

GL.G.21

9, 1953

In the Privy Council.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF CEYLON

No. 38 of 1952.
UNIVERSITY OF LONDON
 W.C.T.
 10 FEB 1954
**INSTITUTE OF ADVANCED
 LEGAL STUDIES**

BETWEEN

MAHUMARAKALAGE EDWARD ANDREW COORAY APPELLANT

33592

AND

THE QUEEN RESPONDENT.

CASE FOR THE RESPONDENT

RECORD.

1.—This is an Appeal by Special Leave from a Judgment dated the 24th July, 1951, of the Court of Criminal Appeal of Ceylon (Nagalingam, Gratiaen and de Silva, JJ.) dismissing an appeal by the Appellant from his conviction on the 16th October, 1950, in the Supreme Court of Ceylon (Gunasekara, J. and a jury) of criminal breach of trust as an agent contrary to s. 392 of the Ceylon Penal Code, for which he was sentenced to rigorous imprisonment for five years. pp. 81-98 p. 79

2.—The Appellant had been tried jointly with one Bandaranaike, on an indictment charging the Appellant in the first count (held by the Court of Criminal Appeal to be defective) with conspiracy and in the second count with criminal breach of trust contrary to s. 392, and Bandaranaike in the first count with conspiracy and in the third count with aiding and abetting the breach of trust. The Appellant was convicted on counts 1 and 2, and Bandaranaike on counts 1 and 3. The Court of Criminal Appeal quashed the conviction of the Appellant on count 1 and of Bandaranaike on counts 1 and 3. On count 2 the Court of Criminal Appeal set aside the appellant's conviction and ordered a new trial on that count. The proceedings on appeal are reported in (1950) 51 New Law Reports 433. 10

3.—The Appellant was accordingly retried on an indictment which as amended at trial charged him with having committed criminal breach of trust under s. 392 between the 1st May, 1947, and the 30th April, 1948, in respect of Rs. 155,576/93 entrusted to him by the managers of the Moratuwa and Piliyandale Co-operative Wholesale Depots of the Salpiti Korale Stores Societies Union Ltd. in the way of his business as an agent pp. 1-2 20

RECORD. to be deposited to the credit of the Union at the Colombo Co-operative Central Bank. This indictment was framed under s. 168 (2) of the Criminal Procedure Code of Ceylon, under which it is sufficient on a charge of criminal breach of trust to specify the gross sum in respect of which, and the dates between which, the offence is alleged to have been committed. The present appeal arises out of the Appellant's conviction on this retrial.

4.—Criminal breach of trust is defined by s. 388 of the Penal Code, as follows :

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 discretion 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." 10

By s. 389 the punishment for the offence is imprisonment of either description for a term which may extend to three years or fine or both, but severer penalties are provided by s. 390 when the breach is by a carrier, wharfinger or warehousekeeper ; by s. 391 when the breach is by a clerk or servant ; and by s. 392 which provides : 20

Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney, or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

p. 79 5.—At the trial criminal breach of trust by the Appellant in respect of about Rs. 57,500 was established, and he was convicted of such breach as an agent. The Court of Criminal Appeal affirmed that conviction, and the present appeal is limited to the questions set out in paragraph 5 (a) of the petition for special leave to appeal which may be stated as : 30

(1) whether the word "agent" in s. 392 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 s. 392 must be a person whose business, or part of whose business, it is to be an agent.

(2) whether 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. 40

(3) whether the Court of Criminal Appeal were bound to follow English decisions on s. 75 of the Larceny Act, 1861.

6.—The case for the Respondent was that the Appellant was the president of the Salpiti Korale Union, which supplied goods to retail stores through wholesale depots. He was also president of the committee which controlled the depot at Moratuwa, and vice-president of the Co-operative Central Bank. (The allegations concerning the Piliyandale depot were abandoned by the Crown at the trial. No further reference, therefore, is made to that depot.) The Appellant secured the appointment of one Ranatunga as manager of the Moratuwa depot. The Union required that retail stores doing business with the wholesale depots should make
 10 all payments in excess of Rs. 100 by cheque or money order, but not in cash; and all sums received at the depots had to be deposited promptly at the Co-operative Central Bank. The Appellant instructed Ranatunga to collect large sums from retail stores in cash. At the end of the day the Appellant took from Ranatunga the cash, etc., collected during the day, saying he would deposit it with the Co-operative Central Bank. He then appropriated the cash and substituted for it his own cheque for the same amount. The Co-operative Central Bank had an account at the Bank of Ceylon, and all cheques received by the Co-operative Central Bank were sent to the Bank of Ceylon for collection. After depositing his own cheques
 20 with the Co-operative Central Bank to the credit of the Union, the Appellant used his position as vice-president of the Co-operative Central Bank to ensure that his cheques were not sent by that Bank to the Bank of Ceylon. By the time that these operations were discovered and the proceedings were started, more than thirty of the Appellant's cheques were outstanding and had been withheld from presentation for several months.

7.—The Appellant did not give evidence at the trial, nor were any witnesses called on his behalf. Gunasekara, J., in his charge to the jury, directed them that, in order to satisfy the words "in the way of his business" in s. 392, the Crown had to prove, not that the Appellant carried
 30 on a business of undertaking agencies, but that on the particular occasion he acted as the agent of somebody else.

p. 78 ll. 30-38
 pp. 2-79
 p. 14 ll. 1-7

8.—After his conviction the Appellant appealed to the Court of Criminal Appeal. The grounds of appeal originally raised no point on s. 392, but in additional grounds, filed shortly before the hearing and argued by leave of the Court, it was alleged that the conviction under s. 392 was bad, because there was no evidence that the Appellant was at any time engaged in business as an agent.

9.—The Judgment of the Court of Criminal Appeal was delivered by Nagalingam, J. Dealing with the argument on s. 392, the learned
 40 Judge said Counsel for the Appellant had contended that the words "banker, merchant, factor, broker, attorney or agent" must be construed *ejusdem generis*; therefore, since the other words all referred to persons carrying on particular avocations, "agent" must mean someone carrying on the business of an agent. The learned Judge said that, while "banker" p. 95 l. 14-28

pp. 82-98
 p. 94 l. 37-p. 98 l. 9

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 p. 95 l. 29-p. 96
 l. 18

and "merchant" referred to people carrying on a regular calling, "factor," "broker" and "attorney" did not necessarily refer to such people. In *Lowther v. Harris* (1927) 1 K.B. 393 it had been held that a person acting for one principal only, and having no general occupation as agent, might be a factor within the meaning of the Factors Act, 1889. One transaction might suffice to constitute someone a broker, and "attorney" was recognised as meaning simply a holder of a power of attorney. In support of the *ejusdem generis* construction, Counsel had relied on *R. v. Portugal* (1885) 16 Q.B.D. 487 and *R. v. Kane* (1901) 1 K.B. 472, in which that construction had been applied to the words "banker, merchant, broker, attorney or other agent" in the Larceny Act, 1861, s. 75 (now repealed), and it had been held that the words "other agent" did not cover an ordinary agent intrusted from time to time with chattels or valuable securities. The word "other" was omitted from the Ceylon Code, and the majority of the Court of Criminal Appeal doubted whether the English decisions would have been the same if the word had not been in the Larceny Act. Counsel had also argued that the words "in the way of his business" must mean "in carrying on the business of" and not merely "in the course of acting as." The learned Judges saw no reason to think that the legislature had intended the meaning suggested by Counsel. S. 392 had always been interpreted as meaning all agents except those specifically enumerated in ss. 390, 391 and 392, and the same view had been taken in India. The majority of the Court held that the argument on s. 392 was of no avail to the Appellant.

p. 96 ll. 19-50

p. 97 ll. 1-20

p. 97 l. 21-p. 98
 l. 9

10.—The Respondent respectfully submits that the Court of Criminal Appeal was right in declining to construe s. 392 by the *ejusdem generis* rule. A single transaction is sufficient to constitute a person a factor, or (as the Respondent submits) a broker or an attorney; and it is therefore impossible to extract from the words "banker, merchant, factor, broker, attorney" a genus such as was suggested below by Counsel for the Appellant. The word "agent," being used without qualification, refers to all agents whether professional or otherwise, and s. 392 applies to criminal breach of trust committed by anyone acting in the capacity of an agent.

11.—The Respondent respectfully submits that the Court of Criminal Appeal was also right in holding that the words "in the way of his business as" were not intended to restrict the operation of the section to professional attorneys, agents, etc. The section applies to all agents, and these words (in the Respondent's submission) are intended to confine its operation to acts done by such a person while acting as an agent. In the present case, however, the Respondent submits that the Appellant was a person part of whose business it was to be an agent. He was president of the Salpiti Korale Union and vice-president of the Co-operative Central Bank. The business of those concerns was, therefore, part (at least) of his business.

The Appellant habitually took money from the Union's depot to the Bank, and in so doing acted as the Union's agent; so that it was part of his business to act as such agent.

12.—The Court of Criminal Appeal were also, in the Respondent's submission, right in the view which they took of the application to s. 392 of decisions under s. 75 of the English Larceny Act, 1861.

13.—If (contrary to the Respondent's submission) s. 392 is not applicable to this case, the Appellant was clearly proved to have committed a very serious criminal breach of trust punishable under s. 389 of the Penal Code. Any defect was not in the conviction for criminal breach of trust, but in the conviction for such breach in particular aggravating circumstances. The jury properly could, under s. 183 of the Criminal Procedure Code, have convicted the Appellant of the offence punishable under s. 389 of the Penal Code, and the Court of Criminal Appeal could, under s. 6 (2) of the Court of Criminal Appeal Ordinance, have substituted for the verdict found a verdict of guilty of the offence punishable under s. 389. The Respondent therefore submits that if the verdict found by the jury cannot stand, a verdict of guilty under s. 389 should be substituted.

14.—The Respondent, accordingly, submits that the Judgment of the Court of Criminal Appeal of Ceylon was right and should be affirmed, and that the conviction and sentence upon the Appellant should be affirmed (or at any rate should only be varied) for the following amongst other

REASONS.

1. BECAUSE in s. 392 of the Penal Code the word "agent" is not to be read *ejusdem generis* with the preceding words.
2. BECAUSE the Appellant was proved to have committed criminal breach of trust as defined by s. 388 of the Penal Code.
3. BECAUSE the circumstances in which the Appellant committed such breach of trust established that he did so in the way of his business as agent.

HARTLEY SHAWCROSS.
FRANK GAHAN.

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