

1960

Present: H. N. G. Fernando, J.

ARIYARATNAM, Appellant, and S. I. POLICE, Respondent

*S. C. 88—M. C. Kandy, 2522**Penal Code—Section 392A—Criminal breach of trust by public servant in respect of money or balance of money—Ingredients of offence.*

In a prosecution under Section 392A of the Penal Code for criminal breach of trust by a public servant, an essential ingredient of the offence is the failure of the accused to pay money or to account for money when required to do so by an officer mentioned in the Section.

APPEAL from a judgment of the Magistrate's Court, Kandy.

Colvin R. de Silva, with *M. M. Kumarakulasingham* and *S. Saravanan-muttu*, for the Accused-Appellant.

P. Colin-Thome, Crown Counsel, for the Attorney-General.

August 5, 1960. H. N. G. FERNANDO, J.—

The appellant has been convicted on a charge under Section 392A of the Penal Code in respect of a sum of just under Rs. 2,000/-. That Section makes punishable the failure by a Public Servant either to pay over or produce money or balances apparently due according to accounts kept by him in his official capacity, or else to duly account for such money or balances. But no offence arises unless there is such a failure when the Public Servant is required (to pay over, produce or account) by one of the officials mentioned in the Section. In its amended form the only officials whom the Section mentions are, The Secretary to the Treasury or the Deputy Secretary to the Treasury, The Auditor General, The Assistant Auditor General or any officer specially appointed by the Secretary to the Treasury to examine the accounts of the Department concerned. It will be seen that in order to bring the Section into operation there must, first, be a requirement addressed to the Public Servant either by one of the functionaries expressly mentioned or else by an officer specially appointed by the Secretary to the Treasury to examine the accounts in question.

In this case the officer who addressed a requirement to the appellant was not a person holding a special appointment made by the Secretary

to the Treasury. His authority, P 1, which has been produced, purports to appoint him a deputy to the Auditor General for the purpose of examining the relevant accounts, but that authority has been granted by the Auditor General and not by the Secretary to the Treasury. The provisions in Section 392A as to the officer by whom a requirement mentioned in the Section should be given is manifestly an imperative provision and it would not be open for me to take notice of the fact that virtually speaking an authority granted by the Auditor General should be regarded as being as good as one granted by the Secretary to the Treasury.

The circumstances to which I have referred have the result that the prosecution has failed to prove an essential ingredient of the charge, namely, that there was a failure to pay money or to account for money when required to do so by an officer mentioned in the Section. The charge, therefore, must necessarily fail.

Crown Counsel has invited me to consider whether in the circumstances a conviction of an offence under Section 392 cannot be entered in substitution. Considering that the burden of proof on the prosecution in a charge under Section 392A is, even to some slight extent, of a lesser degree than that which obtains in charges framed under Section 392, I cannot agree to that. Such a course by me would entail the necessity to reach findings of fact on matters which may not have received the consideration of the trial judge.

I hold that no charge under Section 392A lies against the appellant on the facts which the prosecution are able to prove. Accordingly the appeal has to be allowed and the appellant acquitted.

Appeal allowed.
