CALCUTTA HIGH COURT

Major Robert Stuart Wauchope

Vs

Emperor

(Lort-Williams ,J.)

24.08.1933

JUDGMENT

Lort-Williams, J.

1. The appellant, Major Robert Stuart Wauchope, O.B.E., Indian Army, has bean convicted by the Chief Presidency Magistrate of criminal breach of trust under Section 409, I.P.C., in respect of two sums of Rs. 1,500 each alleged to have been received by him on 4th March and 1st July 1929, respectively, from the Government of the Nizam of Hyderabad, in his official capacity as officer in charge of No 6 Survey Party of the Government of India, with headquarters at Bangalore and field headquarters at Secunderabad, and sentenced to six months' imprisonment and a fine of Rs. 1,000 on each of two counts, the sentences of imprisonment to run concurrently.

2. The appellant is the son of the late Col. Wauchope, C.B., C.M.G., C.I.E., of the Survey of India, and is an officer of 27 years' standing. He joined the army in 1906, and was appointed to the Survey of India in 1910. Between 1914 and 1921 he was again employed on military duty, during which period he was appointed Assistant Director of Works at Waziristan, was mentioned in despatches, and received the honour of the O.B.E., in recognition of his services. In 1921 he returned to the Survey of India and later became officer in charge of No. 6 Survey Party. In 1929 he became Superintendent of Surveys. These survey parties worked under a Director of Survey at Bangalore. In 1929 the Director, Col. Brown died and the appellant acted in his place. In 1930 he was appointed Assistant Surveyor-General and was stationed in Calcutta. Since May 1932 he has been suspended in connection with these alleged misappropriations, as a result of the findings of a Departmental Committee of Inquiry. He is a married man with two children and is entitled to a pension of £530 as Major. In the normal course he would have been promoted Lt. Col. in August 1932 with a pension of £800, and with reasonable expectation of being promoted Col. eventually with a retiring pension of £900 per annum.

3. In dealing with this case, I regret to find it necessary once again to draw attention to certain

fundamental principles of law, which there seems to be an increasing tendency either to disregard or to overlook, on the part of both Judges and Magistrates, as well as by those who appear to prosecute on behalf of the Crown. The first is that every accused person must be presumed to be innocent, unless and until he has been proved beyond reasonable doubt to be guilty, and the second is that his guilt must be established by relevant evidence before he can be convicted. Inview of the appellant's past record, if for no other reason, he had every right to expect that these fundamental principles would be strictly observed throughout his trial. In the present case the Magistrate in his judgment has made frequent reference to certain printed hand-books of rules and instructions purporting to have been issued by order of the Surveyor-General of India and others, and to other facts which do not appear to have been proved in evidence and which are not included in the record or in the list of exhibits, For this reason alone these statements must be disregarded, apart from the fact the evidence of the witnesses for the prosecution shows that the alleged rules did not apply, or applied only very partially to the particular circumstances in which, and the period when, the survey work of the appellant was done. Further, the Magistrate's judgment seems to show that he assumed that all that the prosecution had to do to establish criminal misappropriation was to prove that the appellant had received the two sums alleged, and had failed to account for them.

4. Only five witnesses were called on behalf of the prosecution and they sought to establish the following facts: The appellant's ordinary field survey work was carried on during the cold whether, and extended to June or July. His field headquarters were at Secunderabad. The main survey headquarters were at Bangalore, and were in charge of a Director of Survey-Col. Brown. At the end of the field season the appellant's survey party used to move to Bangalore. The appellant had under his control a head clerk named Chetty, an Assistant Clerk, a Jemadar and Peons and a large number of field surveyors. During the field season appellant had to do a great deal of touring. Periodical returns of work, finance, etc., were made to the Director and other superior officers. The appellant was ultimately responsible for these returns, and for cash and accounts, though the clerical work, naturally was done by his staff.

5. A cash chest was kept with two keys. The appellant had one and the jamadar the other. "When on tour, appellant's key was held by Chetty, who used to make all necessary disbursements, often amounting to many thousands of rupees. Appellant and Chetty each kept a cash account book, but it is obvious from inspection, and admitted by the complainant that appellant's book was generally a mere copy of Chetty's. Disbursements were made under three heads: (1) pay; (2) travelling allowance and contingencies; (3) miscellaneous. The accounts show that receipts consisted of money received from Government, and from numerous other sources, such as sales of materials and maps, payments for survey work received from Indian States, Government Departments and private firms or individuals, rents, freight and so on. No attempt was made by

any of the witnesses to explain these accounts or to show what the various items of receipt or expenditure referred to. The Courts both here and below have been left to discover what is possible from a cursory examination. Major Meade, who was the complainant and a member of the Court of inquiry, purported to explain the nature of the work done and the system followed, or which ought to have been followed. But he admitted that he had no knowledge of the facts, beyond what he was able to obtain from the official records and papers. Consequently his evidence was of little, if any, value, and did not carry the case beyond what could be obtained by inspection and perusal of the documents.

6. The clerk Chetty appeared anxious to disclaim all knowledge of the facts, beyond those which he thought sufficient to absolve him from any charge of being implicated in the allege misappropriation. According to Major Meade's evidence, for what it was worth, the ordinary work of the Survey Department is small scale mapping; but other work, called extra departmental, is undertaken for Municipalities, Indian States, and Government departments. Sanction for this must be obtained from the Surveyor-General but may be given after the work has been completed. The danger of taking into consideration facts which have not been proved in evidence is shown by the fact that the Magistrate has relied upon the printed rules to which I have referred to establish that the appellant acted dishonestly in undertaking such work without first obtaining sanction, and by omitting to pay the price into the treasury, when the admitted evidence establishes without shadow of doubt that such rules had no application, and the appellant acted quite properly in accordance with recognized practice. The rule upon which the Magistrate specifically relies was not even in existence when the work was undertaken, out of which the present charges arise.

7. This work was undertaken by the appellant at the request of the Hyderabad Government, and consisted of a survey of two forts. The negotiations are contained in letters and conversations between the appellant and the witness, Mr. Yazdani, during the cold weather season of 1928-29. It was agreed that Rs. 3,000 should be put at the appellant's disposal by the Nizam's Government, and payment was made to the appellant by two warrants for Rs. 1,500 each on 4th March and 1st July 1929 respectively. This was not an isolated instance. The cash account-books of the appellant and Chetty contain numerous references to work done for, and large payments made by the Hyderabad Government to the appellant in 1927, 1928 and 1929, as well as other extra departmental work and payments similarly dealt with. In view of this and other evidence it is idle to suggest that, the appellant ought to have transmitted these sums direct to the Government treasury, and that his omission to do so, ought to be regarded as evidence that he intended to appropriate them to his own use.

8. All that we know is that these warrants were cashed, and that neither the appellant nor anyone

else has been able to point to any specific entry of these amounts in the cash account-books. On the other hand there is nothing whatever to show that the proceeds were appropriated by the appellant. There is no entry in his Bank pass book, nor any other evidence to suggest that he was any better off at or after the time when these warrants were cashed. The endorsement on the First warrant was written by Chetty and the money collected by one of the peons Chetty says that he gave it to the appellant. The appellant says that so far as he has any recollection of the matter after three years, he placed it in the cash chest, and used it for contingent expenditure. That he wanted it for this purpose is confirmed by his letters, written to Mr. Yazdani, asking for payment.

9. If he wanted to keep the matter secret and misappropriate the money, it is difficult to understand why he gave this warrant to Chetty to endorse, and to a peon to collect. Still more difficult to appreciate is Chetty's explanation about why he omitted to enter the payment in his cash account-book. When this witness was first asked about this payment he said that he recollected nothing, which may have been true. But if this evidence is to be accepted, similar belief should be accorded to the appellant when he admits the same forgetfulness. Upon being confronted with his endorsement on the warrant Chetty purported to recollect that he received this money from the peon, and handed it to the appellant. We have only his word for this. But it is not necessary even to suggest that his abatement may not be true, it is sufficient to observe that the evidence on this point is as consistent or otherwise with Chetty's guilt or innocence as with that of the appellant, and no more.

10. Chetty explained that he did not enter the payment in his cash account-book because he thought that it was personal to the appellant. The Magistrate has accepted this as a reasonable explanation. In my opinion his evidence was transparently false. The warrant was made out to the appellant in his official capacity as officer-incharge of No. 6 party, Survey of India, and was so endorsed by Chetty. It was on the official printed form of the Nizam's Government. Many similar payments had been made to the appellant by this Government, and had been entered by Chetty in the cash account-book, though he had the hardihood to say that he thought that these also were personal. He has suggested no reason for treating this payment differently. The most charitable view to take of his evidence is, that his omission was due merely to carelessness, which he cannot now afford to admit. The second warrant was received at the end of June and cashed by the appellant personally on 1st July 1929. At that time the whole staff had moved to Bangalore, and the appellant himself was leaving that morning, and was making his final round of visits to officials in Hyderabad. These circumstances not only explain why this warrant was not endorsed and collected by members of his staff as before, but they afford a very natural explanation why this receipt was overlooked, and why it was not entered in the cash account-books of either the appellant or Chetty.

11. The prosecution has relied very much upon the appellant's alleged omission to mention this Hyderabad extra departmental work in the returns made by him to the Director in January and April 1929, and this seems to have impressed the Magistrate strongly. It was suggested that this omission confirmed the truth of the allegation that the appellant intended to conceal this work, in order to enable him to misappropriate, these payments. Such patent torturing of the evidence by the prosecution was unpardonable. It is a hard thing to torture the laws so that they torture men." Those who appear on behalf of the prosecution must be made to realise that it is no part of their duty to try by hook or by crook to obtain convictions. And it is the duty of the Magistrate sternly to discountenance such methods, which are but a travesty of justice. It is hardly conceivable that such arguments should have been allowed or accepted by the Court, when I find that so early as 1st June 1929, the appellant informed the Director that negotiations to undertake extra departmental work for the Nizam's Government were in progress, and that on 15th July he supplied the Director with details stating the work and the cost, and said that sanction would be applied for later on. In the August return further details were given, and in October the work was included in a long list of surveys for which sanction was required. It appears from the correspondence between the appellant and Mr. Yazdani that the work was estimated to occupy six months, did not commence until March 1929, and was still in process of revision in March 1930, when further work on this survey was required by the Hyderabad Government. These facts are sufficient to dispose of the suggestion that this work ought to have been included in earlier returns, and even the witness Chetty could not be prevailed upon to say so.

12. Further upon this allegation of concealment, it must be observed that every one of these letters and documents, or copies of them, were either kept on the appellant's files or forwarded to the Director or other appropriate Government Department. It has not been suggested that the appellant destroyed or concealed a single relevant document. But Major Meade very fairly and frankly admitted that if the appellant had wished to suppress all mention of the survey of the fort, he could have done so and submitted a blank return. Moreover he admitted that if the appellant had paid this money into the Treasury at any time during 1930 or 1931, nothing further would have been heard of the matter.

13. Yet both the prosecution and the Magistrate have relied upon these documents to prove his guilt. Thus it was proved that, on 18th November 1929 the appellant described the Hyderabad survey as paid-for work, and in the same letter said that Rs. 2,000 was the final amount to be recovered from the Nazam's Government before 31st March 1930. Apparently this sum was intended to cover Rs. 1,500 for the second fort and Rs. 500 for some extra work which had been estimated originally at Rs. 600. In Ex. 39 the appellant said that other work had been done in connexion with Warangal Fort, but was included in the sum of Rs. 3,000, because the work on the two first forts had been over-estimated. This had caused some errors in accounting, and it was

uncertain whether some items were outstanding or not. Mr. Yazdani being on leave in England, he had been unable to clear these matters up. But the maps of the two first forts ought to have been supplied, because the Hyderabad Government had obviously paid for them, and the accounts required further examination and adjustment. In October 1930 appellant came to Calcutta as Assistant Surveyor-General and Mr. Kenny succeeded him as officer-in-charge of No. 6 party. The sum of Rs. 600 was paid into the treasury in this month. In March 1931 appellant wrote to Mr. Kenny saying that there were one or two outstandings with the Hyderabad Government for which he was responsible, one being the Rs. 500 already mentioned, and which the appellant apparently thought was still unpaid. There was further correspondence throughout 1931, upon the subject of the recovery of outstandings, which were stated to amount to Rs. 2,000, and the appellant said that he would take steps to recover them. In February 1932 the appellant wrote to Mr. Yazdani saying that there were outstandings amounting to Rs. 2,000 for which appellant was personally responsible, and for which he had tried unsuccessfully to obtain payment during Mr. Yazdani's absence. He was writing from memory and was uncertain to which work these outstandings applied. Rs. 500 was for extra work in connexion with the first fort, and either the first or second fort was still not paid for. Mr. Yazdani replied that both the forts had been paid for, and referred to the two cheques sent in 1929, and asked for the maps to be supplied. The appellant wrote again in May saying that he might have made some confusion in the allocation of the sums due as he was writing from memory. He reminded Mr. Yazdani about extra work at Warangal, Aurangabad and Daulatabad, and asked whether payment had been made for these. About this time Major Norman, who had succeeded Mr. Kenny, wrote a confidential letter to the Surveyor-General, and the appellant sent an explanation (Ex. 39) to which I have referred already. As a result there was the Departmental enquiry and the appellant was suspended. From these facts, the prosecution submitted and the Magistrate agreed, that the only possible inference to be drawn was that the appellant had been trying to cover up his traces, and to create an atmosphere of confusion in order to put off the evil day, when he would have to admit that he had received this money. His forgetfulness of the facts and incidents, and his attempts to recover the money were a mere pretence. In fact the Magistrate went so far as to say that once the prosecution had proved that the appellant had received the money, and the appellant was unable to show from his accounts that, and how, he had used it for public work, the conclusion that he had misappropriated it was inevitable.

14. It was inevitable only upon the assumption that an accused person must be presumed to be guilty, unless and until he proves himself to be innocent. I have already referred to this fallacy. But Mr. Bhttacharjee on appeal has again attempted to argue that in such circumstances the onus of proof is shifted to the accused. He has referred to one or two cases in which this unusual and erroneous contention has been accepted and approved. I dealt fully with this matter in Emperor v. Ganesh Prosad Tewary, Appeal No, 206 of 1929 (Calcutta), but as that case was not reported it is

necessary for me to repeat some of my observations contained in that judgment.

15. In criminal cases the onus of proving the general issue never shifts, and it lies upon the prosecution to prove beyond reasonable doubt the guilt of the accused. In this case the prosecution had to prove dishonest misappropriation by the appellant, and unless and until they could point to a state of facts which led inevitably to the conclusion that the appellant was guilty, they failed to discharge the onus which lay upon them. If there is one maxim of criminal jurisprudence which is better established and more fundamental than any other, it is that an accused person must always be presumed to be innocent until he is proved to be guilty. It is true that the burden of establishing any special issue raised by the accused rests upon him, but there is always the burden of the general issue as to the guilt of the accused person which always rests upon the prosecution. I am quite sure that the case of Harendra Kumar Ghose v. Emperor was wrongly decided. The learned Judges there said that the Courts below have found that the petitioner was a tax daroga and cashier of the Municipality, that the amounts which he is said to have embezzled were received by him and he failed to account for them. These being the findings we think that all the, elements constituting an offence under Section 409, I.P.C. have been found.

16. They go on to say:

The burden was initially placed on the prosecution and when the prosecution succeeded in proving the receipt by the petitioner of the several amounts it was for the petitioner to show that he had not converted them to his own use. In these circumstances we do not think that the burden was wrongly placed on the petitioner.

17. In my opinion, the statements to which I have referred are in direct conflict with the elementary principles of the criminal law. The same criticizm applies to the case of Emperor v. Kadir Baksh (1911) 33 All 249. In that case the learned Sessions Judge had said:

The prosecution ought to have shown by some evidence that the amount with the embezzlement of which he has been charged had in reality been appropriated by him to his own use and that his defence was groundless.

18. The learned Judge in the Court of appeal said:

In our opinion the learned Sessions Judge is quite wrong in the proposition which we understand him to lay down in this paragraph of his judgment * * * It is entirely wrong to suggest that it lay on the prosecution to prove the actual mode of misappropriation of the money ... when they proved that he had not returned the money in accordance with his duty, when he returned the summonses unserved, the Crown had proved their case, and it lay on the accused to prove his

defence.

19. It is true that the prosecution need not prove the actual mode of misappropriation, but they must prove dishonest misappropriation. The onus, as I have said, is always upon the Crown. It never shifts to the prisoner. In Woodroffe's Law of Evidence, Edn. 8, p. 691, it is stated as follows:

The onus of proving everything essential to the establishment of the charge against the accused lies upon the prosecution who must prove the charge substantially as laid. The onus never changes, For every man is to be regarded as legally innocent until the contrary be proved, and criminality is never to be presumed.

20. In Phipson's Law of Evidence, Edn.6, p. 33, it is stated as follows:

Generally in criminal cases (unless otherwise directed by statute), the presumption of innocence cast on the prosecutor the burden of proving every ingredient of the offence even though negative averments be involved therein.

21. In the case of Gunananda Dhone v. Santi Prokash Nanley as follows:

Indeed this must be so in many cases, for the offence (which was an offence under Section 405, I.P.C.) necessarily involves secrecy, and the exact manner, point of time or place where the misappropriation, conversion, user, disposal or sufferance takes place, remains more often than not, a matter within the special knowledge of the accused himself. In this class of cases the overt act of the accused showing his dishonesty is essentially necessary to be proved to establish the offence, and till the time arrives when that act is done it cannot be said with certainty that the offence was committed. A very common case of this kind is where the accused received the money for the prosecutor and failed to account for it. Mere retention of the money would not necessarily raise a presumption of dishonest intention, but it is only a step in that direction.

22. It is true of course that the legislature sometimes specifically relieves the prosecution of proving certain essential facts among the necessary ingredients of a crime, e.g., with regard to the crime of receiving stolen goods, well knowing them to have been stolen, where goods recently stolen are found in the possession of anyone, according to English law, the jury may convict that person of the offence unless he gives some explanation of his possession. A similar provision is made in India by Illus. (a), Section 114, Evidence Act. Even in this type of case the onus is not shifted, that is to say, the onus of proving the guilt of the prisoner still remains on the Crown, with the result that if the prisoner gives an explanation which may reasonably be true, even though it is not believed by the Judge or the jury, he or they must acquit the accused, because in such circumstances the onus of proving the guilt of the accused has not been discharged. That

was decided in a very well-known case R. v. Schama-R. v. Abramovitch (1914) 84 LJK B 396. That decision has been followed in this Court in the case of Satya Charan v. Emperar , part of the headnote of which is:

Held also, that the statement to the jury that the burden of proof has shifted was a serious misdirection as the onus on the prosecution to prove guilt never changes.

23. The learned Judges (Newbould and Mukerji, JJ.) referred to the case of Hakim Mondal v. King Emperor AIR 1920 Cal 342 in which the learned Chief Justice pointed out that in a criminal case the onus is on the prosecution to prove beyond reasonable doubt the guilt of the accused and that the onus never shifts. They also referred to the case of R. v. Abramovitch (1914) 84 LJK B 396 under the reference, R. v. Issac Schama (1914) Cr App. 45. 8. They went on to say that the law in India is similar to the law in England in this case is clear from the words used in Illus, (a) to Section 114.

24. Moreover even where the legislature has put upon the accused the burden of proving certain matters be is in a much more favourable position than the prosecution. As is stated in Phipson's Law of Evidence (supra) p. 34:

When the burden of the issue is on the prosecution, the case must be proved beyond a reasonable doubt ... when, however, the burden of an issue is upon the accused, he is not, in general, called on to prove it beyond a reasonable doubt, or in default to incur a verdict of guilty; it is sufficient if he succeed in proving a prima facie case, for then the burden of such issue is shifted to the prosecution, which has still to discharge its original and major onus that never shifts, that is, that of establishing, on the whole case, guilt beyond a reasonable doubt" R. v. Cavendish CL 178 and R. v. Stoddart (1909) 25 TLR 612.

25. Again on p. 35 it is stated:

It is not however for the accused to prove honest dealing with the property, but for the prosecution to prove the reverse (R. v. Lewis) 14 Cr App. 33; and if an explanation be given which the Jury think may be true, though they are not convinced that it is, they must acquit, for the main burden of proof (i.e. beyond reasonable doubt) rests throughout upon the prosecution, and in this case will not have been discharged,

26. There are two other cases which are sometimes referred to, Queen-Empress v. Hari Dagdu (1962-98) Rat. Un. Rep. Cr C 872 and Queen-Empress v. Ram Chandra (1862-98) Rat. Un. Rap. Cr C 860. Both are authority for the proposition that the onus never shifts to the accused.

27. The appellant submitted a long and very full and frank statement to the Court of inquiry (Ex.

7) in which he denied emphatically that he had misappropriated the money, and maintained that it had been used for his work, though, after the lapse of three years, he was unable to point to specific relevant items in the accounts. He said that he had no recollection of the actual payments, though he assumed that they had been paid, and were put into the cash chest and used for contingencies. That there were many factors which would tend to obscure his recollection of details, the chief being the very large programme both of routine and extra-departmental work on which the party was engaged, over very difficult terrain, and involving a large amount of touring over a wide area, and continual absence from headquarters. This is confirmed by his journals. The appellant describes at length the great pressure of work, both field and clerical, the necessity for large sums for contingent expenditure, for which sanction was sometimes delayed, the constant discussions with his superior officers, the shock caused by the illness and death of the Director who was a great friend of the appellant, the necessity for acting temporarily in his place, and the heavy matter of adjusting his affairs. He submits that all these multifarious duties and distractions and the inevitable dislocation of routine work were sufficient to explain the possibility of some oversight and negligence.

28. The Magistrate has seen fit to describe this full statement as "absolutely no explanation," In my opinion this explanation rings true, is reasonable, probable, and ought to have been accepted. Against it, there is the bald statement of the clerk, whose veracity I have already given good reasons for distrusting, that this money was not used for survey work, and that the work on the forts was paid for out of the ordinary budgeted funds of the party. But he did not attempt to point to a single item in the cash account books as being attributable to this work, and it is a reasonable inference that he was unable to do so. There is no evidence to show that this money ever reached the pocket or the bank account of the appellant, though the Magistrate thought fit to make this assertion, regardless of lack of testimony.

29. Finally he seems to have felt that some explanation was necessary to show why a senior officer of 27 years' standing should have done anything so desperate and foolish as to misappropriate what he describes as the comparatively trifling sum of Rs. 3,000 when his whole career, pension and reputation as a gentleman and an officer would be jeopardised. I am not surprised that he was puzzled, but I cannot help expressing astonishment and indeed incredulity at the explanation which he thought was sufficient to dispose of his dilemma. He says that the explanation was that the appellant was desperately hard up, that at the end of February 1929, he owed his Bank the sum of Rs. 56, and the position was the same in July 1929.

30. What the Magistrate meant by this, I find it difficult to understand, unless it be that he was determined at any cost to find some justification for the conviction which he intended to make. The appellant's pass-book shows that he was in credit to the extent of sums ranging up to over

Rs. 1,100 odd, throughout the whole of the months of March, April, May and June, at end of which month there was a debit of Rupees 23. By 10th July he was again in credit, which ranged up to Rs. 1,200 odd throughout all the following months of that year up to 30th December, when there was again a debit of Rs. 10. To pick out two items, over a period of 12 months and of paltry sums such as these, is so unpardonable, that I regret to have to say, that in my opinion it savours of unfairness. If the Magistrate considered Rs. 3,000 to he a comparatively trifling sum, in what category did he place sums such as Rs. 56 and Rs. 23? Moreover the appellant was permitted by his bankers to overdraw without security to the extent of Rs. 9,000, and was in receipt of a salary ranging from Rs. 1,300 odd in 1929 to Rs. 2,300 in 1932.

31. But this was not all; the prosecution were so desperately hard pressed for material to secure a conviction at any cost, that they went to the length of giving evidence of six Calcutta Small Cause Court decrees which the Magistrate describes as showing that in 1930, 1931 and 1932 the appellant was "hopelessly involved financially and owed money all round." Now the first thing to observe is that this evidence was wholly irrelevant being subsequent to the material dates, and I have no doubt whatever that the prosecution knew perfectly well that this was so and introduced it for the purpose of prejudice. In fairness to the Magistrate I must assume that he also knew that the evidence was irrelevant, and in spite of this knowledge admitted it. One plaint was for three months' rent due up to March 1932, one was the balance of an English decree dated June 1931 of which a large part had been paid off in December 1931, one was for goods supplied between 13th July 1929 and February 1930, one was for goods supplied between December 1930 and January 1932, one was for goods supplied between December 1931 and April 1932 and one was for goods supplied between May 1931 and June 1932. Most of this expenditure was due in all probability to increase in cost of living in Calcutta.

32. It is upon such trumpery and such irrelevant facts that this officer has been convicted. Lest I be tempted to use harsh words in criticising this procedure, I will content myself only with saying, that this is neither the manner nor the spirit in which a prosecution ought to be conducted, or a trial held under the British Crown. I am satisfied with the explanation which the appellant gave and I believe it to be true. The appeal is allowed, the convictions and sentences are set aside and the appellant is acquitted. The fines, if paid, must be refunded. The appellant is discharged.

Henderson, J.

33. I agree with what has fallen from my learned brother with regard to the burden of proof. If the learned Judges who decided the case reported in Harendra Kumar v. Emperor intended to lay down that as soon as the prosecution prove that the money was in the possession of the accused, he must be convicted unless he can show what happened to it, that is a proposition from which I must express my respectful dissent; it means that a burden is placed on the accused which in

many cases it is impossible for him to discharge. In my judgment it is not a question of the shifting of onus but a question of influence. The prosecution must always prove misappropriation; but they may do so either directly (e.g., by showing that the notes were paid into the account of the accused) or indirectly by circumstantial evidence. No doubt in the latter case the fact that the accused has failed to show what has happened to the money coupled with other circumstances may justify an inference that he misappropriated it. But that does not mean that the burden of proof has shifted from the prosecution to the defence.

34. The present case depends upon circumstantial evidence. In such a case the prosecution always tend to view everything which the accused does with suspicion. But, inasmuch as the accused is presumed to be innocent, acts capable of an innocent interpretation should be so interpreted: and it is only acts which are suspicious in themselves which require an explanation from the accused. My learned brother has dealt with the circumstances on which the prosecution rely to establish misappropriation in this case. As far as I can see, the only action of the appellant which is suspicious per se is his demand that the money should be sent to him instead of being paid into the treasury. But according to the evidence of Chetty this particular procedure was always adopted by the appellant and was not confined to these two payments; it cannot therefore be inferred from this that the appellant adopted this procedure in order to make it easy for him to misappropriate these two sums. On the other hand the entire absence of any circumstantial evidence at the time of the transactions to suggest a theory of misappropriation strongly corroborates the defence. This is not a case of systematic fraud. As far as I have been able to understand the prosecution case, the suggestion is that the appellant yielded to a sudden temptation to take the money as a temporary loan. It is not the prosecution case that he was addicted to dissipation or extravagance. The only explanation of such conduct would be that he was hardly pressed at the time. If in fact creditors had been pressing him for immediate payment and threatening to report him to his superior officer, and if these pressing claims had been discharged immediately after the receipt of the money, the prosecution could easily have discovered it. No attempt was even made to prove that such was the case. It appears from the appellant's pass book that he was able to borrow from his bank.

35. There is therefore no reason why he should have embezzled these two sums. Having failed to prove the existence of financial embarrassment at the time of the transactions, the prosecution ought not to have introduced evidence to show that decrees were obtained against the appellant at subsequent dates; it is clear that such evidence can throw no light whatever on the only matter which has to be determined in this case. There can be no question that if the appellant is innocent, he cannot possibly remember what was done with the money. He stated that, so far as he could remember it was spent in connexion with the work; he also hazarded a suggestion that it might have been included in one of the various refunds. This explanation could only be tested by

an examination of the various vouchers. If it appears that any of the expenditure in connexion with the work is not entered in the cash book, it would at once be clear that Chetty's statement on this point is not true. It may be that this matter cannot be tested without a lengthy or laborious inquiry which the department are not prepared to undertake. But the inquiry is one which might lead to the demonstration of the innocence of the appellant. In these circumstances it seems to me that, if the department are not prepared to carry out such an investigation, they should accept the appellant's explanation.

36. Lastly, I am of opinion that some weight should have been given to the past character of the appellant. No doubt, if the prosecution had been able to prove misappropriation by direct evidence, no amount of evidence with regard to character would have been of any avail. But the present case depends upon circumstantial evidence and the question is what inference is to be drawn from circumstances, which may be given either an innocent or a sinister interpretation. It is exactly in a case of this kind that evidence of good character becomes important and it would be unreasonable to hold that there is no difference between a member of an honourable service with an unblemished record and an old thief with previous convictions. In conclusion I need only say that I entirely agree with my learned brother that this appeal must be allowed. But although I find myself unable to agree with the decision of the learned Magistrate, I see no reason to suppose that in convicting the appellant as he did, he was not satisfied that the prosecution case was properly proved by legally admissible evidence.