Benwell v. Republic of Sri Lanka

COURT OF APPEAL.
COLIN-THOME, J., RANASINGHE, J. AND ATUKORALE, J.
C.A. APPLICATION 23/79 AND 633/79.
MAY 7, 8, 9, 1979.

Extradition Law, No. 8 of 1977, sections 6, 9, 10 and 14—Prima facie case required—Evidence Ordinance, sections 34, 62, 63 65 and 100—Whether computer evidence admissible—English law—Sale of Goods Ord. (Cap. 48), Section 12 (1).

Held

(1) In proceedings under section 10 of the Extradition Law, No. 8 of 1977, the Court in Sri Lanka is entitled to consider for the purposes of sufficiency of evidence, only the evidence that is relevant and admissible under the law of Sri Lanka and the standard of proof required is nothing less than a prima facie case.

(2) Computer evidence is in a category of its own. It is neither original evidence nor derivative evidence. Under the law of Sr Lanka, computer evidence is not admissible under section 34 of the Evidence Ordinance nor under any other section of the Evidence Ordinance.

(3) Section 14(1) (*a*) of the Extradition Law, No. 8 of 1977, is only an enabling provision and is not intended to prevent the rejection of evidence taken abroad contrary to the rules of evidence in Sri Lanka or inadmissible thereunder.

Cases referred to

(1) *Schtraks v. Government of Israel and Others, (1962) 3 All E.R. 529; (1962) 3 W.L.R. 1013; (1964) A.C. 556.*
(2) *The Government of Australia v. Harrod, (1975) 2 All E.R. 1; (1975) 1 W.L.R. 745.*
(3) *R. v. Governor, Brixton Prison, ex parte Sadri, (1962) 3 All E.R. 747; (1962) 1 W.L.R. 1304.*

APPLICATIONS for a Writ of Habeas Corpus and in Revision from an Order of the High Court, Colombo.

E. R. S. R. Coomaraswamy with *S. Devasagayam, S. C. B. Walgampaya* and *P. Illangakoon*, for the petitioner.

K. M. M. B. Kulatunga, Additional Solicitor-General, with *Priyantha Perera*, Deputy Solicitor-General and *D. C. Jayasuriya*, State Counsel, for the State.

Cur. adv. vult.

June 9, 1979.

COLIN-THOME, J.

This is an application for a mandate in the nature of a writ of habeas corpus under section 11 of the Extradition Law, No. 8 of 1977, read with section 141 of the Constitution of the Democratic Socialist Republic of Sri Lanka in respect of the body of P. G. J. Benwell, M.B.E., J. P. (corpus) and for extension of bail under section 103 (4) of the Administration of Justice Law, No. 44 of 1973.

The petitioner is the mother of the corpus, P. G. J. Benwell.

On 27.11.1978 P. G. J. Benwell was arrested on a warrant issued by the High Court of Colombo, under the provisions of section 9 of the Extradition Law, No. 8 of 1977, on receipt of an authority to proceed issued by His Excellency the President of Sri Lanka, acting under the powers vested in him by section 8 of the Extradition Law read with Article 44 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka, in pursuance of a request made to him on behalf of the Government of Australia.

The request was made on behalf of the Government of Australia, a designated Commonwealth country, under section 8 of the said law, to extradite P. G. J. Benwell from Sri Lanka to Australia as he was accused of certain criminal offences. The request was made on the basis of 12 warrants containing the allegations that Benwell at Sydney, New South Wales, (*a*) on various dates between January 1977 and June 1978 embezzled 11 valuable securities, namely, 11 cheques for various amounts received by him in the name of his employer, the United Dominions Corporation Ltd., of New South Wales, in his capacity as a clerk of the said Corporation, and (*b*) that Benwell on 3.3.1978, at Sydney, falsely pretended to S. T. Warmeant that a Toyota motor car, number CUP—301, was the free and unencumbered property of his mother, Lady May Benwell, and by means of this false pretence obtained from Warmeant $ 2,800 with intent to defraud.

The said warrants had been issued in pursuance of 12 Informations—General Purposes filed before the Stipendiary Magistrate, New South Wales, and, thereafter, the evidence of certain witnesses was recorded and exhibits tendered before him in September 1978, all in one day.

Together with the request to the President of Sri Lanka by the Government of Australia was furnished a summary of evidence in respect of 11 charges of embezzlement, offences under section 157 of the New South Wales Crimes Act, 1900 as amended, and in respect of a 12th charge of obtaining property by false pretences, an offence under section 179 of the said Act. Exhibits 1, 3, 4, 7, 9, 11, 13, 15, 17 to 77, 79 and 80 to 109 (referred to herein as E1, E3, etc.) were also forwarded together with the depositions of witnesses.

After the arrest of Benwell, he was released on bail by order of the High Court and thereafter the High Court held an inquiry in terms of section 10 (4) of the Extradition Law. At the close of the inquiry the learned High Court Judge ordered the committal

of Benwell to the custody of the Fiscal, Western Province, under section 10 (4) of the Extradition Law to await his extradition in respect of counts 1 to 9 and 12 and proceeded to comply with section 11 (1) of the said law.

At the inquiry in Sydney, G. A. B. Olivier was the main witness for the prosecution in connection with the 11 charges of embezzlement. He was a senior inspector of the United Dominions Corporation Ltd. (hereinafter referred to as the Corporation) which was a listed public company and also registered as a finance company under the Money Lenders' Act of New South Wales. Olivier's duties were Branch and Departmental inspections. He had been employed by the Corporation for approximately 9 years and claimed that he had a thorough knowledge of its accounting practices and procedures. He knew Benwell who was an employee of the Corporation from about 20th November, 1972, until he resigned on the 9th of June, 1978. Benwell held the position of Securities Officer of the Head Office Lending Department. His responsibilities included the custody of security documents, settlement and discharges of real estate transactions. He was familiar with Benwell's signature and handwriting.

Benwell had three separate accounts with the Corporation. The first was a real estate mortgage tender relating to a property at 14, Frederick Street, 'MIRANDA'; the second was a real estate mortgage account in relation to a property at 13, Burraaneer Avenue, 'CRONULLA'. The third was a hire-purchase account with the Corporation in relation to a Toyota Crown Sedan motor vehicle registered No. CUP-301. Olivier produced the ledger card relating to the 'MIRANDA' mortgage account marked E82, and the ledger card relating to the 'CRONULLA' account marked E 83. He produced the hire-purchase agreement relating to the motor vehicle E 84 and the ledger card relating to the hire-purchase agreement marked E 85. In the course of business the Corporation employees were permitted to invest money at certain rates of interest with the Corporation and Benwell invested such moneys with the Corporation.

Olivier was shown 3 computer sheets which purported to set out the investments and amounts deposited with the Corporation by Benwell. He had marked in pencil the numbers 1 to 9 against some of the deposits. The three computer sheets were marked E 86.

Olivier stated in regard to the first charge that the Corporation advanced $ 18,000 to Mrs. K. Joan Winters on Accounts No. RLT 4902 3/10. This advance was secured by a registered mortgage over a property at 171, Arundle Street. The memorandum of

mortgage was marked E 87. The property subject to the mortgage was subsequently sold on 14.1.1977 and on that day the Corporation received a New South Wales Bank Cheque for $ 18,355.06 drawn in favour of the Corporation (E 88). This represented the full proceeds of the payout figure discharging Mrs. Winter's debt to the Corporation. Olivier stated that this cheque was not credited either to the Corporation or to Mrs. Winter's account with the Corporation. It was credited to the account of Benwell with the Registry Department of the Corporation. In other words, it was credited to Benwell's private account.

Olivier was then shown an application form for unsecured deposits relating to Benwell's depositing of a total sum of $ 18,400 with the Corporation. That was made up of the cheque E 88 plus another $ 44.04 with a separate cheque. On this form E 89 Olivier identified Benwell's signature at the bottom. He produced the discharge of the mortgage between Mrs. Winter and the Corporation marked E 90. Benwell had signed the document as a witness.

With regard to charge 2, Olivier stated that the Corporation advanced $ 187,000 to Jayer Pty. Limited secured by a registered mortgage of property at Bayswater Road. Unit 2 of these premises was sold on 17.1.1977 and on that day the Corporation received a Commonwealth Bank cheque for $ 6,300 drawn in favour of the Corporation, representing the full payout figure required to discharge the obligations of the mortgagor. The cheque was marked E 47. On 28.1.1977 Benwell deposited that Bank cheque to the credit of his own account with the Corporation. Olivier gave this evidence after referring to the 3 computer sheets E 86 against the pencil entry '2'. He added that Benwell made an application for unsecured deposits E 91 which related to the deposit of the cheque E47 to his own private account. Benwell had also signed as a witness the discharge of the mortgage for $ 6,300 marked E 92.

Regarding charge 3, the Corporation advanced $ 8,000 to F. Rubio. The loan was secured by a registered mortgage over a property at Liverpool Road. This property was subsequently sold on 4.3.1977 and on that day the Corporation received a C.B.C. Bank cheque for a sum of $ 7371.82 being the full proceeds of the payout figure required to discharge Rubio's debt. The cheque was marked E 49. The discharge of the mortgage which Benwell had signed as a witness was marked E 50 and the memorandum of mortgage E 48. The proceeds of the cheque E 49 were credited to Benwell's private account with the Corporation. Olivier had

marked that entry in pencil in E 86 with the figure '3'. An application for unsecured deposits signed by Benwell marked E 93, according to Olivier, was used for the deposit of the cheque E 49 to Benwell's private account.

Regarding charge 4, Olivier stated that the Corporation advanced $ 10,100 to Peter and Marie Zillmer. Those funds were secured by a registered mortgage over a property at Highway Avenue. The mortgage was marked E 94. On 6.12.1977 the Corporation received A. N. Z. Bank cheque for $ 8,189.50 drawn in favour of the Corporation being the full payout figure discharging the obligations of the Zillmers to the Corporation. The cheque was marked E 95. The application for unsecured deposits E 96 was used by Benwell to deposit E 95 into his private account. Olivier had marked the entry relating to this transaction in the computer sheets, E 86 with the figure '4'.

Regarding charge 5, the Corporation advanced $ 20,400 to Robert and Colin Smith. Those funds were secured by registered mortgage over property at Queen Victoria Street. This property was sold on 22.12.1977 on which day the Corporation received a Commonwealth Savings Bank cheque for $ 18,985.47 drawn in favour of the Corporation (E 99). This figure represented the full payout figure and discharge of the obligations of the Smiths to the Corporation. The mortgage document was marked E 97 and the discharge certificate which bore the signature of Benwell was marked E 98. The proceeds of the cheque E 99 were credited to the private account of Benwell. Benwell had signed an application for unsecured deposits E 100 relating to the deposit of the proceeds of the cheque E 99 into his private account. This was marked in pencil '5' in E 86.

Regarding charge 6, the Corporation advanced $ 12,800 to Frank and Collette Wilson and those funds were secured by a registered mortgage (E 62) over property at Percy Street. This mortgage was subsequently discharged on 12.1.1978. The total payout figure on the mortgage was $ 9731.23. The cheque E 63 for $ 2,000 was part of the total payment for the discharge of the mortgage and the proceeds of this cheque were credited to the private account of Benwell. Benwell had signed an application for unsecured deposits to deposit the proceeds of the cheque E 63 into his private account.

Regarding charge 7, Norman and Merle Kuskey were advanced $ 9,800 by the Corporation. These funds were secured by a mortgage of property at Phipps Avenue. This mortgage was subsequently discharged on 5.2.1978. The proceeds of cheque E 44 for

$ 4,287.94 drawn in favour of the Corporation representing the full payout figure in discharge of the obligations of the Kuskeys to the Corporation were credited to the private account of Benwell. Benwell had also signed an application for unsecured deposits to deposit the proceeds of E 44 to his own account. Referring to the computer sheets E 86 Olivier stated that the amount against the entry in pencil marked '7' indicated that these monies were deposited to Benwell's private account.

Regarding charge 8, the Corporation advanced. $ 8,300 to M. Rashid, the funds being secured by a registered mortgage over a property at Flinders Avenue. This mortgage was subsequently discharged on 17.2.1978. Benwell had signed the discharge certificate E 53. On 27.2.1978 the Corporation received a Bank cheque for $ 7,248.05 drawn in favour of the Corporation being the full proceeds required to discharge Rashid's obligation to the Corporation. The proceeds of the cheque E 51 were credited to the private account of Benwell. Benwell signed an application for unsecured deposits E 105 to credit the proceeds of the cheque E 51 to his private account.

Regarding charge 9, the Corporation advanced $ 30,000 to P. and I. Kalpaxis. These funds been secured by a registered mortgage of property at West Parade. The mortgage was discharged on 26.5.1978 and the Corporation received a Commonwealth Bank cheque for $ 23,298 drawn in favour of the Corporation. This represented the full proceeds of the payout figure required to discharge the mortgage. The cheque for this amount was marked E 54 and on 29.5.1978 the proceeds of this cheque were deposited to the credit of Benwell's private account with the Corporation. Benwell signed an application for unsecured deposits E 106 to credit the proceeds of E 54 to his own account.

Regarding charges 10 and 11 the Corporation advanced $ 685,000 to K. and Y. Bechara. These funds were secured by a registered mortgage over properties at Hampdon Road and Chandos Street. Lot 6 was subsequently sold on 17.6.1978 and on that day the Corporation received a Commonwealth Bank cheque for $ 33,618.17 in favour of the Corporation. That figure was the full proceeds of the payout required to discharge the obligations of the Becharas to the Corporation in respect of lot 6. The cheque was marked E 58. On 9.8.1978 Benwell directed proceeds of that cheque together with other monies towards the payment of the outstanding balances on his two mortgage accounts referred to earlier. Olivier stated after referring to the ledger sheets E 82 and E 83 that a part of that money has fully discharged Benwell's obligations to the Corporation in respect of the property Miranda.

He added that the balance together with other money discharged Benwell's obligations to the Corporation in respect of his property at Cronulla. This took place on the day of his resignation.

The ledger sheet was tendered and marked E 107. Lot 1 of the Five Dock properties relating to the Becharas was sold on 2.6.1978. On that day the Corporation received six cheques totalling $ 33,838.27, all the cheques being drawn in favour of the Corporation, representing the total payout figure for the Becharas obligations to the Corporation in respect of lot 1. One of those cheques was an A.N.Z. Bank cheque for $ 4,900 marked E 61. On 9.6.1978 Benwell directed the proceeds of that cheque together with other monies towards the outstanding balances on his two mortgage accounts with the Corporation. E 108 was the discharge document.

Regarding charge 12, Olivier stated that on 3.8.1977 Benwell entered into a hire-purchase agreement with the Corporation relating to the Toyota car CUP—301. On 3.3.1978 Benwell sold the car to Mr. Warmeant. He did not have the authority of the Corporation to dispose of the vehicle nor did he inform the Corporation of his intending sale. He had not discharged his obligations under the hire-purchase agreement prior to his disposal of the car. The nett balance outstanding in relation to the car was $ 2,342 after allowing for the statutory rebate.

With regard to the first 11 charges, where Benwell had credited his own private accounts with monies received by him for and on behalf of the Corporation, he did not have any authority to dispose of those monies in the manner in which he did. He was required to hand those cheques to the cashier together with a notation as to what account they should be credited, and in each case it would have been the account of the mortgagor for that particular transaction. This was not done in the 11 instances referred to.

In relation to Benwell's private investment account as at 9.6.1978, the date of his resignation, his balance was nil. The last funds were taken out on 7.6.1978 and that was between $ 2,000 and $ 3,000 plus a small amount of interest. Olivier stated that he had made a list of the withdrawals and he produced a list of investment account, relating to Benwell showing the deposits and withdrawals and cheque numbers relating to those accounts. This was marked E 109.

The witness S. T. Warmeant stated that on 3.3.1978 on seeing an advertisement for the sale of the Toyota car CUP—301 in the Sydney Morning Herald he made a telephone call to Benwell. Benwell told him: "I am selling it for my mother." He went

over to Benwell's address at Unit 64, 22 Waruda Street, Kirribilli. Benwell asked for $2,800 for the car but he offered $2,700 and Benwell agreed. He paid Benwell this amount and obtained a receipt. Benwell then handed over to him the registration papers and then he observed that the car was in Benwell's name. Benwell told him: " Yes, I bought it for my mother."

At the time he purchased the vehicle he believed it to be the property of Benwell's mother and free and unencumbered of any debt. He would not have parted with the money if he had believed or known otherwise. Subsequently he had to pay an additional $2,200 to the Corporation.

The learned High Court Judge with regard to charges 10 and 11 held that there was nothing to show that the cheques had been paid into Benwell's account and therefore the evidence relating to charges 10 and 11 was insufficient to warrant Benwell's trial under those charges. We are in agreement with this finding.

The grounds of the present application are that:--

(1) The learned High Court Judge erred in his finding that he was satisfied that the evidence contained in the depositions and exhibits furnished in terms of section 8(2) of the Extradition Law would be sufficient to warrant the trial of the corpus for the offences set out in charges 1 to 9 and 12 if they had been committed within the jurisdiction of the High Court, and in holding that the corpus should therefore be committed to custody to await his extradition in terms of section 10(4) of the said Law;

(2) The said evidence or portions of the said evidence admissible according to the rules of evidence in Sri Lanka are insufficient to warrant such trial and in the absence of prima facie proof of the guilt of the corpus given before the High Court according to the Sri Lanka rules of evidence, the learned Judge, who could act only upon the evidence before him, was not entitled to commit the corpus to custody, if he had properly directed himself on the law:

(3) When the said evidence is tested according to the rules of evidence applicable in Sri Lanka, as it ought to be tested, and all inadmissible evidence such as hearsay evidence is excluded, it will be found that;

(i) there was no admissible evidence before the High Court to hold that there was a prima facie case in respect of any of the charges 1 to 9 and 12 against the corpus;

(ii) there was no reasonable evidence of the offence contained in the said charges for the High Court to have acted upon the basis that there was a case against the corpus which he had to meet ;

(iii) there was no evidence before the learned High Court Judge upon which he could exercise his discretion whether he would commit or not ;

(iv) the admissible evidence was too slight to constitute a prima facie case sufficient to warrant a committal for trial if the charges had originally been brought in the Courts of Sri Lanka and the matter was decided according to the laws of Sri Lanka ;

(v) if the test laid down in English law and referred to in the order is applied, that is, if the evidence adduced stood alone at the trial, would a reasonable jury, properly directed, accept it and find a verdict of guilt, then the application for extradition ought to be refused.

(4) In the absence of due authentication under section 14 of the Extradition Law of the documents furnished to the High Court in terms of seciton 8, the High Court ought not to have ordered a committal of the corpus and such documents ought not to have been read.

(5) In principle the Courts of Sri Lanka will and must protect the rights of the individual by insisting upon strict compliance with the conditions precedent to surrender prescribed by the Statute Law of Sri Lanka before they take the view that the alleged offender should be surrendered, and nothing can or will be inferred in favour of the application for extradition.

(6) The High Court erred in law in holding that the evidence tendered and admissible amounted to offences of embezzlement or criminal breach of trust under section 391 of the Penal Code ; while at the same time conceding that if money had first gone into the Corporation's account and the corpus had thereafter by some device drawn it out the offence would not be embezzlement.

(7) Charge 12 against the corpus and the evidence relating thereto did not disclose any offence under the Law of Sri Lanka but only a civil liability, if at all, and the

corpus, therefore cannot be extradited for the said offence in terms of section 6(1)(*b*) and (*c*) and section 10(4) (*a*) of the said Law, and the reasons given by the High Court for holding to the contrary are based on misdirections of law and fact.

(8) In any event, the said charge 12, read with the evidence tendered in support thereof, disclosed, if at all, an offence of a trivial nature, within the meaning of section 11(3)(*a*) of the said law.

(9) The High Court erred in law in holding that E82, E83, E85, E86 and E107 were admissible under section 34 and that E109 was admissible under section 65(7) of the Evidence Ordinance.

(10) The corpus ought not to be extradited or committed to or kept in custody for the purposes of such extradition and ought to be discharged from custody in terms of section 11 (3) (*c*) of the said Law inasmuch as the accusation against him by the officers of his former employer the United Dominions Corporation Ltd., of New South Wales, had not been made in good faith in the interests of justice, and therefore having regard to all the circumstances it would be unjust or oppressive to extradite the corpus.

The relevant parts of section 6(1) of the Extradition Law, No. 8 of 1977, reads:

"For the purposes of this Law, any offence of which a person is accused .... in any designated Commonwealth country .... shall be an extraditable offence, if—

(*b*) in the case of an offence against the law of a designated Commonwealth country, it is an offence which, however described in that law, falls within any description set out in the Schedule hereto, and is punishable under that law with imprisonment for a term of not less than 12 months ; and

(*c*) in any case, the act or omission constituting the offence, or the equivalent act or omission, would constitute any offence against the law of Sri Lanka if it took place within Sri Lanka, or, outside Sri Lanka.

Section 6, therefore, recognises the doctrine of dual criminality.

Under section 10 (4) of the Extradition Law " where an authority to proceed has been issued in respect of a person arrested and the court of committal is satisfied, after hearing any evidence tendered in support of the request for the extradition of that person or on behalf of that person, that the offence to which the authority relates is an extraditable offence, and is further satisfied—

(*a*) where the person is accused of the offence, that the evidence would be sufficient to warrant his trial for that offence if it had been committed within the jurisdiction of the Court ;

the Court shall, unless his committal is prohibited by any other provisions of this Law, commit him to custody to await his extradition thereunder, but if the Court is not so satisfied, or if the committal of that person is so prohibited, the court shall discharge him from custody. "

Section 10 (4) has to be read together with section 6. The Court of committal must first be satisfied that the alleged offence is an extraditable offence. Section 10 (4) (*a*) required that the evidence must be sufficient to warrant a person's trial for that offence, if it had been committed within the jurisdiction of the Court in Sri Lanka. This is also clear from a reading of section 6 (1) (*c*).

In other words, the Court in Sri Lanka is entitled to consider, for the purposes of sufficiency of evidence, only the evidence that is relevant and admissible under the law of Sri Lanka. Section 14 (1) of the said Law reads :

" In any proceedings under this Law including proceedings on an application for a mandate in the nature of a writ of Habeas Corpus in respect of a person in custody thereunder—

(*a*) a document, duly authenticated, which purports to set out evidence given on oath in a designated Commonwealth country .... shall be admissible as evidence of the matter stated therein ;

(*b*) a document, duly authenticated, which purports to have been received in evidence, or to be a copy of a document so received, in any proceedings in any such country or State shall be admissible in evidence. "

Under section 14(2) :

"A document shall be deemed to be duly authenticated for the purposes of this section—

(a) in the case of a document purporting to set out evidence given as aforesaid, if the document purports to be certified by a Judge or other officer in or of the country or State in question to be the original document containing or regarding that evidence or a true copy of such document ;

(b) in the case of a document which purports to have been received in evidence as aforesaid or to be a copy of a document so received, if the document purports to be certified as aforesaid to have been, or to be a true copy of a document which has been, so received ;

and in any such case the document is authenticated either by an oath of a witness, or by official seal of a Minister, of the designated Commonwealth country in question."

Section 14(1) (a) of the said Law is only an enabling provision and is not intended to prevent the rejection of evidence taken abroad contrary to the rules of evidence in Sri Lanka or inadmissible thereunder.

In *Schtraks v. Government of Israel and Others* (1) (Per Lord Reid) the House of Lords held that the proper test to apply in determining whether the material before the magistrates had been adequate to justify a committal under the Extradition Act, 1870, was whether, if that evidence stood alone at the trial, a reasonable jury properly directed would accept it and find a verdict of guilty.

In *The Government of Australia v. Harrod* (2), it was held that under section 7(5) of the Fugitive Offenders Act, 1967, (which is the same as section 10(4) of the Extradition Law, No. 8 of 1977 of Sri Lanka) what the magistrate had to decide was whether the evidence was sufficient to warrant trial if the offence had been committed within his jurisdiction ; it was not his duty to have regard to Commonwealth statutes other than those relating to the offence charged ; nor was he required to have regard to whether the trial would lead to conviction in the Commonwealth territory. The interpretation of the expression "sufficient" with reference to the English authorities suggests that the standard of proof required is nothing less than a prima facie case.

With regard to Charges 1 to 9 the evidence reveals that all the cheques connected with the charges were in favour of the Corporation. The cheques were crossed "Not negotiable" and

payable to the payee's account, and in at least 6 of the cheques they were crossed to the credit of particular accounts of the Corporation by special crossing so that they had to go into the Corporation's Bank account.

In the course of his order the learned High Court Judge stated that Benwell embezzled the cheques before dispatching them for collection, when he credited them to his own account with the Corporation and that " when the cheques were realised and the money was paid into the Corporation's account with its Bankers, it was no longer the money of the Corporation as the cheques had been credited to Benwell's account. The Corporation was only holding it for him. In actual fact the money did go into Benwell's private account else he would not have been able to draw it all out as E 109 shows. Benwell has intercepted the cheques and prevented his master, the Corporation, from receiving the money on them. His act of diverting the cheques to his own use in violation of his trust or duty amounts to embezzlement according to the definition of the word given earlier. "

Embezzlement, however, implies that there must be interception of property by a clerk or servant received for his master before it reaches the possession of his master. There can, therefore, be no embezzlement of the valuable securities since interception of a cheque, in order to amount to embezzlement of the cheque, must effectively be prevented from reaching the account of the master, otherwise, the attempt at embezzlement fails whatever other offence may be committed.

According to Olivier and the summary of evidence the corpus got all the relevant mortgages relating to the first 9 charges discharged. Therefore, the mortgagors suffered no loss. Olivier stated that the corpus instead of crediting the relevant cheques to the mortgagor's account in the Corporation credited it to his own savings account. However, the prosecution did not produce a single account of any of the mortgagors nor was the personal savings account of the corpus produced in proof of Olivier's statement.

The discharge of the mortgages had been witnessed by Benwell. But Olivier omitted to point out that Benwell merely witnessed the signatures of two of the attorneys of the Corporation on the discharge document as a Justice of the Peace. In fact B. A. C. Chittenden, Manager of the Corporation, had signed the discharges of 6 of the 9 mortgages and Olivier himself had signed one (charge 6). In other words, it would have been known to the responsible authorities of the Corporation that the cheques had been received in discharge of the mortgages.

The summary of facts and Olivier's oral testimony alleged that, on each of the 9 charges, after crediting the cheques to his own savings account, Benwell continued to make interest payments on behalf of the mortgagors to the Corporation and so concealed his misappropriation or embezzlement. However, the various mortgagors' accounts were not produced to prove this and the learned High Court Judge correctly held that there was no evidence whatsoever of this allegation.

The prosecution produced applications for unsecured deposits which Olivier stated were signed by Benwell on or about the dates of the relevant cheques and for the same amounts or for larger amounts. Olivier purported to identify Benwell's signature on these documents. But there were certain other important entries in the body of the document not referred to. One set of entries referred to the Bank and the amounts of the relevant cheques, the other referred to a Bank and the amount necessary to make up the full amount of the deposits. Olivier did not state who had made these entries.

The Accountant, Cashier or the Auditor who had presumably examined these documents and made entries on them was not called to testify to the entries in the body of the document. There were alterations of the addresses of the corpus on these documents. The most obvious error was the address on the document E106 dated 29.5.1978. The original address was given as 13, Burraneer Bay Road which the corpus had sold on 3.3.1978. On this day the corpus was residing at Unit 64, 22 Waruda Street, Kirribilli and sold the Toyota car to Warmeant. The second set of cheques to make up the full amount was not produced. There was nothing in the documents to show on the face of them that they were the identical cheques. There was no proof that a deposit did in fact take place as the corpus' savings account in the Corporation was not produced.

Olivier produced three uncertified Computer Sheets E86 which he said was the Ledger Card of Benwell in the books of the Corporation. He stated that E86 set out the investments and amounts deposited by Benwell with the Corporation. He had made certain pencil marks on E86 of the numbers 1-9 against the deposits representing charges 1 to 9. He did not state that E86 contained any withdrawals. Olivier relied substantially on E86 in order to establish that Benwell credited his personal savings account and not the Corporation's account with the relevant available securities. There was no clear evidence as to who was responsible for crediting these cheques to Benwell''s account.

There was no evidence of any movement of money from the employer's account to the savings account or other account of the corpus.

The suggestion of internal manipulation rested on inconclusive evidence. No cheques for withdrawals were produced, no bank account or extract from banker's books were produced. No alleged instructions given by the corpus regarding the crediting of the cheques to his account to any other officer or accountant or cashier were produced and no such person called.

Olivier stated that on 9.6.1978 prior to Benwell's resignation the balance in his private Investment Account was nil. Thereafter he produced E109 which was not certified. He stated it was made by him from primary documents (not produced) and E109 showed the deposits and withdrawals by Benwell and the cheque numbers relating to those documents.

An inspection of E86 and E109 reveals several discrepancies. There are 9 items in E86 which are preceded by a dash or minus sign. Oliver gave no interpretation of these signs, whether they indicated deposits or withdrawals. If they are deposits then there are 17 items of deposits in E86 totalling $ 72,100 which are not found in E109. If thev are withdrawals 8 items of deposits in E86 totalling $ 38,200 are not found in E109. Only 2 items of deposits in E86 (other than the 9 items covered by the 9 counts) are found in E109, namely,

4.8.1977—$ 2,500

19.9.1977—$ 6,000

Assuming that the minus items in E86 indicate withdrawals, 11 items of withdrawals totalling $ 74,000 which are found in E109 are not found in E86. If the 8 items in E86 referred to above are taken as deposits and if Benwell credited the 9 items covered by the 9 charges, then with the 2 other items of Benwell's deposits taken into E109 the balance as at 9.6.1978 in his savings account should have been at least $ 38,200, and not the nil balance as shown in E109 and stated by Olivier.

On the other hand, if the 11 items of withdrawals referred to above in E109 and which are not included in E86 are excluded on the basis that E86 is correct and, therefore, E109 is wrong, then there should have been $ 78,200 plus $ 74,000—$ 112,200 which is more than the sum of $ 99,500 covered by the charges 1 to 9. From the sum of $ 99,500 if a total sum of $ 3,463.06 is deducted, being the total of the small cheques, alleged to have been drawn by Benwell to make up the amounts in E86, E93, E96, E100, E104, E105 and E106 there will be a balance of $ 96,036.94.

It is clear, therefore, that the documents E86 and E109 cannot be reconciled. E109 has been drawn up by Olivier ostensibly to show withdrawals of alleged illegal deposits soon after the deposits were made. This achieved by the intermediate deposits including a deposit of $ 19,300 on 1.1.1978 in E86 being ignored. In this way the deposits and withdrawals of 1977 and 1978 are both made to total $ 108,000 and a nil balance is shown on 9.6.1978 in E109. By the Investment Account itself not being produced the balances of 1976 are not shown.

E109 was prepared by Olivier from some other documents. He did not state what his sources were or how he prepared E109 nor was this document authenticated by him. The learned High Court Judge held that E109 was admissible under section 65 (7) of the Evidence Ordinance which reads as follows :—

> " Secondary evidence may be given of the existence, condition, or contents of a document .... when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection .... evidence may be given as to the general result of the document by any person who has examined them, and who is skilled in the examination of such documents."

There is no evidence, however, that the original documents consist of numerous accounts or other documents which cannot conveniently be examined in Court. Furthermore, the fact to be proved was not only the general result, but also the detailed results relating to the 9 charges. The requisites of section 65 (7) have not been complied with. E109 is derivative evidence and the absence of the document or documents from which it was derived was completely unaccounted for. E109 is, therefore, pure hearsay evidence and inadmissible under section 65 (7) of the Evidence Ordinance.

In *R. v. Governor Brixton Prison, ex-parte Sadri* (3), an order was made under section 5 of the Fugitive Offenders' Act, 1881, by a Magistrate committing *S* to prison pending his return in custody to Aden. *S* had been arrested on a warrant charging him with three offences committed in Aden when he was an accountant employed by a firm there, namely, falsification of accounts in a cash book, theft and conspiracy to commit a criminal breach of trust. The Magistrate had before him affidavits from two partners and the man who succeeded S as accountant in the firm dealing with the examination of the cash book and with the results of the examination, but neither the cash book nor any authenticated copies of it or of the extracts

referred to in it were available. It was held that *S* was entitled to a writ of habeas corpus because, in the absence of the cash book itself or of authenticated copies of it there was no admissible evidence which could satisfy the Magistrate that the strong or probable presumption of guilt predicated by section 5 of the Act of 1881 was raised, and, therefore, the case could not be sent back to the Magistrate. At page 750 Lord Parker, C.J. stated :

> "I think that requisitioning countries putting the machinery of the Fugitive Offenders Act, 1881, into force should come into this country properly armed with the necessary material. This Court certainly does not wish to make difficulties and I would like to make it plain that, for my part, I should not have thought that it was necessary for every exhibit to depositions taken in the foreign country or authenticated copies of every exhibit to be brought over to this country nor, indeed, all the exhibits in the case of a series of counts of a similar nature ; but it does seem to me that, when the exhibit in question is the very document, as here, which it is alleged was falsified, at least the requisitioning country should either send the document or provide an authenticated copy of it or of the relevant extracts."

In the instant case, the prosecution relied substantially on the documents E86 and E109 to prove the charges of embezzlement against Benwell. E109 was a vital document, the authenticity of which was hotly contested. As E109 had not been properly authenticated and as there was no evidence of its primary sources there was no means of testing its accuracy in relation to the original documents. It was, therefore, pure hearsay and inadmissible in evidence.

E86 consisted of three computer sheets and the learned High Court Judge held that these sheets were admissible under section 34 of the Evidence Ordinance which states that :

> " Entries in books of account regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire but such statements alone shall not be sufficient evidence to charge any person with liability. "

Under section 34 the word ' book ' signifies a collection of sheets of paper bound together with the intention that such binding shall be permanent and the papers used collectively in one volume. Unbound sheets of paper in whatever quantity, though filled up with one continuous account, are not a ' book of account.' Loose sheets of paper containing accounts have not the

probative force of a book of account regularly kept. See Monir's Principles of the Law of Evidence (1872), 4th Edition, at page 279, and Ameer Ali's Law of Evidence, 11th Edition, Vol. I—page 780. Section 34 was in existence long before the invention of computers. It was never contemplated that section 34 should extend to loose sheets of paper like E86.

It is axiomatic that entries in books of account kept in the course of business are admissible for corroborating the evidence of the person who made such entries. Corroboration is best afforded by the evidence of the person who wrote the books of account and in whose presence the transaction took place.

In the instant case the evidence of the person who operated the computer when E86 was made was not called as a witness. There was no means, therefore of ascertaining on what material E86 was prepared. Olivier did not make E86 and there was no evidence that he operated the computer at the relevant time. There was no evidence that E86 was an original document in order to make it admissible under section 34.

Derivative evidence has been ruled out by the English Courts, vide *R. v. Governor Brixton Prison, ex-parte Sadri (supra)*. Hearsay evidence has also been ruled out : *Vide* Halsbury's Laws of England, 4th Edition, Vol. 18 page 97 para 235—Note 3, *Ex-Parte Sirugo* (1967) where hearsay evidence was held to be inadmissible for purposes of testing the sufficiency of evidence. It has also been held that it is doubtful whether bank accounts and statements attached to duly authenticated documents are admissible as evidence of those accounts. Under English Law such evidence may be adduced by the production of copies under the Bankers' Book Evidence Act 1879 or by calling a representative of the Bank. *Vide* Halsbury's Laws of England 4th Ed. Vol. 18, page 114, para. 269, Note 8—*Ex-Parte Jenkins* (1969).

Under section 62 of the Evidence Ordinance primary evidence means the document itself produced for the inspection of the Court, and Explanation 2 states that—" Where a number of documents are all made by one uniform process as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest ; but where they are all copies of a common original they are not primary evidence of the contents of the original. "

Under section 63(2) of the Evidence Ordinance—" Secondary evidence means and includes copies made from the original by mechanical processes which in themselves insure the accuracy of the copy and copies compared with such copies." There is no material that E86 was made with other documents by one uniform

process or that it is a copy made from the original by a mechanical process which in itself insures the accuracy of the copy. A mere glance at E86 shows that, even apart from the ink entries the whole of it could not have been made by one uniform process. Entries for the year 1977 both precede and follow entries for the year 1978 on the second sheet. No explanation has been given for this unusual recording. The document E86 does not satisfy the requirements of sections 62 and 63 (2) of the Evidence Ordinance.

Computer evidence is in a category of its own. It is neither original evidence nor derivative evidence and in admittng such a document a Court must be satisfied that the document has not been tampered with. Under the law of Sri Lanka computer evidence is not admissible under any section of the Evidence Ordinance and certainly not under section 34. One has, therefore, to look to the law of England which can be brought in under section 100 of the Evidence Ordinance.

In England under the Civil Evidence Act, 1968, computer evidence has been made admissible only in civil cases and that too under the most stringent conditions as set out in section 5 of the Act. One of these conditions is that throughout the material part of the relevant period the computer was operating properly. In other words, there must be evidence before Court of the accuracy of the contents of the documents produced by the computer, and that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of activities regularly carried out during the relevant period. In any civil proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate—

(*a*) identifying the document containing the statement and describing the manner in which it was produced ;

(*b*) giving such particulars of any device involved in the production of that document as may be appropriate for the purposes of showing that the document was produced by a computer ;

(*c*) that the computer was operating properly and accurately during the relevant period etc., signed by a person occupying a responsible position in relation to the operation of the relevant device must be produced.

In any event such evidence is not admissible in English Law in criminal cases. Such evidence is clearly inadmissible under any provisions of the Evidence Ordinance of Sri Lanka.

With regard to Charge 12 of obtaining property by false pretences the Registration certificate of the Toyota car which was a vital document in the whole transaction was not produced. There was no reference to the Australian Law corresponding to the Motor Traffic Act of Sri Lanka (Cap. 203) relating to Registration Certificates. One has, therefore, to be guided by the Law of Sri Lanka on this question. Vide Dicey's Conflict of Laws, 6th Ed. p. 866, Rule 194—

> "....................any differences alleged to exist between foreign and English Law must be proved by expert evidence to the satisfaction of the Court, as matters of fact, not of law, and in the absence of satisfactory proof the foreign law will be held to be identical with the English Law respecting the matter in question."

See also *Government of Australia v. Harrod (supra)* where the House of Lords held that under section 7 (5) of the Fugitive Offenders Act 1967 (same as section 10 (4) of the Extradition Law of Sri Lanka) what the Magistrate had to decide was whether the evidence was sufficient to warrant trial if the offence had been committed within his jurisdiction. It was not his duty to have regard to Commonwealth Statutes other than those relating to the offence charged.

Under the Motor Traffic Act of Sri Lanka the certificate of registration would reveal to a prospective purchaser the identity of the absolute owner of a vehicle and whether the vehicle was covered by a hire-purchase agreement. Under section 9 (5) of the Motor Traffic Act under a hire-purchase agreement the name of the person who let the vehicle is registered as the absolute owner. So that a glance at a registration certificate made under the Motor Traffic Act would reveal whether a vehicle is let under a hire-purchase agreement and under any encumbrance. Nothing in this Act prevents a registered owner from selling a vehicle.

According to Warmeant in the course of the transaction he examined the registration certificate of the Toyota car and found that Benwell was the owner of the vehicle. He stated that Benwell said that he bought it "for his mother". In other words, there was no representation that he bought it in his mother's name. With regard to the 2nd part of the representation there was no evidence that Benwell tried to make out that the car was free and unencumbered of any debt. In the absence of the registration certificate and of any reference to the Australian Law there is no material before this Court to conclude whether there was any obligation on Benwell to disclose that the car was

covered by hire-purchase agreement. If the certificate of registration disclosed this as it will do in Sri Lanka then there is no basis for the charge.

Another inconsistent feature in the evidence is that according to the summary of facts at the time of the sale of the car to Warmeant, Benwell owed the Corporation $ 2,891.20. But according to Warmeant he had to pay an additional $ 1,200 to the Corporation. According to Olivier the nett balance outstanding at the time of Benwell's' resignation in relation to the vehicle was $ 2,342 after allowing for a statutory rebate.

Section 12 (1) of the Sale of Goods Act of Sri Lanka, Cap. 84, reads:

> " Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated. "

So that at the most the transaction with Warmeant was a breach of warranty which may give rise to a claim for damages. Taking the totality of the evidence the material is insufficient to commit Benwell on a charge of obtaining property by false pretences under section 179 of the New South Wales Crimes Act 1900 or under section 398 of the Penal Code.

For the reasons stated we allow the application and grant and issue a Mandate in the nature of a writ of habeas corpus in favour of the petitioner in terms of section 11 of the Extradition Law, No. 8 of 1977 read with section 141 of the Constitution of the Democratic Socialist Republic of Sri Lanka. We hold that the order dated 2nd February 1979, of the High Court committing the corpus to custody and the grounds of the said committal are invalid and we set it aside and order that the corpus is not liable to be extradited or to be committed to or kept in custody and is to be discharged from his bail on the warrants issued in this case forthwith.

For the reasons stated we allow the connected application C. A. No. 633/75 for revision under section 11 of the Administration of Justice Law, No. 44 of 1973, read with section 11 (3) of the Extradition Law, No. 8 of 1977, and make the same order as aforesaid.

RANASINGHE, J.—I agree.

ATUKORALE, J.—I agree.

Application allowed.