questioned by the police), that he had gone to Colombo, not on the 11th July but on a subsequent date and having been unable to hand the money over to Mr. Wanninayake, he gave the money to a friend of his, one K. L. Ratnasekera, to be handed over to the Minister. He said further that Ratnasekera was dead and unable to testify for him and also that he had asked his lawyers to summon Ratnasekera's wife to speak to that fact. There were also according to him two persons who saw him hand over the money to Ratnasekera, i.e., the M. P. for Gampola and another person from Mamandala ; he further testified that having come to hear that Ratnasekera had not paid the money to the Minister, he on 23rd November, 1965 paid the sum of Rs. 91 to the Rev. Wimalasiri Thero. The defence adduced no evidence other than that of the accused.

The learned Magistrate's comment on this part of the defence is as follows :—

" According to the accused he gave the money to one Ratnasekera. Ratnasekera according to him is now dead. He has not called anyone to support his version that Ratnasekera is dead. He has not called any person to corroborate his evidence that this money was paid to Ratnasekera although according to him the M. P. for Gampola and another person from Mamandala were present at the time."

At the conclusion of the case, the lawyer appearing for the accused submitted that the charge on which the trial proceeded was in respect of an offence committed on 10th July 1965 and that the evidence did not establish the commission of any such offence on that date.

The learned Magistrate while accepting the position that the evidence did not establish the commission of the offence on the 10th July purported to follow a judgment of Swan, J. in *Panditakoralage v. Selvaranayagam*[1] and rejected the defence submission that the accused should be acquitted on the English principle supposed to have been laid down in the case of *Severo Dossi*[2] " that a date specified in a charge has never been considered a material matter unless time was the essence of the offence ". It is I think necessary to deplore this tendency to run to English rules of procedure in criminal law when there is express provision in our own. Section 6 of the Criminal Procedure Code permits recourse to English Law only when " no special provision has been made by this Code or by any other law for the time being in Ceylon ". It may be that the English law is the same and the English cases are relevant for that reason ; but that must be established first before the English cases are used.

What provision is made in our law in regard to the specifying of the date in a charge ? Section 168 of the Criminal Procedure Code reads as follows :—

" (1) The charge shall contain such particulars as to the time and place of the alleged offence and as to the person (if any) against whom and as to the thing (if any) in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged and to show that the offence is not prescribed.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of movable property, it shall be sufficient to specify the gross sum or, as the case may be, the gross quantity in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 179 :

Provided that the time included between the first and last of such dates shall not exceed one year. "

[1] *(1954) 56 N. L. R. 143.* [2] *13 Cr. App. R. 158*

Section 171 then proceeds to say :

> "No error in stating either the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was misled by such error or omission."

The question then for the court was not the vague test of whether "time is the essence of the offence" but whether the error in stating that the offence was committed on the 10th of July could have *misled the accused.*

The main ground on which the learned Magistrate held that there was dishonest misappropriation was that the accused was giving a false story when he said that he had given the money to Ratnasekera to be given over to the Minister. The failure to prove that Ratnasekera was dead as an explanation for his not being called and the failure to call other witnesses who were present when the money was supposed to have been given over to Ratnasekera to be paid over to Mr. Wanninayake seem to have been the foundation for his disbelief of the accused. Now, where the charge alleges misappropriation on the 10th of July it was not necessary for the accused to adduce evidence in regard to the handing over of the money to Ratnasekera on some later date, because such evidence is irrelevant if misappropriation had already taken place on the 10th of July. Accordingly it seems to me completely unjust to have drawn inferences adverse to the accused from his failure to substantiate his story about Ratnasekera ; his lawyers may well have advised themselves and the accused that proof of honest application of the money on a date subsequent to the date of misappropriation alleged in the charge will not help to obtain an acquittal, any more than proof that he handed the money to the Rev. Wimalasiri Thero on the 23rd of November 1965 would help to secure that result.

It seems to me that in a charge involving what is sometimes referred to as "temporary misappropriation", the specification of a named date or "a date unknown" between two terminal dates, is that kind of particular relating to the matter with which the accused is charged which is almost invariably material, for the reason that the defence is virtually being told that evidence of honest dealing with the property after the alleged date of offence is irrelevant and need not therefore be produced at the trial.

The case dealt with by Swan, J. in 56 N. L. R. 143 was not a case of misappropriation, temporary or otherwise ; it related to a charge of possessing ganja and upon an application of section 171 of the Criminal Procedure Code Swan, J. held that in that particular case the accused had not been misled by the reference in the charge to the date of the

offence as "*on or about March 28, 1954*" when the evidence disclosed that the ganja was actually found in the accused's possession on the *29th March 1954*.

The case of *The Attorney-General v. Dheen* [1] was also cited to the learned Magistrate. This is a judgment of Gunasekara, J. It is sufficient to state the facts of that case to show how indistinguishable it is from the instant case. That too was a case of "temporary misappropriation". The prosecution case was that the accused who was a proctor had been entrusted by one Gunasekera with a sum of Rs. 340·09 on the 18th December 1951 to be paid before 14th January 1951 to the credit of an action in the Court of Requests of Galle in terms of the Decree in that case. The money had not been deposited in Court but when a complaint was made by Gunasekera to the Law Society, the accused had, before any inquiry was held, paid the money back to Gunasekera. The charge against the accused was in the following terms: "……that you did ……at Galle on 18th December, 1951, you being entrusted with property to wit, a sum of Rs. 340·09 in your capacity as agent…… did commit criminal breach of trust in respect of the said property and that you have thereby committed as offence punishable under section 392 of the Penal Code."

At the trial, it was contended on behalf of the accused that the charge meant that the offence was committed on 18th December, 1951, but that there was no evidence to prove the commission of an offence on that day. Upholding this contention the learned Magistrate discharged the accused. The Attorney-General appealed against this order.

In appeal, it was submitted on behalf of the Attorney-General that the charge did not mean that the offence was committed on 18th December, 1951, but that it was committed in respect of money that was entrusted to the accused on that date. It was further argued (*a*) that the averments in the charge, taken together, were reasonably sufficient to give the accused notice of the matter with which he was charged; (*b*) that it was not necessary that the charge should particularize the time of offence; (*c*) that even if the Magistrate thought the time should have been stated, he should have amended the charge to supply the omission. It was further contended that the Magistrate should have convicted the accused as he had held both that the money had been entrusted to the accused on 18th December, 1951, and that the accused had misappropriated it.

Gunasekara, J. held—

(1) That the charge meant that the offence was committed on 18th December, 1951, and that the prosecution had failed to prove this charge. All the accused had to do was to show that there was no evidence that he misappropriated any money on the day in question.

[1] *(1961) 61 C. L. W. 74.*

(2) That there was no omission in the statement of the particulars of the offence that had to be supplied by an amendment.

(3) That as the accused was not tried on a charge of having committed an offence at any time other than the 18th December, 1951, it was not open to the learned Magistrate to find that the accused misappropriated the money.

In the course of his judgment Gunasekara, J. said : " In order to defend himself against the charge that he was called upon to answer, *it was sufficient for the accused to show that there was no evidence that he misappropriated any money on the day in question.* It was not necessary for him to give or adduce evidence contradicting or explaining other items of incriminating conduct imputed to him by the prosecution, such as was imputed in the evidence that he claimed to have deposited the money to the credit of the civil case. Nor was it necessary for him to adduce evidence in support of his explanation of his omission to deposit it. Under these circumstances an inference that he misappropriated the money at some other time, though he may not have done so at the time in question, cannot be drawn from the fact that he has not chosen to refute any particular allegation. In my opinion there was no sufficient ground for the learned Magistrate's finding that the accused misappropriated the money. He was not tried on a charge of having committed such an offence at any time other than the 18th December, 1951. The appeal is dismissed."

It is clear from this passage that the test being applied by Gunasekara, J. was that set out in section 171 of the Criminal Procedure Code ; it was obviously the view of Gunasekara, J. that in a case where a date of offence is alleged in a charge relating to temporary misappropriation the accused is under no duty, and that it would be irrelevant for him to show that he had not misappropriatd the money on a subsequent date or that he had properly applied it on such subsequent date.

The only reason for the learned Magistrate not following this case was that Gunasekara, J. had not referred to or considered English case-law whereas Swan, J. in 56 N.L.R. 143 had. It is necessary however to add that even this approach would have led to a different conclusion had not the learned Magistrate misunderstood and so misapplied, a dictum of Atkin, J. in the case of *Severo Dossi* (reported more fully in 13 Cr. App. R. than in 87 L.J. K.B. 1024). The learned Magistrate quotes the following passage from that judgment :—

" From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence, and although the day be alleged, yet if the jury finds him guilty on another day, the verdict is good.....Thus although the date of an offence should be alleged in an indictment it has never been necessary that it should be laid according to truth unless time is of the essence of the offence. It follows therefore that

the jury were entitled, if there was evidence that they could come to that conclusion, to find the appellant guilty of the offence charged against him even though they found that it had not been committed on the actual date specified in the indictment. "

The learned Magistrate then adds : " It is my view that in a charge of Criminal Breach of Trust, time is not of the essence of the offence ". This statement indicates that the Magistrate understood Lord Atkin as saying that the test to be applied is an abstract one, having reference to the offence as defined in the law and not to the particular instance of it alleged to have been committed by the accused in the charge or indictment. It seems to me plain that what Lord Atkin was saying was that if the date is an essential part of the criminal act alleged in the charge, then it is material but not otherwise. If Lord Atkin's dictum is applied in this sense, it is somewhat similar to the test that would be applied under section 171 of our Criminal Procedure Code. But it must be a matter of special note that prejudice to the accused is the essence of the test under section 171 while the test of time being the essence of the alleged offence does not bring that element to the forefront.

Reference should also be made in this judgment to the fact that Counsel for the appellant tendered to this Court an affidavit from Mrs. Ratnasekera and a certified copy of the death certificate of Ratnasekera which proved that he had in fact died on the 31st of October 1965, long before the trial in the Magistrate's Court, thus showing that the accused had been disbelieved on a matter, which was irrelevant in meeting the charge as framed but which might have been met by cogent and perhaps decisive evidence if the proper date had been alleged.

In the result I am of opinion that the error in stating the date of the offence was material and that the conviction cannot stand.

Crown Counsel urged that the case be sent back for a fresh trial on a suitably amended charge. It is only necessary to say that the prosecution had every opportunity of moving the Magistrate to alter the charge suitably before he gave his verdict. This the prosecution did not do because, presumably it was not prepared to let the accused have the benefit of a fresh trial which would have been inevitable if the Magistrate did alter the charge ; the prosecution instead elected to go on with the charge as it stood. This is not a case in which having regard to the date and nature of the offence and the amount involved, and the totality of the other circumstances, the accused should be vexed again.

I accordingly set aside the conviction and sentence and acquit the accused.

Appeal allowed.