1962
Apr 9, 11, 12,
July 10

CHARALAMBOS SOTERIOU (PAMBOS) v. THE REPUBLIC

[WILSON, P., ZEKIA, VASSILIADES, JOSEPHIDES, JJ.]

CHARALAMBOS SOTERIOU [PAMBOS],

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 2489).

Criminal Law,—Stealing—Stealing by public servant—Criminal Code, Cap. 154, sections 255, 259, 262, and 267—Embezzlement—Larceny Act 1916 section 17—Although there is no similar section in our criminal code, still the combined effect of sections 255, 259, 262 and 267 is to create the offence of embezzlement provided in section 17 of the English Act—Criminal Code, Cap. 154, sections 268, 269.

The appellant was convicted, *inter alia*, of stealing under sections 255, 262 and 267 of the Criminal Code Cap. 154, in circumstances which amount to embezzlement as provided for in section 17 of the English Larceny Act, 1916. It was argued on behalf of the appellant that the findings may perhaps amount to embezzlement under section 17 of the Larceny Act, 1916 in England but cannot amount to the felony of theft under section 255 of our Criminal Code. The High Court in dismissing the appeal :

Held : (1) Our Code does not originate in an enactment intended to codify the English common law ; or, for that matter, the law of England at that time. And the absence of special provision for the crime of embezzlement, corresponding to section 17 of the Larceny Act, 1916, is not an omission, accidental or intentional, to provide for that crime, as suggested on behalf of the appellant. It occurs because misappropriations by clerks or servants, were considered as sufficiently provided for, by the sections dealing with the various kinds of stealing.

(2) The opening words in section 267, 268 and 269 "if the offender is"....., in the context where these sections occur, clearly mean : If the person who steals within the meaning of section 255, is a person employed.....etc., etc. Read in this way, each of these sections fully covers the offence stated in the margin.

(3) The combined effect of sections 255, 259, 262 and 267 is to create the offence of embezzlement as provided in section 17 of the English Larceny Act, 1916.

(4) Per ZEKIA (JOSEPHIDES J., *concurring*) :—

The interpretation laid down by this Court, might differ from the one accepted by English authorities. Indeed it is difficult to reconcile the view we have taken with some English authorities on the point. However, as we agree to the reasonableness of the interpretation rendered by this Court, we concur with our brother Judges.

Appeal dismissed with regard to the convictions of the offences of stealing and false accounting. Appeal allowed with regard to the conviction of the offence of forging and uttering.

Cases referred to :—

Police v. Pericles Papaioannou 17 C.L.R. 50.

Appeal against conviction.

The appellant was convicted on the 3rd March, 1962 at the Assize Court of Famagusta (Criminal Case No. 7347/61) on 5 counts of the offences of (1). Stealing by person in the public service contrary to ss.262 and 267 of the Cr. Code Cap. 154, (2) Fraudulent false accounting contrary to section 313(b) of the Cr. Code, Cap. 154, (3) False accounting by public officer contrary to section 314 of the Cr. Code Cap. 154, (4) Forgery contrary to ss. 331, 332, 333, 334 and 335 of the Cr. Code Cap. 154, (5) Uttering a false document, contrary to section 339 of the Cr. Code Cap. 154 and was sentenced by Attalides, P.D.C. Loizou and Kourris, D.J.J. to 9 months' imprisonment on each count, the sentences to run concurrently.

G. Cacoyannis for the appellant.

A. Frangos for the respondent.

Cur. adv. vult

The facts sufficiently appear in the judgment delivered by VASSILIADES, J.

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(HARALAMBOS
SOTERIOU
(PAMBOS)
v.
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WILSON, P. : The first judgment will be delivered by Mr. Justice Vassiliades.

VASSILIADES, J. : This is an appeal against conviction by the Assize Court of Famagusta on five counts charging the appellant with the misappropriation of a sum of £20.- and the defalcation of accounting documents in connection thereto. Count 1 is for stealing the £20 ; Counts 2 and 3 for false accounting ; and Counts 4 and 5 for forging and uttering a relative receipt.

The grounds of appeal, elaborately put in the fourteen paragraphs of the notice of appeal, by able counsel, may be divided in two parts : (a) legal grounds in support of the contention that the facts as found do not establish the offences charged ; and (b) that the findings of the trial-court are not justified by the evidence. Grounds outside these two main categories, were not pressed.

The appellant is a Government employee with 22 years service, attached at the material time, to the District Administration as Chief Village Roads Foreman. In his capacity as such, he had under his control government machinery, including a grader.

For the use of this grader in levelling certain village roads the appellant received from the Inspector and Treasurer of the Improvement Board of a district area (P.W.1) the sum of £25.— on the 24th October, 1960 ; and signed the relative official voucher on the Board's forms, which was put in evidence as exh.1. The document speaks for itself, confirming the fact that this was an official payment ; for the use of the government grader ; made to the appellant in his official capacity.

In the ordinary course of his duty, the appellant, on his part, should fill in and issue to the payer, a corresponding receipt-voucher on the government-form known as F. 18, out of a block of such forms, in appellant's hands for the purpose. This is issued in triplicate, with different colouring, apparently to avoid mistakes, and help auditing. The white part remains on the block as an official record ; the yellow part (to the same effect) goes to the payer of the money ; and the pink part is attached to the lodgment-voucher, which goes with the money to the District Treasury in support of the relative account.

The appellant prepared, signed and issued an official receipt on form F. 18, in connection with the transaction in question, on the 3rd December, 1960, *viz.* about six weeks after he received the money. The pink and white parts were traced in the respective government-records, and they were produced as exhibits 13 and 14 respectively ; the former is a carbon-paper copy of the latter. The yellow part was not traced. This receipt, however, is for £5 ; and not for £25.— (Typed notes of the record, p.70 ; in the fourth page of the judgment).

The Inspector-Treasurer of the Improvement Board (P.W.1) stated that some time after the said payment, the appellant delivered to him an official receipt on form F. 18, for £25.—, which the Inspector (P.W.1) kept in his possession until the 28th February, 1961, when he returned it to the appellant at the latter's request, for adjustment, after a refund of £20.—, made by the appellant on that date ; a refund from the £25 paid to the appellant by the witness on the 24th October, 1960, under exh.1. (Typed notes p.2, C-H).

The appellant admits giving a yellow-colour receipt "similar to F.18" to the witness (P.W.1) for £25, "about a week or 10 days" after the payment of the money on October 24th. (Typed notes p.47, F.) But that, he says, was not the yellow part of exhibits 13 and 14. It was a provisional receipt, he said. The yellow part, according to appellant's evidence, was for £5, same as the other parts ; and was delivered by him to a certain Costakis Andreou, a driver, in December, together with £20.— for refund to the Improvement Board. (Notes p. 48, D and E.) Costakis Andreou, according to the appellant misappropriated the £20 ; and appellant never saw that yellow part of the F.18 for £5.— again. Andreou informed him later, he says, that it could not be found. (Notes p.50, E).

As regards the "provisional" yellow coloured receipt "similar to F.18" for £25, which he gave to the Inspector (P.W.1), the appellant admits asking for its return, and actually taking it back from the Inspector in February, when appellant refunded the £20 ; he put it in his office papers, he says, and it was there when he left the office early in March. (Notes p 50, E.) But in fact no such paper was found.

Appellant's version regarding the said payment of the £25, the receipts issued, and the refund is this : After calcu-

lating the price and negotiating with the Improvement Board for the services of the Government-grader, the appellant received £25.— promising to make a further reduction, if he could do so. For this amount he signed exhibit 1 on the Board's form, on the 24th October, 1960. He also issued a provisional receipt of a yellow-colour "similar to F.18 which he handed to the Board's inspector a week or 10 days later.

By the 3rd of December, 1960, appellant decided to reduce the charge for the grader to £5.— and refund the £20.—, he says. He then issued an F.18 for £5.— and handed the yellow part of the voucher together with the £20 to Costakis Andreou to pass them over to the Improvement Board.

Costakis Andreou misappropriated the £20, appellant says, and lost the F.18 for £5. When he discovered the misappropriation of the money, the appellant made Andreou pay it back by instalments, he says. And when he had recovered it all, by the end of February 1961, he went to the village, where he refunded the £20.— to the Board's Inspector, and obtained the return of the "provisional" yellow receipt for £25, which was no longer any use to the Inspector. (Notes p.50, D.)

This was on the 28th February, 1961, after the Auditors had come for a surprise inspection of appellant's account on the previous day, the 27th February.

Costakis Andreou was not called as a witness ; and neither the "provisional" yellow-colour receipt for £25, nor the yellow part of the F.18 for £5.— were ever traced. Nor was the refund discussed with the District Officer or any other superior officer.

After hearing the evidence for the prosecution, and after hearing the appellant in the witness-box for several hours (his evidence covers 20 pages of the record) the trial court reviewed the whole evidence before them, and made their findings.

> We are satisfied, the Court say, that the extra work was agreed to be done.....at £25. (Page 72, F. of the record).....
>
> We are further satisfied that the accused, some days later, delivered to P.W.1 (the Board's Inspector) the yellow duplicate of Form F. 18 for the sum of £25..... .....(Page 73, B.)

We have no doubt in our mind that the accused, having been faced with the auditor on the 27th February, he rushed on the evening of the 28th to find P.W.1 (the Board's Inspector) in order, on the one hand, to destroy a damning piece of evidence against him, and on the other hand, to settle the outstanding bill appearing at the Petrolina Station in the name of the District Administration" (Page 73, G.).....

The conduct of the accused, his entries in the various official documents, his receiving of the £25 and his depositing with the District Treasury of only £5, and his hurried trip to Asha and then to Aphania, together with the remaining circumstances of this case, leave no doubt in our mind that his intent was to defraud....." (Page 74, D & E.)

Upon these findings the trial-court convicted the appellant on counts 2 and 3 (for false accounting) and 4 and 5 (forging and uttering the missing yellow part of F.18 of the 3rd December). And relying on the judgment in *Police v. Pericles Papaioannou* (17 C.L.R. p. 50) the Assize Court rejected the submission of the defence regarding count 1, for stealing, and convicted the appellant on that count as well.

In view of the very serious consequences of these convictions for the appellant, this Court has listened to the able plea advanced on his behalf by learned counsel, with the utmost care. After full consideration of the whole case, the Court unanimously agreed that the trial - court's findings regarding the misappropriation of the £20, between the receipt of the money by the appellant on the 24th October, 1960 and the 3rd December, 1960, when he issued the F.18 for £5 (exh. 13) should not be disturbed.

On these findings, which, in our opinion, are fully justified on the evidence, the conviction on counts 2 and 3 must stand.

As regards the convictions on counts 4 and 5 for forging the yellow-part of F.18, No. L. 102316, of the 3rd December, 1960, and uttering such forged document, this Court are inclined to the view that in the absence of the alleged forged document, in the circumstances of this case, the appeal should succeed ; and the convictions on counts 4 and 5 be set aside.

This disposes of the factual part of the appeal. What

remains is the contention advanced on behalf of the appellant, that the trial-court's findings cannot support the conviction on count 1, for stealing. Sections 262 and 267 of our Criminal Code (Cap.154) upon which count 1 is based, merely provide for punishment, learned counsel submitted; they do not create an offence. The offence for which these two sections provide the punishment, is the offence of stealing ("the felony termed theft" as section 262 puts it) which is the offence under section 255 of the Code.

The trial court findings, counsel further submitted, could perhaps amount to embezzlement under s.17 of the Larceny Act, 1916 in England; but cannot amount to the felony of theft under section 255 of our Code. And, elaborating on the distinction between larceny and embezzlement in the law of England, counsel submitted that while our code provides for the former, it does not provide for the latter.

Interesting and attractive as the argument appears to be, in my opinion, it is devoid of substance.

As regards the first part of the submission, to the effect that sections 262 and 267 of our code, merely provide for punishment, one may observe at once, that both sections refer to the offence of stealing defined in section 255. But that cannot mean that without the definition-section, the offence of stealing is not provided for.

Reading section 262, or section 267 in its context, one would only have to attach a meaning to the words "any person who steals" in the former section, or the corresponding expressions in the latter, and one would have both offence and punishment in the section. And surely the Courts applying the law codified in the Cyprus Criminal Code, would be able to give a meaning to these words or expressions, even without section 255.

Once, however, section 255 is there, opening the part of the Code covering "Offences Relating to Property", as a definition-section, one does not have to look for the meaning; the Court applying the Code, must give to these words and expressions, the meaning provided for them or amplified and settled, in the definition-section.

As regards the second part of the submission to the effect that our Code has, for some reason or other, failed to provide for the offence known as embezzlement in the law of England,

one has only got to look whether the definition of stealing in section 255 of our code is wide enough to cover embezzlement.

Speaking for myself, I have no doubts on the point. My brothers Zekia and Josephides JJ. take the view that the combined effect of sections 255, 259, 262 and 267, is to create the offence of embezzlement as known in the English Law and as provided in section 17 of the Larceny Act, 1916. We all agree that on the facts of this case as found by the trial court, the conviction on Count 1 must be sustained.

Section 255 of our Code originates in section 245 of the Cyprus Criminal Code Order in Council, 1928, enacted in that year, for the then Crown Colony of Cyprus, in substitution of the Ottoman Penal Code (Vide M.P. 1326/26/1;— red 251 ; and official Gazette No. 1947 of 17th October, 1928).

According to the Memorandum of the Attorney-General, attached to the relative Bill :—

> "The draft Code, based on the principles of English Law, followed closely a Model Code compiled by the Legal Advisers to the Colonial Office for the East African Dependencies". (M.P. referred to above, at red 137, paragraph 5.)

Our Code, therefore, does not originate in an enactment intended to codify the English common law ; or, for that matter, the law of England at that time. And the absence of special provision for the crime of embezzlement, corresponding to section 17 of the Larceny Act, 1916, is not, in my opinion, an omission, accidental or intentional, to provide for that crime, as suggested on behalf of the appellant. It occurs because misappropriations by clerks or servants, were considered as sufficiently provided for, by the sections dealing with the various kinds of stealing.

The opening words in sections 267, 268 and 269 "If the offender is".....in the context where these sections occur, clearly mean, in my view : If the person who steals within the meaning of section 255, is a person employed. . . . etc. etc. - Read in this way, each of these sections fully covers the offence stated in the margin.

Mere reference to other Criminal Codes, is, I think, enough to remove any hesitation on the point. In the Cri-

minal Code of Canada (Snow's 6th Edition, 1955) there is no reference to embezzlement in the Index, at all. Fraudulent conversion and allied offences, in sections 276 - 278 under the general heading of "Theft" in Part VII, dealing with offences against property, cover the ground (Vide "conversion" at page 237 ; and section 276 at page 245).

In the French Penal Code, misappropriation of money by public officers (articles 166—198) is one of the "Felonies and Misdemeanours against Public Order" (articles 132—294) Larceny comes under the part for "Felonies and Misdemeanours against Property" (articles 379—463). And misappropriation by a servant (article 386) is an aggravated form of stealing. (Vide the American Series of Foreign Penal Codes — France — at pages 72 and 130).

In the German Penal Code (same Series — No. 4 — Germany), larceny and embezzlement are dealt with under the same chapter, 19, sections 242—248. Fraudulent conversion is provided for, in section 246 at page 127 under the heading of embezzlement. And a comparison of that section with the proviso to our section 255(1) shows that they both cover much the same offence.

I do not consider it necessary to deal further with the point. In my opinion, the definition-section of our Code (section 255) was apparently intended to cover all kinds of stealing, including embezzlement ; and section 267 read together with sections 255 and 259 fully covers the case in hand.

The result is that the appeal against the convictions on counts 1, 2 and 3 fails ; and the convictions on these counts stand. The appeal against the convictions in counts 4 and 5 succeeds ; and these two convictions are set aside.

As the sentence on each of these counts is 9 months imprisonment, running concurrently, the term to run in respect of the first three counts from the date of conviction. We affirm the sentence as it stands, although we feel that we must say that in a case of this nature, concerning an experienced government servant, we think that the sentence imposed is very lenient.

ZEKIA, J. : The only statement I wish to make is that the interpretation laid down by this Court might differ from

the one accepted by English authorities. Indeed it is difficult to reconcile the view we have taken with some English authorities on the point. However, as I agree to the reasonableness of the interpretation rendered by this Court, I concur with my brother Judges.

JOSEPHIDES, J. : I agree with the result. As already stated in the judgment of my brother Vassiliades, J., it is my view that the combined effect of sections 255, 259, 262 and 267 of our Criminal Code is to create the offence of embezzlement as provided in section 17 of the English Larceny Act, 1916. I would, however, associate myself with the observations made on this point by my brother Zekia, J.

WILSON, P. : I agree.

Appeal dismissed with regard to the convictions of the offences of stealing and false accounting. Appeal allowed with regard to the conviction of the offence of forging and uttering.