IN THE CAYMAN ISLANDS COURT OF APPEAL

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CICA (CRIMINAL) APPEAL NO. 16 OF 1992

BEFORE: THE RT. HON. MR. JUSTICE EDWARD ZACCA, PC., OJ. PRESIDENT

THE RT. HON. MR. JUSTICE P. TELFORD GEORGES, PC., J.A.

THE HON. MR. JUSTICE KENNETH C. HENRY, J.A.

VALDA MAE PARCHMENT v. REGINA

Mr. Norman Hill Q.C. and Mr. Garcia for the Appellant

Mr. Bulgin for the Crown

On 31st March, 1994 and 11th August, 1994.

REASONS FOR JUDGMENT

The Appellant, who was at the time employed in the Foreign Exchange Department of the Canadian Imperial Bank of Commerce ("the Bank"), was convicted for the theft from the bank of bank draft No. 3932917 and for obtaining by deception from the First Home Bank Ltd. U.S.$ 1,303. the proceeds of that draft. She was sentenced to 9 months imprisonment on each count, 6 months of which was suspended, the sentences to run concurrently.

She appealed against her conviction on two grounds - firstly that the verdict of the jury was unsafe and unsatisfactory and secondly that the no case submission made at the close of the prosecution's case ought to have been upheld by the learned trial judge. She also sought leave to appeal against the sentence which it was alleged was manifestly excessive and harsh.

The Appellant had on previous occasions purchased from the Bank U.S. $ drafts which she used to make monthly payments on a mortgage loan held by the First Home Bank Ltd. on her home. The prosecution's case was that in January 1989 she managed to obtain and use such a draft without paying for it. The case rested largely on the evidence of Celia Mae Seymour, a supervisor in the Foreign Exchange Department

of the Bank at the date of trial in April 1992. In January 1989 she had been an employee of the Bank for some 3 years and was working in the Foreign Exchange Department. Her evidence is that the Appellant brought draft no. 3932917 to her for signature. The supporting documents which ought to have accompanied the draft were not produced, but although this was in breach of the Bank's procedure it was not unusual where the purchaser of the draft was a fellow employee. Having signed the draft she took it to a senior officer, one Mr. Tyndale, who co-signed it, and she then handed it back to the Appellant.

The supporting documents would have disclosed the method of payment for the draft. Countering the Appellant's statement to the police that her husband's salary cheque had been used in part payment for the draft, the prosecution led evidence from Movine Brown, a bank teller at the Bank, who said that on Friday January 13, 1989 (the date of the draft) she cashed the cheque in question for the Appellant. If the salary cheque had been used in part payment for the draft it would not have been cashed but would have formed part of the supporting documentation.

If the jury accepted the evidence of Celia Seymour and Movine Brown and concluded that the absence of documentation indicated a failure by the Appellant to pay for the draft, it was clearly open to them to convict the Appellant for the offences with which she was charged.

The principles on which a court ought to act in considering a no case submission are set out in R v. Galbraith (1981) 73 Cr. App. Rep. 124 as follows:

> "If there is evidence that the crime alleged has been committed by the defendant there is no difficulty - the judge will stop the case.
> (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or it is inconsistent with other evidence
> (a) where the judge concludes that the prosecution evidence taken at its highest is such that a jury properly directed could not properly convict on it, it is his duty on a submission being made to stop the case

> (b) where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability or other matters which are generally speaking within the jury's province and where on one possible view of the facts there is evidence on which the jury could properly conclude that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

Applying those principles it is clear that the learned trial judge was correct in rejecting the no case submission. The second ground of appeal against conviction therefore fails.

There was, however, evidence which appeared to be inconsistent with the evidence of both Celia Seymour and Movine Brown. Movine Brown's evidence is that the salary cheque was cashed at some time after 2:30 p.m. on Friday January 13, 1989, was, in accordance with bank practice, held by her until the following Monday and appears in the copy of her teller's record for January 16, 1989 which was produced in evidence. The cheque would therefore have been in her possession at the close of business on Monday. The cheque however bears the clearing stamp of the Bank of Nova Scotia dated January 16, 1989 and does not bear Miss Brown's teller stamp as it ought to have done if she cashed it.

Mr. Tyndale was not called to give evidence for the prosecution. Mr. Michael King who was the manager in January 1989 gave evidence of the investigation he conducted in relation to draft no. 3632917. He found no supporting documents for the draft and such documents as were found suggested that the Appellant's husband's salary cheque was cashed by Movine Brown.

In his cross-examination however the following appears at p. 51:

> "Q. In your statement of 1st June you concluded that as no document reached the Funds Department someone had removed the documentation after the draft had been properly issued ?
>
> A. Yes, I said that in June after my investigation.
>
> Q. Were you not saying that Tyndale could not have signed the draft unless satisfied the draft was properly issued including documentation showing the method of payment?
>
> A. Yes."

Again at page 57:

"Q. On the basis of your statement is it correct the draft was properly issued but the funds never reached the Funds Transfer department ?

A. Yes."

And at page 59:

Q. Would it have been possible for the cheque to have been used to pay for the draft and after the draft had been properly issued the cheque is removed with the other documentary and then the cheque be cashed and the documentation destroyed ?

A. That is possible."

The Appellant did not give evidence at the trial, but in one of her statements to the police, which was put in evidence by the prosecution, she denied cashing her husband's cheque and said that she had used it, together with a withdrawal from her account, to purchase the draft.

In the light of all the evidence, and in the absence of any evidence from Mr. Tyndale, counsel for the Appellant appears to have suggested to the jury in his address that Celia Seymour was not a reliable witness.

The learned trial judge in his summing up told the jury:

" Mr. Hill suggests that because Mr. King spoke to others including Mr. Tyndale who was his predecessor in office before he came had reached this conclusion that documentation had been removed that Mr. King was making a finding based not on the operation of the system. That's a suggestion by Mr. Hill but on the actual method that was used. (sic) What it comes to is this. Without knowing what the officers that Mr. King spoke to told him (nobody knows that), Mr. Hill is implying that they told Mr. King that the draft was documented before issue. Its only an inference. So you see Mr. Hill, without knowing what Mr. Tyndale knows, can do, (sic) and others told Mr. King, is implying that what they told Mr. King is not what Celia Seymour told you. In brief, Mr. Hill is inviting you to find <u>not on evidence</u> (repeated) but on what would seem to be his insinuation that Celia Seymour is not a reliable witness. That's a matter for you to decide. But you don't decide it upon this cock-eyed approach through Mr. King.

You, I repeat, are the judges of facts and as such you have to decide which witnesses you will believe and which you will not. But you make those decisions, not on suggestions, and insinuations advanced by counsel that have no backing in evidence but on the basis of the facts before you. On this matter the Crown submits that the important fact is that no documentation in relation to this draft has ever been found at the C.I.B.C. Bank. It is on that fact and his knowledge of the system that the Crown submits Mr. King concluded that the draft was issued with documentation. That's what the system calls for. And which documentation was later removed. The Crown has not said so in so many words but as I

understand the Crown's case (and I think you will understand it that way too) it is that Mr. King erred in concluding that there had been documentation of the draft which had subsequently been removed, invites you to accept the evidence of Celia Seymour and to dismiss it by speculating on what any one might have said to the contrary because we don't know what was said. Simple as that.

As a part of his attack of the veracity of Celia Seymour Mr. Hill commented several times on the absence of Mr. Tyndale. You will remember that. He put it that Mr. Tyndale should have been called as a witness. Because he, too had signed the draft. If that is all that his suggestion is about there is, of course, no reason why the Crown should call more than one witness to prove a fact. A case is not determined by numbers..... If the comment on Tyndale's absence is an invitation that had been called he would have revealed Celia Seymour to be an unreliable witness when she said that the draft was issued without documentation. Then the insinuation can only be speculation. For Mr. Hill in that instance is not advancing a proposition based on fact which it is his duty to do as counsel for the defence. Because he can advance propositions favourable to his client and unfavourable to the Crown but he must do so on facts. Not on speculation. It is not your job to speculate. I keep telling you you deal with facts. Well that is all I wish to say at this stage on the question of suggestion. There are other examples in the course of this long hearing. I can't deal with all of them but I have given you certain guidelines to follow, I hope, which will help you as to how you deal with them."

In our view characterising counsel's submission as a cock-eyed approach was unfortunate and although the learned trial judge was correct in directing the jury that they must act on evidence and not speculate, there was in fact no more evidence pointing to Mr. King's conclusions (as to removal of documents) being based on his knowledge of the system than there was to their being based on what he had been told by the Bank's employees during the course of his investigation. Both were equally a matter of inference. Indeed if, as the learned trial judge suggested, Mr. King's conclusions were based on his knowledge of the system, this would seem to suggest that the information in Miss Seymour's evidence that the system had not been observed could not have reached him in the course of his investigation. In the absence of evidence from Mr. Tyndale and having regard to the evidence of Mr. King the jury would have been entitled to question the reliability of Miss Seymour's evidence or recollection. But this on the learned trial judge's directions they could not do.

In **Mears v. the Queen** (1993) 1 W.L.R. 818 at 820 Lord Lane delivering the advice of the Privy Council observed:

> "The Court of Appeal took the view that the trial judge was not putting forward an unfair or unbalanced picture of the facts as he saw them. In rejecting the defendant's submission that the comments of the judge were unfairly weighted against him, the court asked themselves whether the comments amounted to a usurpation of the jury's function. In the view of their Lordships it is difficult to see how a judge can usurp the jury's function short of withdrawing in terms an issue from the jury's consideration. In other words this was to use a test which by present day standards is too favourable to the prosecution. Comments which fall short of such a usurpation may nevertheless be so weighted against the defendant at trial as to leave the jury little real choice other than to comply with what are obviously the judge's views or wishes. As Lloyd L.J. observed in **Regina v. Gilbey** (unreported), 26 January 1990:
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> 'A judge ... is not entitled to comment in such a way as to make the summing up as a whole unbalanced.. It cannot be said too often or too strongly that a summing up which is fundamentally unbalanced is not saved by the continued repetition of the phrase that it is a matter for the jury.'
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> Their Lordships realise that the judge's task in this type of trial is never an easy one. He must of course remain impartial, but at the same time the evidence may point strongly to the guilt of the defendant; the judge may often feel that he has to supplement deficiencies in the performance of the prosecution or defence, in order to maintain a proper balance between the two sides in the adversarial proceedings. It is all too easy for a court thereafter to criticise a judge who may have fallen into error for this reason. However, if the system is trial by jury then the decision must be that of the jury and not of the judge using the jury as something akin to a vehicle for his own views."

In the present case although the learned trial judge ultimately also reminded the jury of the submissions made on behalf of the Appellant, in the passage of his summing up to which we have referred he has in our view commented in such a way as to make the summing up as a whole fundamentally unbalanced.

In all the circumstances we were of the view that the conviction was unsafe and unsatisfactory and we therefore allowed the appeal, quashed the conviction and set aside the sentence.