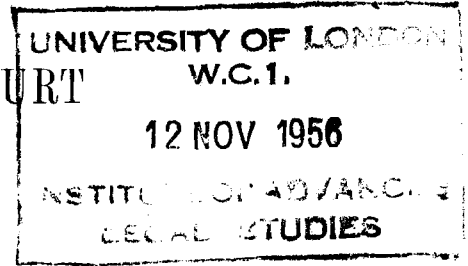


In the Privy Council.

No. 2 of 1948.

ON APPEAL FROM THE SUPREME COURT  
OF CEYLON



BETWEEN

A. J. E. G. CASPERSZ ... .. APPELLANT

AND

THE KING ... .. RESPONDENT.

CASE FOR THE RESPONDENT

1.—This is an Appeal from a Decree of the Supreme Court of Ceylon dated the 7th March, 1946, which affirmed the conviction of the Appellant by the District Court of Trincomalie on the 13th November, 1945, but substituted for a sentence of six months' rigorous imprisonment a fine of Rs. 500 and imprisonment till the rising of the Court. The Appellant paid the fine and served the sentence of imprisonment.

RECORD  
p. 62  
p. 54, l. 28  
p. 62, l. 36

2.—The charge against the Appellant was that between the 10th April and the 19th May, 1944, he, being entrusted as executive engineer at Trincomalie of the Public Works Department with money to pay overseers for rubble bottoming on specified parts of the Trincomalie-Batticaloa road, committed criminal breach of trust in respect of Rs. 6,218.48 out of such money.

3.—The charge was under Section 392 of the Penal Code, which is as follows :—

392. Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney, or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

## 4.—The Penal Code contains the following definitions :—

388. Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits “criminal breach of trust.”

## ILLUSTRATIONS.

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\* \* \* \* \*

(c) A, residing in Colombo, is agent for Z, residing in England. There is an express or implied contract between A and Z that all sums remitted by Z to A shall be invested by A according to Z's direction. Z remits 10,000 rupees to A, with directions to A to invest the same on mortgage of coffee estates. A dishonestly disobeys the directions, and employs the money in his own business. A has committed criminal breach of trust.

(d) But if A, in the last illustration, not dishonestly but in good faith, believing that it will be more for Z's advantage to hold shares in a company, disobeys Z's directions and buys shares in a company in Z's name instead of investing the money on mortgage, here, though Z should suffer loss, and should be entitled to bring a civil action against A on account of that loss, yet A, not having acted dishonestly has not committed criminal breach of trust. 20

22. Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing “dishonestly.”

21. “Wrongful gain” is gain by unlawful means of property to which the person gaining it is not legally entitled. 30

“Wrongful loss” is the loss by unlawful means of property to which the person losing it is legally entitled.

## 5.—The evidence for the prosecution established the following facts :—

p. 35, ll. 19-22

(1) In January, 1944, the Appellant, as the executive engineer at Trincomalie was put in charge of the work on a three-mile stretch of the Trincomalie-Batticaloa road, a narrow existing road which had to be improved as part of a plan for improving the China Bay road.

p. 37, l. 44

p. 37, l. 21 ; p. 38,  
ll. 10-11  
p. 35, l. 30

(2) For military reasons the work was of great urgency, and speed was more important than cost. For this reason the work was started in January, 1944, before the usual estimate was drawn up and approved. 40

- (3) On the 11th February, 1944, the Appellant submitted an estimate for the work, and was notified on the 26th February that the estimate was approved. The estimate provided for an expenditure of Rs. 16,228.84 on rubble bottom. p. 65  
p. 65, items, 31, 10, 20
- (4) On the 23rd February, 1944, Mr. Leader (the First Assistant Director of Public Works who on retirement left Ceylon in May, 1944), impressed on the Appellant the prime importance of completing the work as soon as possible. There is no evidence, however, to support a suggestion that Mr. Leader told the Appellant that the Appellant might do anything and might do it anyhow so long as it was reasonable. Mr. Leader agreed to the Appellant's request for the rates of pay to be increased and said that he would confirm it by letter, as he in fact did. p. 35, l. 31 ; p. 38, ll. 8-12  
p. 35, l. 36  
p. 35, ll. 34-39
- (5) The Appellant had an account in the Bank of Ceylon to which public moneys were credited to enable the Appellant to pay for the work. p. 38, l. 36—p. 39, l. 25
- (6) The method by which such work is done is as follows : overseers, who are registered government servants with pension rights, employ the necessary labourers who are paid at rates approved by the government. Periodically the overseer prepares a bill for the work done by him. The measurements and amounts are checked by the executive engineer and if necessary the bill is corrected. A voucher is then prepared in the office and certified as correct. The head clerk and engineer then sign a cheque which is paid to the overseer. p. 36, ll. 6-14  
p. 40, ll. 42-44  
p. 42, ll. 35-43
- (7) At the time of the work there was an acute and increasing shortage of labour in Ceylon especially in Trincomalie, and threats were used to force overseers to bring labourers to Trincomalie for the work. p. 36, ll. 42-45 ;  
p. 37, ll. 11-14  
p. 37, ll. 26-36 ;  
p. 132
- (8) At the instance of the Appellant a 100 per cent. increase in rates was sanctioned, but nevertheless the shortage persisted. The overseers doing the work were from the commencement grumbling that they were losing because they were paying their labourers more than they were getting from the Public Works Department. p. 37, ll. 5-14  
p. 46, ll. 17-19
- (9) Complaints were made to the Appellant, who procured the overseers to insert items in their bills for rubble bottom, although in fact no rubble bottoming was done. p. 47, ll. 34-44 ;  
p. 48, ll. 14, 27-32 ;  
p. 49, ll. 22-26 ;  
p. 50, ll. 1-3, 24-26
- (10) On various dates from the 6th April, 1944, to the 18th May, 1944, overseers submitted 10 bills in which claims were made in respect of rubble bottom. Each bill was supported by a form attached thereto purporting to show the measurements of the work. pp. 71, 75, 77, 81, 85, 87, 91, 95, 99, 103  
pp. 73, 76, 79, 83, 84, 89, 93, 97, 101, 104
- (11) In seven of the bills so submitted the quantity of rubble bottom was altered, indicating that the measurements had been checked by the executive engineer. The measurement forms were correspondingly altered. In the other three bills (as also in some of the seven bills) there were alterations not relating to rubble bottom. pp. 71, 77, 85, 87, 91, 95, 103
- (12) Most of the alterations were made by the Appellant but some were made by a young engineer, H. K. Melsom, who was on probation, and pp. 45-47  
p. 45, ll. 13-15

p. 45, ll. 16-25  
p. 45, ll. 30-36

p. 45, l. 42—p. 46,  
l. 6

p. 131, l. 17

in March, 1944, had been sent to study the work under the Appellant. Melsom knew that no rubble bottom was laid. When for the first time he saw a bill with a claim for rubble bottom Melsom mentioned to the Appellant that no rubble bottoming had been done. The Appellant, however, instructed Melsom to reduce the quantities and to pay, as the rates were low and as the overseers had to overcome their difficulties. Later Melsom refused to certify bills with items for rubble bottom. The Appellant then showed Melsom a letter from the Minister saying that the cost of the work on the roads was of secondary importance. The Appellant also told Melsom that Mr. Leader had asked him to do the work with as little delay as possible. 10

p. 42, l. 20—p. 44,  
l. 18 ; p. 41, ll. 29-40

(13) Sums amounting in all to Rs. 6,218.48 were by the Appellant's authority paid out of the public funds entrusted to the Appellant to overseers in respect of rubble bottom which to the Appellant's knowledge had not been laid.

p. 36, l. 18  
p. 36, ll. 19-32

(14) Acting on information the superintending engineer made investigations in May, 1944. On the 28th May the Appellant told him that the Appellant took full responsibility. The Appellant asked for advice, and the superintending engineer advised him to recall the money paid for rubble bottom and to credit the revenue. 20

p. 47, l. 44 ; p. 48,  
l. 32 ; p. 50, l. 4 ;  
p. 50, l. 27

p. 44, ll. 18-40 ;  
p. 119, l. 1—p. 120,  
l. 25 ; p. 121,  
ll. 25-38

(15) The Appellant demanded repayment from the five overseers who had received payments for rubble bottom. Three of them refunded to the Appellant the amounts received, but two flatly refused to do so. The Appellant, however, paid to the credit of the government Rs. 6,224.03 expressed to be recoveries on account of overpayments, and the Appellant caused the chief clerk to make out receipts which purported to show repayments from each of the five overseers.

p. 39, ll. 26-34, p. 68

p. 113  
p. 114, l. 5

(16) The Director of Public Works received from the superintending engineer a report on the irregular payments, and on the 13th July, 1944, the Director of Public Works read this report to the Appellant and recorded the Appellant's answers to questions based on the report. The record was signed by the Appellant. 30

p. 68, l. 35—p. 69, l. 1

(17) The report stated that the Appellant admitted that he was solely responsible for the payments to the overseers for foundation work which had not been done, the Appellant's only motive being one of assistance to the overseers for their inconveniences and losses.

p. 113, l. 18—p. 114,  
l. 4

(18) The Appellant stated to the Director of Public Works that his reasons for making payments for work not done were that Mr. Leader had instructed him to get the work done as quickly as possible by paying anything and anyhow so long as it was reasonable ; that the overseers did not cover their costs, and so when they appealed to the Appellant for permission to charge this item, the Appellant gave permission ; that the Appellant's sole purpose was to get the work done, and in that he succeeded until relieved of the work ; and that there was no collusion between the Appellant and the overseers. 40

(19) The Director of Public Works did not consider that it was in question that the Appellant took the money himself, and the Appellant was not suspended or prosecuted until late in 1944. p. 39, l. 39-p. 40, l. 1; p. 41, ll. 4-18

6.—The Appellant did not give evidence, except after conviction in mitigation of sentence. p. 50, l. 39; p. 51, ll. 17-23

7.—The learned Judge of the District Court convicted the Appellant. In his Judgment he set out the facts and stated that the defence relied on the statements of the Appellant and the evidence of the overseers to show that the Appellant had no dishonest intentions. One view of the alterations in the measurement forms was that the Appellant thought that the overseers were charging too much as losses, while another view was that the Appellant was impressing the head office and the Audit with the genuineness of the rubble bottom items. There was no evidence that the amount of the losses was agreed, and no method was mentioned of how the losses were assessed. Accordingly, the learned judge felt constrained to hold that the alterations were to show that the items were genuine, especially as there was no relationship between the alleged losses and the amounts expended. He felt forced to come to the conclusion that the Appellant had criminally misappropriated funds entrusted to him as a public servant. p. 51, l. 8  
pp. 52-54  
p. 53, ll. 19-24  
p. 53, l. 24-p. 54, l. 21

8.—The reasons of the Supreme Court for affirming the conviction were given by Cannon J., who pointed out that the Appellant did not contest the irregular payments but relied on the explanation given to the superintending engineer, and on the urgency of the work. Cannon J. interpreted the word "misappropriated," used by the District Judge, as "misapplied," and went on to consider the meaning of "dishonest" which in the Penal Code appeared to him to have nothing to do with probity. There could be no doubt that the Appellant knew quite well that he was causing wrongful gain to the overseers and wrongful loss to the government. The evidence of the government's attitude towards cost should have indicated to the Appellant that requests for necessary increases would have been dealt with quickly and sympathetically. Other evidence confirmed the view that the Appellant was not acting *bona fide*. Accordingly the conviction was confirmed. pp. 57-61  
p. 58, l. 18-p. 59, l. 5  
p. 59, ll. 14-45  
p. 60, ll. 1-10  
p. 60, ll. 10-18  
p. 60, l. 18-p. 61, l. 6

9.—The Respondent submits that the judgment of the Supreme Court was right, and that this Appeal should be dismissed for the following amongst other

### REASONS.

1. Because the evidence established the offence with which the Appellant was charged.

2. Because the Appellant's motives (although of importance on the question of sentence) are irrelevant to the question of his guilt.
3. Because the courts below were right in doubting the Appellant's explanations of his conduct, which he did not verify by his own evidence.
4. Because the Appellant's explanations (while alleging extenuating circumstances) were a confession of guilt.

FRANK GAHAN.

In the Privy Council.

No. 2 of 1948.

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BETWEEN

A. J. E. G. CASPERSZ ... APPELLANT

AND

THE KING ... .. RESPONDENT.

CASE FOR THE RESPONDENT

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