ATTORNEY - GENERAL
v.
DEWAPRIYA WALGAMAGE AND ANOTHER

COURT OF APPEAL,
S. N. SILVA, J. AND W. N. D. PERERA J.,
C.A. No. 126/85,
H.C. MATARA No. 05/83,
M.C. MATARA No. 41870,
JUNE 6, 1990

Criminal Law – Criminal breach of trust – Criminal misappropriation – Theft – Cheating Sections 391, 386, 393, 395, 396 of the Penal Code – Section 177 read with Section 176 of the Code of Criminal Procedure Act, No. 15 of 1979 – Sentence. – Payment of Fine in Instalments – Ratio decidendi.

1. (*a*) There are two basic ingredients to the offence of criminal misappropriation under S. 386 of the Penal Code–

   i. A mental element of dishonesty, and

   ii. An act of misappropriation or conversion of movable property to his own use by the accused.

There are no words in Section 386 which require that the *mens rea* of dishonesty should be preceded by an innocent state of mind. Dishonest intention is the element of *mens rea* of the offence of criminal misappropriation as defined in Section 386 of the Penal Code.

Although there are some illustrations to the section which reveal that dishonesty may be preceded by an innocent or neutral state of mind, is not a prerequisite of the offence, further more dishonesty is the element of *mens rea* in relation to all other offences of theft, cheating and criminal misappropriation.

(*b*) A person could be found guilty of the offence of criminal misappropriation even if there is evidence to the effect that he had a dishonest intention at the time he initially took the property being the subject of the offence.

(*c*) Where the accused is charged with only criminal misappropriation or criminal breach of trust it has to be considered whether on the evidence the offences of cheating or theft are committed at the time of the initial taking of the property. If it could be said beyond reasonable doubt that such an offence is committed at the time of the initial taking of the property the accused could not be found guilty of the offence of criminal misappropriation or criminal breach of trust. The question to be then decided is whether the conviction could be appropriately entered in terms of Section 177 read with Section 176 of the Code of Criminal Procedure Act, No. 15 of 1979.

(*d*) If the initial taking could be only an irregularity of procedure or would not constitute theft or cheating, the accused could be found guilty of criminal misappropriation or criminal breach of trust. The correct test is to ascertain whether the accused is guilty of another offence such as cheating or theft at the time of the initial taking.

(2) Re sentence a term of imprisonment is not warranted because (i) Thirteen years have lapsed since the commission of the offence, (ii) The accused will lose his employment and related benefits, (iii) A substantial fine had been imposed, which would meet the ends of Justice.

(3) High Court Judge directed to recover the fine in instalments.

(4) Ratio of any Judgment should properly be ascertained in relation to the facts of the particular case.

Cases referred to -

(1) *Ranasinghe v. Wijendra (1970) 74 NLR 38*

(2) *Georgesy v. Seyadu Saibe (1902) 3 Brown's Reports 88*

(3) *Kanavadipillai v. Koswatta (1914) 4 Balasingham Notes of Cases 74.*

(4) *Attorney-General v. Menthis (1960) 61 NLR 561*

(5) *Rajendra v. State of Utter Pradesh AIR 1960 Allahabad 387, 394*

APPEAL from conviction and sentence imposed by the High Court of Matara.

D. S. Wijesinghe P.C. for accused-appellant.

Anura B. Meddegoda S.C. for Attorney-General.

Cur. adv. vult.

June 06, 1990

S. N. Silva, J.

The Accused-Appellant and another were indicted before the High Court of Matara on two counts. The first count was against the Accused-Appellant and it alleged that when he was employed as the Manager of the Rural Bank at Matara, between dates of 1st April, 1977 to 30th September, 1977, he committed criminal breach of trust in respect of a sum of Rs. 70,000, an offence punishable under Section 392 of the Penal Code. The 2nd count against the other accused made on the basis that he abetted the commission of the offence in the first count, by the Accused-Appellant.

After trial, the learned High court Judge found the Accused-Appellant guilty of having committed Criminal breach of trust in respect of a sum of Rs. 50,000, an offence punishable under Section 391 of the Penal Code, and sentenced him to a term of 2 years' R.I., and to a fine of Rs. 50,000, in default 1 1/2 years' R.I.. This appeal has been filed against the said conviction and sentence. The 2nd Accused was found not guilty of the charge of abetting and he was acquitted by the learned High Court Judge.

According to the evidence, the facts relevant to the charge on which the Accused-Appellant was found guilty are as follows : –

The Accused-Appellant was functioning at the material time as the Manager of the Rural Bank at Matara. The Bank formed part of the Multi-purpose Co-operative Society, Matara (M.P.C.S) and was located within its premises. The 2nd accused who was acquitted was the Credit Manager of the M.P.C.S. and supervised the work of the Rural Bank at Matara and another Rural Bank attached to the M.P.C.S.

The Rural Bank operated on an overdraft given by the People's Bank. The overdraft of Rs. 1 1/2 lakhs was deposited in two separate accounts of the M.P.C.S. opened at the People's Bank. The Rural Bank took deposits on savings accounts, gave out small loans and carried on the business of a pawnbroker. According to the instructions that were given, the Rural Bank should not have a cash balance exceeding Rs. 5,000, at any given time. Amounts in excess of Rs. 5,000 had to be deposited in the appropriate account at the Peoples' Bank. If the Rural Bank did not have sufficient cash to carry out the daily transactions, money was obtained from the M.P.C.S. upto a sum of Rs. 5,000 at a time.

The procedure by which such money was obtained from the M.P.C.S. and accounted for at the Rural Bank is important in relation to the charge of which the Accused-Appelant has been found guilty. Witness J. P. Ramachandra, the General Manager of the M.P.C.S. who functioned as the Accountant of the M.P.C.S. at the relevant time, gave evidence as regards the entire procedure. Several other witnesses testified to material aspects of this procedure. Witness H. L. Ramawathie was a clerk at the Bank who maintained the Cashier's Scroll Book, (P 44). In this book, the money received and paid out, were entered. If she found that there was not sufficient cash to carry out the daily transactions, she would make a request verbally to the Accused-Appellant, who was the Manager, to obtain cash from the M.P.C.S. Then the Accused-Appellant would make out a voucher in Form F5 to obtain cash. The voucher is submitted by the Accused-Appellant to the 2nd Accused who had to satisfy himself as to the genuineness of the request. When the 2nd Accused approved the voucher it is submitted to the Accountant (witness Ramachandra) who would authorise a cheque

to be drawn in respect of the sum stated in the voucher. This cheque is drawn in the name of the Accused-Appellant. After the cheque is written out, it is put up for signature to the General Manager and the Chairman of the M.P.C.S. Thereafter, the cheque is handed over to the Accused-Appellant who acknowledges its receipt by signing the cheque register and the voucher. The Accused-Appellant takes the cheque to the Accountant and makes an endoresement on the cheque which is countersigned by the Accountant. Cash is then obtained by presenting the cheque to the Cashier of the M.P.C.S., witness Devasurendra. The Cashier gets the person taking the cash to sign on the reverse of the cheque acknowledging its receipt. It is the duty of the Accused-Appellant to hand over the cash to witness Ramawathie, at the Rural Bank, with the necessary particulars entered in Form 917. This form is entered by the Accused-Appellant and witness Ramawathie acknowledges the reciept of the cash by signing the form. Thereafter she enters the receipt in the Scroll Book (p 44).

It is the case for the prosecution that the Accused-Appellant made out 14 vouchers on F 5 Forms during the relevant period. These forms written by the Accused-Appellant were produced marked P3 to P16. Each voucher is for a sum of Rs. 5,000. The vouchers have been approved by the 2nd Accused and cheques marked P17 to P30 were made out in favour of the Accused-Appellant. The cheques have been endorsed by the Accused-Appellant. The Cashier, witness Devasurendra stated that on all the cheques other than four (P21, P22, P24 and P26) money was paid out by him to the Accused-Appellant. The signature of the Accused-Appellant appears on these cheques as having received the money. The monies on cheques bearing P22, P24, and P26 were drawn by witness Kumanayake, another employee of the Rural Bank, who worked under the Accused-Appellant. He stated in evidence that he cashed the three cheques on the instructions of the Accused-Appellant and that he handed over the sums of money to the Accused-Appellant. The cheque P21 had been cashed by the 2nd Accused. Witness Ramawathie stated in evidence, with reference to the Scroll Book P44, that she did not receive any of the money drawn on cheques marked P17 to P30. She further stated that on cheques marked on the material dates she had sufficient cash in hand and would not have made requests to the Accused-Appellant to obtain cash from the M.P.C.S.. The sum of Rs. 70,000 specified in the charge is the total sum on the 14 cheques P17 to P39, that had not been handed over to Ramawathie.

The Accused-Appellant did not give evidence but made a statement from the dock. He stated that in addition to the duties as a Manager of the Rural Bank, he was assigned to attend to other functions by witness Ramachandra. Because the Rural Bank would need money in his absence he made out vouchers and endorsed the cheques in question and left them at the Bank to be cashed when necessary. He specifically stated that he did not receive any money on these cheques from witnesses Devasurendra or Kumanayake.

The learned High Court Judge has carefully considered the evidence and has rejected the dock statement of the Accused-Appellant. He has accepted the evidence adduced by the prosecution, with regard to the procedure referred to above and the specific involvement of the Accused-Appellant in the matters that are alleged against him. He has accepted the evidence of witness Devasurendra that money on ten of the cheques, amounting to Rs. 50,000 had been handed over to the Accused-Appellant. As regards the three cheques cashed by witness Kumanayake the learned Judge has observed that the evidence of Kumanayake is not supported by any document. There is also no evidence as to what happened to the sum of Rs. 5000 drawn by the 2nd Accused. These sums have been set off from the amount stated in the charge. The learned Judge has specifically accepted the evidence of witness Ramawathie that the Accused-Appellant failed to hand over the sum of Rs. 50,000 cashed by him during the relevant period, on the ten cheques referred to above. The Accused-Appellant has been found guilty of the offence of criminal breach of trust punishable under section 391 of the Penal Code because it was held that he did not come within the categories of persons specified in Section 392, being the penal section specified in the indictment.

Senior Counsel appearing for the Accused-Appellant made only one submission on the facts. It was submitted that there is no acceptable evidence to hold that the sum of Rs. 50,000 referred to was not handed over to witness Ramawathie. According to the procedure as testified to by the witness each sum of money had to be handed over on a Form 917. Counsel submitted that the prosecution should have produced all the 917 Forms for the relevant period and established that there were no forms in respect of the sum of Rs. 50,000. I do not see any merit in this submission on the facts. Witness Ramawathie, whose evidence has been believed by the learned High Court Judge, has specifically stated that these sums were not handed over to her by the Accused-Appellant.

She stated so with reference to the Scroll Book marked P44 which was maintained by her. It had not even been suggested at the trial that witness Ramawathie failed to enter in the Scroll Book monies that were in fact received by her. In these circumstances it was not incumbent on the prosecution to produce all the 917 Forms to establish the negative, that there were no forms in respect of the money received on the impugned cheques.

The next submission of Counsel was that the Accused-Appellant could not have been indicted or found guilty of an offence of criminal breach of trust because according to the evidence, the initial taking of the money from Devasurendra was with a dishonest intention. It was submitted that to constitute the offence of criminal breach of trust the initial taking of the property should be innocent and that it should be followed by a dishonest conversion of the property to his own use by the Accused.

Counsel relied on two matters which according to his submission established that the initial taking of the money by the Accused-Appellant, from Devasurendra was dishonest. The first is, the evidence of witness Ramawathie who stated that according to the Scroll Book P44, on the relevant dates there was sufficient cash and that she would not have made requests to the Accused-Appellant to obtain more cash- implying thereby that the vouchers were made out by the Accused-Appellant with the intent of defrauding the money. The second is the content of count (2) of the indictment which alleged that the 14 vouchers should have been declared invalid by the 2nd Accused. It was submitted by Counsel that in view of these two matters the initial taking of the money by the Accused-Appellant should be considered as dishonest.

On the Law, Counsel relied on the judgment of Weeramantry, J., in the case of *Ranasinghe v. Wijendra* (1) where it was held, that for a person to be convicted of the offence of criminal misappropriation the initial taking of the property by such person must be innocent. Counsel also relied on a passage from Gour's Penal Law of India (which will be referred to later), where it is stated that there is no entrustment in law when the property is obtained as a result of a trick.

In *'Wijendra's case* referred above Weeramantry, J., observed that there was a conflict of decisions on the aspect whether to constitute criminal misappropriation the intial taking of the property should be innocent. I would now briefly deal with these decisions.

In two cases decided at the turn of the century, there were observations to the effect that, to constitute the offence of criminal misappropriation there must be at first an innocent possession of the property by the accused and a subsequent change of intention. In the case of *Geergesy v. Seyadu Saibo*[2] Middleton, J. set aside the conviction of an accused on a charge under Section 394 of the Penal Code (receiving stolen property), on the basis that there was no evidence to establish that the cheque with which the accused dealt had been stolen. It is stated in the judgment that the Solicitor-General submitted at the end of the arguments before the judgment was delivered, that the Court should consider entering a conviction for criminal misappropriation on the evidence that had been recorded. In respect of this submission it was held that the accused could not be convicted of criminal misappropriation because he got the cheque dishonestly. The judgment does not specify the basis on which the inference of dishonesty was drawn.

In the case of *Kanavadipillai v. Koswatta*[3] an accused was convicted of having committed criminal misappropriation of a box of matches. He had gone to the shop of the complainant and wanted to buy a box of matches. He took the box of matches and tendered a five rupee note for the price. Since the complainant did not have the necessary change he took the box of matches and the rupees five to get it changed. Later, the complainant went in that direction and apprehended the accused with a police officer when the accused was returning having changed the five rupee note. In this state of evidence Pereira, J., held that on the facts proved, it could not be safely said that the accused appropriated or converted to his own use the box of matches. It was also held that the accused did not intend to cause wrongful loss to the complainant. The accused was accordingly acquitted of the charge. However, in the judgment, there is a passage which states that there could be no criminal misappropriation unless the possession of the thing alleged to have been misappropriated was come by innocently. It is clear from the judgment that the accused was found not to have been dishonest at that stage and the acquittal is properly referrable to the other grounds stated above.

In the case of *Attorney-General v. Menthis*[4] the Crown filed an appeal against an acquittal entered by the Magistrate of an accused charged with criminal misappropriation. The charge related to two bulls who had been let loose to graze on a pasture land by the complainant. The accused was seen driving these two bulls about 1 1/2 miles away

from the pasture land. There was no evidence as to how he came by the two animals. The learned Magistrate found the accused not guilty on the basis that to constitute criminal misappropriation there must be an initial innocent taking followed by a subsequent change of intention. In appeal Sinnetamby, J., considered all previous authorities and set aside the acquittal. As regards the question of an initial innocent taking, Sinnetamby, j., held as follows at p. 565 :

> "In my opinion, therefore, in order to constitute criminal misappropriation under our law it is not necessary that there should be an innocent initial taking. If the initial taking of the property not in the possession of anyone is dishonest then too the offence is made out..."

In *Wijendra's case* (Supra) the accused was convicted on two charges of cheating and criminal misappropriation. Both offences related to the same sum of money, of Rs. 20, taken by the accused from the complainant on the basis that the parcel which the accused gave, contained three cartons of cigarettes. Whereas, in fact the parcel contained only cardboard boxes filled with pieces of paper. Weeramantry, J., upheld the conviction and the sentence of imprisonment on the charge of cheating. As to the charge of criminal misappropriation it was held that the accused could not have been convicted of the charge because the initial taking of the property was not innocent. Weeramantry, J., considered the decision in *Menthis's case (Supra)*. The observations made in this regard seem to suggest that the ratio in that case should be restricted to situations where the offence is committed in respect of property not in the possession of anyone. The judgment does not specify the basis on which this distinction is made. However, the duality of criteria which this distinction postulates would lead to the following questions : Is it permissible to consider the ingredients of the offence as being different depending on the circumstances in which the offence is committed ? If a person dishonestly takes property not in the possession of anyone and converts that property to his own use is guilty of the offence of criminal misappropriation ; why should a person who does a similar act with a similar state of mind, but in relation to property in the possession of another be not guilty of that offence ? In my view an answer to these questions should be found to prevent our law on this aspect also sliding into a "somewhat bewildering state", (a phrase used by Weeramantry, J., to describe the previous state of the law relating to the offence of larceny in England).

Whatever may have been the approach in early years, the current approach to this aspect by the Courts and the text writers in India, appear to be clearcut and simple. In Gour's Penal Law of India (1984), 10th Edition, p. 3453 it is stated as follows :

> "The argument that criminal misappropriation cannot be committed if the accused had dishonest intention at the time of taking possession of the article, cannot be accepted. The complainant has the choice ; if he thinks that he can make out a case of dishonest intention while taking delivery of article he can charge the accused with cheating ; otherwise he is entitled to charge the accused with criminal misappropriation. If the prosecution proves a case of Section 403, I.P.C., the accused by proving that he had a dishonest intention at the time of taking delivery of the article cannot change the nature of the offence to that of cheating. The Criminal Procedure Code does not contemplate any such change in the nature of the offence committed by an accused ; If it did, it would have consistently with dictates of justice allowed him to be convicted for the offence made out even though not charged with it . . . .".

The words in the foregoing passage are taken mainly from the judgment of Deasai, J., in the case of *Rajendra v. State of Uttar Pradesh* (5).

The gravamen of the submission of Counsel for the Appellant is that according to the evidence, the accused was dishonest well before he got the money into his hands ; that although he subsequently misappropriated the money of the M. P. C. S., in view of his antecedent dishonesty he cannot be convicted of the offence of criminal misappropriation. In other words, he is more dishonest than what is alleged in the indictment, so he is not guilty of the offence. It is seen from the foregoing passage that in the compendious work titled Gour's Penal Law of India a similar argument is dismissed in one sentence. But the confilicting decisions in our country lead me to further inquiry.

Section 386 of the Penal Code merely states that "who ever dishonestly misappropriates or converts to his own use any movable property shall be punished..". *Prima facie,* these words imply that there are two basic ingredients to the offence. A mental element of dishonesty and an act of misappropriation or conversion of movable property to his

own use by the accused. There are no words in this section which require that the *mens rea* of dishonesty should be preceded by an innocent state of mind. In these circumstances it has to be noted that the observations in the two old cases and in *Wijendra's case* basically import an additional qualification to the offence which does not *prima facie* form one of the ingredients under the definition. It is also seen that at various stages this additional qualification has been differently described. In certain passages it is stated that the offence would not be made out if the property is taken with a dishonest intention or a guilty state of mind. In other passages it is stated that to constitute the offence there should be an innocent taking. In the judgment of Weeramantry, J., itself both formulations are used at different stages. Although, superficially both formulations may relate to the same matter, it has to be noted that dishonesty or guilty state of mind relates to the mental element whereas innocence would embrace not only the mental element but also the acts.

In view of the submission of Counsel it is necessary to discern the precise ratio in *Wijendra's case* and thereby to ascertain the limits of the qualification made by Weeramantry, J., to the offence of criminal misappropration. The ratio of any judgment should properly be ascertained in relation to the facts of the particular case. From the fact in *Wijendra's case*, it is seen that the accused committed the offence of cheating, of which he was found guilty, when he took the money from the complainant. Therefore, the finding in the case is that where an accused has committed the offence of cheating, he cannot in addition be convicted of the offence of criminal misappropration of the same property in respect of which the offence of cheating was committed. It is in this context that Weeramantry, J., introduced a qualification to the offence of criminal misappropriation, that to constitute the offence there should be an "initial innocent taking of the property." The word "innocent" here, should be considered as connoting a state of being not guilty of an offence : Because, if at the time of the initial taking itself, the accused is guilty of an offence he should be convicted of that offence and not of the offence of criminal misappropriation. the objective of Weeramantry, J. in introducing this qualification was to preserve the lines of demarcation between the offence of criminal misappropriation and the other offences such as theft and cheating and no more. This is borne out by the following passage taken from the concluding paragraph of the judgement (at p. 43) .

"It is my view upon a review of all the authorities that in the case of a change of criminal misappropriation where the property is taken from the possession of another, such initial taking must be innocent, for this is the feature which marks out this offence from the offence of theft and other offences which may be committed. To view this matter otherwise may result in obscuring the line of demarcation between criminal misappropriation and such offences as theft and cheating.."

Such a qualification may be necessary if this matter is viewed from another perspective. In a situation where at the time of the initial taking of the property of an offence such as theft or cheating has been committed, the property in the hands of the accused, would be stolen property as defined in Section 393 of the Penal Code. Such property could be the subject of any of the offences specified in Sections 394, 395 or 396 regarding stolen property. But, it is clear from the words of Section 386 and the several illustrations to that section, that the offence of criminal misappropriation is not intended to encompass situations where a person misappropriates or converts to his own use the proceeds of another offence.

On the other hand, if at the time of the initial taking of the property the accused is not guilty of another offence such as theft or cheating but there is evidence that he had a dishonest intention, that by itself would not negative an offence of criminal misappropriation subsequently committed in relation to that property. Dishonest intention is the element of *mens rea* of the offence of criminal misappropriation as defined in Section 386 of the Penal Code. The commission of the offence should be accompanied by such intention. Although there are some illustrations to the section which reveal that dishonesty may be preceded by an innocent or neutral state of mind, the presence of such an innocent or neutral state of mind at the time the property is initially taken is not a prerequisite of the offence. Furthermore, dishonesty is the element of *mens rea* in relation to all three offences of theft, cheating and criminal misappropriation. Lines of demarcation cannot be drawn in respect of these offences only with reference to the element of *mens rea*.

Upon the foregoing analysis I am of the view that a person could be found guilty of the offence of criminal misappropriation even if there is evidence to the effect that he had a dishonest intention at the time he

initially took the property being the subject of the offence. But, in view of the lines of demarcation between the offences of theft, cheating and criminal misappropriation, the latter offence, would not be made out where at the time of the initial taking of the property the person is guilty of one of the other offences. Such property should then be designated stolen property within the meaning of Section 393 of the Penal Code and would not come within the purview of offence of criminal misappropriation as defined in Section 386. The foregoing view of this aspect relevant to the offence of criminal misappropriation is consistent with the *rationes* of the decisions in the cases of *Attorney General v. Menthis* (Supra) and *Ranasinghe v. Wijendra* (Supra). In *Menthis's case* according to the evidence, the initial taking of the property itself was dishonest. However it could not be said that the accused was guilty of an offence at the time of the initial taking itself because the property was not in the possesion of any person. The offences of theft or cheating are not committed where the property taken is not in the possession of any other Person. Similarly, such taking would not constitute any other offence under the Penal Code. Therefore the property did not constitute stolen property at the time of the initial taking and the accused could rightly be convicted of the offence of criminal misappropriation. In *Wijendra's case* the accused was guilty of the offence of cheating at the time of the initial taking of the property. Therefore the property should be considered as stolen property and the accused would not be guilty of an offence of criminal misappropriation in relation to it. Thus it is seen that the view formulated above would be consistent with the lines of demarcation of the several offences under the Penal Code. In my view the observation in one sentence of the judgment of Weeramantry, J., which states that the accused cannot be convicted of the offence of criminal misappropriation because the initial taking of the property was "with a guilty mind", should be considered as obiter. As repeatedly observed, in *Wijendra's case* at the time of the initial taking of the property the accused was guilty of the offence of cheating and that should be considered the true basis of the decision.

The application of the foregoing test to a case where the accused is charged with the offences of criminal misappropriation or criminal breach of trust and another offence such as cheating or theft, would be straightforward. However, where the accused is charged with only criminal misappropriation or criminal breach of trust it has to be considered whether on the evidence the offences of cheating or theft are

committed at the time of the initial taking of the property. If it could be said beyond reasonable doubt that such an offence is committed at the time of the initial taking of the property the accused could not be found guilty of the offence of criminal misaporopriation or criminal breach of trust. The question to be then decided is whether the conviction could be appropriately entered in terms of Section 177 read with Section 176 of the Code of Criminal Procedure Act, No. 15 of 1979. For the reasons stated below it would not be necessary to consider that aspect in this case.

As regards the submission of Counsel for the Accused-Appellant referred to above, the only evidence relied upon to establish that the initial taking itself is constituted an offence, is that of witness Ramawathie. As noted above she stated that in view of the entries in P44 she would not have made requests for money to the accused at the relevant times. Even if full weight is attached to this evidence, in my view it would be only evidence of irregularity in procedure. The accused could then be considered as having withdrawn money at a time when he should not have done according to the prescribed procedure. However, the accused was the Manager of the Bank and the superior officer of witness Ramawathie. In these circumstances he could well have envisaged the need to have extra cash in the bank and taken necessary steps even without a request from Ramawathie. Assuming that he submitted the vouchers, when he should not have done, that by itself would not constitute the offence of cheating. There would be no evidence of a dishonest intention. The evidence of the dishonest intention really comes from his subsequent conduct, in his failure to hand over the money received from Devasurendra to Ramawathie. This is in fact the act of misappropriation. In the circumstances, the facts do not in any way warrant a finding that the accused was guilty of the offence of cheating at the time of the initial taking of the property from Devasurendra. From the act of misappropriation, it may be possible to draw an inference that the accused entertained a dishonest intention from the time he submitted the vouchers. However, this would in no way constitute a basis to negative the offence of misappropriation (criminal breach of trust) committed by the accused.

Counsel for the Accused-Appellant also relied on a passage found at page 3486 of Gour's Penal Law of India (10th Edition), which states that there could be no entrustment to constitute the offence of criminal breach of trust if the confidence associated with entrustment is obtained

as a result of a trick or cheating. It would indeed be so. As noted above if the taking of the property itself constitutes an offence of cheating, the property so taken would not come within the purview of the offences of criminal misappropriation and criminal breach of trust. The correct test in my view is to ascertain whether the accused is guilty of another offence such as theft or cheating, at the time of the initial taking of the property. I have already held that the evidence in the case does not in any way warrant an inference that the accused was guilty of the offence of cheating at the time of the initial taking of the property. In these circumstances I see no merit in the submissions made by Counsel for the Accused-Appellant. I accordingly uphold the conviction of the Accused-Appellant.

The learned High Court Judge has imposed a sentence of 2 years' R I , and a fine of Rs. 50,000 in default 1 1/2 years' R. I. For the following reasons I am of the view that a substantive term of imprisonment should not be imposed on the Accused-Appellant :

(1) A period of almost 13 years has elapsed since the commission of the offence ;

(2) As a necessary consequence of this conviction the Accused would loose his employment and the benefits related to such employment ; and

(3) A substantial fine has been imposed, which in my view would meet the ends of justice.

I accordingly set aside the term of 2 years' R. I., and sentence the Accused-Appellant to a term of 2 years' R.I., the operation of which is suspended for a period of 5 years. The learned High Court Judge of Matara is directed to comply with the provisions of Section 303 subsection (4) and (6) of the Code of Criminal Procedure Act, No. 15 of 1979 regarding the suspended term of imprisonment. I affirm the fine of Rs. 50,000 and the default sentence imposed by the learned High Court Judge. The learned High Court Judge of Matara is directed to effect recovery of this fine and to order its payment on such instalments, as may be considered appropriate. Subject to the foregoing variation in the sentence the appeal is dismissed.

W. N. D. Perera, J.– I agree.

Appeal dismissed. Subject to variation in sentence.