

1946

*Present : Cannon and Cankeratne JJ.*THE KING *v.* CASPERSZ.129—*D. C. (Criminal) Trincomalee, 293.**Criminal breach of trust—Meaning of “dishonestly”—Penal Code, ss. 21, 22, 388, 392—Sentence—Circumstances when fine is sufficient punishment.*

Where the accused, an Executive Engineer in the Public Works Department, overpaid certain overseers out of money entrusted to him by the Government and made entry of the overpayments under a fictitious heading of expenditure—

*Held*, that the accused had, by intentionally causing wrongful gain to the overseers and wrongful loss to the Government, acted dishonestly within the meaning of section 22 of the Penal Code and was guilty of the offence of criminal breach of trust.

Where a fine and its consequences are sufficient punishment the Court would not impose a sentence of incarceration.

**A** PPEAL against a conviction from the District Court of Trincomalee

*H. V. Perera, K.C.* (with him *S. N. Rajaratnam*), for the accused appellants.

*H. H. Basnayake, Acting Attorney-General* (with him *R. A. Kannangara; C.C.*), for the Crown.

March 7, 1946. CANNON J.—

The appellants were charged under section 392 of the Penal Code that between April 10 and May 19, 1944, at Trincomalee, he being entrusted in his capacity as a public servant, namely, Executive Engineer, Public Works Department, Trincomalee, 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 mileposts on the Trincomalee-Batticaloa road, committed criminal breach of trust in respect of the sum of Rs. 6,218.48 out of the said money. Evidence was led giving particulars of the accused's position and that in January or February, 1944, he was required to make an estimate for the construction of the road mentioned. This estimate he made for Rs. 100,000 which included an item of Rs. 15,000 for rubble bottoming. The estimate was approved, and in fact the work was begun before the estimate was approved on account of urgency, as the road was required for military purposes. Contractors called “overseers” contracted to work on the road at certain rates but the accused overpaid them because they represented to him that they were sustaining losses and could not carry on without compensation and he told them that they should put their losses under the fictitious heading of “rubble bottoming,” the rubble bottoming having been omitted from the work. It was understood that he would be unable to get the increased amounts without undue delay if at all.

The defence did not contest these irregular payments or that they were made under those circumstances, but the defence relied on an explanation which had been given by the accused to his superior officer when he began an investigation on or about the 28th of May. In this explanation the accused admitted that he had made irregular payments of the amounts mentioned in the charge but said that he had done so on account of an emergency which had arisen and to avoid undue delay in

the work which would be caused by applying for and obtaining the required additional funds. He said that when he was instructed to supervise the work he was threatened with dismissal by the Commander-in-Chief if it were not done expeditiously, and he was further informed that the Minister of Communications had said that cost was of secondary importance in this particular matter. Further to show the urgency of the matter he said that the Director of Public Works had authorized a one hundred per cent. increase in wage rates for labourers instead of the fifty per cent. which had been given over the rest of the Island. In spite of this, however, the overseers met with labour difficulties and complained that they were sustaining loss for which they demanded compensation adding that without it they would be unable to carry on with the work. These losses he said were sustained by them in the cost of labour, recruiting labour, food, living costs, advances and desertions, the daily expense of keeping labourers on the site of the works and many other overhead charges. He felt that he must meet their demands at once and in order to do so resorted to the approval of a fictitious entry in the place of expenditure for rubble bottoming which was not in fact done. The defence further relied on the cross-examination of the witnesses for the Crown which elicited from the P. W. D. officials' evidence about the urgency of the work and the Minister of Communications' letter directing that cost would be regarded as of secondary importance, and further that there were labour difficulties and that disproportionate rates of wages were being paid in the Trincomalee area. The defence also elicited from five overseers who gave evidence that they were paid the money under the fictitious entry and that they had incurred loss for which the money was compensation. The accused was not called to give any further explanation of the matter and the District Judge convicted him and sentenced him to six months' imprisonment.

For the appellant Mr. Perera submits that the amount mentioned in the charge was not earmarked for the construction of this road and therefore the conviction is wrong. There does not seem to be any clear evidence that the amount was earmarked for the road, but if it was not there is evidence that there was money placed by the Government at the Bank at the disposal of the accused for meeting the cost of public works of which he had the supervision, and undoubtedly this road constituted part of those public works. I do not think, therefore, that there is substance in that contention. It was further submitted that the District Judge in his judgment had mentioned that he had come to the conclusion that the accused had criminally "misappropriated" the funds. Technically, there was no "misappropriation" of funds and therefore the District Judge's finding was unsupported by the evidence. I think the District Judge used the word "misappropriation" in order to express his meaning that the accused had misapplied those funds, and that is borne out by the fact that the District Judge immediately after making that remark proceeds to say "I find him guilty under section 392" which is the charge in the indictment. Mr. Perera further contends that the evidence given by the Crown witnesses, coupled with the accused's explanation, shows that the breach of trust was not dishonest because the overseers state that the money was paid for work which was in fact done. He

omphasises the circumstances in which he submits the accused was placed, namely, his mental state in view of the position of urgency with which he was faced and his fear of dismissal if there was any delay ; that he had received an ultimatum from the overseers and therefore delay would have been inevitable unless he had paid them as he did ; that the accused had therefore been actuated by the paramount importance of the work, the ultimatum of the overseers, and his fear of inevitable delay if the compensation demanded by the overseers was not immediately paid to them. It therefore becomes necessary to discuss the meaning of the word "dishonest" according to the Penal Code, and it appears to have nothing to do with probity.

Section 22 of the Penal Code defines "dishonestly" as follows : "Whoever does anything with an intention of causing wrongful gain to one person or wrongful loss to another is said to do that thing dishonestly." The words "wrongful gain" and "wrongful loss" are explained by section 21 which reads :—

- (1) Wrongful gain is gain by unlawful means of property to which the person gaining is not legally entitled.
- (2) Wrongful loss is the loss by unlawful means of property to which the person losing it is legally entitled.

The issue then is :— Did the accused, when he authorized this payment under a fictitious head to the overseers, intend to cause wrongful gain to the overseers or wrongful loss to the Government ? This view of the meaning of "dishonestly" in the section is held in India and was adopted in All India Reports, 1944, Calcutta, page 92. One must, I think, judge a person's intention from what he does and what must appear to him at the time as the natural consequences of his act. It seems to me, therefore, that there can be no doubt that the accused knew quite well that by so acting he was causing wrongful gain to the overseers and wrongful loss to the Government. As regards his state of mind, his explanation that the delay was inevitable and the submissions made about that, it is to be observed that the documentary evidence shows that the Government was taking a keen and active interest in the construction of this road and that the Minister of Communications wrote that cost in regard to its construction was to be regarded as of secondary importance. This should, it seems to me, have indicated to the accused that any application by him for the immediate sanction of necessary increases would have been sympathetically received and quickly dealt with. There is further the fact that the Government was requiring from him fortnightly reports on the progress of this work and in one column of the report forms there was a special head "Explanation for delay". Again, it would seem natural for the accused to have put in that column something about these demands of the overseers, but I have examined all these fortnightly reports and nothing of that nature appears in that column. He also knew that Mr. Leader, the then Director of Works, had without any difficulty or delay granted him in a personal interview sanction for the one hundred per cent. increase which I have already mentioned. Another point is the lack of intelligence that is conveyed about the amounts, and I think the District Judge is correct when he remarks "I am unable to

find even a very rough relationship between the alleged losses and the amounts expended on the whole work during the relevant period." The amounts too were large being sums of Rs. 400, 800, 1,000, &c., and here again there is not in the evidence, either oral or documentary, anything to show how these amounts of alleged losses were computed, or whether they were checked at all by the accused.

I have been impressed by Mr. Perera's argument that the overseers' evidence that they 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 when one comes to consider the documentary evidence in the case, namely, the Minister's letter, the fortnightly reports and the figures together with the fact that there is no evidence that the accused consulted any of his superior officers about them or made any report to them on the matter until the investigation was begun, this documentary and oral evidence leads me to the conclusion that the overseers' evidence does not rebut the inference of intention by the accused. The documentary evidence indicates to me that the accused had no reasonable ground to fear undue delay, and if in fact he did fear undue delay, he took no reasonable steps to counteract it. In fact the evidence I have mentioned appears to me to be *prima facie* evidence that he was not acting *bona fide*. For these reasons we are unable to disturb the order of the District Judge convicting the accused.

Mr. Perera has, however, addressed us on the question of sentence which was one of six months' imprisonment and submitted that this is not a case where a sentence of imprisonment should be imposed without the option of a fine. It seems to me that if it were a case for imprisonment the sentence passed is inadequate but I agree that in the particular circumstances the accused should be given the option of a financial penalty for these among other reasons: He has attained from the ranks the high and responsible position of Executive Engineer and has served the State in the Public Works Department for some 29 years without complaint. He is 45 years of age and has a family of five, and unlike what one might say the ordinary person he is likely to lose his pension rights. Moreover, I expect that he will be dismissed from the Service. These consequences then are in my opinion sufficient punishment without adding that of incarceration. And further the Crown has in fact suffered no loss because the money has been refunded. For the sentence of imprisonment I substitute a fine of Rs. 500 and imprisonment till the rising of the court. If the fine is not paid within one month the sentence will stand.

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 committing Magistrate to sit at the trial on the Bench when the Judge is the Judge of fact as well as of law as he was in this case. I agree with that opinion.

CANEKERATNE J.—I agree.

*Conviction upheld.  
Sentence altered.*