

9, 1953

P.C. Appeal No. 38 of 1952

In the Privy Council.

UNIVERSITY OF LONDON
VICI
10 FEB 1954
INSTITUTE OF ADVANCED
LEGAL STUDIES

ON APPEAL

FROM THE COURT OF CRIMINAL APPEAL OF CEYLON

BETWEEN

33891

MAHUMARAKALAGE EDWARD ANDREW COORAY *Appellant.*

AND

THE QUEEN. - *Respondent.*

CASE FOR THE APPELLANT.

RECORD.

10 1. This is an appeal by Special Leave from the judgment and order of the Court of Criminal Appeal of Ceylon dated the 24th day of July, 1951, dismissing the Appellant's appeal against his conviction in the Supreme Court of the Island of Ceylon dated the 16th October, 1950, on an indictment charging him with criminal breach of trust as an agent contrary to Section 392 of the Ceylon Penal Code. The Appellant was sentenced by the trial judge to five years' rigorous imprisonment.

20 2. The case for the Crown, which will be more fully set out hereafter, was that the Appellant had misappropriated 35 separate sums of money represented by 35 separate cheques. The Appellant was President of a group of Co-operative Societies known as the Salpiti Korale Union, which was bound under its rules to deposit whatever monies it received from sales to its constituent member Societies with the Co-operative Central Bank of which the Appellant was a director. It was alleged that the Appellant from time to time took possession of such monies for the ostensible purpose of conveying them to the bank and then proceeded to substitute therefor cheques drawn on his own or his brother's account. Thereafter he instructed one Bandaranaike, who was manager of the bank, to delay presentation of some of the said cheques. By the 1st April, 1948, there were 35 such delayed cheques representing 30 a total of Rs. 155,700.

3. The Appellant was indicted under Section 392 of the Ceylon Penal Code which reads as follows:—

" 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,

RECORD.

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."

The issue in this appeal is whether the Appellant, who was not a professional agent and did not purport to act as such, could have committed the offence created by this section. It was contended on behalf of the Appellant in the Court of Criminal Appeal and is now contended—

- (a) that the word "agent" is governed by the expression "in the way of his business" just as much as are the words "banker" "merchant" etc., so that the agent contemplated by Section 392 must be a person whose business or part of whose business it is to be an agent; 10
- (b) that the word "agent" must be read as *ejusdem generis* with the words "banker, merchant, factor, broker" and "attorney" and in this connection refers only to a professional agent who commits a criminal breach of trust in the way of his business as such agent;
- (c) that this construction of the word "agent" is supported by a comparison of Section 392 with the other sections of the Penal Code dealing with criminal breach of trust, namely Sections 388, 389, 390, 392A and 392B. The material sections are annexed hereto. 20

By a majority of two to one the Court of Criminal Appeal held (it is submitted wrongly) that the word agent in Section 392 was not limited by the preceding words and covered any kind of agent acting for any principal. They declined to follow the decision of the English Divisional Court in *The Queen v. Portugal*, 16 Q. B. D. 487 and of the English Court of Crown Cases Reserved in *The Queen v. Kane* (1901), 1 Q. B. 472. In these two cases the English Courts construed a similar section (now repealed) in the Larceny Act, 1861 (24 and 25 Vict. c. 96, s. 75), which provided as follows:— 30

"75. Whosoever, having been intrusted, either solely, or jointly with any other Person, as a Banker, Merchant, Broker, Attorney, or other Agent, with any Money or Security for the Payment of Money, with any Direction in Writing to apply, pay, or deliver such Money or Security or any Part thereof respectively, or the Proceeds or any Part of the Proceeds of such Security, for any Purpose, or to any Person specified in such Direction, shall, in violation of good Faith, and contrary to the Terms of such Direction, in anywise convert to his own Use or Benefit, or the Use or Benefit of any Person other than the Person by whom he shall have been so intrusted, such Money, Security, or Proceeds, or any Part thereof respectively; and whosoever, having been intrusted, either solely, 40

or jointly with any other Person, as a Banker, Merchant, Broker, Attorney, or other Agent, with any Chattel or valuable Security, or any Power of Attorney for the Sale or Transfer of any Share or Interest in any Public Stock or Fund, whether of the United Kingdom, or any Part thereof, or of any Foreign State, or in any Stock or Fund of any Body Corporate, Company, or Society, for safe Custody or for any special Purpose, without any Authority to sell, negotiate, transfer, or pledge, shall, in violation of good Faith, and contrary to the Object or Purpose for which such Chattel, Security, or Power of Attorney shall have been intrusted to him, 10 sell negotiate, transfer, pledge, or in any Manner convert to his own Use or Benefit, or the Use or Benefit of any Person other than the Person by whom he shall have been so intrusted, such Chattel or Security, or the Proceeds of the same, or any Part thereof, or the Share or Interest in the Stock or Fund to which such Power of Attorney shall relate, or any Part thereof, shall be guilty of a Misdemeanor, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for any Term not exceeding Seven Years and not less than Three Years,—or to be 20 imprisoned for any Term not exceeding Two Years, with or without Hard Labour, and with or without Solitary Confinement; but nothing in this Section contained relating to Agents shall affect any Trustee in or under any Instrument whatsoever, or any Mortgagee of any Property, Real or Personal, in respect of any Act done by such Trustee or Mortgagee in relation to the Property comprised in or affected by any such Trust or Mortgage; nor shall restrain any Banker, Merchant, Broker, Attorney, or other Agent from receiving any Money which shall be or become actually due and payable upon or by virtue of any valuable Security, according to the Tenor and 30 Effect thereof, in such Manner as he might have done if this Act had not been passed; nor from selling, transferring, or otherwise disposing of any Securities or Effects in his Possession upon which he shall have any Lien, Claim, or Demand entitling him by Law so to do, unless such Sale, Transfer, or other Disposal shall extend to a greater Number or Part of such Securities Effects than shall be requisite for satisfying such Lien, Claim, or Demand.”

The majority of the Court of Criminal Appeal held (it is again submitted wrongly) that the English authorities could be distinguished from the present case on the ground that in Section 392 the words “ or 40 agent ” had been substituted for the words “ or other agent ” in the English Statute.

4. The facts of the case may be outlined as follows:—

The Appellant, a man of hitherto good character, was Vice-President of the Co-operative Central Bank the President being a Mr. Arsecularatne. There were about 16 other directors. The manager was the said Bandaranaike. The members of the

RECORD.

bank consisted of Unions of Co-operative Societies and also certain individual Societies and individual members. The Appellant was President of the Salpiti Korale Union and Treasurer of a constituent Society at Laxapithiya. The system that obtained was that the Co-operative Central Bank made loans to member Unions and Societies to enable them to buy their stocks. Re-payment of such loans took place weekly and were supposed to be made by means of money orders and cheques, payments in cash being discouraged. The Co-operative Central Bank itself paid in the cheques, money orders and cash received into its account with the bank of Ceylon. 10

The Salpiti Korale Union supplied its member Societies through three depots, namely Moratuwa, Piliandala and Polgasovita. The manager of the Moratuwa depot was one Ranatunga and the manager of the Piliandala depot was one Leo Cooray, who was the Appellant's brother. The Appellant was President and Chairman of the Moratuwa Regional Committee, which was responsible for the management of the Moratuwa depot. The case for the Crown was that the Appellant induced Ranatunga and Leo Cooray to accumulate large sums in cash and to hand them over to him for transmission to the bank. It was further alleged that instead of banking these monies he appropriated them to himself and substituted therefor his own cheques drawn on his own account with the Bank of Ceylon and, in three cases, cheques drawn by his brother E. J. Cooray. Certain of these cheques were paid straight into the Bank of Ceylon and were duly honoured and others were presented and honoured after being held up for a time. By the 1st April, 1948, however, 35 cheques were awaiting presentation as aforesaid. In that month, Mr. Arsecularatne discovered that these cheques were being held back by Bandaranaike and consulted the Registrar of Co-operative Societies. Thereafter he and the Registrar had an interview with the Appellant, who admitted that the cheques had been held back at his request and said that he did not want to defraud the Bank. He offered to repay Rs. 125,000 before the following Saturday and the balance before the 30th April. These sums were not in fact paid. In the following month all 35 cheques were presented for payment to the Bank of Ceylon but were not honoured, having been stopped by the Appellant. 40

5. The trial in respect of which the Appellant now appeals was a retrial ordered by the Court of Criminal Appeal in pursuance of Section 5(2) of the Criminal Appeal Ordinance, 1938. In the original proceedings the Appellant was tried jointly with the said Bandaranaike on an indictment containing three counts. The first count charged both accused with conspiracy. The second count charged the Appellant with

having committed criminal breach of trust contrary to Section 392 aforesaid. The third count charged Bandaranaike with having aided and abetted such criminal breach of trust. The Appellant was found guilty on the 1st and 2nd counts and sentenced to two years and six years imprisonment, while Bandaranaike was found guilty on the 1st and 3rd counts and sentenced to two years and two years. The sentences in each case were to run concurrently. On the 25th May, 1950, the Court of Criminal Appeal (Nagalingam, J. (President), Gratiaen and Gunasekara, J.J.) by a majority quashed the convictions on the 1st and 3rd counts. They set aside the conviction of the Appellant on the 2nd count and ordered that he be retried on this count in fresh proceedings.

RECORD.

6. The indictment on which the Appellant was tried in these proceedings was framed as follows:—

“ That between 1st May, 1947 and 30th April 1948 at Colombo, within the jurisdiction of this Court, you being entrusted with a sum of Rs. 149,574/93 by D. S. Ranatunge and M. S. Leo Cooray, managers of the Moratuwa and Piliyandale Co-operative Wholesale Depots of the Sulpiti Korale Stores Societies Union, Ltd. in the way of your business as an agent, to be deposited to the credit of the said union at the Colombo Co-operative Central Bank, committed criminal Breach of trust in respect of the said sum of Rs. 149,576/93; and that you have thereby committed an offence punishable under Section 392 of the Penal Code.”

Charge and
Plea.
pp. 1, 2.

7. The Trial Judge's charge to the jury included the following passages:—

“ Now gentlemen, let me read to you the charge that is laid against the accused. It is that between the 1st May 1947 and the 30th April 1948, at Colombo, he, being entrusted with a sum of Rs. 155,576/93 by D. S. Ranatunga and M. S. Leo Cooray, 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 said Union of the Co-operative Central Bank Ltd., did commit criminal breach of trust in respect of the said sum. Now that is the charge. In brief, that he was entrusted by these two managers of the Piliyandale and Moratuwa Depots with a certain sum of money aggregating to Rs. 155,000/- to be deposited in the Central Bank and instead of so depositing it he in breach of that trust converted that money or appropriated that money to himself. Now gentlemen, the act that is alleged against the accused is the act of appropriating the money. The crime that is alleged against him is that he appropriated the money in certain circumstances that made the act a criminal Act.”

Charge to
Jury.
pp. 9, 10.

“ Well gentlemen, so much of the charge as I have referred to already, amounts to a charge of dishonest misappropriation of money.

pp. 13, 14.

RECORD.

Dishonest misappropriation is a criminal offence. The Crown alleges dishonest misappropriation under certain aggravating circumstances. The Crown says, not only did the accused dishonestly misappropriate money but he did that in breach of a trust. The Crown alleges in other words the offence of criminal breach of trust which is defined in these terms: '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, commits criminal breach of trust.' Well, that is a more serious offence than criminal mis-appropriation or dishonest mis-appropriation. Well the Crown says, not only is this criminal breach of trust because there was attached to the property that came into your hands a trust, but you were placed under an obligation to deal with that money in a certain way, namely, to go and deposit it to the credit of the Salpiti Korale Union in the Co-operative Central Bank. Not only did you dishonestly misappropriate the money and commit the offence of criminal breach of trust, but you committed an aggravated form of criminal breach of trust as an agent and therefore you were liable to a greater penalty. This is the section under which the accused is charged: 'Whoever, being in any manner entrusted with property, or with any dominion over property, in the way of his business as an agent, commits criminal breach of trust in respect of that property, shall be punished with so and so.' That is to say, if a man commits criminal breach of trust in respect of property entrusted to him in the way of his business as an agent he commits a more serious offence.

"Now 'in the way of his business' does not necessarily mean that the Crown must prove that the accused carried on some sort of a business in which he undertook agencies, undertook to act as an agent for various people. It is sufficient if, on the particular occasion, he acted as an agent of another.

"So gentlemen, the meaning then of the indictment is this: The Crown says that the accused dishonestly misappropriated certain monies. That is an offence. But that is the least of the offences included in the charge. The Crown says this is an aggravated form of dishonest misappropriation. It is no ordinary dishonest misappropriation but an aggravated form amounting to criminal breach of trust because there was impressed upon that money a trust and it was in breach of that trust that he appropriated. Then again the Crown says, it is not merely criminal breach of trust but an aggravated form of criminal breach of trust. It was criminal breach of trust of money entrusted to the accused as an agent. So that what is the more serious is the criminal breach of trust as an agent,

but included in that charge is the minor offence of criminal breach of trust and still more minor offence of criminal misappropriation. So it is for you to say whether you are satisfied beyond reasonable doubt that the accused dishonestly misappropriated this Rs. 155,000/- or any part of it. Then if you are satisfied beyond doubt that he did, either in respect of the whole sum or in respect of any smaller sum, you will go on to consider whether he did so in breach of a trust in respect of the whole sum of any part of it. If you are satisfied beyond reasonable doubt that he did, then you will go on to consider whether the further aggravating element is proved, namely, that he did so in respect of monies entrusted to him as an agent."

RECORD.

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" Well then gentlemen, if you are not satisfied beyond doubt that the accused dishonestly misappropriated the sum of Rs. 94,000/- off or any part of that sum, you will acquit him. But if you are satisfied beyond reasonable doubt that he did dishonestly misappropriate that sum or any part of it, then you will hold him guilty of the offence of dishonest misappropriation and you will go on to consider whether there is a more aggravated offence. You will ask yourselves whether if he did dishonestly misappropriate the money, was it money that came into his hands subject to a trust to deposit it in the bank. It is not necessary for that purpose that he should have been expressly told by anybody, ' please deposit this in the bank'. In all the circumstances what was his duty in regard to that money? If it was to deposit that money in the bank and instead of depositing he dishonestly appropriated it to himself, then it is criminal breach of trust. If you have any reasonable doubt on that point then you will acquit him of criminal breach of trust but convict him of dishonest appropriation. But if you have no reasonable doubt on that point, namely, that it is criminal breach of trust then you will go on to consider whether he did so as an agent, that is to say, was he acting as the agent of the manager of the Moratuwa Depot when he got the collection into his hands to deposit in the bank. Well gentlemen, 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, whether he asked for it himself or volunteered his services it is immaterial, if he entrusted the money to him to deposit in the bank for him when he would be acting as the manager's agent."

p. 76.

8. The jury unanimously returned the following verdict:—

" Guilty of criminal breach of trust as an agent in respect of a sum of about Rs. 5,700 "

Verdict and
sentence.
p. 79.

RECORD.

The Trial Judge then sentenced the Appellant as aforesaid to five years' rigorous imprisonment.

9. The Appellant appealed to the Court of Criminal Appeal of Ceylon. The judgment of the Court of Criminal Appeal (Nagalingam (President), Gratiaen and de Silva, JJ.) was delivered by Nagalingam, J. After holding that the other grounds of appeal failed, the learned Judge proceeded to consider the contention put forward on behalf of the Appellant that since the Appellant had not acted as a professional agent the conviction under Section 392 was bad. He arrived at the following conclusions:—

- (a) Although there could be little doubt that the terms "banker" and "merchant" must necessarily refer to persons who carry on a regular calling in these special vocations, in regard to the other categories of persons falling under the designations of "factor", "broker" or "attorney" it was possible to conceive of, and in fact there were many, instances where a person acted for another individual in any of these capacities and that on one only occasion.
- (b) One transaction might be sufficient to constitute a person a broker and "attorney" need not necessarily be a term that need be applicable to the class of persons known to English law as attorneys at law but certainly was wide enough and was recognised as a term which referred under Ceylon law to a person who held a power of attorney.
- (c) There was a very important variation between the provision of the English Larceny Act of 1861 and Section 392 of the Ceylon Penal Code. The words in the Larceny Act were "banker, merchant factor broker attorney or other agent," while in Section 392 the term "other" was significantly omitted. The majority of the Court had grave doubts as to whether the construction placed upon the English statute would have been the same had the word "other" been omitted.
- (d) The Court saw no reason to hold that the phrase "in the way of his business" was intended by the Legislature to mean "in carrying on the business".
- (e) If Ranatunga, who had to bank the proceeds of sale handed the funds to the prisoner to be deposited in the bank and the prisoner undertook to carry and deposit the funds, the relationship of principal and agent was thereby constituted, it being immaterial as to whether one was the manager of the depot and the other the President of the Union that ran the depot. Nor did the majority of the Court think that there was any substance in the contention that it was the prisoner who volunteered to carry the funds for deposit.

For these reasons the majority of the Court were of opinion that this ground of appeal, like the others, was of no avail to the Appellant and the appeal was accordingly dismissed.

RECORD.
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10. Special Leave to appeal to His Majesty in Council was granted by an Order in Council dated the 1st day of November, 1951, the appeal being limited to the questions set out in paragraph 5 (a) of the petition for special leave. Paragraph 5 (a) read as follows:—

“ Your Petitioner was indicted and found guilty under Section 392 of the Penal Code which refers to breach of trust committed by any person ‘ in the way of his business as a banker, merchant, factor, broker, attorney or agent.’ It is submitted that the word ‘ agent ’ is governed by the expression ‘ in the way of his business as ’ just as much as are the words ‘ banker ’, ‘ merchant ’ etc., so that the agent contemplated by Section 392 must be a person whose business, or part of whose business it is to be an agent. Alternatively it is submitted that the word ‘ agent ’ must be read as *ejusdem generis* with the words banker, merchant, factor, broker and attorney and, in this connection, refers only to a professional agent who commits a criminal breach of trust in the way of his business as such agent. It was not suggested in the present case that Your Petitioner was a professional agent and he cannot therefore have committed the offence envisaged by this section. The Court of Criminal Appeal held, however, that the word ‘ agent ’ in this section was not limited by the preceding words and covered any kind of agent acting for any principal. They declined to follow the decision of an English Divisional Court in *The Queen v. Portugal* 16 Q. B. D. 487 and of the Court of Crown Cases Reserved in *The Queen v. Kane* (1901) 1 Q. B. 472, where the Courts construed a similar section (now repealed) in the Larceny Act 1861. This section (24 & 25 Vict. a 96, s. 75) provided that ‘ who so-ever, having been entrusted, either solely or jointly with any other person, as a banker, merchant, broker or other agent with any chattel or valuable security . . . shall convert to his own use or benefit . . . such chattel or security . . . shall be guilty of a misdemeanour ’. The Court of Criminal Appeal held by a majority (it is submitted wrongly) that they were not bound to follow the English authority on the ground that in Section 392 the words ‘ or agent ’ had been substituted for the words ‘ or other agent ’ in the English statute.”

11. The Appellant humbly submits that his said conviction should be quashed and his said sentence set aside and that this appeal should be allowed with costs here and in the Courts below for the following, amongst other,

REASONS:—

1. Because the word “ agent ” in Section 392 of the Ceylon Penal Code should be interpreted as *ejusdem generis* with the words “ banker, merchant, factor, broker, attorney ”

RECORD.

and as therefore meaning a professional agent carrying on business as such agent.

2. Because the Appellant was not at any material time a professional agent and did not purport to carry on an agent's business and could not therefore be convicted of an offence under Section 392 aforesaid.
3. Because the majority of the Court of Criminal Appeal were wrong in holding that one transaction would be sufficient to constitute a person a broker for the purpose of this Section and that the term "attorney" in the said section was wide enough to cover any person holding a power of attorney. 10
4. Because the majority of the Court of Criminal Appeal were wrong in holding that the construction placed by the English Courts upon Section 75 of the Larceny Act, 1861, might have been different if the word "other" had been omitted.
5. Because the majority of the Court of Criminal Appeal were wrong in holding that the words "in the way of his business" should not be construed as "in carrying on the business of" but as the equivalent of "in the way of his function" or "in the course of acting as" or even "in the capacity of". 20
6. Because the majority of the Court of Criminal Appeal were wrong in refusing to follow the decision of the English Courts in *The Queen v. Portugal* and *The Queen v. Kane*.
7. Because the majority of the Court of Criminal Appeal were wrong in holding that the relationship between Ranatunga and the Appellant was that of principal and agent.
8. Because the Appellant was not intrusted with the moneys in question or any part of such moneys as an agent. 30

DINGLE FOOT.

ANNEXURE.

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 40

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." RECORD.
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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
10 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
20 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
30 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,

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

P.C. Appeal No. 38 of 1952.

In the Privy Council.

ON APPEAL

*FROM THE COURT OF CRIMINAL APPEAL
OF CEYLON.*

BETWEEN

MAHUMARAKALAGE
EDWARD ANDREW
COORAY -

Appellant,

AND

THE QUEEN

Respondent.

CASE FOR THE APPELLANT.

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