

1947

Present : Keuneman S.P.J. and Jayetileke J.

THE KING v. FOENANDER.

S. C. 78—D. C. (Crim.) Kegalla, 2,679.

Criminal breach of trust—Shortage of property entrusted to accused—Reasonable explanation—Evidence of dishonesty—Penal Code, s. 392.

A number of parcels were entrusted at the Fort Station to the accused who was a Railway Guard to be delivered at Rambukkana. On delivery some parcels were found to be missing. The accused admitted receipt of the parcels but could not account for the shortage. His explanation was that someone had probably stolen them while he was attending to his work. There was evidence that two railway porters travelled in the van from Fort to Polgahawela.

Held, that there was no evidence of dishonesty on the part of the accused and he could not be convicted of criminal breach of trust.

A PPEAL against a conviction from the District Court, Kegalla.

E. F. N. Gratiaen, K.C. (with him *G. E. Chitty*), for the accused, appellant.

J. A. P. Cherubim, C.C., for the Attorney-General.

Cur. adv. vult.

July 11, 1947. JAYETILEKE J.—

The accused has been convicted on an indictment under section 392 of the Penal Code with having committed criminal breach of trust in respect of two bales of textiles entrusted to him on or about December 7, 1944, and sentenced to undergo rigorous imprisonment for a period of six months. The accused is a railway guard, and, on the day in question, he was in charge of the guard's van which was attached to the Up-country night mail train. The evidence shows that at the Fort Railway Station he was entrusted with the following parcels by Pelis, a railway policeman, to be delivered to the officer in charge of the Rambukkana Railway Station :—

- (1) A bag of forage.
- (2) A parcel of newspapers.
- (3) A letter with a cheque enclosed.
- (4) (a) Two bundles of beedies,
(b) Two bales of textiles.
- (5) Three service letters.

Pelis issued to him four waybills in respect of items 1, 2, 3, 4, namely, P 4, P 5, P 6 and the original of P 2. No waybill was issued for the service letters as it was not usual to do so. Pelis prepared a summary of the waybills and parcels handed over by him to the accused (P 2) and obtained the accused's signature to it. P 2 shows that in addition to the parcels referred to above, various other parcels were entrusted to the accused to be delivered at other stations. The accused's duty was to deliver the waybills and the parcels to the officers in charge of the respective stations to which the parcels were consigned.

When the train reached Rambukkana Station the accused delivered to the officer in charge P 4, P 5, P 6 and the articles referred to in items 1, 2, 3, 4 (a) and 5. The officer-in-charge says that he asked the accused for the original of P 2 and the accused gave him a bundle of waybills and asked him to search for it, but P 2 was not in it. Just then Rayappen, the consignor of the two bales of textiles, turned up and inquired about the goods consigned by him. The accused requested him to search for the goods in the van. Rayappen did so, but did not find them. At a departmental inquiry held on January 5, 1945, the accused made a statement P 14 which was read in evidence at the trial. In that statement he has admitted that the two bags of textiles were entrusted to him and he has stated that after taking charge of the Fort parcels he had to take charge of the Colpetty parcels and to check and accept ice and various other things loaded in the waggon. He has also stated that two

railway porters travelled in his van from the Fort as far as Polgahawela. The statement taken as a whole shows that the accused could not explain what happened to the goods and that he believed that the goods had been stolen either by someone at the Fort Railway Station when he was attending to the work referred to by him or by the two railway porters between the Fort and Polgahawela Railway Stations. One of the witnesses called by the Crown supported the accused's statement that two railway porters travelled in the accused's van that night. On these facts the question arises whether the charge can be sustained. Two elements are necessary to constitute the offence of criminal breach of trust:—(1) There must be a trust. (2) There must be dishonesty. The accused was, no doubt, entrusted with property, but he would not be guilty of criminal breach of trust unless he dishonestly misappropriated or converted the property to his own use, or dishonestly used it or disposed of it in violation of any direction of law prescribing the mode in which the trust he undertook was to be discharged, or wilfully suffered some other person so to do. There is no direct evidence of dishonest misappropriation of the property by the accused in this case, nor are there any circumstances from which dishonest misappropriation may be inferred. The alterations in the road bill P 3 to which Mr. Cherubim invited our attention do not prove any dishonesty on the part of the accused even if they were made by the accused. The District Judge says in his judgment that the accused has failed to explain what happened to the goods. In saying so he has obviously lost sight of P 14. In *Koch v. Nicholas Pulle*¹ Lawrie J. said—

“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?”

The explanation given by the accused seems to be a reasonable one and I think it should be accepted. It is possible that the two railway porters stole the goods, but the accused cannot be convicted in the absence of evidence that he wilfully suffered them to do so. In *Emperor v. Ramaya*² the accused, who was the tindal of a cargo boat was entrusted with 200 hides to be carried to a steamer. On delivery on the steamer twenty-two hides were missing up on which the accused was convicted of criminal breach of trust. It was held that there was no evidence of dishonesty nor could dishonesty be inferred from the mere fact that some of the hides disappeared from the boat. The accused may have been negligent but he was not dishonest. The crew or some of them may have committed the theft but the accused could not be convicted unless there was evidence of, at least, wilful sufferance which must, at least, amount to abetment.

In *Koch v. Nicholas Pulle* (*supra*) it was held that mere deficiency in the quantity of the goods entrusted to a servant is not of itself sufficient

¹ (1898) 3 N. L. R. p. 198.

² 1 *Crim. L. J.* 908.

proof of criminal breach of trust. It must be shown that the accused disposed of the property in some way other than that in which he was bound to apply it and that in so disposing of it he did so dishonestly.

I would set aside the conviction and sentence and acquit the accused.

KEUNEMAN A.C.J.—I agree.

Accused acquitted.

