No. 124 of 1931.

In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

BETWEEN—ALBERT GODAMUNE ... ... Appellant,

AND

THE KING ... ... Respondent.

Case for the Appellant.

RECORD.

1. This is an Appeal by special leave from a Judgment and Order of the Supreme Court of the Island of Ceylon delivered on the 3rd March 1931 whereby that Court answered adversely to the Appellant a question of law reserved and referred for the decision of that Court by Mr. Justice Lyall-Grant under Section 355 (1) of the Criminal Procedure Code of Ceylon (Ordinance No. 15 of 1898) after the conviction and sentence of the Appellant at a Session of the Supreme Court of the Island of Ceylon in its Criminal Jurisdiction for the Midland Circuit held at Kandy. p. 91. pp. 70-90.

2. On the 5th January 1931 the Appellant was indicted at the said

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pp. 1, 2. Session upon an Indictment containing six Counts charging dishonest misappropriation punishable under Section 386 of the Ceylon Penal Code and a seventh Count charging criminal breach of trust punishable under Section 389 of that Code.

p. 1. 3. The first Count charged dishonest misappropriation on a date between the 26th November 1927 and 21st January 1929 at Kandy of Rs. 10,000 the property of C. W. Peiris and others.

p. 1. The second Count charged dishonest misappropriation at the same time and place of the same sum, therein laid as the property of H. C. Ensor Harris.

p. 2, l. 1. The third Count charged dishonest misappropriation on a date between the 30th March 1928 and 21st January 1929 of Rs. 5,000 the property of C. W. Peiris and others.

p. 2, l. 8. The fourth Count charged dishonest misappropriation at the same time and place of the same sum, therein laid as the property of H. C. Ensor Harris.

p. 2, l. 14. The fifth Count charged dishonest misappropriation on a date between the 28th August 1928 and 21st January 1929 of Rs. 3,000 the property of C. W. Peiris and others.

p. 2, l. 21. The sixth Count charged dishonest misappropriation at the same time and place of the same sum, therein laid as the property of H. C. Ensor Harris.

p. 2, l. 27. The seventh Count charged criminal breach of trust at the same time and at the same place and of the same sum, namely Rs. 10,000, as those mentioned in the first and second Counts alleging that the said sum had been entrusted to the Appellant by P. G. Cooke on behalf of C. W. Peiris and others.

There was no charge of criminal breach of trust in respect of the said sums of Rs. 5,000 and Rs. 3,000, nor in respect of any sum alleged to have been entrusted to the Appellant by or on behalf of H. C. Ensor Harris.

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4. Before the Appellant was arraigned Counsel on his behalf submitted that the Indictment as framed was irregular and illegal and thereupon Counsel for the Crown, with the leave of the Court, withdrew the said first, second and seventh Counts and made the said fourth and sixth Counts alternative to the said third and fifth Counts respectively. p. 4, l. 13. p. 5, l. 1.

5. The Appellant pleaded not guilty to the Indictment as so amended and a jury was empanelled to try him thereon. p. 5, l. 7.

6. At the close of the Case for the Crown, Counsel on behalf of the Appellant submitted that there was no case to go to the jury, because there was no evidence that the said sums of Rs. 5,000 and Rs. 3,000 were the property of H. C. Ensor Harris when the Appellant dealt with them and because if those sums were the property of C. W. Peiris and others there was no evidence that the Appellant's appropriation of them was criminal. p. 44, l. 6.

This submission was overruled by the learned Judge. p. 46, l. 7.

7. Before the learned Judge directed the jury, Counsel for the Crown asked for leave to add a charge that the Appellant had committed criminal breach of trust on a date between the 30th March 1928 and 21st January 1929 at Kandy in respect of Rs. 5,000 entrusted to him by P. G. Cooke on behalf of C. W. Peiris and others but the learned Judge refused to allow a new charge to be added to the Indictment at that late stage. He appears, however, to have directed the jury that they could find the Appellant guilty of criminal breach of trust although that offence was not charged at all in the amended Indictment. p. 63, l. 19. p. 65, l. 2. p. 65, l. 34. p. 69, l. 44.

8. On the 10th January 1931 the jury returned a verdict finding the Appellant guilty on the said fourth and sixth Counts (which had been re-numbered second and fourth) and he was thereupon sentenced to one year's rigorous imprisonment on each of the said Counts, the sentences to run concurrently. p. 3, l. 2. p. 3, l. 8.

9. On the 17th January 1931 the learned Judge at the request of Counsel for the Appellant stated and signed a Case for the Opinion of the Supreme Court under Section 355 (1) of the Criminal Procedure Code reserving and referring for the decision of a Court two questions of law which had arisen on the trial namely :— pp. 68-70.

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p. 70, l. 20. (1) Was there evidence upon which the jury could find that the property was the property of Harris ?

(2) Can a person be convicted of criminal misappropriation of money which has been entrusted to him ?

p. 69, l. 42. He did not think it necessary to reserve or refer the question whether he was right in directing the jury that they could find the Appellant guilty of criminal breach of trust, since the jury had not in fact found the Appellant guilty of that offence.

10. The learned Judge consented in the exercise of his discretion to reserve and refer the said question whether the property was the property of Harris because he was of opinion that this was a crucial point in the case and that the question was not without difficulty. 10

p. 67, l. 9.
p. 68, l. 16.

11. On the 23rd, 24th, 25th and 26th February 1931 the Supreme Court consisting of MacDonnell C. J., Garvin S. P. J., and Dalton J., pursuant to Section 355 (2) of the said Code heard arguments upon the said two questions.

p. 75, l. 20.
p. 81, l. 5.
p. 87, l 29.

12. On the 3rd March 1931 the Supreme Court delivered their Judgment and Order holding by a majority (Garvin S. P. J., dissenting) that the first of the said two questions ought to be answered adversely to the Appellant and that accordingly the said conviction and sentence should be affirmed, and that it was unnecessary to answer the second of the said two questions. 20

p. 75, l. 24.
p. 81, l. 7.

13. Thereupon the Appellant presented to Your Majesty in Council a Humble Petition praying for Special Leave to enter and prosecute an Appeal against the said Judgment and Order of the Supreme Court and by an Order in Council dated the 29th June 1931 Your Majesty was pleased by and with the advice of his Privy Council to grant such leave.

p. 91.

14. The facts relevant for the purposes of this Appeal lie within a comparatively small compass and were not substantially in dispute.

p. 94. 15. By a Marriage Settlement dated the 17th April 1897 one H. F. Ensor Harris (erroneously described in the Indictment as H. C. Ensor Harris) settled upon certain trusts the sum of Rs. 40,000 secured 30

by a second mortgage upon an estate called "Belgodde" or "Belmont" and by an Indenture dated the 2nd August 1920 the Appellant and one W. R. Westland were appointed Trustees of the said Marriage Settlement in place of the former Trustees.

16. At all material times the said Harris was entitled to the income from the property settled by the said Marriage Settlement. p. 83, l. 4.

17. In 1920 the said Harris sold the said "Belmont" estate to one H. W. Boyagoda for Rs. 85,000 of which Rs. 40,000 was secured to the said Trustees by a mortgage on the said "Belmont" estate executed by the said Boyagoda in favour of the Trustees. Subsequently Boyagoda made default in the payment of the interest on the said mortgage and on the 30th March 1928 the Trustees obtained Judgment against him in an hypothecary action for the principal sum of Rs. 40,000 and Rs. 23,000 accrued interest. p. 71, l. 19. p. 71, l. 26. p. 68, l. 33.

18. In the meantime Boyagoda had been a party to other transactions in connection with the "Belmont" estate of a complicated character resulting in much litigation, and a Chetty named Palaniappa, who claimed as a result of such transactions to have become the owner of the said estate subject to the said mortgage in favour of the Trustees and to two other mortgages in favour of the said Harris, had purported to sell the said estate for Rs. 30,000 to a syndicate consisting of the said C. W. Peiris and four others. p. 18, l. 1. p. 19, l. 41. p. 47, l. 30. p. 56, l. 33. p. 18, l. 9.

19. In November 1927 Boyagoda was attacking in the Courts the title to the said estate both of Palaniappa and also of the syndicate, alleging as regards the syndicate that they had acquired the same under circumstances which rendered them Trustees thereof for Boyagoda. p. 56, l. 34. p. 71. l. 32. p. 83, l. 16.

20. The litigation with Boyagoda in which the said syndicate thus became involved ultimately terminated in an Appeal to the Privy Council No. 78 of 1930 in which the details of the said transactions were reviewed, but only general evidence as to Boyagoda's attitude was given in the present case and for the purposes of this Appeal it is sufficient to state that as a result of Boyagoda's attitude the syndicate found themselves in a very difficult position when the Trustees obtained the said Judgment in the said hypothecary action. p. 83, l. 22.

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p. 71, l. 30.
p. 83, l. 15.

21. The said syndicate had been joined as Defendants in the said hypothecary action and if the Rs. 63,000 due on the primary mortgage was not paid the estate could be sold by the Court under the hypothecary decree and the syndicate would then lose the said estate and have nothing to show for the Rs. 30,000 which they had paid for it to Palaniappa. If on the other hand they paid the Rs. 63,000 and Boyagoda subsequently succeeded in invalidating their title to the said estate they would lose the said estate and have nothing to show for the Rs. 63,000 which they had paid to redeem it from the primary mortgage.

p. 21, l. 30.
p. 22, l. 40.
p. 23, l. 37.

22. Moreover if the syndicate once paid any part of the Rs. 63,000 and such payment was officially certified or received by the beneficiary, namely the said Harris, there could in their view be no hope of recovering it if Boyagoda ultimately invalidated their title.

p. 54, ls. 53 follg.

23. On the other hand, according to the Appellant, he thought that if he gave time to the syndicate and the extra interest which thereby accumulated was above the value of the land he would be liable to make good the deficit.

24. In these circumstances the syndicate by one Cooke, a Proctor acting for them, came to an arrangement with the Appellant which was recorded in a letter of the 18th November 1927 and the sums in respect of which the Appellant has been convicted are sums received by him pursuant to that arrangement.

p. 84, ls. 1 to 5.

p. 72, l. 3.
p. 84, l. 7.

Apart from the letter itself the only evidence as to the terms of the arrangement given at the trial was that of Peiris, of Cooke and of the Appellant himself.

p. 104.

25. The letter was as follows :—

"Confidential. 18th November 1927.

"Alfred Godamune Esq.,
"Proctor
"Kandy.

"Dear Mr. Godamune,

"D. C. Kandy No. 34987.

"I understood from you at the interview you had with Mr.

" C. W. Peiris at my office some days ago that provided you were " paid Rs. 10,000 on account accumulated interest you would get the " case to lay by for one year, and that during that period the balance " interest should be paid from time to time as my Clients were able. " Further that you would undertake not to certify of record any " payments made by my Clients on account, should it become " necessary for you to enforce writ for the recovery of the claim. Of " course if the amount realised by the sale of the property does not " fetch the amount of your claim, then you could appropriate the " moneys paid by my Clients towards the deficiency. The reason for " this, as explained to you, is that my Clients do not wish Mr. " Boyagoda or anyone else to profit at their expense as the mortgage " was one that was executed by Boyagoda. On receiving your " confirmation of this I shall send you a cheque for the Rs. 10,000.

" Yours sincerely,

" (Signed) P. G. Cooke."

26. Section 244 (b) of the Criminal Procedure Code (Ordinance No. 15 of 1898) provides as follows :—

(1) It is the duty of the Judge—

(b) To decide upon the meaning and construction of all documents given in evidence at the trial.

27. Accordingly it is submitted on behalf of the Appellant that Garvin S. P. J. was right in saying that the correct meaning and construction of the said document was a question for the Judge and not one for the jury. The learned Judge at the trial, however, left it to the jury to say what was the correct meaning and construction of the said document and his action in so doing was approved by the majority of the Supreme Court. p. 87, l. 27. p. 80, l. 30.

28. Peiris in evidence said :—

" The conditions were arrived at between me and Mr. Godamune " in the first instance. The only condition was that the money we " handed to Mr. Godamune was to be held but those payments were " not to be certified of record. All the conditions were embodied in " Mr. Cooke's letter . . . . . There was an action instituted by " Mr. Boyagoda . . . . . and that case was going on at that time p. 18, l. 31.

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" and we were advised by our lawyers not to make any payments " until the final issue of the case if possible . . . . . We did not
p. 20, l. 29. " want to be out of pocket in the event of our losing the property " . . . . . He" (the Appellant) " wanted us to make some payments " towards the interest so that interest may not get accumulated, the
p. 21, l. 12. " reason being that he would be taking a risk as a trustee. . . . . " He" (the Appellant) " was to hold the money in confidence without
p. 21, l. 21. " telling anyone . . . . . He was to hold the money at our disposal.
p. 21, l. 29. " That is what I meant by in confidence . . . . . I intended that " he should not pay the money to Mr. Harris. If he was to give the 10 " money to Mr. Harris or his son he had to certify payments and in " the event of our losing the Colombo case which was going on we " would have lost all that money. That is why we asked him to " hold the money at our disposal without certifying payments. What " we wanted him to do was to keep the money for himself and not to
p. 21, l. 41. " pay it to Mr. Harris. Accused was to hold the money at our " disposal . . . . . Our position was that he was to hold that " money in trust for ourselves until such time when we were " prepared to ask him to certify payment. We wanted to show our " bona fides that we were really prepared to pay the accumulated " interest." 20

29. Cooke in evidence said :—

p. 22, l. 34. " This special arrangement was made because I wanted to safe-
p. 22, l. 39. " guard my clients in case they lost that action . . . . . I would " have objected to the accused having paid the money to Mr. Harris " because if my clients lost the case they would lose the money. My " clients wanted their money protected. I said that Mr. Godamune
p. 23, l. 17. " was to hold the money in terms of my letter . . . . . Accused " was to hold this money pending further instructions from me and I
p. 23, l. 33. " held the accused responsible for the money . . . . . I paid the
p. 23, l. 36. " money to Mr. Godamune on his credit to pay back if necessary 30 " . . . . . If the payments were certified there would be an end of " the money. If Mr. Harris or Mr. Boyagoda were to know of the " payments they may have attempted to enforce certification " . . . . . I wished the accused to have control over the money till
p. 24, l. 11. " the case was decided."

30. The Appellant in evidence said :—

p. 47, l. 34. "If I gave time and the interest that accumulated was above

" the value of the land I thought in my position as a Trustee I would " be liable to make good the deficit . . . . . The monies paid to p. 48, l. 29. " me were payments to indemnify me against any risks I ran."

31. There was evidence that the Appellant did not disclose the fact p. 69, l. 1. of these payments to the said Harris or to his co-trustee or to the lawyers acting for the Trustees in the said hypothecary action There was also evidence that the Appellant spent the whole of the money received on his p. 69, l. 12. private affairs.

Ultimately the syndicate required the payments to be certified and in p. 69, l. 8. this way the fact that they had been made came to the knowledge of the said Harris and of the Appellant's co-trustee and of the lawyers acting for the Trustees in the hypothecary action. The said Harris then accepted p. 69, l. 25. the transfer of an estate called the Lunuwila Estate in satisfaction of the payments received by the Appellant and concurred in those payments being certified but he alleged that he did so in consequence of misrepresentations by the Appellant.

32. The learned Judge after setting out in the said Case stated and signed by him for the Opinion of the Supreme Court, that which is summarized in the preceding paragraph proceeded as follows :—

" I instructed the Jury that if they found it proved that the p. 69, l. 29. " money in question was paid to the accused as Mr. Harris' agent " for the purpose of being handed over to Mr. Harris and that the " property had passed from Peiris and others, they might consider it " to be the property of Mr. Harris from the time it reached the hands " of the accused. That ruling has been objected to and it is argued " that there was no evidence on which the Jury could have been " directed to find that it was the property of Mr. Harris.

" It was further argued that there was no evidence to show that " it was the duty of the accused to pay over the money to " Mr. Harris."

33. Accordingly, as already mentioned, the principal question which he reserved and referred for the Opinion of the Supreme Court and the only question upon which they expressed their Opinion was the following :—

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p. 70, l. 20. (1) " Was there evidence upon which the Jury could find that " the property was the property of Harris ? "

34. The Opinion of the Supreme Court will be found set forth at pages 70 to 90 of the Record.

35. In his Judgment in the Supreme Court MacDonnell C. J., after setting out certain of the passages in the evidence quoted above, said (inter alia)

p. 73, l. 34. " It is necessary perhaps to notice the position between the " parties. The accused was safeguarding himself, he says so, by " insisting that if time be given interest should be paid, but in giving " time and in agreeing not to pay over interest he was preferring the " advantage of himself and others to that of his *cestui que trust* when " his duty was either to get him the interest at once, or to proceed " with the action and enforce payment, and so he was committing, it " seems to me, a breach of his duties as a trustee. The syndicate " knowing he was a trustee, Messrs. Peiris & Cooke say so, were " inducing him to prefer their advantage to that of his *cestui que* " *trust* and so to commit a breach of trust."

And again :—

p. 75, l. 7. " I would add one thing further. The accused having yielded to " this solicitation to commit breach of trust was in this position. If " he kept faith with the syndicate, he was doing so to the damage of " his *cestui que trust.* If he decided on second thoughts to prefer his " paramount duty as trustee and pay over the interest to Mr. Harris, " then he would have been breaking faith with the syndicate. It is " not perhaps necessary to decide the point but I doubt they could " have claimed the money back either from the accused or from Mr. " Harris, had the former paid it over in breach of the agreement for " the agreement seems to have been based on an illegal consideration " and if so the rule *in pari delicto* would apply. But however this " may be, it seems to me that there was clear evidence from which " the Jury could infer that the accused had received something the " property of Mr. Harris, namely, interest."

36. In his Judgment, Dalton J. said (inter alia :—

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"There is no doubt from the letter that Peiris and his syndicate, p. 77, l. 40.
"although they had no difficulty in asking for and obtaining for
"themselves an improper benefit from the trustee at the expense of
"the beneficiary to the trust, did not wish Boyagoda or anyone else
"to benefit at their expense, but whether they could in law, under
"the circumstances here, prevent Harris obtaining the benefit of the
"payments in any event, had he come to know of it, is in my opinion,
"doubtful. The letter must be read as a whole. It must further be
"remembered that it is written by their proctor, who must have
"understood the ordinary meaning of the various terms he used, and
"who, as his evidence shows, was fully aware that Godamune was a
"trustee in the matter."

37. On the other hand Garvin, S. P. J. said :—

"For my own part, it seems to me, that it is the plain meaning p. 86, l. 33.
"of this letter that Peiris and the other members of the syndicate
"were to make 'payments' to the accused up to the amount of the
"accumulated interest, taken for the purpose of the arrangement at
"a round figure of Rs. 23,000 upon the condition that it was not to
"be treated as a 'payment' in discharge of the liability to pay
"interest or in part extinction of the liability to pay interest or in
"part extinction of the decree to be entered thereafter, but to be
"held by the accused and 'appropriated' in one contingency only,
"the event of a deficiency upon sale and execution of the property
"under mortgage.

"It may be legitimate as the learned presiding Judge has done
"to refer to these as 'payments' made to the accused 'in the name
"of accrued interest and for the amount of that interest,' but they
"were payments made under conditions which make it impossible to
"say that it was the intention either of Mr. Cooke or Mr. Peiris that
"it should go in discharge of Boyagoda's debt, and that the property
"in the money be thus transferred to Godamune as trustee for
"Harris . . . . . .

"The terms and conditions upon which this money was placed p. 87, l. 11.
"in the hands of the accused are those set out in P 14, and if this p. 104.
"letter is construed as I think it must be, as meaning that these
"sums of money were placed in his hands as a security for any loss
"which he may sustain by granting to the syndicate the concession
"of a year's time, and not in discharge of the interest payable by

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" Boyagoda, then it is impossible to say that there is evidence upon " which the Jury could have legitimately found that these moneys " were in any sense the property of Mr. Harris . . . . . .

p. 88, l. 11. "I can find nothing in the evidence of either of these witnesses " (Cooke and Peiris) which is in conflict with, or varies in any " material particular the terms of the letter P 14. Indeed both " these witnesses accept the letter P 14 as correctly setting out the " conditions upon which these ' payments ' were made . . . . . .

p. 90, l. 22. "In the result therefore the evidence of both Mr. Cooke and " Mr. Peiris is consistent with the interpretation I have placed on " the letter P 14. Neither of them has said that these moneys were " to go immediately as they were received in discharge of the interest " due on the bond. Their evidence on the contrary militates p. 104. " strongly against such suggestion. Both of them abide by the " letter P 14 as correctly setting out the terms and conditions which " they insisted on prior to the acceptance by the accused before they " sent him any money. The matter is therefore brought back to the " position in which it stood before I entered upon a consideration of " the evidence of these two witnesses. The question at issue turned " upon the construction of the letter P 14 which sets out the " conditions upon which the accused received the money. I have " already discussed that view of the matter and have stated my own " view on the letter. But if as has been contended the letter is " ambiguous and its meaning cannot be arrived at with certainty, " then there was no evidence upon which the Jury could have found " affirmatively that the money was ' the money of Mr. Harris ' ."

38. The Supreme Court therefore by a majority answered adversely to the Appellant the said question reserved and referred to them by the learned Judge after the trial.

39. From the said Judgment of the Supreme Court the present Appeal to His Majesty in Council has been brought and the Appellant humbly submits that the same ought to be allowed for the following amongst other

REASONS:

1. Because even if the Appellant committed a breach of trust by entering into or carrying out an improper arrangement with third parties whereby he was to receive sums of money unknown to his cestui que trust and to hold such sums for his own or third parties' benefit those facts did not entitle the jury to find that a sum received in pursuance of such arrangement was, for the purpose of a criminal charge of dishonest misappropriation, the property of the cestui que trust.

2. Because upon any legal or fair view, the facts did not warrant a conviction of the Appellant of the only offence for which he was convicted, namely dishonest misappropriation of money the property of the said Harris.

3. Because the majority of the Supreme Court were wrong in holding that notwithstanding Section 244 (1) (b) of the Criminal Procedure Code the meaning and construction of the said letter dated the 18th November 1927 could properly be left to the jury to determine.

4. Because if the said letter dated the 18th November 1927 was ambiguous, there was no evidence to justify the jury in attributing to it a meaning or construction adverse to the Appellant's contention that the sum in question was not at the material time the property of the said Harris.

5. Because the Opinions of the majority of the Supreme Court were wrong and ought to be over-ruled and because the Opinion of Mr. Justice Garvin was right and ought to be upheld.

H. I. P. HALLETT.

No. 124 of 1931

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

BETWEEN—

ALBERT GODAMUNE ... Appellant

— and —

THE KING ... ... Respondent

Case for the Appellant.

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