PANTIS
v.
THE ATTORNEY-GENERAL

COURT OF APPEAL
WIJEYARATNE, J. AND
WEERASEKERA, J.
C.A. NO. 51/87
H.C. KANDY NO. 140/85
AUGUST 23 & SEPTEMBER 2 AND 9, 1993

Criminal Law – Breach of trust – Burden of proof – Explanation by accused – Absence of prejudice.

Where an accused was indicted in the High Court on 2 counts, that being the Manager of a Co-operative Society he did commit criminal breach of trust (1) of cash Rs. 73,132/78 and (2) of paddy valued at Rs. 61,401/12 and the Judge had stated in his judgment that it is difficult for the prosecution to prove the manner in which the accused dishonestly converted this property to his own use and it is the duty of the accused to give an explanation to satisfy Court.

Held:

1. The Judge should have avoided using such language as the burden of proof is always on the prosecution to prove its case beyond reasonable doubt and no such duty is cast on the accused and it is sufficient for the accused to give an explanation which satisfies Court or at least is sufficient to create a reasonable doubt as to his guilt.

2. As the trial Judge was a trained Judge who would have been aware that the burden of proof was on the prosecution to prove its case beyond reasonable doubt if a reasonable doubt was created in his mind as to the guilt of the accused he would have given the benefit of that doubt to the accused and acquitted him.

3. Further misstatement has not prejudiced the substantial rights of parties or occasioned a failure of justice and there was ample evidence to justify the convictions.

Cases referred to:

1. *Gunatunga v. The King* 53 N.L.R 522
2. *Koch v. Nicholas Pulle* 3 N.L.R 198
3. *The King v Ragel* 5 N.L.R 314
4. *Rex v. Seneviratne* 15 C.L. Rec 57
5. *The King v. Pulle* 12 N.L.R 63

6. *The King v. Foenander* 48 N.L.R 327
7. *Sumanadasa v. The State* 78 N.L.R 31
8. *Kanapathipillai v. Fernando* 73 N.L.R 124

APPEAL from the judgment of the High Court of Kandy.

R. I. Obeysekera, P.C. with *A. W. Yusuf* and *Sanjeewa Jayawardena* for accused-appellant.

Rienzie Arsecularatne, S.S.C for the Attorney-General.

Cur. adv. vult

November 05, 1993

WIJEYARATNE, J.

In this case the accused-appellant was found guilty of two amended counts in an indictment which, after the amendments, read as follows:-

(1) That between 1.1.77 and 4.8.77, while being the Manager of the consumer section of the Morayaya branch of the Minipe M.P.C.S., did commit criminal breach of trust in respect of goods to the value of Rs. 73,132/78, an offence punishable under section 391 of the Penal Code.

(2) That between 2.4.77 and 3.8.77, while being the Manager of the granary section of the Morayaya Branch of the said Minipe M.P.C.S., did commit criminal breach of trust of 84,059 lbs. of paddy valued at Rs. 61,441/12, an offence punishable under section 391 of the Penal Code.

At the trial R. M. Ran Banda (Inspector of Co-operative Societies), A. Margueret Abeygunasekera (an employee of the Minipe M.P.C.S.), R. B. Bisso Kumari (a clerk of the Minipe M.P.C.S.), Y. M. Nanda Yaparatna (a clerk at Minipe M.P.C.S. during this period), W. M. Hema Kumarihamy (an employee of Bibile M.P.C.S.), D. Lakshmi de Silva (an employee of the Rural Banking Section of Minipe M.P.C.S.), H.M. Anulawathie (an employee of Minipe M.P.C.S.), and Police Inspector E.M.S.B. Ekanayake (who made inquiries this case and took charge of productions) gave evidence for the prosecution.

The prosecution closed its case leading in evidence productions P1 to P94.

On behalf of the defence the accused-appellant himself gave evidence and called as witnesses R. B. Ekanayake (General Manager of Morayaya Co-operative Union from 1972 during the relevant period, and K. Heen Banda Ekanayake (Accountant of Morayaya Co-operative Union from 1973 to 1980).

The learned High Court Judge found the accused-appellant guilty on the two amended counts and sentenced him to three years' rigorous imprisonment and a fine of Rs. 100, in default one month's rigorous imprisonment on the first count.

He also sentenced the accused-appellant to three years' rigorous imprisonment on the second count and a fine of Rs. 100, in default one month's rigorous imprisonment.

The jail sentences were to run concurrently.

From this order the accused-appellant has filed this appeal.

At the hearing Mr. R. I. Obeysekera, P.C., for the accused-appellant submitted that the learned trial Judge has placed too heavy a burden on the accused by stating that the accused should give an explanation regarding the shortages **which would satisfy the court.** He submitted that this amounted to placing too heavy a burden on the accused. It is sufficient in law for the accused to give an explanation which satisfies the trial judge or **at least an explanation which is sufficient to create a reasonable doubt as to his guilt.** Therefore he submitted that, since the learned trial Judge has misdirected himself by placing a heavier burden than warranted by law, on that ground alone the conviction should be set aside.

He also submitted that the trial Judge has confused the charges in this case with a charge under section 392A of the Penal Code where a duty is cast on the part of a public officer to produce the money shown in the account kept by him or duly to account therefore as laid down in the decision in *Gunatunga v. The King*[1]. He submitted that in this case the charge was not under section 392 A but under section 391 of the Penal Code and therefore no such burden lies on the accused but the burden is always on the prosecution.

At this stage it is appropriate to refer to the passage in the judgment of the learned High Court Judge which is in Sinhala and which reads as follows:

'මෙවැනි නඩුවකදී පැමිණිල්ලෙන් විත්තිකරුවකු බඩු සාවද්‍ය ලෙස පරිහරණය කළ ආකාරය ඔප්පු කිරීම අපහසු කාර්‍යයකි. ඉහත සඳහන් නඩු තීන්දුව අනුව විත්තිකරුට මෙම භාණ්ඩ අඩුවීම සම්බන්ධයෙන් අධිකරණය සෑහීමකට පත්විය හැකි ප්‍රකාශයක් කිරීමට යුතුකමක් තිබුණි. විත්තිකරු සාක්ෂි කුඩුවේ සිට දී ඇති සාක්ෂියෙන් ඔහු වංක ලෙස මොරයාය ප්‍රාදේශිකයේ පාරිභෝගික අංශයෙන් හා වී අංශයෙන් භාණ්ඩ සාවද්‍ය ලෙස පරිහරණය කළ බව ඔප්පු වී ඇති බව නිගමනය කරමි. 1 සහ 2 වැනි සංශෝධිත චෝදනාවලට විත්තිකරු වැරදිකරු කළෙමි.'

I agree that the learned trial Judge should have avoided using such language which means that there is a burden on the accused to give an explanation which satisfies the court.

The burden of proof is always on the prosecution to prove all ingredients of the charge beyond reasonable doubt and there is no burden in our law for the accused to give any explanation (unless in certain cases where specific provision is made by law). In my view it is sufficient if the accused gives an explanation which satisfies the court or at least is sufficient **to create a reasonable doubt** as to his guilt.

It should be kept in mind that the trial Judge was a trained judge who would have been aware of the fact that the burden of proof is always on the prosecution to prove a case beyond reasonable doubt. Therefore if a reasonable doubt was created in his mind, no doubt he would have given the benefit of that doubt to the accused and acquitted him on the charges.

In any event I am of the view that the matter is governed by Article 138 (1) of the Constitution (as amended by the Thirteenth Amendment) which reads as follows:

> "138 (1) The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be (committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance), tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and **restitutio in integrum**, of all causes, suits, actions, prosecutions, matters and things (of which such High Court, Court of First Instance) tribunal or other institution may have taken cognizance:

Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."

This is a fit case to apply the proviso above as this misstatement of the law has not occasioned in a failure of justice or prejudiced the substantial rights of the accused as there is ample evidence to justify the conviction.

Further Mr. Obeysekera criticised the statement made in the aforesaid portion of the judgment wherein the learned trial Judge has stated that the accused by his own evidence while in the witness box proved that he had dishonestly misappropriated goods from the consumer section and the paddy section of the Morayaya branch. The learned Judge has said so because the accused himself admitted and acknowledged some of these shortages and the learned Judge has rejected his attempts to explain them away. The accused has stated that the Police officers and persons from the Co-operative Society who brought him from his house got him forcibly to sign certain documents. The accused has gone on to say that he was not in his proper senses and that he went to the Police Station and the Police did not record his complaint. However the accused-appellant has never stated that he made any complaint to any higher Police officer in this connection. The accused admitted his signatures on several forms where he had taken the responsibility for shortages. On one occasion at the stock taking on 3.8.77 the accused-appellant was absent and he had delegated witness Lakshmi de Silva to be present at that stock taking.

The accused-appellant attempted to say that there was a disturbed situation arising out of the Elections of July, 1977, but there is no evidence that this led to any large scale pilfering of goods or cash by unruly elements.

Mr. Obeysekera also submitted that a mere shortage of goods is not sufficient to prove the charges against the accused-appellant and invited the attention of court to several decided cases including that of *Koch v. Nicholas Pulle*[2], The *King v. Ragel*[3], *Rex v. Seneviratne*[4], *The King v. Pulle*[5], *The King v. Foenander*[6] and *Sumanadasa v. The State*[7]. However in *Koch v Nicholas-Pulle* (supra) Lawrie J. stated:

"That in all cases under this section the explanation by the servant is an important part of the evidence before the Jury or the Court. Does the explanation satisfy the Court that there has been no dishonesty, no criminal breach of trust or does it contain admissions or statements from which either the guilt of the accused is proved or guilt may reasonably be presumed?"

Another important case is *Kanapathipillai v. Fernando*[6] where Thamotheram, J. considered several decisions and stated the principle that in a prosecution for criminal breach of trust an inference of dishonest misappropriation or conversion can reasonably be drawn if the true facts are not capable of any innocent explanation and the accused has not at any stage attempted an explanation or his explanation is rejected as untrue and false. In my view this judgment of Thamotheram, J. sets out succinctly the legal position.

It is not enough for the prosecution merely to prove that the clerk or servant who is charged has not accounted for all the money and or goods that he has received and for which he was bound to account for; there may be other explanations for the deficiency besides dishonesty and the prosecution must prove circumstances from which dishonesty can be inferred. Such a circumstance in the present case is an explanation given by the accused which would apparently have been easily capable of proof but which is not proved and which the court has disbelieved or rejected.

In this case the explanation of the accused has been rejected and rightly rejected.

On a consideration of all the evidence in the case the prosecution has proved both the charges against the accused beyond all reasonable doubt. Therefore I affirm the convictions on the two counts.

Mr. Obeysekera finally made a submission that since this offence occurred in 1977 and the accused was found guilty in 1987 and this appeal has come up another six years later this is an appropriate case where this court should delete the jail sentence.

I have carefully considered the question of sentence. In this case the sums involved are Rs. 73,132/78 and Rs. 61,441/12 and these had a very much higher value in the period when these offences were

committed. During this period these sums of money had a very big value. Since then owing to an inflation the value of money has eroded very much. I have to keep in mind that these sums of money had a very high value during the period when these offences were committed.

When the accused gave his evidence on 14.7.87 he gave his age as 39 years and now he must be about 45 years old. However these are very serious offences particularly in institutions like Co-operative Societies which are meant for the benefit of the public.

In my view, if at all the sentences have erred on the side of leniency; this is not a case where this court should interfere with the sentences that have been imposed.

For these reasons the conviction and sentences are affirmed and the appeal is dismissed.

WEERASEKERA, J. – I agree.

Appeal dismissed.