69, 1932

In the Privy Council.

No. 124 of 1931.

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

BETWEEN

ALBERT GODAMUNE - - - - - - - *Appellant*

AND

THE KING - - - - - - - - - - *Respondent.*

Case on behalf of the Respondent.

RECORD.

Case for Respondent

1. This is an appeal by special leave granted on the 29th June, 1931 from the Judgment of the Supreme Court of the Island of Ceylon delivered on the 3rd March, 1931 upon a case stated on the 17th January, 1931 under the provisions of Section 355 (1) of the Criminal Procedure Code by Mr. Justice Lyall-Grant sitting as Assize Judge at Kandy Criminal Sessions.

2. On the 10th January, 1931 at the said Sessions before Lyall-Grant J., and Jury the Appellant was convicted of two offences under Section 386 of the Ceylon Penal Code, (1) Of dishonestly misappropriating on a date between the 30th March 1928 and the 21st January 1929 at Kandy the sum of Rs.5000/- the property of one Ensor Harris, and (2) Of dishonestly misappropriating on a day between the 28th August 1928 and the 21st January 1929 the sum of Rs.3000/- the property of the same person. For these offences the Appellant was sentenced to rigorous imprisonment for one year on each offence, the sentences to run concurrently. p. 3.

3. At the conclusion of the trial on the application of Counsel for Appellant the learned Judge agreed to refer certain questions of law which had arisen during the trial for the decision of a court consisting of two or more Judges of the Supreme Court and, in the meanwhile, admitted the Appellant to bail.

pp. 1 and 2. 4. The indictment originally contained seven counts against the Appellant, the 1st, 2nd and 7th of which were formally withdrawn by Counsel for the Crown, and the trial proceeded on the 3rd, 4th, 5th and 6th Counts re-numbered the 1st, 2nd, 3rd and 4th respectively.

5. The re-numbered 1st and 3rd Counts charged the Appellant with dishonestly misappropriating the sums of Rs.5000/- and Rs.3000/- respectively the property of Peiris and others, and the 2nd and 4th counts alternatively charged him with dishonestly misappropriating the same sums therein laid as the property of the said Ensor Harris. To the indictment so amended the Appellant pleaded not guilty. The Jury returned a verdict of guilty on the 2nd and 4th counts, and not guilty on the 1st and 3rd counts. The learned Judge directed the Jury that if they found certain facts to be proved it was open to them to find the Appellant guilty of criminal breach of trust under Section 389 of the Ceylon Penal Code but, as no such charge appeared on the indictment, they should not consider
p. 69. that question unless they were unable to find that the sums in question were the property either of the said Peiris and others or of the said Ensor Harris. The Jury made no finding in their verdict of any criminal breach of trust.

6. The trial of the Appellant at the said Sessions occupied from the 5th to the 10th of January 1931, on which latter date the said verdict was given and the said sentence was passed.

7. The evidence for the prosecution was to the effect that the Appellant on the 2nd August 1920 became a co-trustee with one Westland
p. 94. of the marriage settlement, dated the 17th of April 1897, of the said Ensor Harris. The settlement which was for Rs.40,000/- was secured on certain property which was sold on the 3rd August 1920 to one Boyagoda, part of the purchase consideration therefor being the execution by the said Boyagoda in favour of the co-trustees of a primary mortgage bond carrying interest for Rs.40,000/- on the said property.

Under the terms of the said marriage settlement the said Ensor Harris was entitled to the income from the trust his wife having died in the year 1906.

By March 1927 there were arrears of interest due on the said mortgage bond amounting to Rs.23,126/- and on the 14th March 1927 the said co-trustees put the bond in suit in the District Court of Kandy against the said Boyagoda joining the said Peiris and four others as defendants with him as they claimed to have purchased the property from him. At that time there was a suit pending in the District Court of Colombo between the said Boyagoda and the other defendants as to their respective rights in the said property. The filing of the Answer of the Defendants to the

suit brought by the co-trustees was due on the 26th November 1927, and prior to that date an interview took place at Peiris' office in Colombo between him and the Appellant with a view to the Appellant giving time for the payment of the arrears of interest and postponing advertising the property for sale for one year.

8. What took place at that interview and the arrangement made with the Appellant was stated by Mr. Peiris in his evidence-in-chief to be as follows :—

"The claim in the plaint included a sum of 23,126 /- on account p. 18, ll. 18-37.
10 "of accumulated interest. As purchaser of the property we "were anxious to prevent its sale. I entered into an agreement "with Mr. Godamune to pay up the amount on behalf of myself "and the other members of the syndicate. Two other members "of the syndicate had seen Mr. Godamune with regard to getting "some time for the payment of the judgment debt and by "appointment Mr. Godamune came to see me at my office in "Colombo. I believe we arrived at an arrangement that day. "That must have been in November 1927. The arrangement "was for us to make payments on account of interest and for
20 "the trustees to give us one year's time to pay the balance of the "accumulated interest 23,000 /- and they were not to advertise "the estate for sale within that one year, and I believe that "at the end of that year any further arrangement was to be made "if we could not for any reason pay the full amount. 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. The only condition I made
30 "was that payments were not to be certified although the money "was paid. He undertook to certify payments whenever we "wanted."

Later, the witness under cross-examination said: "We asked p. 20, ll. 30-33.
"Mr. Godamune to give time to pay up the amount. He wanted us to "make some payments towards the interest so that interest may not get "accumulated, the reason being that he would be taking a risk as a "trustee." And in re-examination said: "When I said the accused was p. 21, l. 20.
"to hold the money in confidence I meant without certifying payments. "He was to hold that money at our disposal."

40 In answer to the Court, the witness admitted that he knew the money was paid to the Appellant as a trustee, and added: "I knew that p. 21, ll. 28-45.
"he had to pay this money to Mr. Harris or his son. I intended that he "should not pay the money to Mr. Harris. If he was to give the 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 that money at our " disposal without certifying payments. What we wanted him to do was " to keep the money for himself and not to pay it to Mr. Harris. Accused " was to hold the money at our disposal. The use of the payment was to " satisfy Mr. Godamune who was asking something on account of the " accumulated interest. At that time I did not know that the money was " to be paid to Mr. Harris. At that time I was under the impression that " the payments should be made to Mr. Godamune for the benefit of the " minor. We wanted him to be satisfied with that money till a time when " we asked him to certify payments. Our position at that time 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 shew our " bona fides that we were really prepared to pay the accumulated interest."

Mr. P. G. Cooke who acted as Proctor on behalf of Mr. Peiris and the
p. 22, l. 15. fellow members of the syndicate and who was called as a witness by the Crown also stated in his evidence-in-chief :—" They came to my office and " made the arrangements. My recollection is that Mr. Godamune was to " give Peiris and others one year's time to pay the 40,000/- mortgage " provided they paid up the arrears of interest which amounted to about " 23,000/- first by paying 10,000/- and the balance whenever they could " within the year (Shown P. 14). This is the letter I wrote to the accused " embodying the conditions.

* * * * * *

p. 22, l. 29. " I knew this money was being paid to Mr. Godamune as Trustee. The " first condition was that my clients be given a year's time and during that " year my clients were to make payments on account of interest and " Mr. Godamune was to undertake not to certify or record these payments." In cross-examination, he claimed that he paid the money to Mr. Godamune on his credit to pay back if necessary—for repayment in the terms of the letter Ex. P. 14 and marked the letter " Confidential " because he did not want anybody to know that these payments had been made on account of interest.

9. The terms of the letter referred to were as follows :—

Ex. (P. 14), p. 104.

" 18th Nov. 1927.

Confidential.

Albert Godamune Esquire,
Proctor, Kandy.

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 toward the deficiency. The reason for this as explained to you is that my clients do not wish Mr. Boyagoda or any one 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,

(Sgd.) P. G. COOKE."

10. The evidence for the prosecution further shewed that the Appellant received from Mr. Cooke acting on behalf of Mr. Peiris and the syndicate Rs.23,000/- as follows:—On the 26th November 1927 Rs.10,000/-, on 30th March 1928 Rs.5000/-, on the 28th August 1928 Rs.3000/- and on the 6th November 1928 Rs.5000/-. At the time these payments were made the Appellant did not acquaint either his co-trustee or the proctors, Messrs. Leisching & Lee, acting in the suit, with the fact, nor was Ensor Harris informed of such payments at the time that they were paid.

It further appeared that on the 30th March 1928 in the suit brought in respect of the Rs.40000/- mortgage bond judgment by consent was entered for the plaintiffs as prayed for in the Plaint.

11. On the 23rd November 1928 the said P. G. Cooke by letters of that date (Exs. P 19 and D 2) called upon Messrs. Leisching & Lee and the Appellant to cause the payments made as aforesaid to be certified of record. p. 119. p. 120.

In the words of paragraph 3 of the Reference : " The 21st of January " 1929 was fixed as the date on which the plaintiffs were required to certify " payments. There was evidence that the accused had spent the whole " of the money on his private affairs. His co-trustee refused to certify " that payments had been made on the ground that he was in ignorance " of any such payments, although he was pressed by the accused to join in " certifying, the accused telling him that he had paid either the money or " its equivalent to Mr. Harris. The Court certified the payments in " consequence of a note from Mr. Harris being produced in Court informing " the plaintiffs' proctors that with reference to the sum of Rs.23,000/- " paid to Mr. Godamune on account of interest in the case and for which the p. 69, ll. 10 to 28.

" defendants were claiming credit Mr. Godamune had settled the matter " with him as life renter by transferring Lunuwila Estate in his favour. " There was evidence that just before the case came up in Court for certifica- " tion of the amount paid to the accused, the accused made desperate " efforts to compound with Mr. Harris, and Mr. Harris' evidence was to the " effect that he accepted the transfer of Lunuwila Estate—a transfer which " was made on the morning of the 21st of January—in lieu of the Rs.23,000 /- " in consequence of misrepresentations made to him by the accused."

12. At the close of the case for the prosecution Counsel for the Defence submitted that there was no case to go to the Jury. On his Lordship holding that the case must go to the Jury, the Appellant gave evidence as a witness on his own behalf, and claimed that the money was paid to him not as a part of the trust, but in order that he should keep it as a personal payment to himself to indemnify him from the risks he ran by giving a year's time to pay.

p. 46.

13. On the case stated by Mr. Justice Lyall-Grant for the opinion of the Supreme Court he reserved two questions for their consideration :—

p. 70.

(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 ?

14. The Reference was argued before Macdonell, C.J., Garvin, S.P.J., and Dalton, J., on the 23rd, 24th, 25th and 26th February 1931. The Chief Justice and Dalton, J., in their written judgments, dated the 2nd and 3rd March 1931 respectively, were both of the opinion that there was evidence on which the Jury could find that the property was the property of Harris and therefore answered the first question in the affirmative, and affirmed the said conviction and sentence. Garvin, S.P.J., on the contrary, considered that the question should be answered in the negative. None of their Lordships held it necessary to deal with the second question submitted to them.

15. In the course of his judgment the Chief Justice after reviewing the evidence given by the witnesses Peiris and Cooke said :—

p. 73, l. 26.

" I can only conclude that these statements were evidence " from which the jury could conclude that there was a payment " of interest fettered by conditions, but still a payment of interest. " If the monies paid were interest, then, as admitted in argument, " they would be the property of Mr. Harris. A distinction was

"attempted to be taken between a payment of interest and a "payment on account of interest, but I cannot see that any "distinction exists."

After reading the letter (ex P. 14) the Chief Justice continued :—

"I can only conclude on the best light I can obtain that this p. 74, l. 13.
"letter does not contradict the oral evidence but is in accord with "it. Construing it as best I can it seems to say, we pay interest "but you must not certify it on the record. This is not incon-"sistent with it being interest, for it would still be the duty of the
10 "accused to keep it safe for his client, though the fact of the "payment was to be concealed for a year from him and from "everybody else ; it remains interest none the less.

* * * * * * *

"Construing the letter and the oral evidence as best I can p. 75, l. 3.
"it seems to me beyond question that there was evidence for the "Jury from which they could if they were so minded, determine "that these payments were the property of Mr. Harris as charged "in the indictment."

16. In the Appellant's Petition for special leave to appeal it was
20 submitted :—

(1) That the majority of the Supreme Court failed to distinguish between the categories of civil and criminal liability in that they took the view that if the Appellant committed a breach of trust by entering into 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 the third parties' benefit the sums so received might be found by the Jury for the purpose of a criminal charge of dishonest misappropriation to be the property of the cestui que trust.

30 (2) That the said Supreme Court had created a dangerous precedent for the future by allowing the meaning and construction of a document to be left to the Jury contrary to Section 244 (1) (*b*) of the Criminal Procedure Code.

17. It is submitted on behalf of the Respondent :—

(1) As to the Appellant's first submission that it proceeds upon a misconception of the judgments delivered by the majority of the Court, as they did not hold that the only inference to be drawn from the evidence was that the Appellant held the said

moneys for his own or the third parties' benefit, but, on the contrary, held that it was open to the Jury on the evidence to find that the moneys were paid and received as interest or on account of interest, and as such became the property of the cestui que trust.

(2) As to the second submission it is denied that anything in the judgments of the majority of the Court warrant any such allegation as reference to the following passage in the Judgment of Mr. Justice Dalton shows :—

pp. 80-81, ll. 25-47.

ll. 1-4.

" That the letter is only capable of the construction put " upon it in this argument I am unable to agree. I agree how- " ever that it was the duty of the judge, if in his opinion the " letter could not on any reasonable interpretation afford " evidence that the payment was a payment of interest, to have " so instructed the jury. In my opinion he was correct here in " not doing so. If a document is capable of two or more mean- " ings, with regard to the transactions being entered into, it is " in my opinion the duty of the judge, whilst leaving it to the " jury as a question of fact to decide what was the meaning " intended by the parties as expressed in the document, to state " to the jury the legal effect of any reasonably possible meaning " having regard to the words used. For this purpose the whole " document must be carefully looked at, greater regard being " had to the intention of the parties rather than the precise " words used."

" Great stress had been laid in the course of the argument " upon the provisions of s. 244 1 (*b*) of the Criminal Pro- " cedure Code, where it is laid down that it is the duty of the " judge to decide upon the meaning and construction of all " documents given in evidence at the trial, but it is clear from " the provisions of s. 245 that it is the duty of the jury " to decide all questions that are to be deemed in law to be " questions of fact and to decide which view of the facts is true. " Having regard to the terms of this letter and the other " evidence led to which I have referred it seems to me to be " eminently a question of fact for the jury to decide what was " the true nature of the transaction between Peiris and the " accused, in other words what was the nature of the payments " made to Godamune, and that the learned judge correctly " directed them that there was evidence for them to consider " that the money was interest and as such the money of the " beneficiary Harris."

18. It is submitted that the appeal should be dismissed and the judgment of the Supreme Court should be affirmed for the following among other

REASONS.

(1) BECAUSE there was evidence upon which the Jury could find that the property was the property of Harris.

(2) BECAUSE the question of whether the property was the property of Harris was a question of fact which it was the duty of the Jury to decide.

10 (3) BECAUSE no injustice of a serious or substantial character has occurred either by a disregard of the proper forms of legal process or by a violation of principle such as amounts to a denial of justice.

(4) BECAUSE the Judgment of the Supreme Court of the Island of Ceylon was right for the reasons given in the Judgments of the Chief Justice and Mr. Justice Dalton.

STAFFORD CRIPPS.

KENELM PREEDY.

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

ON BEHALF OF THE RESPONDENT.

BURCHELLS,
5 The Sanctuary,
Westminster, S.W.1,
Solicitors for the Respondent.

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