1952 *Present :* **Gratiaen J. and Pulle J.**

GUNATUNGA, Appellant, *and* THE KING, Respondent

S. C. 100—D. C. (Criminal) Panadure, 176

Criminal breach of trust by public servant—Burden of proof—Joinder of such charge with charge of falsifying accounts—Legality—Penal Code, ss. 392A, 467.

Upon a charge under section 392A of the Penal Code the burden rests on the prosecution to prove the ingredients of the offence of criminal breach of trust as defined in section 388 and that burden, so far as the element of dishonesty is concerned, is *prima facie* discharged by the failure on the part of the public officer to produce the money shown in the accounts kept by him or duly to account therefor.

A joinder of a charge under section 392A with charges of falsification of accounts under section 467 of the Penal Code would not be illegal if the accounts in question had been falsified to conceal the misappropriation which is the subject-matter of the charge under section 392A.

APPEAL from a judgment of the District Court, Panadure.

Colvin R. de Silva, with *T. W. Rajaratnam*, for the accused appellant.

Boyd Jayasuriya, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

January 31, 1952. PULLE J.—

The only point of substance urged on behalf of the appellant is that there has been a misjoinder of charges in the indictment. The appellant was at the time material to the case the postmaster in charge of the Ingiriya Post Office. On the 27th June, 1950, an examiner of post office accounts, duly authorized for that purpose made a demand on the appellant to produce a sum of Rs. 37,698.58 shown to be due to the Crown in the accounts kept by him. The appellant's failure to produce the money was the subject of the first charge against him under section 392A of the Penal Code. The second, third and the fourth charges alleged that in the course of the transaction set out in the first the appellant, with intent to defraud, made false entries in accounts sent by him to the head office. It is not necessary to refer in detail to the particulars set out in the charges relating to falsification. The case for the prosecution was that the falsification was part of a scheme to keep the head office ignorant of the misappropriation of the sum of Rs. 37,698.58 which was the subject of the first charge.

No objection was taken at the commencement of the trial on the ground of misjoinder of charges but at a later stage it was submitted that the joinder of the second, third and fourth counts with the first was illegal for the reason that the alleged falsification had no connection whatsoever with a mere failure to produce a sum of money, when the appellant was called upon to do so by an authorized officer, and that the irrelevancy of the falsification to any issue arising under section 392A rendered it impossible to treat the falsification and the mere failure to produce the money as parts of the same transaction. The learned

trial judge overruled the objection. Thereafter the prosecution withdrew the second and the third counts and the trial proceeded on the remaining counts. The reason given by the prosecution for the withdrawal of the counts referred to was to meet an allegation of embarrassment by the defence. It is not, however, easy to reconcile the withdrawal by the prosecution of the second and third counts with the retention of the fourth count.

At the close of the case for the prosecution the appellant was called upon for his defence and he gave no evidence. The learned District Judge convicted the appellant on both counts and sentenced him on the first count to one year's rigorous imprisonment and to pay a fine of Rs. 1,000, in default six months' rigorous imprisonment and to one year's rigorous imprisonment on the fourth count, the sentences to run concurrently. At the hearing of the appeal learned Counsel for the appellant conceded, and in my opinion rightly, that if an essential ingredient of an offence under section 392A of the Penal Code is the dishonest conversion of the money which the public officer concerned fails to produce when demand is made by a duly authorized officer and if, further, accounts had been falsified to conceal such misappropriation, the dishonest conversion and the falsification could be regarded as one transaction and that a joinder of a charge under section 392A with charges of falsification would not be illegal.

Dr. Colvin R. de Silva repeated the argument he put forward in the trial court. When the bare wording of section 392A is examined without reference to section 388 and without staying to consider the reason for the enactment of the new section there is much to commend the argument that the element of dishonest conversion essential to the offence of criminal breach of trust, as defined in section 388 of the Code, is not imported into the provisions of section 392A. This very contention was, however, urged by the Crown in two reported cases and was rejected by this Court. In the case of *King v. Ragal* [1] Bonser C.J., said:

> "It was sought to be argued that this Ordinance (*i.e.*, Ordinance No. 22 of 1889 which first enacted the section which is now numbered as section 392A of the Penal Code) altered the law in respect of criminal breach of trust in its most essential particular. To constitute the offence of criminal breach of trust, you must find dishonesty. In my opinion this Ordinance did not intend to make a man a criminal who had no guilty or dishonest intent: *it simply intended to facilitate proof of dishonesty, which it is often difficult to prove.* Of course, if, as in many cases it occurs, a person has falsified his accounts, then you have at once evidence of dishonesty."

This case was followed by Porter J. in *Somander v. Uduma Lebbe* [2]. We were asked to hold that the decision in *King v. Ragal* [1] was wrong as the learned Chief Justice had travelled beyond the plain words of section 392A and read into it provisions which only the Legislature could have inserted. The substance of section 392A was taken from section 1 of Ordinance No. 22 of 1889 which is described as "An Ordinance relating to criminal breach of trust by public servants in this Colony."

[1] *(1902) 5 N. L. R. 314.* [2] *(1924) 24 N. L. R. 146.*

As the law stood at that time it was a matter of utmost difficulty where a shortage of money in the hands of a public servant was discovered to specify when and what portion of the money which he is unable to account for was misappropriated. Even if the prosecution could satisfy the court that various sums of money represented by the shortage were misappropriated between two specified dates, a charge of criminal breach of trust could not be brought home. It was only in 1919 (*vide* section 7 of Ordinance No. 31 of 1919) that section 168 of the Criminal Procedure Code was amended by the addition of sub-section (2) which reads:

> "When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 179:
>
> Provided that the time included between the first and last of such dates shall not exceed one year."

I may in passing mention that it was by the Criminal Procedure Code (Amendment) Ordinance, No. 57 of 1947, that section 168 (2) was further amended by extending it to misappropriation of all manner of "Movable" property.

Again, if an examination of the accounts revealed a systematic falsification of entries by a public officer pointing to an embezzlement, the extent of which could only be a matter of speculation, he could not have been charged with falsification because section 467 of the Penal Code was then not in force. It was added to the Code in 1903. Therefore, as the law stood in 1889 one could not say that Bonser C.J. was wrong in holding that by enacting 392A the Legislature did no more than facilitate proof of dishonesty which is an essential element that the prosecution has to establish for a conviction on a charge of criminal breach of trust. In other words, upon a charge under section 392A the burden rests on the prosecution to prove the ingredients of the offence of criminal breach of trust as defined in section 388 and that burden, so far as the element of dishonesty is concerned, is *prima facie* discharged by the failure on the part of the public officer to produce the money shown in the accounts kept by him or duly to account therefor. A finding of dishonesty on the evidence taken as a whole is a pre-requisite to a conviction. In this view of the matter the false entries in the present case were so intimately connected with the misappropriation that the misappropriation and the falsification could rightly be regarded as a single transaction.

In my opinion the appeal fails and should be dismissed.

GRATIAEN J.—I agree. In my opinion the legislature did not intend, by enacting section 1 of Ordinance No. 22 of 1889 (which has since been incorporated in Chapter 17 of the Penal Code) to create a new offence, also entitled "criminal breach of trust", containing elements separate

and distinct from the elements of the substantive offence defined in section 388 of the Code. As my brother points out, the purpose of section 392A is merely to facilitate, in the case of public servants entrusted with public funds, proof of the commission of an offence defined in section 388 and punishable, as an aggravated form of that offence, by section 392. Proof of the ingredients specified in section 392A furnishes *prima facie* evidence of the dishonest misappropriation or conversion of the missing funds so as to establish the commission of " criminal breach of trust " defined in section 388. This does not mean that the accused is debarred from setting up any defence which would normally be available to a person charged with criminal breach of trust. If, for instance, he can establish facts sufficient to create doubts as to the existence of the element of *dishonesty*, he is entitled to an acquittal. Again, as Bonser C.J. indicates in *King v. Ragal* [1], it would afford a good defence if the evidence, taken as a whole, fails to satisfy the trial Judge that, notwithstanding the shortage of the cash involved, there had in fact been a *conversion* of public funds. I think, however, that the headnote to *King v. Ragal* goes too far when it states that " to justify a conviction there must be direct evidence (that is, presumably, in addition to the *facts* specified in section 392A) of dishonesty or such conduct on the part of the accused as would lead to the inference of dishonesty or dishonest intention ". On the contrary section 392A is specially designed to relieve the prosecution of the burden of proving any facts other than what is expressly mentioned in the section in order to establish *prima facie* the dishonest conversion of public funds on a date or dates which the Crown is not required (and may well find it impossible) to specify. Indeed, by a statutory fiction, section 392A regards the date on which the accused " failed to pay over or produce . . . or to account for " the missing funds as the date of the actual commission of the substantive offence, namely, criminal breach of trust by a public servant.

Dr. Colvin R. de Silva concedes that, if section 392A is to receive the interpretation which my brother Pulle and I have adopted, no plea of misjoinder arises. I agree therefore that the appeal must be dismissed.

Appeal dismissed.