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INSTITUTE OF ADVANCED
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Appeal No. 2 of 1948.

15249

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

BETWEEN

A. J. E. G. CASPERSZ - *Appellant,*

AND

THE KING - - *Respondent.*

CASE FOR THE APPELLANT.

RECORD.

1. This is an appeal, by Special Leave, against a judgment and decree of the Supreme Court of the Island of Ceylon (hereinafter referred to as the "Supreme Court"), dated the 7th March, 1946, dismissing (with a variation of sentence) an appeal against a judgment and Order of the District Court of Trincomalie, dated the 13th November, 1945, by which the Appellant was found guilty and convicted of the offence of criminal breach of trust under Section 392 of the Ceylon Penal Code (hereinafter referred to as "the Code"), and sentenced to six months' rigorous imprisonment. pp. 57—61. p. 62. pp. 51—55.

The said sentence of imprisonment was set aside by the Supreme Court and a fine of Rs. 500/-, and imprisonment until the rising of the Court, substituted therefor. p. 62.

The Appellant has paid the fine and served the substituted sentence of imprisonment. p. 62.

2. The main question for determination on this appeal is whether or not the Appellant was properly convicted of the said offence in view of the fact that during his trial the prosecution did not, and, on its own evidence, could not, challenge his probity.

3. The offence of "criminal breach of trust" is defined in Section 388 of the Code, which runs as follows:—

"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

RECORD.

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'."

4. That an agent's disobedience to the express orders of his principal, and his subsequent unauthorised conduct of his principal's affairs resulting in a loss to his principal, the whole of such conduct being the result of an honest belief that thereby the advantage to the principal would be greater than if his express orders were carried out, does not render the agent liable to a prosecution for "criminal breach of trust" is apparent from the following "Illustrations" to the said Section 388:— 10

"(c) A. residing in Colombo, is agent for Z. residing in England. There is an express or implied contract between A. and Z. that all sums remitted by Z. to A. shall be invested by A. according to Z.'s direction. Z. remits 10,000 rupees to A., with directions to A. to invest the same on mortgage of coffee estates. A. dishonestly disobeys the directions, and employs the money in his own business. A. has committed criminal breach of trust.

"(d) But if A., in the last Illustration, not dishonestly but in good faith believing that it will be more for Z.'s advantage to hold shares in a company, disobeys Z.'s directions and buys shares in a company in Z.'s name instead of investing the money on mortgage, here" [*i.e.*, Ceylon] "though Z. should suffer loss, and should be entitled to bring a civil action against A. on account of that loss, yet A., not having acted dishonestly has not committed criminal breach of trust." 20

5. The Appellant was convicted and sentenced under Section 392 of the Code which, providing for the punishment of "criminal breach of trust" when committed by, *inter alia*, a public servant, runs as follows:— 30

"392. Whoever, being in any manner entrusted with property, or with 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."

It is not disputed that the Appellant was a "public servant" who was "entrusted with property, or with dominion over property, in his capacity of a public servant." 40

6. It is clear from the terms of the said Section 388 (see paragraph 3 hereof) and from the Illustrations thereto (see paragraph 4 hereof) that

there can be no " criminal breach of trust " where there is no dishonesty —that an unauthorised disposition of property belonging to another does not of itself amount to the said offence—and it is relevant therefore to refer to the definition of " dishonestly " in Section 22 of the Code, which runs as follows:—

> " 22. 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 '."

7. " Wrongful gain " and " wrongful loss " are thus defined in Section 21 of the Code:—

> " 21. ' Wrongful gain ' is gain by unlawful means of property to which the person gaining is not legally entitled.
>
> " ' Wrongful loss ' is the loss by unlawful means of property to which the person losing it is legally entitled.
>
> " A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully.
>
> " A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property."

8. The facts of this Case are as follows:—

The Appellant—an Executive Engineer who has served for twenty-nine years in the Public Works Department of the Government of Ceylon without any complaint whatsoever—was in January, or February, 1944, instructed by his superiors to prepare an estimate of the cost of proposed improvements of certain sections of the Trincomalie—Batticola road. It is a matter of history that at that time the great national emergency caused by the late war was continuing with exceptional force in Ceylon, and, in the Appellant's Department, it was a matter of common knowledge that the Commander-in-Chief was extremely anxious to have the said improvements executed at great speed.

p. 61, l. 15. p. 35, ll. 21—31. p. 37, ll. 21—25.

9. So great was the urgency that the work on the proposed improvements was commenced nearly a month before the Appellant could submit his estimate (Ex. P. 1) which, prepared with all possible speed, he was unable to do before the 11th February, 1944. The estimate was approved (Ex. P. 2) on the 25th February, 1944.

The Appellant estimated that the total cost of the proposed improvements would amount to Rs. 112,500, inclusive of items totalling about Rs. 15,000 for " rubble-bottoming."

" Rubble-bottoming," it should be mentioned, is a process designed to ensure greater firmness in the surface of a road. It is not always essential and the exact amount necessary in any given instance can only be determined after the road concerned is broken up for reconstruction.

p. 35, ll. 29—31. Ex. P. 1, p. 65. Ex. P. 2, p. 67. p. 35, ll. 24—27. p. 22, ll. 40—41. p. 37, l. 47 to p. 38, l. 1. p. 5, ll. 47—48.

RECORD.

If on breaking up the road it is found that the original rubble-bottoming is in order then no fresh rubble-bottoming would be laid down.

p. 35, ll. 40—42.

10. Following the approval of his estimate the Appellant continued to be in charge of the work, progress reports of which he had to submit every fortnight; and, in accordance with practice, he engaged certain Overseers to undertake and carry out the various constructional operations. These Overseers, it should be explained, when thus called upon by the Government to undertake work, engage the necessary amount of labourers at wages approved by the Government, and arrange for their transport, accommodation and board. Many of them are registered in the books of the Public Works Department and are Government employees (with pension rights)—a category to which three out of the five Overseers whom the Appellant engaged belonged. All of them work for profit.

p. 40, ll. 43—45. p. 48, l. 16. p. 49, ll. 8, 36.

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11. Departmental practice and routine in the payment of an Overseer is as follows:—

p. 36, ll. 6—14. p. 42, ll. 35—43. p. 52, ll. 17—24. Ex. P. 5 (b), pp. 73—74. Ex. P. 23, p. 115.

The amount of work done by an Overseer's labourers and his expenses in connection therewith are, from time to time, set out by the Overseer in a "bill" and in a "measurement form," both of which are presented to the Executive Engineer in charge who, after checking them, passes them for payment.

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A voucher is then prepared in an office of the Public Works Department and this document incorporates a form of Certificate to be signed by the Executive Engineer, who thereby certifies that the account of the Overseer concerned is correct, that the rate charged by him is fair and reasonable, and that the amount due to him has been paid. The voucher contains, also, a form of receipt to be signed by the Overseer on receiving payment. The prepared voucher is then sent to the Executive Engineer, who signs the Certificate therein and, also, a cheque for the amount due to the Overseer, which last-mentioned document must bear, also, the signature of the Head Clerk of the Provincial Branch of the Public Works Department (in this case Trincomalie). On payment being thus made to him, the Overseer signs the said receipt form in the voucher.

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p. 42, ll. 41—42.

12. Shortly after he had taken charge of the said work, it was made apparent to the Appellant and his Overseers that it would be very difficult indeed to find labourers to work at the approved rates in Trincomalie—always a difficult place for those who sought and employed labour, and, particularly so, in 1944. Such labour as was available in the district appeared to be attracted to the camps of Service Departments and Military Contractors whose rates of pay were higher and hours of work less.

p. 35, ll. 31—40. p. 36, l. 42 to p. 37, l. 3. p. 37, ll. 39—42. p. 113, ll. 23—30.

40

Seriously perturbed at the labour situation which, deteriorating daily, seemed likely to delay an urgent work of national importance,

p. 37, ll. 4—5.

the Appellant, on the 23rd February, 1944, reported his difficulties to his immediate superior, the Superintending Engineer (one J. H. E. de Kretser) and to the latter's superior officer, the Assistant Director of Public Works (one L. H. Leader) at a personal interview which he had with them both. This meeting resulted in his securing Mr. Leader's approval to his suggestion that the rate which the Public Works Department had hitherto authorised as being a reasonable one for its Overseers' labourers should be increased by 100 per cent. The approval was subject to confirmation in writing and meanwhile the Appellant was instructed to get the work done as quickly as possible and always to remember that " urgency was of primary importance." At or about the end of February or the beginning of March, 1944, the said approved increase was confirmed and thenceforward the new rate became operative.

p. 35, ll. 31—39.
p. 37, ll. 6—11.
p. 38, ll. 10—12.
p. 37, ll. 10—11.

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13. In March, 1944, the Minister of Communications and Works instructed (Ex. D. 1) the Director of Public Works that the cost of the work on which the Appellant was engaged was to be regarded " as of secondary importance to that of expeditious completion "; and, by a communication (Ex. D. 2), dated the 6th May, 1944, the Executive Engineer of Chilaw, in ordering a registered Overseer (one D. A. Perera) to proceed at once, with his labourers, from Chilaw to Trincomalie, there to work under the Appellant, warned him as follows:—

Ex. D. 1, p. 131.
Ex. D. 2, p. 132.

20

" I have to warn you that the work proposed is of paramount importance and is considered by Commander-in-Chief as the most important job in Ceylon at the moment. Your co-operation is solicited without delay.

p. 132, ll. 15—25.

" I have been instructed by D. P. W." [the Director of Public Works] " to inform you that unless you bring the necessary labourers before Monday the 8th evening you will be dismissed from service altogether.

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" The above instructions are issued by D. P. W. on the orders of C.-I.-C. and the Hon. the Minister of Communications and Works. If you are not willing to co-operate you should submit by letter today stating your reasons so that papers could be forwarded to D. P. W. for disciplinary action.

" I have been instructed to inform you that no excuses will be accepted under any circumstances."

The Overseer to whom this communication was sent complied with the order it contained. He was one of the five Overseers to whom the Appellant is alleged to have made payments in " criminal breach of trust."

p. 49, l. 41.

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14. Notwithstanding the increased rate of pay which they were now authorised to offer, the Overseers working for the Appellant found it difficult both to recruit fresh labourers or to retain those already recruited. Their difficulties could only be overcome by paying their

p. 47, ll. 31—36. p. 48, ll. 22—29. p. 49, ll. 20—26.

labourers even higher wages than those authorised and this, at some financial loss to themselves, they did for a little time. The impossible situation could not however continue and, not unnaturally, they made insistent demands upon the Appellant to set matters right at once.

p. 50, ll. 1—2, ll. 22—26.

Had the circumstances had any semblance of normality, the Appellant would undoubtedly have followed the regular Departmental routine in reporting the matter again to his superiors and, freed from responsibility thus, would have awaited their decision with equanimity; but the times were exceptional, the work he was engaged on was of paramount national importance demanding completion at express speed on pain of instant 10 dismissal of everyone concerned, the cost of the work was, on the highest authority, to be subjugated to the primary task of urgent completion, official consent to any further increase in the authorised scale of wages was likely to take an appreciably long time, and already the acute labour difficulties has caused a considerable delay which, in the absence of instant and extraordinary measures, threatened to continue.

In these circumstances the Appellant conceived the plan (referred to in the next paragraph) of making compensatory payments to his Overseers from the funds at his disposal—a plan whereby he was due to derive no profit whatsoever, apart, of course, from the personal 20 satisfaction of having evolved a scheme which would enable expeditious completion of the work to be achieved.

p. 113, ll. 23—39. pp. 47—50.

15. Having decided to abandon the process of "rubble-bottoming" in the reconstruction of the road in question as he was perfectly entitled to do, the Appellant planned to utilise the surplus funds at his disposal thus; he suggested to his Overseers that they should continue the other processes of road-reconstruction at top speed with all the labour they had, or could get, at wages higher, if need be, than those authorised and paying, if necessary, any increased cost of food, accommodation, etc., and that each should reimburse himself for any losses that he might 30 thereby sustain by inserting in his "bill" the amount of his loss under the heading of "rubble-bottoming."

p. 48, ll. 31—32.

The Overseers acted on this suggestion and the work was eventually completed in May, 1944. It was in evidence that had they not done so the work would not have been completed by that date.

The Appellant had never disputed the fact that on his authority the said compensatory sums were paid out to his Overseers in the manner outlined. He submits however that the execution of his plan amounted to no more than a departmental irregularity—a short-circuiting of routine—which was carried out in the national interest; that it did not 40 cause any "wrongful gain" to the Overseers nor any "wrongful loss" to the Government, but that even if it did result in either or both of these things it was still far removed from "dishonesty," there being no evidence at all from which it could reasonably be inferred that he had

deliberately conceived the plan with the intention of bringing about either of the said results, neither of which benefited him in the least.

16. Following the completion of the work which, as will hereinafter appear, was stated in the evidence of the principal prosecution witness to have been "done reasonably well," the Appellant was, in the normal course of official routine, transferred elsewhere and, on the 15th May, 1944, another Executive Engineer (one F. H. S. Gunesekera) succeeded him at Trincomalie and was put in charge of such special work in the district as still remained to be done.

p. 38, l. 8. p. 36, ll. 16—17. p. 21, ll. 11—20.

10 As the result of a conversation that took place on the 22nd May, 1944, between the said Gunesekera and the Superintending Engineer (J. H. E. de Kretser), it was ascertained that, in regard to the section of the road which had been completed under the Appellant's supervision, "rubble-bottoming" had been charged for but not done. The Superintending Engineer, who paid frequent visits of inspection to the area, knew, of course, that the said process was not being carried out—the Appellant had said or done nothing to make him believe that it was necessary and had not mentioned it in his fortnightly progress reports—but he did not know that it was being charged for.

p. 36, ll. 17—19. p. 38, ll. 2—6. p. 36, l. 15.

20 17. On the 28th May, 1944, the Appellant interviewed the said Superintending Engineer, and made it clear to him that he took full responsibility in the matter. He explained that his only reason for authorising the said payments was to compensate the Overseers for the losses they had suffered.

p. 36, ll. 20—32. p. 38, ll. 20—22.

The Superintending Engineer advised the Appellant to "recall the money," credit the same to the Revenue, and to "take a chance with the Audit regarding overpayments." This the Appellant promised to do.

p. 36, ll. 26—29.

The subsequent requests for refunds were only partially successful. Three out of the five Overseers concerned complied with the request. 30 The other two flatly refused to do so on the ground that a refund would involve them in a loss. The Appellant, however, himself repaid the amounts irregularly paid to these last two Overseers, so that by July, 1944—approximately eleven months before the present prosecution was instituted in the Magistrates' Court—there were no sums whatever which the Government could regard as due and owing to itself.

p. 47, ll. 44—45. p. 48, ll. 26—37. p. 49, l. 10. p. 50, ll. 4—5. p. 50, ll. 27—28. Ex. P. 34, p. 120.

18. It would seem that the Appellant's conduct was not at first regarded in the serious light that later came to be associated with it, and for nearly thirteen months after he had assumed full responsibility for the irregularities—from the 28th May, 1944, up to the 27th June, 40 1945—he remained in the service of the Government, carrying out important undertakings and handling large sums of money to the satisfaction of everyone concerned. And this notwithstanding the fact that at a Departmental enquiry on his conduct held by the Director of Public Works (one C. H. Bradley) on the 13th July, 1944, he had made a statement (Ex. P. 22) in which he had admitted that he had authorised

p. 1. p. 38, ll. 14—18. p. 39, l. 48 to p. 40, l. 1. Ex. P. 22, pp. 113—114.

RECORD.

p. 113, ll. 19—23.

the said payments to the Overseers and explained that his sole purpose in so acting was " to get the work done "—an urgent piece of work which, he said, he had been instructed by the Assistant Director of Public Works (T. H. Leader) to complete " as quickly as possible by paying anything and anyhow as long as it was reasonable," and in respect of which he had been given *carte blanche.*

p. 39, l. 46. p. 8, ll. 34—35. p. 41, ll. 13—15. p. 31, ll. 17, ll. 30—33.

19. In January, 1945, certain articles relating to the said payments were published in a periodical called " Searchlight " and, subsequent to their publication—whether as a result thereof or not it is not clear—it was decided to prosecute the Appellant. Accordingly these proceedings were set in motion and the Appellant, after being committed for trial by by the Magistrates' Court of Trincomalie, was tried in the District Court of Trincomalie, on the following charge, dated the 24th October, 1945, to which, of course, he pleaded not guilty:— 10

p. 32.

> " That between 10th April, 1944, and 19th May, 1944, at Trincomalie, you being entrusted in your capacity as a public servant, to wit, Executive Engineer, Public Works Department, Trincomalie, with dominion over property, to wit money for the purpose of payment to Overseers for rubble bottoming laid down at the 78th, 79th and 80th mile posts on the Trincomalie—Batticaloa Road, did commit criminal breach of trust in respect of the sum of Rs. 6,213.48 out of the said money, and that you have thereby committed an offence punishable under Section 392 of the Penal Code." 20

20. In support of its case the prosecution called several witnesses but not one of these imputed any dishonest motive to the Appellant in authorising the said irregular payments to the Overseers, and there not being a shred of evidence that the Appellant had, by his conduct, derived any direct or indirect advantage, the prosecution " could not have made and did not make " any suggestion to that effect. 30

As will be apparent from their testimony referred to below, the prosecution witnesses substantiated the explanation which the Appellant had consistently given—that he had acted as he had done solely in order to overcome labour difficulties which threatened to delay the completion of an urgent work of great importance and non-completion of which, with expedition, threatened to endanger not only the safety of the State but also the positions of himself, his superiors and subordinates.

p. 35, ll. 30—40.

21. The principal witness for the prosecution was J. H. E. de Kretser, Superintending Engineer, who, in examination-in-chief, said that " the work was started before the estimate was prepared as the work was very urgent," that he recalled an interview which took place on the 23rd February, 1944, between himself, the Appellant, and the Assistant Director of Public Works (Mr. Leader), in the course of which the Appellant had asked for increased rates to be paid to the labourers and that, subject to written confirmation which eventually arrived, the 40

request was agreed to by Mr. Leader, that the Appellant had not mentioned "rubble bottoming" in his fortnightly progress reports, that, subsequently, he had admitted authorising the said payments to the Overseers for which conduct he had taken full responsibility and that he (the witness) had advised the Appellant to "recall the money paid for the rubble bottom and credit" [it] "to the revenue and take the chance with the Audit regarding over-payments," which the Appellant had promised to do.

p. 36. ll. 2—5. p. 36. ll. 24—32.

22. In cross-examination, the Superintending Engineer said:—

p. 36, ll. 37—39.

10 "Rates are fixed by the Department with the sanction of the Treasury. . . . Changing of any rate will take considerable time. . . . After Japan came into the war the labour market changed very much and it was difficult to get labour. There was acute shortage of labour. This shortage increased every week and every month. During the war period my Department found it difficult to get enough labour. Rates of labour went soaring high. In the early part of 1944 the Department found it difficult to get labour, at the normal rates sanctioned by the Treasury. There were complaints in our Department that our labourers were being crimped by competitors. I believed that Military contractors were paying more 20 than we did.

p. 36, l. 42, to p. 37, l. 3.

"There was no change in the system of getting sanction for increased rates.

p. 37, ll. 3—5.

"The situation deteriorated as time went on. . . . Labour in Trincomalie is more difficult than in any other part of the Island. . . .

p. 37, ll. 11—12.

"There was an acute shortage of labour even after the 100 per cent. increase was sanctioned. . . .

p. 37, ll. 13—14.

"I reported the fact that the work was slow."

p. 37, ll. 18—19.

23. In further cross-examination the Superintending Engineer 30 said:—

"The Commander-in-Chief was particular that the work should be done speedily. He said that the Accused and I and all of us will be dismissed if the work was not finished expeditiously. In official circles it was regarded that the Commander-in-Chief may carry out his threats. . . .

p. 37, ll. 21—25.

"We had to threaten the Overseers to come over to Trincomalie. The Overseers were threatened that if they did not come over to Trincomalie with their labourers they will be dismissed. . . . It is possible that they came reluctantly. They knew of the 100 per cent. 40 increase. The conditions in Trincomalie were not attractive and some of them were not willing to come. . . . The labourers preferred working under the Services as they were doing less work per day. . . .

p. 37, ll. 26—34. p. 37, ll. 41—42.

"Before the estimate one can say whether rubble-bottoming is necessary or not. It is only after breaking up the road one could say exactly what quantity is necessary. . . . Accused never pretended

p. 37, l. 47 to p. 38, l. 6.

RECORD.

to me that he was doing rubble-bottoming. He did not mention it in his reports. . . . I thought Accused was using a thicker coating of metal. . . .

p. 38, ll. 7—8.

"Considering the rush with which the work was done, I think the work was done reasonably well.

p. 38, ll. 10—11.

"Mr. Leader" [the Assistant Director of Public Works] "said that urgency was of primary importance. The Minister" [of Communications and Works] "said that the cost was of secondary importance.

p. 38, l. 12.

"Mr. Leader left the Island in May, 1944." 10

24. Finally, in cross-examination, the Superintending Engineer said:—

p. 38, ll. 12—18.

"Accused had worked under me in other districts. He handled during these times fairly large sums. I had no occasion to report him for inefficiency or dishonesty.

"After 28.5.44" [the date on which the Appellant had admitted making the said payments] "he continued to be Executive Engineer, Trincomalie, until he was suspended on 27.6.45. During these thirteen months he was in charge of the district work that involved monthly about Rs. 25,000. No irregularity had come out 20 so far. I did not have any occasion to report him.

p. 38, ll. 18—20.

"Accused's confession did not suggest that he took any portion of the money. I advised him to get the money back from the Overseers.

p. 38, ll. 20—22.

"Accused told me why he paid the money. Accused said that he made the payments to cover up the losses of the Overseers."

p. 38, l. 32 to p. 39, l. 34.

25. The Director of Public Works (C. H. Bradley), giving evidence for the prosecution, testified, in examination-in-chief, to: the manner in which Executive Engineers and Overseers operate, the payments made in this case, the Departmental inquiry he had held, and the Appellant's 30 statement made thereat. (See paragraph 18 of this Case.)

In cross-examination, the witness said:—

p. 39, ll. 35—44.

"I was informed by Mr. Kretser of the statement made by Accused to him. I did not at that time think of suspending him. Even after 13-7-44" [the date of the Departmental enquiry at which the Appellant had admitted making the said payments and had assumed full responsibility therefor] "Accused was permitted to continue as Executive Engineer. The matter continued like that for some time. I was considering what action should be taken. I returned to Accused some months afterwards the bills and the 40 vouchers relating to this transaction. Auditor-General received a petition. He called for the papers. . . .

p. 39, ll. 45—46.

"There were articles in the paper *Searchlight*. I was sent a copy of the *Searchlight*.

"Accused did not admit to me that he took the money for himself. That was not in question. If that was in question I would not have permitted him to be in charge of public funds. . . . p. 39, l. 46 to p. 40, l. 1.

"Labour situation was acute during this time. From the point of view of the Commander-in-Chief this was an urgent project. . . . Speed was of primary importance. . . . This work was not done as fast as it was required. . . . p. 40, ll. 8—9 p. 40, ll. 17, 26—27.

"Executive Engineers had threatened Overseers with dismissal if they failed to take labourers. . . . This threat of dismissal will place the Overseers in a different position. This threat might have placed the Overseers in a position of financial loss. A registered Overseer cannot be dismissed without the authority of the head office. If a registered Overseer is dismissed he will lose his pension rights. . . . p. 40, ll. 37—44.

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"All monies had been refunded." p. 41, ll. 1—2

In re-examination, the witness said:—

"I was in communication with the Attorney-General before any publication appeared in the *Searchlight*. . . . I had not finally decided what I should do. I at one time thought of dealing with him departmentally." p. 41, ll. 6—7. p. 41, ll. 13—14.

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26. The Executive Engineer, Badulla, (H. K. Melson), another prosecution witness, referred, in examination-in-chief, to the assistance he had given to the Appellant during the progress of the work and to the fact that, on the Appellant's instructions, he too had passed Overseers' bills for payment with the knowledge that the "rubble-bottoming" charged for had not been done. He spoke of an occasion when the Appellant had asked him "to reduce the quantities and pay as the rates were low and as the Overseers had to overcome their difficulties"; and of another occasion when he had, after refusing, consented to certify Overseer's bills containing items for rubble-bottoming, on being shown, by the Appellant, "a letter from the Minister indicating that money was of secondary importance" p. 45, ll. 32—35. p. 45, l. 45 to p. 46, l. 4.

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27. In cross-examination, the witness (H. K. Melson) said:—

"When I passed these bills I did not think that I was doing anything dishonest. To my knowledge there was no conspiracy between me and the Accused to cheat the Government for our benefit. . . . p. 46, ll. 8—10.

"From the commencement the Overseers were grumbling that they were losing. They complained that they were paying the labourers more than they were getting from the P.W.D. . . . p. 46, ll. 17—19.

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"Normally I knew what I was doing was wrong. I should say that I considered it not wrong under these circumstances. . . . p. 46, ll. 27—28.

"An arrangement was made with the Overseers before the 25th March that they should be paid for items of rubble-bottoming to cover up their losses." p. 46, ll. 37—39.

RECORD.

In re-examination, the witness, on being asked to explain the alteration of an item relating to rubble-bottoming in an Overseer's bill, said:—

p. 47, ll. 2—4.

"Accused told me that the Overseers will get more if this amount was not reduced. In all instances when I altered the quantities from one quantity to another it was because Mr. Caspersz asked me to do it."

pp. 47—50.

28. Giving evidence as prosecution witnesses, all the five Overseers concerned admitted having received sums for "rubble-bottoming" which process, they said, they had not carried out. They explained that, 10 following their representations as to losses which they had incurred, and were incurring, by paying their labourers at a rate higher than the one authorised, the Appellant had permitted them to re-imburse themselves by the method under review.

p. 50, ll. 4—5. p. 50, ll. 27—28. p. 47, ll. 44—45. p. 48, ll. 36—37. p. 49, l. 10. p. 48, ll. 17—18. p. 50, l. 6.

As to refunds, two of the Overseers said, that they had refused to comply with the Appellant's request to refund the amounts they had received for "rubble-bottoming" for to do so would involve them in a loss; the other three said that they had complied with the request.

No disciplinary or other action has been taken against the said Overseers; on the contrary, one of them, in his evidence, said that he had 20 since the occurrence of these events, been promoted, and another said that he was expecting promotion shortly.

29. Typical of the evidence given by the said Overseers was that of S. Kandasamy, one of the Overseers concerned. In examination-in-chief, Kandasamy said:—

p. 48, ll. 13—15. Ex. P. 5, p. 71. Ex. P. 13a, p. 99.

"P.5 and P.13a contain items of rubble bottoming. No rubble bottoming was done. For amounts due to us we were asked to include that item."

In cross-examination, the witness said:—

p. 48, ll. 16—22.

"I am a registered Overseer. . . . My post is pensionable. I am 30 promoted as Town Overseer, Anuradhapura. . . . I am now Overseer for 12 years. I was working at Mihintale during this time. The Superintending Engineer asked the Executive Engineer and the Executive Engineer asked me to go to Trincomalie.

p. 48, ll. 22—27.

"When I came I found that the labourers had to be paid more than what was paid by Government. . . . We did the work on contract. We were paid on contract rates for the work done. We take the contract basing the contract amount on the amount we had to pay the labourers.

p. 48, ll. 27—31.

"I told Accused of the loss. We were losing every week. As 40 ordered we did the work. I would not have gone on indefinitely losing. Though I had men some of my labourers left. They go away because they do less work and they are paid better.

"If I had not been paid my losses my labourers would have left and the work would not have been done." p. 48, ll. 31—32.

In re-examination, the witness said:—

"Generally we make profit by doing work for the P.W.D." p. 48, l. 45.

30. At no stage of the Appellant's trial did the prosecution suggest that the facts were other than those stated by the Appellant in his explanation to his superior officers or that the evidence of its own witnesses which supported that explanation was not worthy of belief. If the facts as stated by him had been in any way challenged by the
10 prosecution, the Appellant would have supported them by entering the witness-box himself and by every other means at his disposal. This he did not do as upon any fair view the necessity for doing so had not arisen.

31. By his Judgment and Order, dated the 13th November, 1945, the learned District Judge found the Appellant guilty and convicted and sentenced him as stated in paragraph 1 hereof. pp. 51—55.

In the Appellant's respectful submission, his conviction was erroneously based upon a rejection of the evidence of the prosecution witnesses and followed an adjudication of a new case which the learned District Judge made out against him—a case which was not the case
20 presented by the prosecution, against which, and against which alone, he had defended himself.

32. Dealing with the explanation given by the Appellant to his superior officers and with the evidence of the prosecution witnesses supporting it, the learned Judge rejected the prosecution evidence, and expressed the view that the Appellant's intention must have been dishonest, and that the said Overseers and the Executive Engineer of Badulla (H. K. Melson) were his "accomplices". p. 54. ll. 3—6.

He then continued as follows:—

"Mr. Gratiaen who appeared for Accused very forcibly urged
30 that as the Crown did not challenge the explanation given by Accused I should accept the statements made by Accused and the evidence given by the Overseers as true. I do not know whether the absence of any challenge by the Crown amounts to an admission by the Crown that the statements of Accused are true. Whatever it may be I am of opinion that I should come to a conclusion, after hearing all the evidence and all the views, whether Accused had the guilty intention when he made payments for work not done. p. 54, ll. 10—19.

"I am forced to come to the conclusion that Accused criminally misappropriated funds entrusted to him as a public servant. I find
40 him guilty under Section 392." p. 54, ll. 19—21.

The Appellant respectfully submits that the learned Judge was wrong to reject the evidence of the said Overseers and to ignore the important significance of the fact that the prosecution did not and could not have challenged the testimony of its own witnesses.

RECORD.

33. The Appellant would respectfully draw attention also to the extraordinary error—whether or not induced by a misconception of the charge, it is impossible to say—that the learned District Judge appears to have fallen into. The Appellant was not charged with "criminal misappropriation of property" under Section 386 of the Penal Code but with "criminal breach of trust" under Section 392 thereof. It was never—and on its own evidence never could have been—the prosecution case that the Appellant had misappropriated any funds or converted them to his own use, but—as appears from the quotation from his Judgment in the preceding paragraph—the learned Judge appears, for some unknown reason, to have thought otherwise, although he finally found the Appellant guilty under the said Section 392. 10

In dealing with this point which, it is submitted, shows that there was some confusion in the mind of the learned District Judge as to the offence with which the Appellant was charged, the learned Judges of the Supreme Court, in their Judgment hereinafter referred to, said that "technically" there was no "misappropriation" of funds and on that ground it was possible to say that the finding of the Trial Court was unsupported by the evidence. But it was their opinion that, as used by the learned District Judge, the word "misappropriation" must be construed as if it meant "misapplication" because of his subsequent reference to the said Section 392 under which, he said, he found the Appellant guilty. 20

p. 59, ll. 14—23.

The Appellant respectfully points out that a mere misapplication of funds is not an ingredient of the offence of "criminal breach of trust" (see Sections 392 and 388 of the Code, paragraphs 3 to 5 of this Case, *supra*) and submits that no dishonest intention can legitimately be inferred from any such misapplication.

34. The learned District Judge was impressed—in the Appellant's submission, unduly so—by the fact that he had been unable to discover any specific relationship between the amounts paid for "rubble bottoming" and the total amounts in the Overseer's bills. He expressed the view that if the Overseers paid increased rates it would normally be an all-round increase by all the Overseers and, continuing, said that had he been able to find a relationship between the said amounts he would have accepted the Appellant's explanations and thus, presumably, acquitted him of any dishonest intention. 30

p. 53, ll. 30—38.

In the Appellant's respectful submission, the inability of the learned Judge to discover any specific relationship between the said amounts was not, in the circumstances of this case and in the absence of any evidence on the point, a ground for attributing dishonesty to the Appellant or for rejecting the explanations which he had given; for the losses which the Overseers had testified to sustaining were due to the admittedly difficult and unusual conditions prevailing at Trincomalie, the effect of which varied in character and degree with each Overseer, and a sufficient explanation from each would no doubt have been forth- 40

coming had any attempt been made to examine them on the point by the prosecution whose witnesses they were.

RECORD.

35. Against his conviction and sentence the Appellant preferred an appeal to the Supreme Court, where it came up for hearing before a Bench consisting of Cannon and Canekaratne JJ., with results as stated in paragraph 1 hereof.

pp. 55—56.

36. On the point stressed by the Appellant's Counsel that, in the total absence of any evidence of dishonest intention, the Appellant could not possibly be guilty of the said offence of "criminal breach of 10 trust," Cannon, J. (with whom Canekaratne, J., who did not deliver a separate Judgment, agreed) held that:—(1) Under Sections 22 and 21 of the Code (see paragraphs 6 and 7 hereof) dishonesty had "nothing to do with probity"; and (2) the Appellant must be assumed to have known that by his conduct he was causing a "wrongful gain" to the Overseers and a "wrongful loss" to the Government.

p. 59, ll. 23—34.
p. 59, ll. 36—37.
p. 60, ll. 1—10.

The Appellant respectfully submits that the above conclusions of the learned Judge are contrary to reason because:—(1) It is impossible, without doing violence to the English language, to dissociate probity from "honesty" or from "dishonesty"; (2) there was no evidence to 20 show that the Appellant's conduct had resulted in a "wrongful gain" to the Overseers or a "wrongful loss" to the Government; (3) the relevant evidence tended to show that the Overseers had received no more than they would have done had the Appellant proceeded departmentally in again bringing their difficulties to the attention of his superiors; (4) the said evidence was clear that the work was reasonably well done; (5) upon any fair view it could not be said that the Appellant's conduct was such as to justify the inference that it took place in furtherance of an intention to cause any "wrongful loss" or "wrongful gain."

37. The learned Judge of the Supreme Court, unlike the Trial 30 Judge, appears to have treated the evidence of the Overseers as if it was entitled to acceptance. He nowhere doubted their veracity and, moreover, he said, "I have been impressed by Mr. Perera's argument that the Overseers' evidence that they" [*i.e.*, the amounts irregularly paid out] "were genuine losses and were treated as such by the Accused is evidence to show that the Accused was actuated by a motive of duty." But, he was of the opinion "that the Overseers' evidence does not rebut the inference of intention by the Accused" mainly because: (a) the Appellant had not mentioned "rubble-bottoming" in his fortnightly, progress reports; (b) he had been informed of the instructions of the Minister 40 of Communications and Works that cost of the work was to be regarded as being of secondary importance; and (c) he had not again reported his difficulties to his superior officers. Having based himself upon these views for the purpose of affirming the conviction, the learned Judge then went on to say that the said documentary evidence (see (a) and (b), *supra*) indicated to him that the Appellant had no reasonable ground to

p. 60, ll. 36—39.
p. 60, ll. 44—45.
p. 60, ll. 18—24, 40.
p. 60, ll. 12—18, 40.
p. 60, ll. 41—43.
p. 60, l. 45 to p. 61, l. 3.

RECORD.

p. 61. ll. 3—4.

fear undue delay and that in any event he had taken no reasonable steps to counteract it. It appeared to him that there was "*primâ facie* evidence" that the Appellant had not acted *bonâ fide*.

38. The Appellant respectfully submits that these conclusions show that the learned Judge did not correctly appraise (if he did not actually overlook) the oral evidence in the case all of which (given, it must be remembered always, on behalf of the prosecution) pointed strongly to the following facts:—

(1) that, even if conscious of the departmental irregularity he was committing, the Appellant had nevertheless acted in good faith; 10

(2) that there had been considerable delay in the progress of the work which made the taking of immediate and extraordinary steps imperative; and

(3) that following the relevant departmental routine in order to surmount the labour difficulties which presented themselves from day to day would have added substantially to the said considerable delay.

39. As to the said "documentary evidence" on which the learned Judge laid stress, the Appellant respectfully submits that his failure to 20 refer to "rubble-bottoming" in his fortnightly progress reports could not legitimately give rise to any inference of any dishonest intention on his part, for that process, to the knowledge of his superior officer who frequently inspected the work, was not being carried out, and it was therefore natural for him to omit any reference to it; and, further, that as the delay had been overcome or minimised by his plan for short-circuiting departmental routine, it would have been illogical (even if desirable) for the Appellant to have referred to his labour difficulties in the said Reports, for to have done so would have led to the very delay which, at all times and at all costs, he was anxious to avoid. 30

Ex. D. 1, p. 131.

40. A further piece of "documentary evidence" on which the learned Judge laid stress was the written communication (Ex. D. 1.) referring to the instructions of the Minister of Communications and Works that expeditious completion of the work should be regarded as being of primary, and its cost as being only of secondary, importance. The learned Judge said that this showed that the Government was taking a keen and active interest in the construction of the road which inference, in his opinion, the Appellant should also have drawn, together with the further inference that any application by him for the immediate sanction of necessary expenses would have been "sympathetically received and 40 quickly dealt with"; and the fact that he did not think in these terms was evidence to show that he did not act in good faith.

The Appellant does not deny that he was aware of the said instructions of the Minister of Communications and Works which, incidentally, reached him also as a peremptory order from the Commander-in-Chief—

indeed he has already made it clear that he was if anything only too conscious of the importance and urgency of the work that had been entrusted to his sole charge—and he is not prepared to dispute the proposition that from the said communication of the Minister it could legitimately be inferred that the Government was taking a " keen and active interest " in the said work, the cost of which was to be regarded as being of " secondary importance "; but he respectfully submits nevertheless that it would have been unreasonable for him to deduce from these facts or inferences, the further inference that the regular
10 departmental routine in such matters with its usual and inevitable delay had been dispensed with or even modified or was likely to be dispensed with or modified.

In this connection the Appellant would refer again to the evidence of the principal prosecution witness (J. H. E. de Kretser) whose evidence was that " changing of any rate will take considerable time ", and that " there was no change in the system of getting sanction for increased rates ". (See paragraph 22 hereof.)

p. 36, ll. 38—39.

p. 37, ll. 3—4.

41. In conclusion the learned Judge referred in the following words to a feature of the trial which was most regrettable:—

20 " The accused has filed an affidavit in which he says that the Magistrate who committed him for trial sat on the Bench with the District Judge during the trial and had some communication with the District Judge about the indictment; he complains that he was thereby prejudiced. The point of prejudice is not pressed by his Counsel, but it is submitted that it is undesirable for a Magistrate to sit on the Bench when the Judge is a Judge of fact as well as of law as he was in this case. I agree with that opinion."

42. A decree in accordance with the judgment of the Supreme Court was drawn up on the 7th March, 1946, and against the said
30 judgment and decree this appeal is now preferred to His Majesty in Council, Special Leave to appeal having been granted to the Appellant by an Order in Council, dated the 21st December, 1946.

p. 62.

pp. 63—64.

The Appellant humbly submits that the appeal should be allowed, with costs, and that his conviction and sentence should be quashed for the following, among other,

REASONS:—

1. Because on the evidence in the case and on a true interpretation and application of the relevant Sections of the Code it is clear that the admittedly irregular conduct of
40 the Appellant did not amount to the offence of " criminal breach of trust ".

2. Because it was essential for the prosecution to prove beyond any doubt that the Appellant acted " dishonestly " in authorising the said payments to the Overseers and this it has not done.

RECORD.

3. Because the Supreme Court was wrong to hold that under the Code "dishonesty" has nothing to do with "probity".

4. Because it was not proved that the Appellant had caused any "wrongful gain" or "wrongful loss" to anyone.

5. Because the prosecution did not prove any facts from which an inference could legitimately be drawn that the Appellant's intention was to cause any "wrongful gain" or "wrongful loss".

6. Because the case found by the learned Trial Judge against the Appellant was, on the facts, not the case presented against him by the Crown against which latter case alone he had been called upon to defend himself. 10

7. Because the charge upon which the learned Trial Judge convicted the Appellant was not in law the charge upon which he was tried.

L. M. D. DE SILVA.

R. K. HANDOO.

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Appeal No. 2 of 1948.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

BETWEEN

A. J. E. G. CASPERSZ - *Appellant,*

AND

THE KING *Respondent.*

CASE FOR THE APPELLANT.

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