

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

C.I.C.A. NO. 20/98
IND. NO. 57/95

DESMOND SEALES

v

REGINA

BEFORE: The Rt. Hon. Edward Zacca, President
The Rt. Hon. Telford Georges and
The Hon. James Kerr, Justices of Appeal

Mr. Norman Hill Q.C. instructed by Messrs. L.A. Samson & Company for the appellant.
Mr. Sam Bulgin & Miss Cheryl Richards for the Crown

Heard on the 30th and the 31st days of July, 1998. Decision given on the 13th day of August, 1998. Written reasons delivered on the 10th day of December 1998.

Zacca, P.

On August 13, 1998 we dismissed this appeal and promised to put our reasons into writing. This we now do.

The appellant was charged on an indictment containing ten counts. On Counts 1, 2, 3, 4, 7, 8, 9, and 10 he was jointly charged with his wife Carol Fox Seales. Each count alleged Theft contrary to sections 223 and 229 of the Penal Code (1995 Revision). Mrs. Seales was alone indicted on Counts 5 and 6.

The appellant was convicted by a jury on Count 3 (by majority 5 – 2), Count 7 (by majority 6 – 1), Count 8 (by majority 5 – 2), and Count 9 (unanimous). He was found not guilty on Counts 1, 4, and 10. On count 2 the jury was split 4 – 3.

Prior to the trial of the appellant, Carol Fox Seales had pleaded guilty to Counts 1, 2, 3, 5, 6, 7, 8, and 9.

The appellant was sentenced as follows:

Count 3	18 months imprisonment
Count 7	12 months imprisonment
Count 8	18 months imprisonment
Count 9	12 months imprisonment

Sentences on counts 3 and 8 were to run consecutively and sentences on counts 7 and 9 concurrently.

The particulars of the Indictment relating to the counts on which the appellant was convicted read:

Count 3:-

Desmond Seales and Carol Fox Seales on or about the 23rd day of August, 1991 at George Town, Grand Cayman stole the sum of C.I. \$10,000.00 the property of Gerald G. Specht.

Count 7:-

Desmond Seales and Carol Fox Seales on or about the 12th day of September, 1991 at George town, Grand Cayman, stole the sum of C.I. \$5,500.00 the property of John and Carol Ouweleen

Count 8:-

Desmond Seales and Carol Fox Seales on or about the 2nd day of December, 1991 at George Town, Grand Cayman stole the sum of C.I. \$10,000 the property of John and Nancy Mikutowicz.

Count 9:-

Desmond Seales and Carol Fox Seales on or about the 3rd day of August 1992, at George Town, Grand Cayman stole the sum of C.I. \$6,900 the property of the Cayman Islands Government.

The appellant was chairman and Director of C.I.T.V. Mrs. Seales was also a director. This company was the first television station to operate in the Cayman Islands but soon found itself in financial difficulties.

Seales and Company was a Real Estate and Management Company operated by the appellant and his wife. Both were directors.

The Crown's case against the appellant relied to a great extent on conversations which he had with the complainants and letters written to them by the appellant.

Count 3

Evidence was led by the Crown that Seales and Company agreed to manage certain properties for Gerald Specht. The rental collected was to be lodged to Gerald Specht's bank account. Sometime in 1992 it was discovered that on or about 23rd August, 1991, a bank draft of \$10,000 was made payable to C.I.T.V. and deposited to the account of C.I.T.V. It is not disputed that this money came from Specht's account and belonged to him and that he had not given permission for any monies to be paid from his account to C.I.T.V.

It was the Crown's case that although the money was transferred by Carol Seales, the appellant had knowledge of the transfer at the time it was made and had agreed to it.

Evidence led by the Crown indicated that the appellant was aware of the financial difficulties of C.I.T.V. in 1991. He met with Mr. Colin McKie, the manager of the Bank of Nova Scotia, Grand Cayman in August 1991. It was then agreed that the overdraft of C.I.T.V. should not exceed \$25,000. At that time the overdraft was at approximately \$24,500. However a bank statement showed that on 22nd August 1991, the overdraft exceeded \$25,000 and stood at \$32,814.48. It also indicated a deposit of \$10,000 on 23rd August, 1991 which brought the overdraft to a figure below \$25,000. It is not disputed that this \$10,000 was transferred from Mr. Specht's account to the account of C.I.T.V. and that this was done without the knowledge and permission of Mr. Specht.

During the latter part of 1992, Mr. Specht was concerned about the state of his bank account. He communicated with Mrs. Seales. A fax was sent by Mr. Specht to Carol Seales. Telephone calls were made to Carol Seales but she was unavailable. After several telephone calls, Mr. Specht made contact with the appellant on 28th October, 1992. He explained to the appellant his concern about his account and the action he proposed taking. Notes were made at the time by Mr. Specht of the telephone conversation. The appellant responded to Mr. Specht in the following terms:

“As I explained to Judy, we are very guilty. We are caught between a very hard rock and a very hard place. Carol was ill. In the long run she got scared. I am winning but I have a lot to carry”.

The appellant also told Mr. Specht that he lost the feel for the business when he moved out and has since moved Carol and the business into the same building transnational with him so he can be closer to it. The appellant also stated to Mr. Specht.:

“I request that you wait getting a third party involved until you hear from us and can read our plans, It’s not like I am disappearing”.

Following upon this telephone conversation, the next day, a facsimile dated 29th October, 1992 was sent by the appellant to the Spechts. It is now set out in full:

“Dear Jerry and Judy,

Further to our telephone conversation of yesterday, as explained to you, because of the difficulty we encountered with the start up of our local television operation by Government’s decision to grant two other television licences, as well as ours, has adversely affected our liquid financial position and as a result the funds we held for you were absorbed in our operations.

Carol has prepared statements through September in relation to your operating account and through October in relation to the rents we have

collected on your behalf and from which we are drawing funds for the repairs to unit number one.

Because of our position it will not be possible for us to transfer this amount into your account at the moment. In addition to that amount, we acknowledge that we are also liable to you for the amount of the fixed deposit account which we held for you in the amount of C.I. \$19,583.92 (as at 29th May, 1994). Although bank interest rates have dropped substantially (2.75%) we are calculating interest on this amount at the same 5.5 per cent to October 30, 1992.

As we see it, (subject to your review , of course) we have a total liability to you at this moment totaling C.I. \$32,183.13 (this does not include repair charges after yesterday).

As discussed with you yesterday, we are prepared to provide you with a personal guarantee/promissory note together with a guarantee from C.I.T.V. 33, our television operation to secure your position.

I reiterate my apologies for not communicating with you earlier, however, quite frankly, it has been a hellish period for survival over the last few months.

It is our hope that we will be able to work a repayment plan out between ourselves when Judy comes here next week.

I look forward to speaking with you personally.”

It is signed “Desmond” above “Desmond Seales, M.B.E.”

Mr. Specht admitted that he had always dealt with Mrs. Seales in relation to his affairs.

Count 7

John Ouweleen stated in his evidence that in 1985 he purchased a house in Grand Cayman. It was rented out from time to time and it was managed by Seales and Company. Rental was to be deposited to a bank account at Cayman National Bank.

In 1991 he experienced difficulty with his bank account and requested statements from Seales and Company. None was forthcoming and so in August 1992, he travelled to Cayman and went to the office of Seales and Company where he met with Carol Seales. He discovered a withdrawal of \$5,500 from his account. The money was placed in a fixed deposit for six months to mature on 12th September, 1992. He agreed that on maturity the money would be deposited to his account. Not having received the deposit slip on the maturity of the fixed deposit, he made several attempts to contact Seales and Company, but to no avail.

Mr. Ouweleen then came to Cayman on the 28th October, 1992 and went to Seales and Company. At first he met with Carol Seales and on a review of the accounts discovered more discrepancies. He subsequently saw the appellant and enquired from him about the \$5,500. He told the appellant that he wanted his money and the appellant replied that he did not have the money. The appellant informed Mr. Ouweleen that the money was used to finance Cayman Island T.V., and that he should consider the money as borrowed, that large corporations up in the States are periodically down, and that Seales and Company would rise again. No permission was given to the appellant or Mrs. Seales to remove the \$5,500 from his account, or to use it for C.I.T.V.

Mr. Ouweleen admitted in cross-examination that from the beginning he had an understanding with Mrs. Seales and that the 28th October, 1992 was the first time that Mr. Seales was addressing his problems.

Count 8

Evidence was led by the Crown that Mr. John Mikutowicz purchased a property in the Cayman Islands. A mortgage was obtained from Eurobank and it was agreed that the rental from the premises would be paid towards the mortgage account. This account fell

into arrears and Mr. Mikutowicz telegraphically transferred \$10,000 to Seales and Company. This money was to be applied solely to the Eurobank mortgage account. This was not done. On December 22, 1992 a letter was sent to the appellant. It read:

“I just placed my 100th call to your office without the courtesy of a reply. I have also called Carol each and every time I have phoned you with no response. The last time I did have the opportunity to speak with Carol she advised me that there was rent money from the Cayman Resorts that was going to be deposited into my Eurobank account. Clearly this did not happen. I just received a pleasant Christmas note from George Ebanks (copy enclosed). I believe that the Caymans are subject to the British Tort system of law which is somewhat similar to the U.S. system. Your misuse of my funds and continued use of my rent receipts for your personal endeavors is considered fraud here in the U.S. and is punishable on a criminal basis. Perhaps this is not true in the Caymans, but believe me I intend to find out.

I demand to hear from you via telephone immediately. I can assure you that I am not going to drop this issue. In the meantime, deposit any funds you may have into my Eurobank account.

Please remember to sign my name to any Christmas presents you or Carol give this season as I'd like the recipients to know where the money came from to purchase them.

I remain financially harmed.”

The letter is signed John Mikutowicz and it is copied to Carol Seales and George Ebanks.

In reply to this letter the appellant wrote to John Mikutowicz. The letter is dated 30th December, 1992 and reads:

"It is regrettable that you were forced to write the type of letter you did, owing to our lack of response to your numerous calls.

Quite frankly, for the last few weeks, I have been in a state of total depression caused by the financial burdens we are faced with compounded by the government's decision that granted two more television licences. This has made life miserable for us.

I know that you may say, our problems may be self-inflicted, perhaps so. However, we were only trying the best we could for this community and took risks that we thought we could correct.

Yes we are subject to the same risks, for co-mingling funds.

Yes we do want to correct the situation.

One way was to sell the T.V. Station and get out, but the local pirates would like to steal it instead of the offer we suggested that would have gotten us funds to correct our indebtedness.

George Ebanks, knew of our development and was working with us.

In the absence of immediate funds coming our way, I wonder if I can be bold enough to suggest that we approach Eurobank to get some more funds on the unit to clear up the arrears. You do have Equity, because prices on that unit have increased substantially.

We will be responsible for these payments and charges associated with such arrangements.

Carol will be writing to you separately before Tuesday, 5th January, 1993 confirming the total amount due to you. The only thing left is our desire to settle the debts we find ourselves facing, by personal guarantee at a rate

to be agreed upon once we get our stations planned subscription Cable operation going (to be financed by a join-venture partner we are talking to) we can really clear up a lot of our troubles. I am on the road constantly, drumming up sales and have instructed Carol to bring your statements up to date, so that we have a starting point to whittle away at in the New Year.

I apologize sincerely for the anguish we have caused because of our lack of communication, but everyday, everyday, I was hoping that I would have something positive to tell you.

I trust that you will be able to work with us to sort out this problem. I will call you after you have received Carol's statements, early next week to discuss this matter further.

Carol and I could not give presents this year -- nor could I give her any for her birthday, December 26.

Our "project hope" for 1993 is to "win" -- not just survive.

Wishing you and yours the best for 1993."

The letter is signed "Desmond" and copied to Carol Seales.

On the 23rd October, 1992 the appellant wrote to Mr. George Ebanks of Eurobank informing him that arrangements were being made to transfer funds from Mr. Mikutowicz to his account at Eurobank. Mr. Ebanks was requested to contact the appellant personally regarding the account.

Another letter dated 15th October, 1992 written by Mr. Mikutowicz to the appellant was tendered in evidence. The letter read:

“Desmond:

My patience has run out. Your continued avoidance and non-responsiveness of my telephone calls is both costly and irritating. I must know how you intend to correct the misuse of my funds and execute the transfer of all the funds due, including bank interest at three per cent over the New York prime into the Eurobank account.

I must have your answer no later than 4:00 p.m. eastern standard time 16th October, 1992. I am literally at the end of my rope.”

Count 9

As a result of the sale of property and the payment of the purchase price, an amount of \$6,900 was due to the Cayman Islands Government for Stamp Duty. Despite requests for the payment, the stamp duty was not paid.

William Culbert a Real Estate Manager employed to Seales and Co. sent a memo to the appellant regarding the payment of the stamp duty. The memo was as follows:

“Desmond, I had a call from Alan Jones yesterday and he needs you to call him regarding the outstanding stamp duties issue. I would highly recommend you call him today as you know this has been a sensitive issue with him and he needs your reassurance now.”

Mr. Culbert stated that Alan Jones of the Lands and Survey Department spoke to him about the non-payment of the stamp duty. He in turn spoke to the appellant who indicated to him that a solution to his financial problems was just around the corner and that would enable him to settle the outstanding amount.

At the close of the Crown's case, a no case submission was made by the defence. This was rejected by the trial judge who ruled that a prima facie case had been made out against the appellant.

When called upon for his defence the appellant stated "I do not have anything to say." No witnesses were called on behalf of the appellant.

There is no dispute as to the transfer of the funds of the complainants to the account of C.I.T.V. The defence was that the appellant had no knowledge of the transfer at the time of the transfer and was not a party to the transfer. It was done solely by Mrs. Seales. Mr. Hill Q.C. for the appellant argued nine grounds of appeal. These were:

- (1) The jury's verdict is unreasonable and goes against the weight of the evidence.
- (2) The sentence of the Court is harsh and excessive in all the circumstances of the case.
- (3) The learned trial judge misdirected the jury by inviting them to surmise as to whether or not the appellant knew of, consented to or connived with his wife in relation to the transfer of the various sums alleged to have been stolen.
- (4) The learned trial judge failed to adequately direct the jury on the law regarding intent to deprive the owner permanently thereof, in particular as to when the intent of the appellant had to be formed in relation to the transfer of the various sums alleged to have been stolen.
- (5) The learned trial judge erred in law in rejecting the no case submission made on behalf of the appellant on the basis that there was evidence that the appellant knew of, consented to or connived with his wife in relation to the transfer of the various sums alleged to have been stolen.
- (6) The learned trial judge's summing up to the jury was wholly inadequate in that it failed to provide the necessary assistance to the jury in relation to the evidence that the appellant had knowledge of, consented to or connived with his wife in relation to the transfer of the various sums alleged to have been stolen.
- (7) The learned trial judge misdirected the jury in that he failed adequately to direct them on the law as to the standard of proof

necessary to establish knowledge of, consent to or connivance; and/or intention to permanently deprive the complainants of the various sums alleged to have been stolen.

- (8) The learned trial judge misdirected the jury by inviting them to draw the inference that there was a joint enterprise by reason of the fact that the appellant and co-accused were husband and wife.
- (9) The learned trial judge failed to give a majority direction to the jury and the verdicts taken were in breach of the law and therefore the conviction and sentence ought to be quashed.

Mr. Hill submitted that there was no evidence that the appellant had any knowledge of the transactions at the date when the various sums were placed to the account of C.I.T.V. There was no evidence that he did any act from which knowledge or participation could be inferred. He argued that they were done exclusively by Mrs. Seales. The evidence as it related to the telephone conversations and the letters written by the appellant were subsequent to the transactions and no inference could be drawn from those acts that the appellant had knowledge of the various transactions at the time when the offences are alleged to have been committed.

There is evidence that the appellant was the principal in C.I.T.V. He was aware of the financial difficulties at C.I.T.V. and arranged an overdraft with Mr. Mckie in the sum of \$25,000. On the 23rd August \$10,000 of Mr. Specht's money was transferred from his account to the account of C.I.T.V. thereby reducing the overdraft to a figure below the \$25,000.

The appellant was a director of both C.I.T.V. and Seales and Company. He was an active participant in both companies. It may be that the complainants dealt with Mrs. Seales, but can it be said that the appellant was unaware of what his wife was doing?

Nowhere in the telephone conversations nor in the letters does the appellant disclaim any personal responsibility or knowledge of the transactions at the date when the monies were transferred to the account of C.I.T.V.

The appellant was concerned about the financial difficulties at C.I.T.V., in particular, the overdraft. It is being said that he was not aware of the transfer of funds to C.I.T.V. Was he not concerned as to where the money was coming from to reduce the overdraft?

In our view it was open to the jury to infer from the evidence led by the Crown in particular, the telephone conversations and the letters written by the appellant, that he had the required knowledge and intent at the time of the transactions.

We find that the learned trial judge was not in error in ruling that a prima facie case had been made out.

In the circumstances we do not find that the verdict of the jury was unreasonable or that it could not be supported by the evidence.

Mr. Hill, however, made submission with respect to the directions given to the jury by the judge. It will be necessary to examine these to ascertain whether, if there were any misdirection or non-directions, this could in any way affect the verdict of the jury.

Ground of Appeal 3

Mr. Hill referred the Court to page 40 and line 9 of the summing up where the trial judge said:

“You have been told that, of course, you must not surmise. To surmise, and the dictionary gives a very lucid and clear definition of the word “surmise” and to surmise is to arrive at an idea, to have an idea inferred from incomplete or uncertain evidence. So when you are told not to surmise, it means that you cannot come to an inference based on incomplete or uncertain evidence. It all comes back to what I have told you, that the evidence must point to the guilt and guilt only. To speculate again, is merely a conjecture without knowing the complete facts. You have also been told that conjecture is to form an opinion from incomplete evidence. So that all these words you have been told, it boils down to one thing, that there must be evidence that points to the guilt and the guilt only”.

It cannot be said that in these directions the judge was inviting the jury to surmise. In fact the judge was telling the jury that they were told not to surmise.

We find no merit in this ground of appeal.

Grounds 4 and 6

Mr. Hill submitted that the learned trial judge failed to adequately direct the jury as to when the intent of the appellant had to be formed in relation to the transfer of the funds alleged to have been stolen. He argued that the trial judge failed to direct the jury that the appellant's intent must have been proved at the time the transactions were made. Reference was made to page 399 line 14 – 19 where the trial judge said:

“So what the prosecution has to prove is that the person acted dishonestly, and he dishonestly appropriated the profits of another with the intention permanently depriving him of it...of keeping that property, so that the other person would never be able to get it. Those are the elements of the offence of theft.”

At page 401, line 4, the learned trial judge stated:

“The Crown has to prove in relation to these offences, if they are offences, if they aren't offences, if they are proven, and the other offences that are there, that the accused man, Desmond Seales, consented or connived with this money to commit these offences that he knowingly did so. He consented and he connived that the money would be moved so that they haven't got to prove at all that he actually took the cheques or took the money and put it somewhere with his own hands, or that he was there at the time that it was being taken. The evidence must point in one direction and that is in the direction that he knew that it was being done, and it was done. He consented to it, he connived.”

However at page 413 line 7, the learned trial judge said:

“As I said to you, he must intend to permanently deprive. Now key in this case is that the money was taken. The fact that money has been repaid does not show a lack of intent to permanently deprive. The intention to permanently deprive must be at the time of taking (my emphasis) and you have to adduce from what was done was there an intent to permanently deprive the complainants of their money”

It is clear that the above directions related to the appellant. The trial judge said, “As I said to you, “he” must intend to permanently deprive”. The reference was to the appellant and whilst it may be said that the language of the judge was not elegant, we are satisfied that the jury must have been aware that it was necessary for a conviction that the appellant must have been a participant to the taking of the money at the time of the taking and that there was an intention to permanently deprive the owner at the time of the taking. We therefore find that these grounds of appeal fail.

Ground 7

Mr. Hill submitted that the learned trial judge failed to adequately direct the jury on the standard of proof as it related to each of the counts. Reference was made to page 411 at line 7, the learned judge said:

“At the end of the Crown’s case, the defendant stood mute. He said nothing, and I have to remind you that he didn’t have to say anything at all. He did what was his prerogative. He did what was his right to do. He left the proof to the Crown, because the burden of proof was theirs. So it is on their evidence on which you have to arrive at a verdict. They have to prove each and every offence. You can’t look and say well guilty. You have to examine each offence. Count 1, was he guilty on that? Is the evidence pointing to his guilt or to his innocence? Count 2, Count 3 right down the line. Each one is a separate offence. Each one must be considered by you. And on each one you bring a separate verdict whether he is guilty or whether he is innocent. And on each one of those, the

Crown must prove to you beyond a reasonable doubt that on that offence the defendant is guilty.”

The jury was aware of the particulars of each count. All the counts charged the same offence, that of theft. The jury was told that each count had to be considered separately. We find no merit in this ground of appeal.

Ground 8

In our opinion the learned trial judge did not invite the jury to draw the inference that there was a joint enterprise by reason of the fact that the appellant and co-accused were husband and wife. The judge told the jury that the Crown was asking them to draw certain inferences because they were husband and wife. We find no misdirection on the part of the judge.

Ground 9

Mr. Hill submitted that the learned trial judge failed to give the jury a direction as to a majority verdict and that this non-direction was fatal and the conviction should be quashed.

The Judicature Law (11 of 1975) (1995 Revision) Section 16(2) provides:

“On trials on indictment in cases other than murder or treason, seven jurors shall form the array.

Section 16(6):

Subject to sub section (4) and (5), on a trial on indictment for any offence, the verdict of the jury need not be unanimous if:

(a)...

(b) in a case where there are not less than six jurors, five of them agree on a verdict

Section 16(7)

The majority verdict of a jury shall not be accepted until after the lapse of one hour from the retirement of the jury to consider their verdict.

Section 16(8)

Wherever the verdict of a jury is not unanimous, the Court may direct the jury to retire for further consideration of their verdict.

The Judicature Law does not require a direction on a majority verdict. There are cases where the trial judge will direct the jury in such terms. We do not find that this is a requirement, the failure of which would affect the verdict of the jury. In this case the jurors were out for considerably more than one hour and it was open to the judge to accept a majority verdict as he did.

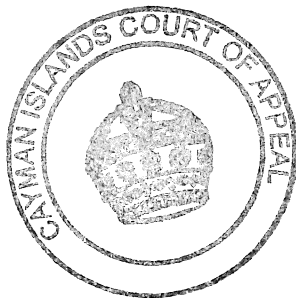
In our opinion, it was open to the jury to infer from the evidence and in particular from the telephone conversation and the letters written by the appellant, that he had the required knowledge and intent at the time of the transactions.


For the above reasons the appeal was dismissed and the convictions affirmed.

The appellant also appealed against the sentence on the on the ground that the sentence was harsh and manifestly excessive.

The Court varied the sentence to the extent that all sentences should run concurrently.


Zacca, J.



Georges, J.A.

Kerr, J.A.