

1944

*Present: Soertsz and Wijewardene JJ.*THE KING *v.* EBAYASINGHE.53—*D. C. (Crim.) Kandy, 170.*

*Evidence—Failure of accused to get into witness-box—Written copy of explanation given by accused to prosecution witness relating to subject-matter of charge elicited in cross-examination of that witness—Admissibility.*

Where the accused, who was charged under section 392A of the Penal Code with committing criminal breach of trust in respect of a sum of money collected by him as a public servant, elicited in cross-examination of the auditing officer a written copy of the explanation which he had given in pursuance of a question put to him by the auditing officer in the course of auditing the accounts—

*Held*, that the explanation was not admissible evidence as the accused was not called into the witness box.

**A** PPEAL against an acquittal by the District Judge of Kandy.

*H. A. Wijemanne, C.C., for the Attorney-General.*

No appearance for respondent.

May 11, 1944. SOERTSZ J.—

The accused in this case, who was the Chairman of the Village Committee of Udugoda Pallésiya Pattu, was charged under section 392A of the Penal Code on the ground that he failed forthwith to pay over when required to do so by the Auditor-General the sum of Rs. 49.08, the balance outstanding from the sum of Rs. 861.05 said to have been collected by him during the period April 1, 1942, to September 16, 1942, in his capacity as a public servant.

After trial the learned District Judge acquitted him and, as far as one is able to gather from the statement of reasons given by the District Judge in his order of acquittal, it would appear that he was greatly influenced by an explanation which is said to have been given by the accused to the auditing officer, the witness Mr. Nethsinghe, when that witness in the course of auditing the accounts of the accused called upon him to hand over to him the balance which the auditing officer found to be outstanding in the hands of the accused. It would appear that the auditing officer or the Auditor-General is entitled to call upon a person in the position of this accused for an explanation and the explanation in question appears to have been given in pursuance of a question put to the accused by the auditing officer. This explanation was elicited in cross-examination of the auditing officer Mr. Nethsinghe and upon his saying that he had a written copy of the explanation given by the accused, Counsel for the accused marked it as D2. That is the explanation upon which the learned District Judge has relied, as I have indicated, to a very great extent. But it is clear that that explanation is not admissible evidence in the way in which it has come into the record. It is an explanation which could have been made admissible evidence if the accused chose to take the course of giving evidence himself, but the accused was, in this instance, not called into the witness box.

In these circumstances we are of opinion that the learned District Judge, having taken into account inadmissible evidence, the proper course for us to take is to set aside the order of acquittal and send the case back for retrial to the learned District Judge so that he may consider, first of all, the exact scope of section 392A of the Penal Code and if he happens to be of the opinion, after hearing Counsel on both sides, that it is necessary in a prosecution under that section for the element of dishonesty or *mens rea* to be established, to consider his evidence on that point that the accused may elect to place before him. That evidence, of course, must be admissible.

We do not think, as we are sending this case back for retrial, that we ought to say anything more. We are of opinion that in all the circumstances of the case it would be desirable that the retrial should be before another District Judge.

WIJEWARDENE J.—I agree.

*Acquittal set aside.*