

## APPELLATE CRIMINAL.

*Before Mr. Justice Thein Maung.*

B. RAJANA (APPELLANT)

v.

THE KING (RESPONDENT).\*

1947  
Oct. 21.*Penal Code, s. 408—Distinction between a civil wrong and criminal offence.*

Appellant, a tindal of a boat in the employment of Port Lighterage Department, was entrusted with a 1,000 bags of rice on 27th November 1946 to be loaded on S.S. "Stagen". On 29th November 1946 the appellant loaded the rice bags and when loading was over 12 bags were found short. He was convicted of criminal breach of trust in respect of the 12 bags and sentenced to six months' rigorous imprisonment.

*Held*: That there was nothing to show that the shortage was due to dishonest misappropriation or conversion by the appellant. Every breach of trust case gives rise to a suit for damage but it is only when there is evidence of a mental act of fraudulent misappropriation that an offence under ss. 408 and 409 can arise.

*Kanhaiya Lall v. Emperor*, 38 Cr.L.J. 491, followed.

*Held further*: Mere failure to deliver the full quantity of goods is insufficient to prove dishonest misappropriation or conversion.

*Ramaya and others v. The Crown*, 1 Cr.L.J. 908, applied.

*Sona Meah v. King-Emperor*, (1924) I.L.R. 11 Ran. 476, distinguished.

*Hla Gyaw* for the appellant.

THEIN MAUNG, J.—The appellant Rajana has been found guilty of a criminal breach of trust in respect of 12 bags of rice and has been sentenced to six months' rigorous imprisonment under section 408 of the Penal Code.

The case for the prosecution is that the appellant was the tindal of the cargo boat SR 156, in the employment of Port Lighterage Department of the Port Commissioners and that in his capacity as such he was entrusted by the ABC Rice Mill, Upper

\* Criminal Appeal No. 1780 of 1947—appeal from the order of 1st Additional Magistrate (Special Power) of Rangoon, dated the 9th September 1947, passed in Criminal Regular Trial No. 6 of 1947.

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Pazundaung, of which the complainant J. S. Forrest is a Director, with a thousand bags of rice on the 27th November, 1946, as per Exhibit A, to be loaded on board the S.S. "Stagen". The appellant loaded the rice bags on the S.S. "Stagen" on the 29th November 1946 and Than Maung (P.W. 2), who was a shipping clerk employed by the said company, checked the loading thereof. When the loading was over, Than Maung found that there were only 988 bags and that there was a shortage of 12 bags. Than Maung then informed the appellant of the shortage and also of the fact "that the totals of the loading as noted by the ship's clerk and the ship's tally clerk also showed that 12 bags of rice were short." The appellant then denied that there was any shortage at all. So Than Maung made a report to the company with the result that on the 2nd December, 1946, Mr. Forrest complained of the shortage to the Commissioners for the Port of Rangoon and forwarded copies of his complaint to the Police Superintendent, River Division, *inter alia*.

The case for the prosecution rests almost entirely on the evidence of Than Maung and his record of loading, Exhibit B. Although he has stated that the totals of the loading as noted by the ship's clerk and the ship's tally clerk also showed that 12 bags of rice were short, neither the ship's clerk nor the ship's tally clerk has been called as a witness for the prosecution, and the notes which are alleged to have been made by them have not been produced. Than Maung has merely stated, "I looked up the totals of the loading in the records prepared by those clerks." He does not say that these notes were shown to and checked by the appellant also.

Ardia, who probably is the same person as Addiyya mentioned in the charge, was called to give corrobora-

tive evidence, either as the ship's clerk or the ship's tally clerk, but it is quite clear from his evidence that he had nothing to do with the loading of the rice bags by the appellant on S.S. "Stagen". He does not even know the appellant and Than Maung.

According to Than Maung's own statement, the appellant denied that there was any shortage at all then and there. So one would have expected him to have asked the appellant to check his note Exhibit B with the notes of the ship's clerk and the ship's tally clerk, or to have asked either or both of those clerks to certify that his record was correct at least by counter-signing on it, but he did nothing of the sort. He has not even noted the names of those clerks, and it is not known whether he made a report to the company before S.S. "Stagen" left Rangoon so that the rice bags could, if necessary, be unloaded for the purpose of checking.

Moreover the prosecution has not produced any receipt granted by the mate or other officer in charge of S.S. "Stagen" for the rice bags which were shipped on it, and it is not known to which place the rice bags were consigned and how many bags of rice were actually received by the consignee.

Under these circumstances I am of the opinion that Than Maung's evidence, even though it is supported by his note Exhibit B, is not conclusive evidence of there having really been a shortage of 12 bags of rice.

Even if there was such a shortage there is nothing to show that the shortage was due to dishonest misappropriation or conversion by the appellant. Nanavutty J. has observed in *Kanhaiya Lall v. Empeyor* (1) :

"The distinction between a civil wrong, which gives rise to a suit for damages for that wrongful act or tort, and a criminal

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offence punishable under the Indian Penal Code is very clear. Every breach of trust gives rise to a suit for damages, but it is only when there is evidence of a mental act of fraudulent misappropriation that the commission of embezzlement of any sum of money becomes a penal offence punishable as criminal breach of trust under ss. 408 and 409 of the Indian Penal Code. It is this mental act of fraudulent misappropriation that clearly demarcates an act of embezzlement which is a civil wrong or tort, from the offence of criminal breach of trust punishable under s. 408, Indian Penal Code. This is clearly brought out in the observations of Coleridge J. in *Rex v. Williams*—(1856) 7 C.P. 338—and in *R. v. Lynch*—6 Cox C.C. 445.”

Fox J. has also held in *Ramaya and others v. The Crown* (1) that the mere failure to deliver the full quantity of goods was not sufficient to support a conviction of the tindal of a cargo boat for having dishonestly misappropriated or converted the missing quantity to his use. The facts proved in that case were that 200 hides and other goods were entrusted to the tindal of a cargo boat to be carried to a steamer. On delivery on the steamer 22 hides were missing but there was no evidence as to what became of them. It will thus be seen that the facts are similar to the facts in this case.

The case of *Sona Meah v. King-Emperor* (2) is distinguishable. In that case the appellant Sona Meah was entrusted with 2,680 gunnies with instructions to deliver them at certain places. On the day following the entrustment he reported to the complainant that the sampan had come into collision with a sailing boat with the result that it capsized and all the gunnies were thrown into the river and lost; and Lentaigne J. observed in the course of his judgment:

“The only reasonable inference that I can draw from this failure to save the gunnies is either that the story is a false one

(1) 1 Cr.L.J. 908.

(2) (1924) I.L.R. 11 Ran. 476.

and that the appellant was not upset at all or that he intentionally let the gunnies drift away, presumably in order that his accomplices might pick up the gunnies. On either aspect the inference to be drawn would be one as to the guilt of the appellant."

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In the present case the appellant has not given an account of the loss of the 12 bags of rice which is shown to be false and incredible. He does not even admit that there has been a shortage of 12 bags of rice and he has denied that Than Maung informed him then and there or at all of the alleged shortage.

Cases relating to failure to account for money entrusted are also distinguishable as the rice bags could not be kept under lock and key and they had as a matter of fact to be kept in the cargo boat from the 27th November 1946 up to about 3 p.m. on the 29th November 1946.

For the above reasons I set aside the conviction and sentence of the appellant Rajana. I acquit him and direct that he shall be released so far as this case is concerned and that his bail bond be cancelled.