[IN THE PRIVY COUNCIL]

1953 *Present :* **Earl Jowitt, Lord Porter, Lord Tucker, Lord Asquith of Bishopstone and Mr. L. M. D. de Silva**

M. E. A. COORAY, Appellant, *and* THE QUEEN, Respondent

PRIVY COUNCIL APPEAL No. 38 OF 1952

C. C. A. Appeal 56 of 1950—M. C. Colombo, 43,770

Criminal breach of trust as an agent—Agency business—Necessary ingredient—"In the way of his business"—Penal Code, ss. 388, 389, 392.

Interpretation—Words in enactment similar to words in English statute—Construction—Binding force of English decisions.

The offence of criminal breach of trust as an agent contrary to section 392 of the Penal Code is limited to the case of a person who carries on an agency business and does not comprehend a man who is casually entrusted with money either on one individual occasion or on a number of occasions, provided the evidence does not establish that he carries on an agency business.

Where an enactment has been passed by the legislature in Ceylon in the same terms as an English statute, the Courts should adopt the construction put upon the words by a long established decision or by a series of decisions over a period of years by the English Courts.

APPEAL by special leave from a judgment of the Court of Criminal Appeal reported in (*1951*) *53 N. L. R. 73.*

Sir Frank Soskice, *Q.C.*, with *Dingle Foot* and *Carl Jayasinghe*, for the accused appellant.

Sir Hartley Shawcross, *Q.C.*, with *Frank Gahan*, *Q.C.*, and *Walter Jayawardene*, for the Crown.

Cur. adv. vult.

March 3, 1953. [*Delivered by* LORD PORTER.]—

This is an appeal by special leave from a judgment of the Court of Criminal Appeal of Ceylon which dismissed an appeal by the appellant from a conviction in the Supreme Court of Ceylon following a trial by judge and jury. The conviction was for criminal breach of trust as an agent contrary to section 392 of the Ceylon Penal Code and resulted in a sentence of five years rigorous imprisonment.

2——J. N. B 25807—1,590 (3/53)

After a previous trial the circumstances of which are now irrelevant the appellant was retried on an indictment which after amendment charged him with having committed criminal breach of trust between the 1st May, 1947, and the 30th April, 1948, in respect of a sum of Rs. 155,576·93, entrusted to him by the managers of the Moratuwa and Piliyandala Co-operative Wholesale Depots of the Salpiti Korale Stores Societies Union Ltd. in the way of his business as an agent, to be deposited to the credit of the same Union at the Colombo Co-operative Central Bank and thereby committed an offence punishable under section 392 of the Penal Code.

It was established in evidence that the appellant was the president of the Salpiti Korale Union, a body which supplied goods to retail stores of the Union through wholesale depots. The method by which the business was carried on was that the Colombo Co-operative Central Bank advanced monies to member business societies to enable them to buy their stocks. These advances were repaid weekly and except in the case of small sums should have been so paid by money orders and cheques and not in the shape of cash. The Central Bank in its turn paid in the money orders, cheques and any cash which might have been received in that firm to its account with the bank of Ceylon.

The Union supplied its member Societies through three depots, viz. :— Moratuwa, Piliyandala and Polgasovita.

In addition to his presidency of the Union the appellant was president of the committee which controlled the depot at Moratuwa and vice president of the Co-operative Central Bank. No question now arises as to the depot at Piliyandala, but it appears that the appellant secured the appointment of a certain Ranatunga to be manager of the Moratuwa depot. Through him as manager payments of sums due from that depot had to be made to and deposited promptly with the Co-operative Central Bank.

The appellant appears to have instructed Ranatunga, instead of following out the prescribed routine, to collect large sums from the retail stores in cash and hand them over to him to be transmitted to the bank. Ranatunga acted upon those instructions and transferred the cash which he had collected to the appellant, who instead of paying it over appropriated the cash and substituted for it his own cheques for the amount due.

All cheques received by the Co-operative Central Bank should have been immediately sent to the Bank of Ceylon for collection. The appellant however as vice president of the Central Bank ensured that in many instances his cheques were not sent forward for collection, with the result that when ultimately his activities were discovered some thirty-five cheques had not been presented. These cheques were some of those which the appellant had substituted for the cash which he had received from Ranatunga and it was for misappropriation of Rs. 57,500 being part of this cash that the appellant was ultimately convicted for criminal breach of trust as an agent.

In these circumstances their Lordships have first to determine whether the facts disclosed constituted a criminal breach of trust as agent and secondly if not whether there can and should be substituted a conviction for some other offence.

Having regard to the wide field over which the argument ranged their Lordships think it desirable to set out fully the provisions of the Penal Code of Ceylon dealing with criminal breach of trust. They are as follows :—

PENAL CODE.

"Of Criminal Breach of Trust."

Sections :

"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".

389. Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

390. Whoever, being entrusted with property as a carrier, wharfinger, or warehouse-keeper, commits criminal breach of trust in respect of such property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

391. Whoever, being a clerk or servant or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, 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 seven years, and shall also be liable to fine.

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.

392A. Whoever, being entrusted with or having the dominion of any money in his capacity as a public servant, fails forthwith to pay over or produce when required to do so by the head of his department or by the Chief Secretary, Auditor-General, Assistant Auditor-General, or any officer specially appointed by the Governor to examine the accounts of his department, any money or balance of any money shown in the books or accounts or statements kept or signed by him to be held by or to be due from him as such public servant, or to duly account therefor, shall be guilty of the offence of criminal breach of trust, and shall on conviction be subject to the penalty provided by Section 392.

392B. Any person who, acting or purporting to act as the agent of any other person, receives from a postal officer any postal article for delivery to such other person and—

(*a*) wilfully throws away, destroys, keeps, or secretes ; or
(*b*) without reasonable excuse (the burden of proving which shall lie upon him) fails to account for such article, or unduly delays such delivery,

shall be deemed guilty of criminal breach of trust, and shall be liable to the punishment prescribed therefor. "

It will be observed that the widest and most general provision is that contained in section 388 inasmuch as it applies to all members of the public.

On the other hand sections 390 to 392 (A) apply to limited classes, treat their behaviour as more heinous and impose a heavier penalty. The final section 392 (B) which like 392 (A) is a later addition, creates a different crime and treats it as subject to the same penalties as those prescribed by section 389.

The question for their Lordships therefore is in the first instance whether the appellant is a member of the class or one of the classes embraced in section 392, or otherwise included amongst those referred to in the section.

It was held in the Courts of Ceylon and is maintained by the respondent that the appellant was entrusted with property in the way of his business as an agent and converted it to his own use and consequently comes directly within the words of the statute.

On the other hand the appellant maintains that the offence is limited to the case of one who carries on an agency business and does not comprehend a man who is casually entrusted with money either on one individual occasion or indeed on a number of occasions, provided the evidence does not establish that he carries on an agency business.

In the present case, it is maintained, no agency business was carried on : the appellant merely received certain sums of money and kept them temporarily, having provided for their ultimate payments by the encashment of his cheques.

The correctness of these contentions depends upon the true construction of the language quoted.

For the appellant his submission is put in two ways. Firstly it is said that whatever might have been the result if the words " in his business " were omitted, their presence excludes the possibility of anyone who does not carry on an agency business coming within the section inasmuch as no one can misappropriate money " in his business " unless he is engaged in a business of some sort : a man may casually misappropriate money and be guilty under sections 388 and 389 but he cannot be included in the limited classes struck at in 392 unless he is a member of one of the categories referred to.

Such a construction is, it is said, in conformity with the general scheme of the fasciculus of sections in which 392 is found. 390 applies to carrier, wharfinger, or warehouse keepers, and to no one else, 391 to clerks and servants or persons so employed and 392A to public servants.

Similarly 392 refers to several classes, it is true, but is confined to those types of persons who are members of the categories set out. Banker and merchant are well known types as indeed are factor and broker. Attorney, their Lordships are told, is not a term naturally applied to a solicitor in Ceylon and might there apply to anyone holding a power of attorney, but in their Lordships' opinion it would be unsafe to draw any definite conclusion from this circumstance since the section is derived from an earlier English Act where an attorney forms one of a class and before its enactment in Ceylon was already to be found in use in India.

The learned Judge of first instance took the view that the accused man could be found guilty of criminal breach of trust as an agent if being entrusted with property on behalf of some other person on one occasion only he dishonestly misappropriated it, and he so instructed the jury. He says: " In the way of his business " does not necessarily mean that the Crown must prove that the accused carried on some sort of business in which he undertook to act as an agent for various people. It is sufficient if on the particular occasion he acts as an agent of another, and again he says in effect :—If you have no doubt that it is criminal breach of trust you will go on to consider whether he was acting as the agent of the manager of the Moratuwa Depot when he got the collection into his hands to deposit in the bank . . . . On that question again it is not necessary that there should be any express words uttered by anybody to constitute him an agent. If there was a collection at the depot which according to the arrangement between the union and the bank must be deposited by the manager from time to time at the bank and he used the services of someone else to deposit the money in the bank, then that other would be acting as the manager's agent.

When the case came before the Court of Criminal Appeal in Ceylon the point was fully argued and the view of the Judge of first instance affirmed. In that Court it was contended that banker, merchant, broker and attorney all referred to those persons who carried on business in those various capacities and that the description agent must be construed as also applying to a person carrying on the business of an agent and to no other even if the words " in his business " had been omitted, but that the insertion of those words made it clear that the accused man must be carrying on the business of an agent and that if he was not, he could not be guilty of an offence within the section.

The Court of Criminal Appeal rejected the argument on the ground that not all the categories of persons comprised in the section of necessity included those only who were engaged in a particular class of business. The term " banker or merchant ", they said, might be descriptive of and confined to one engaged in the business of banker or merchant but a man might be described as a broker though he acted as such on one occasion only, and the word attorney (in Ceylon at any rate) would mean one who was not a lawyer but had been given a power of attorney even for one purpose, and on one occasion only. Similarly it was said the term " agent " was apt to comprehend anyone who was acting as agent in the matter in which he had misappropriated money though he had not been acting in that capacity on any other occasion.

The argument that the subsection comprehends only those engaged in a particular occupation does not lack authority in England.

It is supported by three cases spread over a period of time from *R. v. Prince* [1] to *R. v. Portugal* [2] and *R. v. Kane* [3].

The principle is perhaps most clearly enumerated in the second of these cases at p. 490 where it is said :—

> " It was contended by the Crown that, although the prisoner was not either a banker, merchant, broker, or attorney, and although he was not intrusted with either sum of money in any of those capacities, yet he came within the term, ' other agent intrusted with money or valuable security ' within the meaning of section 75. To this it was answered that, if that contention of the Crown be correct, the section should have said, ' whosoever having been intrusted as agent with any money, ' &c. : that no interpretation or effect would be given to the words ' banker, merchant, broker, or attorney ; ' and that, it was obvious that some effect must be given to those words, if possible, in construing the section, for otherwise the section might be held to apply to everybody intrusted with money to be applied as by the section is provided. In this we agree. We notice that the Larceny Act, a portion of the 75th section of which we are called upon to construe, after in earlier sections classifying various places and things from and of which larceny may be committed,—see sections 31, 38, 40, 50, 60, 62 and 63—proceeds to specify certain classes of persons who may be guilty of the offences therein described ; for instance, from section 67 to section 73, clerks, servants, or persons in the public service are classified ; in section 74, tenants and lodgers are classified ; and in section 75 and afterwards the class aimed at is that of agents, bankers, factors. In our judgment section 75 is limited to a class, and does not apply to everyone who may happen to be intrusted as prescribed by the section, but only to the class of persons therein pointed out. "

So far the reasoning is directly applicable to the case under consideration subject to such immaterial variations as the provisions of the two acts require. It is true that the learned judges who tried the case went on to place some reliance on the fact that the English Act 24 & 25 Vict. ch. 96 s. 75 uses the words " banker, merchant, broker, attorney, or *other* agent " and to draw the inference therefrom that the agent must, like the preceding types, form one of a class. But this is only an additional ground for their decision and is merely used as a support of the view which they already entertained. *Kane's* case in the Crown Cases Reserved follows *R. v. Portugal* (supra) though that Court was not bound by the earlier decision. Save to this extent it does not add any further support to it.

It was argued on behalf of the Crown that the word attorney had a different meaning in Ceylon from that which it bears in England and that the act now under consideration does not contain the word " other ". So far as the second matter is concerned it is to be noted that the Ceylon

[1] *(1827) 2 C. & P. 517.*

[2] *16 Q. B. D. 487.*

[3] *(1901) 1 Q. B. 472.*

Penal Code does include the phrase " in his business " and in their Lordships' view this expression is at least as important as the word " other " in the English Act.

So far as the word " attorney " is concerned their Lordships would point out that the wording of the Ceylon Act is obviously taken direct from the Larceny Act, 1812 52 Geo. III ch. 63 sect. 2 which is repeated in 24 and 25 Vict. ch. 96 s. 75.

In an English Act the doctrine is well established that the interpretation put upon an earlier statute by the Courts should as a rule be followed in a case where similar words are used in a later statute. So in the case of a Colonial Statute it has been held by this Board that in Colonies where an enactment has been passed by the legislature in the same terms as an English statute, the Colonial Courts should adopt the construction put upon the words by the English Courts—see *Trimble v. Hill* [1].

It is true that in that case the decision referred to was one given by the Court of Appeal and that the Courts which it was said should follow it were Courts of a Colony, but in their Lordships' view English Courts should themselves conform to the same rule where there has been a long established decision as to a particular section of an Act of Parliament and even more so where there has been a series of decisions over a period of years. They accordingly are of opinion that in the case of the Courts of a member of the British Commonwealth of Nations a similar course should be followed.

In enunciating the construction which they have placed upon section 392 they would point out that they are in no way impugning the decisions in certain cases that one act of entrustment may constitute a man a factor for another provided he is entrusted in his business as a mercantile agent, nor are they deciding what activity is required in order to establish that an individual is carrying on the business of an agent. In the present case the appellant clearly was not doing so and was in no sense entitled to receive the money entrusted to him in any capacity nor indeed had Mr. Ranatunga authority to make him agent to hand it over to the bank.

Accordingly their Lordships have humbly advised Her Majesty to allow the appeal. The appellant has however plainly been guilty of a criminal breach of trust under section 389 of the Penal Code of which the jury could have found him guilty in conformity with section 183 of the Criminal Procedure Code. The Court of Criminal Appeal on their part could under section 2 of the Court of Criminal Appeal Ordinance have substituted a verdict of guilty under section 389 in place of that under 392, and should have done so if, as their Lordships think, the appellant had clearly committed an offence under the earlier section.

The Board have therefore, as already indicated, humbly advised Her Majesty to allow the appeal, discharge the conviction under section 392 and substitute for it a conviction under section 389. In respect of this offence the appellant must serve a sentence of three years imprisonment less the period of time during which he has been imprisoned under the conviction appealed from.

Conviction altered.

[1] *5 App. Cas. 342.*