942

IN THE CAYMAN ISLANDS COURT OF APPEAL

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

IND. NO. 46/92

CICA #29/93

Noted
See Mc Berry v. R. [1992] 3 All E.R. 881

BEFORE: THE RT. HON MR. JUSTICE EDWARD ZACCA, PC., OJ., PRESIDENT
THE RT. HON. MR. JUSTICE TELFORD GEORGES, PC., JA.
THE RT. HON. MR. JUSTICE GERALD COLLETTE, QC., JA.

JOSEPH CLEVELAND EBANKS VS THE QUEEN

Mrs. Priya Levers with Mrs. Carla Reid instructed by Messrs. Bruce Campbell & Co for the appellant

Mr. Michael Clarke for the Crown

On 11th April, 1995 and 20th April 1995

JUDGMENT

The appellant pleaded not guilty to an indictment containing four counts of theft of money the property of the Cayman Island Government and four counts of false accounting each relating to one of the counts of theft. He had been employed in the Registrar-General's Department and at the dates of the incidents, the subject matter of the charges, he was a higher executive officer. He had worked in the Department since 1978.

His duties included receiving sums paid by members of the public in respect of the registration of partnerships and shipping dues.

He might not in all instances have actually received the money himself, but any sums received by other persons in the office, either directly or by mail would be passed on to him. He would prepare receipts for all sums received. These receipts would be in duplicate the original being handed to or otherwise passed on to the person paying and the duplicate remaining in the receipt book kept at the office. There was no officer in the Department performing the duties of cashier. It could happen that some other employee of the Department in the appellant's absence would prepare and sign the receipt for money paid in. In that case the money would be passed on to the appellant. The receipt would contain the usual particulars -name of person paying, amount paid in Cayman dollars and the purpose for which payment had been made eg. partnership registration, shipping charges etc. All sums received including cheques, were kept in a shoe box in a drawer. At night the box would be placed in the vault.

The revenue collected would in due course be lodged in the Governments's bank account. Lodgments could be made for one day or for several days. The appellant was mainly responsible for the preparation of lodgment slips. The lodgment slips would be prepared from the money - cash and cheques - in the shoe box. There would also be a revenue voucher which would specify the numbers of the first and last receipt in respect of which that lodgment had been made, the total sum lodged and a description of the head of revenue in respect of which the payments had been made. The lodgment slip would be prepared in triplicate-one copy remaining at the Bank, one going to the Treasury and one remaining in the Department. Revenue vouchers are typed by someone other than the appellant.

In July 1991, the Chief Internal Auditor, Mr. Gordon Bird, began an internal audit of the Department.

In the course of the audit he found the duplicates of two revenue receipts which did not appear on any revenue voucher - one for $60.00 dated May 17, 1991 and the other dated April 14, 1991 for $40.00. He concluded from the fact that these numbers did not appear on any revenue voucher that they had not been banked. These transactions constitute the subject matter of counts 5, 6, 7 and 8. Count 5 alleges theft of the sum of $40.00 and Count 7 alleges theft of the sum of $60.00. Count 6 and 8 allege fraudulent false accounting by falsification of the relevant revenue voucher, the falsification being the destruction or concealment of the relevant receipt voucher.

At the close of the case of the ~~Prosecution~~ Counsel on behalf of the appellant made a no case submission in respect of all of the counts of the indictment. The trial judge accepted this submission in relation to counts 5, 6, 7 and 8. He held that in the absence of evidence of banking records in the form of statement and reconciliation of such statement a deficiency had not been proved. The mere absence of the receipt vouchers and the lodgment slips did not lead to the irresistible inference that there had been theft and falsification. The documents may have been misplaced or lost. He rejected the no-case submission in respect of counts 1 to 4. On these counts the appellant was convicted. Against these convictions he has appealed.

For the appellant Mrs. Levers has submitted that the trial judge should also have acceded to the no-case submission in respect of

counts 1 to 4.

Counts 1 and 2 related to payments in respect of partnership registration. Mr. Bird checked the revenue vouchers and the related receipt numbers. The revenue vouchers evidencing the sums deposited - totalled $3,830.61. The receipt numberes covered by this revenue voucher added up to $3,880.60. This indicated an underbanking of $49.99. Closer study of the receipts showed that a cheque for $1,900.00 had been received in payment of the registration fee of four partnerships. The duplicate of the receipt for that cheque had been altered to read $1,800.00. Mr. Bird concluded that there had been an underbanking of $149.99 - the subject matter of count 3 and 4.

The evidence clearly established that the cheque for $1,900.00 had been deposited. It also established that receipts in cash for the period of deposit amounted to only $25.00. These did not appear to have been a sum of $149.99 available to be taken. Mrs. Levers submitted that in the absence of proof of availability of such a sum in cash to be stolen count 3 should not have been left to the jury.

Mr. Clarke contended that once an underbanking had been proved the irresistible inference could be drawn that the money equivalent of the sum underbanked had been stolen. He relied on **Noon v. Smith [1964]1 All E.R. 1450.** That case does no more than establish that larceny can be established by evidence directly proving the theft or by evidence of facts from which any reasonable person could draw the inference that a theft had taken place. On this count the evidence does not establish that there was cash to be stolen and all cheques had been deposited. Mrs. Levers' submission is well founded and we hold

that the appellant ought not to have been called upon to answer Count 3.

Accordingly the conviction on that count is quashed and the sentence set aside.

Mrs. Levers submitted that once the charge of theft failed the charge of falsification necessarily failed even though the alteration of the figures on the duplicate of the receipt was admitted. To prove the offence it had to be proved not only that the document had been falsified dishonestly but that the falsification was

> "with a view to gain for himself or another or with intent to cause loss to another....."

If there was no cash to be stolen that element of gain for the appellant or loss to the Government could not be established. The evidence had established that on an occasion there was an unexplained overbanking of $25.00. Equally there could be an unexplained underbanking.

We accept the submission and hold that the appellant should not have been called upon to answer count 4. The conviction on Count 4 is quashed and the sentence set aside.

Mrs. Levers advanced the same argument in respect of Counts 1 and 2. There was, however, evidence in respect of Counts 1 and 2 that there may have been $790.00 in each available to be stolen. The evidence could be described as depending on the drawing of inferences adverse to the appellant which need not have been drawn had he been

given the full benefit of the doubt-but the inferences could reasonably be drawn.

In our view these charges were properly left to the jury.

Two main criticisms were directed at the summing up both supporting the ground that the trial judge had misdirected the jury as to the case presented by the appellant.

In defining the elements constituting the offence of false accounting the trial judge stated -

> "The defendant admits that he falsified two carbon copy receipts. The Crown alleges that he did so with the intention of pocketing the difference between the carbon copy as altered, and the original receipt in the higher amount...." (emphasis supplied)

The use of the word "falsified" was a misdirection. The defendant had made so such admission. In each case his evidence was that he had altered the duplicate to conform with what he thought the original stated. Of itself the word "falsify" connotes conscious change for the purpose of deception. The appellant made no such admission.

The trial judge also stated -

> "When you look at the specifics look at the the documentary evidence. In relation to Count 1 and 2. The defendant doesn't deny that he altered the receipt to show a lesser amount. But he altered it to show a figure of $790.00 less than that which was actually paid there's no dispute about that"

The judge was there stating an inference which could be drawn from the appellant's evidence as being in fact the appellant's evidence, ~~evidence~~. What the appellant testified was that that he had written the sum of $234.00 because he had been disturbed while receipting his daily work. He had attended to a customer whose payment was $234.00. Next day while his typist was typing the blank receipt numbers she asked for the number of the last receipt. He looked that up and found it a blank. He thought his last transaction was for $234.00 he wrote in that figure. He then noticed he had written two receipts for Campbell Corporate Services Ltd and he cancelled in error the earlier of the two receipts he had never "altered the receipt to show a lesser amount".

The trial judge had in fact earlier read to the jury the evidence given by the appellant on this issue in the language in which it had been given. The subsequent summary of its effect was, however, incorrect and may well have misled the jury.

Later in the summing up the judge did refer to the defendant being "asked about his alteration of $1,900.00 to $1,800.00 on the receipt of Aall Bank and Trust". The appellant admitted an "alteration" not a "falsification".

The second criticism was that the appellant had plainly put his character in issue as part of his defence and that the trial judge had failed adequately to instruct the jury on the manner in which they should deal with this.

The appellant began his evidence by stating that he had been

employed in the Department since 1978, had handled on an average $250,000.00. per annum, had had several audits and had never stolen any money.

The trial judge did bring this to the attention of the jury. He stated-

> "You'll consider all the evidence when determining upon the indictment. And it falls to be considered that the accused has not been accused of pilfering before. It also falls to be considered that he has dealt with substantial sums of money over a number of years without, it seems, previous difficulty".

He continued thereafter with the summary of the appellant's evidence in relation to Counts 1 and 2 already cited above.

The trial judge did also direct the jury that even if they concluded that the appellant had been an untruthful witness they should not necessarily draw the further conclusion that he was dishonest and therefore guilty of the offences charged.

In R. v. Sharp [1993] 3 All ER. 225 the Court of Criminal Appeal confirmed that it is a matter for the discretion of the trial judge whether or not he should give a direction to the effect that a man who had a good character for very many years was less likely to commit an offence of dishonesty - p. 231.

This was a case in which the discretion should have exercised in the appellant's favour. The evidence did not positively establish that he had lied. He had given explanations in the witness box which

he had not earlier given to the police. The trial judge properly directed the jury that this was not remarkable since he had not known prior to the interview the transactions in respect of which he was to be questioned. After the interview on reflection he may well have remembered more than he did at the time of the interview. The appellant's credibility as a witness was crucial to the assessment of the weight to be given to his explanation and for that reason a "propensity" direction was needed.

We think that the absence of such a direction and the factual misdirections in relation to the appellant's evidence on Counts 1 and 2 make it unsafe to uphold these convictions.

Accordingly the appeal against the convictions on Count 1 and 2 are also allowed. The convictions are set aside and the sentences quashed.

In the result the appeals are allowed on all counts.