1970 *Present :* Thamotheram, J.

S. KANAPATHIPILLAI, Appellant, *and* F. C. L. FERNANDO (S. I. Police), Respondent

S. C. 731/69—M. C. Point Pedro, 18228

Charge of criminal breach of trust—Ingredient of dishonest misappropriation—Burden of proof.

In a prosecution for criminal breach of trust the inference of dishonest misappropriation or conversion can reasonably be drawn if the proved facts are not capable of any innocent explanation and the accused has not at any stage attempted an explanation. In such a case the Court can rightly take into account the accused's failure to give evidence.

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

M. M. Kumarakulasingham, with *S. Parameswaran* and *M. Kasi Viswanathan*, for the accused-appellant.

T. N. Wickremasinghe, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

July 6, 1970. THAMOTHERAM, J.—

The accused-appellant was convicted of criminal breach of trust in respect of cash Rs. 1,037.11 entrusted to him in his capacity as Manager of Nugavil Ikiyajothy. M. P. C. S. Ltd. The period during which this offence was alleged to have been committed was stated as between 1.8.64 to 28.2.65.

The accused-appellant was appointed Manager as from 1.8.64 by the Committee of this Society. This appointment required the approval of the Assistant Commissioner for Co-operative Development. The accused-appellant functioned as Manager from 1.8.64, although he had not received this approval at the time, and continued to so function even after this approval was refused, as efforts were being made to persuade the Assistant Commissioner to grant this approval.

The evidence is quite clear that between 1.8.64 and 28.2.65 the accused-appellant did function as Manager during which period he kept the cash book P1, and, he alone made entries in it. P1 is a record of all cash transactions and any balance shown in hand therein was the balance which the accused-appellant should have had at the relevant time. The rule was that any balance over Rs. 100 should be deposited in the Bank. There is evidence that the entries in the cash book during the relevant period were in the accused-appellant's handwriting.

The witness Vallipuram Rasiah stated that on the day the accused-appellant was appointed Manager, that is on 1.S.64, he took charge of the stock, cash, and other items of the Society, in the presence of the other officials and the auditor. He took charge of them as correct. This witness was President of the Society from 29.6.63 to 25.6.64. He said that during his period all balance of over Rs. 100 was regularly deposited in the Bank. The truth of this is established by the fact that when the accused-appellant assumed duties on 1.S.64 he received from the President only a cash sum of Rs. 46·9S, and this is shown in P1.

The witness Anthony Pillai Ligoris assumed duties as President of the Society on 23.1.65. He detected a shortage according to the cash book maintained by the accused-appellant himself. He brought this to the notice of the Committee on 30.1.65. The accused-appellant was given one month notice of termination by letter dated 17.2.65. This notice read as follows :—"In pursuance of the directive dated 11.2.65 issued by the Assistant Commissioner and the decision of the Committee of Management arrived on 16.2.65, I hereby grant you notice of termination of your service as manager after a period of one month from 17.2.65. It is further directed that you should pay all monies due to the Society within the set period". This notice was signed by both the President and Secretary. The accused-appellant however, chose to leave his service on 2S.2.65. The shortage that was reflected in cash book P1 was confirmed by two audits that were held. Inspector Rasiah carried out an audit on 11.2.65 covering the period 1.1.64 to 31.1.65. He found that the accused-appellant should have had in hand a sum of Rs. 1,2S9·8S on 31.1.65.

The accused-appellant was asked to be present at an audit carried out by Inspector Nagalingam Selvaratnam whose audit covered the period 1.2.65 to 30.5.65. The accused-appellant did not attend this audit. However in maintaining the cash book P1 the accused-appellant had accepted the sum of Rs. 1,2S9·8S as the opening balance on 1.2.65. Starting with this opening balance Inspector Selvaratnam found that according to P1 the accused-appellant should have had in hand Rs. 1,0S7·11 on 2S.2.65. That is the date on which he ceased to function as Manager. The resulting factual position as revealed by the cash book P1 maintained by the accused-appellant is as follows. He started to function as Manager on 1.S.64 with a cash sum of Rs. 46·9S given by the President. He should have had in hand on 30.1.65 a sum of Rs. 1,2S9·SS and on 2S.2.65 when he ceased to function as Manager he should have had Rs. 1,0S7·11. The only sums of money he returned were the daily collections for the last two days he functioned as Manager. He had failed to observe the requirement that cash amounts in hand over Rs. 100 should be deposited in the Bank. He gave no explanation for the shortage. When Ligoris questioned him the accused-appellant said that because he was being questioned about the shortage he would make good the shortage. Ligoris asked the accused-appellant to be present before the Committee of inquiry, which he refused to do.

The real question this court has to decide is whether the above material is sufficient to establish dishonest misappropriation or conversion to his own use, cash which was entrusted to him while he functioned as Manager of this Society. An essential particular of criminal breach of trust is dishonesty. 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. I wish to here mention 3 cases referred to in the argument before me and another referred to in Gour's Penal Law of India, 8th edition, page 2861.

In *Rex v. Senaviratne* [1] the appellant was convicted of committing criminal breach of trust in respect of a sum of Rs. 187·50. The appellant was entrusted with the sum of money, which comes into a petty cash account. He had the right to spend this money as occasion demanded. The appellant's case was that he had with this money bought brass taps for his employers. This was found to be false though the Crown produced the voucher P1 containing a receipt for this sum from the alleged vendor of the taps, and declaring that this sum was expended in the purchase of taps. Koch J. said "that the burden of proving a charge is always on the prosecution there can be no doubt. But in a case like this what facts has the prosecution to prove to complete its case ? I am of opinion that it is sufficient for the prosecution to establish that the sum in question had been entrusted to the accused, and if the sum is short when the account is taken, it is for the accused to account for it. In *Welch* [2] the principle was laid down and accepted by Ratanlal in his valuable work on Criminal Law that 'If a person receives money which he is bound to account for and does not do so, he commits this offence'." In this case there was a shortage on the basis that one item referred to in the accounting had in fact not been bought, but that it was falsely asserted that it had so been. There was therefore in this case something more than mere shortage. Nevertheless Koch J.'s statement is of general application.

In *King v. Ragal* [3] it was held that the mere failure on the part of a Post Master to produce a small balance of Re. 1·38 shown in the cash book kept by him cannot be treated as criminal breach of trust. In law shortage of a small sum of money is not itself evidence of dishonesty. To justify a conviction there must be direct evidence of dishonesty or such conduct on the part of the accused as would lead to the inference of dishonesty or dishonest intent. Bonser C.J. in this case said "the first thing that strikes one is the small amount at stake . . . . . (If all an accused can say is) 'I had the money and I cannot give any explanation of what has become of it', and it is a sum which he cannot replace, then there is evidence to satisfy a reasonable man that he has taken the money without any reasonable prospect of paying it back, which of course would be a dishonest act. But that a man who is found to have in his safe, when he is suddenly pounced upon 5 cts. less than

[1] *(1935) 15 C. L. Rec. 57.*
[2] *(1846) 1 Den 199.*
[3] *(1901) 6 N. L. R. 314.*

his account show to be due by him, and can give no explanation of the 5 cts. than that he had taken it, should be made a criminal is revolting to one's idea of justice". These remarks were no doubt made in a case when the accused was charged under the provisions of Ordinance No. 22 of 1889 (vide section 392A of the Ceylon Penal Code), but the remarks are again of general application.

In *King v. Pulle*[1] the appellant was convicted of criminal breach of trust in respect of a sum of Rs. 702 entrusted to him in the capacity of Treasurer of the Provident Fund of the Govt. Printing Office. He received on various dates during the year, a number of sums amounting to Rs. 10,960·47, all of which it was his duty as Treasurer to pay into the Mercantile Bank to the credit of the Fund. He paid in only Rs. 10,257·53 in that year, the balance Rs. 702·85 is a sum in respect of which he was charged. Hutchinson C.J. said "The matter for court to decide was whether he has committed breach of trust in respect of that Rs. 702 or whether it was merely a case of civil liability; whether he had dishonestly misappropriated it or converted it to his own use . . . . His explanation of the deficiency was that he lent the money to various members of the Fund in accordance with an established and recognised practice. There is no adequate evidence of such a practice; and he has not given the name of the persons to whom he lent Rs. 702 or any part of it, and there is no evidence beyond his own statement in proof of the loans. In my opinion the evidence proves that he dishonestly misappropriated the Rs. 702."

The Judge in this case stated the general principle as follows:—"The reported cases of charges of 'embezzlement' and of 'criminal breach of trust' show that it is not enough for the prosecution merely to prove that the servant who is charged has not accounted for all the money that he has received and for which he was bound to account, for there may be other explanation of the deficiency besides dishonesty, and the prosecution must prove circumstances from which dishonesty can be inferred. Such a circumstance is, in the present case, an explanation given by the accused, which would apparently have been easily capable of proof, but which is not proved, and which the court believes not to be true."

In *Jaikrishna Das Manohar Das v. State of Bombay*[2] the Supreme Court observed "direct evidence to establish misappropriation of the cloth over which the appellants had dominion is undoubtedly lacking but to establish a charge of criminal breach of trust the prosecution is not obliged to prove the precise mode of conversion, misappropriation or misapplication by the accused of the property entrusted to him or over which he has dominion. The pricipal ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof, entrustment of property and failure in breach of an obligation to account for the property entrusted, if proved may

[1] *(1909) 12 N. L. R. 63.*

[2] *A. I. R. 1960 S.C. 889 at p. 891.*

in the light of the other circumstances justifiably lead to inference of dishonest misappropriation or conversion. . . . Conviction of a person for the offence of criminal breach of trust may not, in all cases, be founded merely on the failure to account for the property entrusted to him, or over which he has dominion, even when no duty to account is imposed upon him, but where he is unable to account or render an explanation for his failure to account which is untrue an inference of misappropriation with dishonest intent may readily be made."

When one looks at all the facts proved in the instant case there can be no doubt that the inference of dishonest misappropriation or conversion can reasonably be drawn. They are not capable of any innocent explanation nor has the accused at any stage attempted an explanation. His conduct on being informed of the shortage tells against him. Moreover this seems to be a case where the court can rightly take into account the accused's failure to give evidence. This is not to put the burden on the accused. The prosecution has placed sufficient evidence in the light of which the court could justifiably draw an adverse inference from the accused's failure to give evidence.

The appeal is dismissed.

Appeal dismissed.