

1930

*Present : Akbar J.*THE KING *v.* FERNANDO.137—*D. C. (Crim.) Chilaw, 3,863**Appellate Court—Doubt that a conviction is right—Duty of Court—Discharge of accused.*

Where in a criminal case, the Judge of the Appellate Court has any doubt that the conviction is a right one, the accused should be discharged.

The Appellate Court was bound in the same way as the Court of first instance to test evidence extrinsically as well as intrinsically.

A PPEAL from a conviction by the District Judge of Chilaw.

F. J. Soerts, for accused, appellant.

M. F. S. Pulle, for Crown, respondent.

December 12, 1930. AKBAR J.—

The appellant was charged with the offence of committing criminal breach of trust of a sum of Rs. 418, which was said to have been entrusted to him by Sirimane, the virtual complainant in this case, to be paid to Messrs. Walker, Sons & Co., Ltd., Colombo, as part payment for the bus bearing No. S. 645 and was convicted by the District Judge and sentenced to undergo rigorous imprisonment for one month and to pay a sum of Rs. 750 or in default two months' rigorous imprisonment. Out of this fine, if it was paid, Rs. 418 was to be paid to Elias Sirimane, the prosecutor. I have considered this case anxiously and have read over the evidence twice. The main facts of the case were as follows : This bus was bought on a hire purchase agreement, the purchaser being the accused, and the guarantor the complainant. Both the complainant and the accused hired the bus till about October 26, 1929, when an agreement was entered into by them under which the complainant was to be the sole proprietor of the bus. The accounts were looked into and the complainant gave the accused a promissory note for Rs. 400. On February 21 the accused sent a letter of demand to the complainant through his

Proctor, Mr. M. H. Jayatileke. He waited for a month and then filed *D. C.*, Chilaw, action No. 9,257, which action is still pending. On March 12, 1930, Messrs. Julius & Creasy, on behalf of Messrs. Walker, Sons & Co., Ltd., sent two letters of demand to the accused and the complainant, respectively, claiming Rs. 487·50 and threatening to sue unless the money was paid. The complainant's story is that he borrowed Rs. 420 and paid it on March 14 to the accused in Chilaw, asking him to pay the instalment of Rs. 418. This sum, even if it was given to the accused, has not been paid to Messrs. Walker, Sons & Co. The complainant said that he got the letter of demand on March 17 and that he then sent the wire (D1) dated March 21, 1930, and handed it at 12·30 P.M. at the Chilaw Post Office, asking the accused why he had not deposited the Rs. 418 given to him on the 14th. Now it has been proved by Mr. C. H. da Silva, Chief Clerk of Messrs. Walker, Sons & Co., that on March 17 the complainant's son came to see Mr. Roberts of their firm, and that he asked for time to pay the instalment claimed ; that Mr. da Silva was present at the conversation and interpreted it, and that the person who came there said that he was the son of the guarantor, whom he identified in Court. This man, Podimahatmaya, said, it appears, that he came on his father's behalf and that his request was refused. Mr. da Silva further stated that Podimahatmaya made no reference to any payment made to the accused by his father. If Mr. da Silva is believed, this is a serious point against the complainant, because if his father had already paid Rs. 418 to the accused, there is no reason why his father should have sent his son to ask for time to pay and why Podimahatmaya did not refer to the payment of Rs. 418 alleged to have been made on March 14 to the accused. The accused then, it appears, came on March 20 to see Mr. Roberts, and on orders from Mr. Roberts, Mr. da Silva came to Chilaw on March 21 with the accused and another

friend of his, who has given evidence to seize the bus. They got to Chilaw at 9 A.M. and made search for the bus all over Chilaw and then they heard that it was at Puttalam. On March 22 the party proceeded to Puttalam and seized the bus, which was taken to Colombo *via* Kurunegala because da Silva feared a row by the complainant, at Chilaw, if the bus was taken through Chilaw. Immediately after the seizure the complainant and his Proctor came to see Mr. Roberts but Mr. Roberts declined to interfere. The complainant charged the accused in this case on March 26, giving as his witnesses one Malhamy and another man called M. Richard Perera. This Richard Perera has not been called, and the suggestion for the accused was that Richard Perera was a servant of the complainant and that he had eloped with the mistress of Podimahatmaya after the case was filed. On April 7 a new list of witnesses was filed giving the names of Peiris Mudalaly and also the Police Officer of Kokkawilla and another witness, Davith Singho. These witnesses, named Malhamy, Peiris, and the Police Officer of Kokkawilla, have given evidence for the prosecution. They said that on March 14 the complainant came to Malhamy's boutique. Malhamy, it appears, lent him Rs. 120, which is entered in the book (P1), and at the same time the witness Peiris Mudalaly also turned up along with the Police Headman of Kokkawilla and Peiris Mudalaly paid Rs. 200 to the complainant and the complainant paid these two sums, namely, Rs. 120 and Rs. 200, and a further sum of Rs. 100 which the complainant had with him. This sum of Rs. 420 was given to the accused to enable him to pay Rs. 418 to Messrs. Walker, Sons & Co. Of course, if these witnesses are believed, the case for the prosecution is proved, and this is the main point of the learned District Judge's judgment. If the evidence, however, is closely scrutinized there are certain unaccountable features in the case for the prosecution. The complainant must have known when he filed this case

on March 26 that no better witnesses could be cited by him to prove his case than Peiris Mudalaly, the Police Officer of Kokkawilla, and Davith Singho. Davith Singho I may mention did not give evidence at the trial. That being so, how is it that the complainant when he filed his case only gave the names of Malhamy and Richard Perera? The course taken by the complainant throws suspicion on the evidence of Peiris Mudalaly and the Police Officer which they afterwards gave. When the two books are scrutinized the doubt increases. Malhamy's book (P1) is a mere exercise book and the item of Rs. 120 is one but the last entry in the book and could have been inserted at any time; moreover, the entry shows an alteration—114 seems to have been altered to 120. The other ledger produced by Peiris Mudalaly shows an entry on March 14 as follows:—Paid cash at Munnesaram Rs. 200. Peiris Mudalaly states in his evidence that this sum was on account of coconuts bought by him, and the entry in the ledger (P5) shows other items on account of coconuts bought, but the entry on March 14 states simply that cash was paid. It is significant that the next entry after March 14 is dated April 8, 1930, which is the day after the complainant filed his supplementary list of witnesses. The other improbabilities in the case are as follows:—The complainant owed the accused Rs. 400, for which he had given a promissory note. Actually on February 21 the accused sent a letter of demand claiming this Rs. 400. In this state of affairs it is incredible to my mind that on March 14, 1930, the complainant entrusted Rs. 418 to his creditor to be paid to Walkers. The complainant must have known that, if the accused kept this Rs. 418 in payment of the debt due to him, Walkers would probably have seized the bus which then belonged to him solely. The complainant admitted that he went to Galle on March 14 and that he had to pass through Colombo to go to Galle. I cannot understand why he did not break his journey in Colombo and pay Walkers this

sum himself. Da Silva's evidence that on March 17, the complainant's son asked for time to pay the instalment is a further item. Moreover, the letter of demand was for Rs. 487·50. I cannot understand why the plaintiff only gave Rs. 418 to be paid. The accused, no doubt, acted somewhat treacherously towards the complainant in getting Walkers to seize his friend's bus for non-payment of the instalment, and this prosecution may well have been a counter move on the part of the complainant against the accused. The telegram (D1) dated March 21 does not corroborate the complainant's story, because it was handed at half past twelve in the noon. It is in evidence that the accused together with da Silva and his friend Peiris were in Chilaw on that date at 9 A.M. and it is quite possible that the complainant got news of the search for his bus by da Silva's party in Chilaw and that this telegram was sent for the purposes of this case by the complainant. The evidence when read as a whole raises serious doubts in my mind. It has been held in the case of *Milan Khan v. Sagai Bepari*¹ that the duty of the Appellate Court in a criminal case is not similar to that of an Appellate Court in a civil case. In a criminal case, if the Judge of the Appellate Court has any doubt that the conviction is a right one, the accused should be discharged. In a civil case the Court must be satisfied before setting aside the order of the lower Court that the order is wrong. Further, in a case reported in 17 *Weekly Reporter (Criminal)*, page 59, it was held that an Appellate Court was bound precisely in the same way as the Court of first instance to test evidence extrinsically as well as intrinsically. Using this test, a strong doubt, as I have stated, has been created in my mind that the conviction is right, and the benefit of this doubt must be reckoned in favour of the accused. The conviction is set aside and the accused acquitted.

Set aside.

¹ 23 *J. L. R. Calcutta* 347.