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IN THE CAYMAN ISLANDS COURT OF APPEAL

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

C.I.C.A. (CRIMINAL) NO. 48/91

BEFORE: THE RT. HON THE PRESIDENT MR JUSTICE EDWARD ZACCA PC., OJ.
THE RT. HON. MR. JUSTICE TELFORD GEORGES PC. JA.
THE HON. MR. JUSTICE KENNETH HENRY J.A.

BARRY VICTOR RANDALL v. THE QUEEN

Mr. Howard Hamilton Q.C. with Mr. Delano Harrison instructed by Keith Collins & Co. for the Appellant.

Mr. Ivor Archie of the Solicitor General's Chambers for the Crown.

MARCH 29TH, 30TH, APRIL 1ST, 2ND, 1993 AND AUGUST 18TH, 1993

ZACCA, PRESIDENT

The Appellant was convicted by a jury on the 9th day of December, 1991 in the Grand Court on Counts 2 and 7 which charged obtaining property by deception and Counts 3, 4, 5, 6, 11, 12, 13, 14 which charged theft. He was charged on an indictment containing sixteen Counts, five of which charged the offence of obtaining property by deception and eleven for the offence of theft. All counts related to transactions in the Swiss Bank and Trust Corporation Ltd. branch in Grand Cayman.

The Appellant at the time of the alleged offence was a Trust Officer in the said Bank. The allegations were that the Appellant caused certain sums of money to be transferred from one account to another and in so doing dishonestly obtained various sums of money. The theft charges related to various sums of money belonging to the Bank.

A total sentence of three years' imprisonment was imposed on the Appellant .

It is from these conviction and sentences that the Appellant now Appeals.

The case for the Crown in respect of Counts 1 - 7 was that the Appellant, fraudulently utilized funds contained in three accounts, namely Triangle Drilling, Milford Campbell and Campbell Engineering to fund a forth account, Violet Securities. In respect of Counts 8 - 16, the allegations were that the appellant fraudulently utilized funds contained in what was known as the Berlin Trust account.

On behalf of the appellant, Mr. Howard Hamilton, Q.C. and Mr. Delano Harrison, argued thirteen grounds of appeal.

The grounds of appeal were as follows :

1. The learned trial judge erred in failing to accept the submission of 'no case' at the conclusion of the prosecution's case on all sixteen counts.

2a. The learned trial judge erred in particular in calling upon the Appellant to answer the charges contained in Counts 3, 4, 5, and 6, 11 and 12 as there was no evidence whatsoever to link the Appellant with those offences and the witness, Weingart, was not called by the prosecution.

2b. Further, the defence was deprived of the opportunity of calling the witness Weingart because, although his name appeared on the back of the indictment, the prosecution failed to produce him in Court.

3. On the basis of the Crown's case as advanced, the verdicts of 'guilty' returned on Counts 11 to 14 were inconsistent with the verdicts of 'not guilty' on Counts 8,9, 10, 15 and 16.

4a. The learned trial judge misdirected the jury in the following terms " the customer does not own the credit balance in his account". (See Summing-up - page 5, line 32).

4b. The learned trial judge erred in directing the jury that "appropriating is the same as obtaining". (See Summing-up - page 8, line 29).

5. The learned trial judge misdirected the jury by failing to give any or adequate directions as to whether the property, being the subject of the counts in the indictment, belonged to Swiss Bank & Trust Corporation Limited as alleged.

6a. The learned trial judge failed to give any or adequate directions to the jury that, notwithstanding the failure of the Appellant to give evidence, the jury were entitled to rely on what was said in support of his contentions in his caution statements by Prosecution witness, viz Wilkenson, Kaufman.

6b. As a consequence of the misdirection complained of above, the learned trial judge failed to point out the numerous answers contained in the cautioned statements which went towards advancing the appellant's defence, viz.

(a) Re Exhibit 21:

page 2, line 17	(all counts)
page 6, line 9	(counts 13 & 14)
page 7, line 1	(counts 13 & 14)
page 7, line 5	(counts 13 & 14)
page 10, line 1	(counts 3 - 6, 11 & 12)
page 15, line 24	(counts 3 - 6, 11 & 12)
page 16, line 6	(counts 3 - 6, 11 & 12)
page 16, line 16	(counts 3 - 6, 11 & 12)
page 16, line 26	(counts 2 - 7, 11 & 12)

(b) Re Exhibit 56

page 1, para. 2	(counts 13 & 14)
page 2, para. 3	(counts 3 - 6)
page 2, para. 4	(counts 13 & 14)
page 3, para. 2	(all counts)
page 3, paras. 3 & 4	(counts 3 - 6, 11 & 12)

7a. A grave irregularity occurred in the manner in which the verdict was taken in that, in the specific circumstances of the instant case, the jury should not have been allowed to return a verdict on counts 12, 13 and 14 before returning a verdict in counts 8 and 9.

7b. The learned trial judge failed to direct that counts 11 and 12 should also be considered as alternatives to count 15.

8. The learned trial judge failed to indicate to the jury that the witnesses, Wilkenson and Combaluzier stood in the position of accomplices 'Vel non' and, as such, the requisite warning on corroboration should have been given.

9. The learned trial judge inadvertently reversed the burden of proof by directing the jury in the following terms: "there will be some findings of fact which you would have to arrive at in order to find the verdict of not guilty".

10. The learned trial judge failed in his duty to give adequate directions to the jury as to the provisions of the Penal Code relating to theft and obtaining property by deception.

11. The learned trial judge failed in his duty to direct the jury as to the defences which were reasonably open to the Appellant.

12. The learned trial judge erred in failing to give adequate directions concerning the impact of differing verdicts upon each other, given the Crown's allegation of a dishonest scheme.

13. The learned trial judge, no doubt as a result of the length and complexity of the case, unwittingly extended the Summation unduly and thereby failed to identify the contested issues with clarity.

It is proposed to deal with grounds 6 and 11.

GROUNDS 6:

Mr. Hamilton submitted that the prosecution tendered in evidence an interview (Ex. 21) by the Police with the appellant on 6th and 7th December, 1988 and also written answers (Ex. 56) supplementary to the interview, sent by the appellant to Supt. David Gooding. These he argued formed part of the prosecution's case. It was submitted that the documents contained both inculpatory and exculpatory statements and that the entire statement should have been left for the consideration of the jury and it was for the jury to consider the entire statement as evidence giving such weight to the exculpatory statements as thought fit.

Mr. Archie for the Crown submitted that the entire statement was wholly self serving and not evidence of the truth of their contents. The learned trial judge was under no duty to bring the contents of the statements to the attention of the jury. He submitted that the statements contained no admissions of guilt.

In dealing with this aspect of the matter, the learned trial Judge in his summing-up at page 89 stated :

> " It's my view of these interviews and what the legal implication is of them and its this, if a person does answer questions voluntarily and if those answers are against him then those answers can be used in a subsequent trial against him, in evidence, and the most obvious example of that is a confession. But there is nothing in the way of a confession in my judgment in the interview with Supt. Gooding, or in the written answers which Mr. Randall presented. What he said throughout was in denial of guilt. He speaks of seeking to preserve the bank's interest. Now you shouldn't regard that as evidence of the facts in the answers but you can take it into account as showing Randall's attitude at the time they were given and in particular the fact that his written answers on some of the questions asked by Supt. Gooding on 6th December, 1988 were delivered under cover of a letter dated as late as 22nd March, 1989 well over three months later. But as I said you must not draw any adverse conclusions at all from Mr. Randall's refusal to answer questions on 6th September, 1989. He was simply exercising his right to silence. Now I am not, you will be glad to hear, going to refer at length to the text of those interviews because you have them and you will I am sure read them to the extent that you think is necessary when you are deliberating your verdict."

The use of the word "confession" without further explanation by the trial Judge was indeed unfortunate. Confession denotes an admission of guilt. Any matter which the accused admitted and which is required to be established by the Crown if the alleged crime was to be proved against him, may be tendered in evidence as inculpatory evidence. This is so even where that statement by itself does not amount to a confession of guilt.

The effect of the Judge's direction is that he was directing the jury that there was nothing in the statements which could be used against the appellant, and, anything which went towards his defence was not evidence of the facts. The learned trial Judge makes reference to: "he speaks of seeking to preserve the bank's interest". Clearly the appellant was saying that whatever he did, was done with a view to seeking to preserve the Banks' interest. In other words, he did not act fraudulently.

In our view the statements included both inculpatory and exculpatory statements.

In **Regina v. Findlay Duncan [1981] 73 Cr. App R. 359** The accused elected not to give evidence at his trial. He had however made statements to the police which included both inculpatory and exculpatory statements. The trial Judge ruled that the exculpatory statements could not be evidence of the facts.

The matter came before the Court of Appeal and in a judgment of the Court which was read by the Lord Chief Justice it was stated at page 364 :

> " We turn to examine the authorities. In McGregor [1967] 51 Cr. App. R. 338; [1968] 1 Q.B. 371 Lord Parker C.J., at p. 341 and p. 377, 378 respectively said this : "As we understand it, Mr. Dovener says and says rightly that, if the prosecution are minded to put in an admission or a confession, they must put in the whole and not merely part of it." He later cited with approval a passage from the then current edition of Archbold (36th Ed.) para. 1128: ".... the better opinion seems to be that as in the case of all other evidence the whole should be left to the jury to say whether the facts asserted by the prisoner in his favour be true. " Lord Parker went on to consider and reject out of hand a submission by counsel for the appellant that the jury should have been directed to give equal weight to both parts of the appellant's statement, those containing admissions and those containing excuses or explanations.

> This case is clear authority for the proposition that in the case of a "mixed" statement both parts are evidence of the facts they state, though they are obviously not to be regarded as having equal weight.
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> SPARROW [1973] 57 Cr. App. R. 352; [1973 1 W.L.R. 488, seems to be inconsistent with the primary ruling in McGregor (supra), which was not cited to the Court, because Lawton L.J. says this at p. 357 and p. 492 of the respective reports: "the trial judge had a difficult task in summing up that part of the case which concerned the appellant. First, he had to try to get the jury to understand that the appellant's exculpatory statement to the police after arrest, which he had not verified in the witness box, was not evidence of the facts in it save in so far as it contained admissions. Many lawyers find difficulty in grasping this principle of th law of evidence. What juries make of it must be a matter of surmise, but the probabilities are they make very little." He then turned to consider the extent to which the judge should comment on the way in which the case has been conducted and upon the failure of the accused man to go into the witness box.
>
> DONALDSON AND OTHERS [1977] 64 Cr. App. R. 59 was another example of a "mixed" statement. At p. 65 James L.J. says this: In our view there is a clear distinction to be made between statements of admission adduced by the Crown as part of the case against the defendant and statements entirely of a self-serving nature made and sought to be relied by a defendant. When the Crown adduce a statement relied upon as an admission it is for the jury to consider the whole statement including any passages that contain qualifications or explanations favourable to the defendant, that bear upon the passages relied upon by the prosecution as an admission, and it is for the jury to decide whether the statement viewed as a whole constitutes an admission. To this extent the statement may be said to be evidence of the facts stated therein."

And at page 365, the Lord Chief Justice states :

> " Where a "mixed" statement is under consideration by the jury in a case where the defendant has not given evidence, it seems to us that the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanations, must be considered by them in deciding where the truth lies. It is, to say the least, not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state. Equally, where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them ?), whereas the excuses do not have the same weight.

> Nor is there any reason why, again where appropriate, the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence."

In Regina v. Sharp [1988] 1 W.L.R. 7, the House of Lords cited with approval R. v. Duncan (supra). The question before the House was :

> "Where a statement made to a police officer out of Court by a defendant contains both admissions and self-exculpatory parts do the exculpatory parts constitute evidence of the truth of the facts alleged therein".

At page 11, Lord Havers said :

> "however an examination of the authorities shows that the approach in Duncan is of respectable antiquity and that it is only in comparatively modern authorities that it has been questioned. The difference in approach in the authorities is a reflection of the difficulties created in the law of evidence by the hearsay rule and its exceptions. "

At page 12 :

> "The view expressed in Duncan, 73 Cr. App. R. 359 is that the whole statement should be left to the jury as evidence of the facts but that attention should be drawn, when appropriate, to the different weight they might think right to attach to the admission as opposed to the explanation or excuses. The other view, which I might refer to as the "purist" approach, is that as an exculpatory statement is never evidence of the facts it relates, the jury should be directed that the excuse or explanation is only admitted to show the context in which the admission was made and they must not regard the excuse or explanation as evidence of its truth."

Having referred to a number of authorities including R. v. McGregor [1968] 1 Q.B. 371, R. v. Donaldson [1976] 64 Cr. App. R. 59, and Leung Kam-Kwok v. The Queen [1984] 81 Cr. App. R. 83, Lord Havers at page 15 concluded :

> " My Lords, the weight of authority and common sense lead me to prefer the direction to the jury formulated in Duncan, 73 Cr. App. R. 359 to an attempt to deal differently with the different parts of a mixed statement.

> How can a jury fairly evaluate the facts in the admission unless they can evaluate the facts in the excuse or explanation ? It is only if the jury think that the facts set out by way of excuse or explanation might be true that any doubt is cast on the admission, and it is surely only because the excuse or explanation might be true that it is thought fair that it should be considered by the jury. I agree with Lawton L.J. that a jury will make little of a direction that attempts to draw a distinction between evidence which is evidence of facts and evidence in the same statement which whilst not being evidence of facts is nevertheless evidentiary material of which they may make use in evaluating evidence which is evidence of facts. One only has to write out the foregoing sentence to see the confusion it engenders.
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> I cannot improve upon the language of Lord Lane C.J. in Duncan and will not attempt to do so. It is in my opinion rightly decided and should be followed.
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> I would therefore dismiss the appeal and answer the certified question in the affirmative but amend it by substituting for the words " a police officer" the words "a person," to make it clear that this exception is of general application and not limited to statements to the police."

The learned trial judge ought to have told the jury that the whole statement, including the excuses or explanations, must be considered by them in deciding where the truth lies. The trial Judge withdrew the exculpatory parts of the statements as evidence of the facts and left it to the jury to consider only as going to the appellant's attitude at the time the statement was given.

We are of the view that such a direction took away from the jury their consideration of the exculpatory statements in deciding where the truth lies. There was therefore a misdirection and a non-direction to the jury and in such circumstances this would in itself lead to the Court allowing the appeal and quashing the convictions.

GROUND 11 :

It was submitted that the learned trial judge failed to give any directions to the jury as to the defence of the appellant.

It is clear that no directions were given to the jury regarding any defence. Mr. Archie, however, submits that the appellant failed to offer any defence and therefore it was not necessary for the Judge to direct the jury as to the defence of the appellant.

Mr. Hamilton further submitted that the defence of the appellant arose out of cross-examination and the statements tendered in evidence by the Crown.

In the State v. Vibert Hodge [1976] 22 W.L.R. 303, Massiah, J.A. at page 311 said :

> " In BENJAMIN HENRY DINNICK (12) the appellant appealed against a conviction for "wilfully and maliciously disquieting and disturbing a religious meeting". The prosecution's case was that the appellant, a deacon of a religious organisation, had entered a church during a service with his hat on and called out in a loud voice : "People of Bristol, this is the abomination of desolation spoken of by Daniel the prophet". His defence was that he had a right to express his prophecies and to have spoken as he did, but the Recorder did not think it necessary to deal with that defence. It was held that he was wrong. The Lord Chief Justice said : [1910], 3 Cr. App. Rep. at p. 79) :
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> > "There is a principle of our own criminal law which we think has been violated in this case - namely, that when a defence, however weak it may be, is raised by a person charged, it should be fairly put before the jury. The appellant, during the trial, raised the defence that he had a right, as an officer of this church, to object to the proceedings which were going on. It may have been very foolish and unfounded, but that defence ought to have been put before the jury - this is a paramount principle of our criminal law."
>
> The appeal was accordingly allowed
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> The same principle was applied in R. v. Hill (13). In that matter the appellant was charged with felonious wounding. He was found guilty of the offence but insane at the time he committed it. During his trial the appellant admitted the wounding but contended that he did so in self-defence.

> In the course of the trial the judge introduced the suggestion that the appellant may have been insane when he wounded the complainant, and in summing-up left only this question for the jury's consideration. The Court of Criminal Appeal held that he was wrong to have withdrawn from their consideration the issue of self-defence. DARLING, J. said as follows [1911], 22 Cox, C.C. at p. 626) :
>
> > "We have come to the conclusion that this conviction must be quashed... It is immaterial whether that defence was a thoroughly bad one. It ought to have been left to the jury. When the recorder raised the question of insanity, no doubt he thought he was finding a better defence for the appellant than had been already advanced...it is a miscarriage of justice if a prisoner's defence, however weak, is not left to the jury. We think the conviction must be quashed."
>
> There are, of course, several other cases in which the same principle has been articulated. (See R. v. Waters (14) R. v. Tilman (15), R. v. Finch (16) James Henry Mills & Edith Mills (17) Julian v. R. (18)). All these authorities emphasise the cardinal principle of our criminal law that the trial judge is under a duty to put adequately before the jury for their consideration whatever defence an accused person chooses to offer, and that the duty is in no wise diminished by any arrogation on the part of the trial judge that the defence is weak or far-fetched or foolish or for some other reason is unworthy of serious consideration."

It may be that the defence as it existed may have been weak but it was the duty of the learned trial Judge to leave such defence for the consideration of the jury. His failure to do so would lead to a quashing of the convictions.

In view of the above decision arrived at, we deem it unnecessary to consider the remaining grounds of appeal.

Should this Court in the interest of justice order a new trial ? The power of the Court to order a new trial is conferred on the Court by s.6(2) of the Court of Appeal Law, 1975 which is in the following terms :

> " Subject to the provisions of this Law, the Court shall, if it allows an appeal against conviction, quash the conviction and direct that a judgment and verdict of acquittal be entered, or, if the interests of justice so require, may order a new trial in accordance with such directions as the Court may give."

In Reid v. Regina [1978] 27 W.I.R. 254, the Privy Council laid down certain principles which should apply in considering whether or not a new trial should be ordered. However, the Court expressed the view that the list was not exhaustive.

In his judgment, Lord Diplock at page 258 said :

> "Their Lordships would be very loth to embark upon a catalogue of factors which may be present in particular cases and, where they are, will call for consideration in determining whether upon the quashing of a conviction the interests of justice do require that a new trial be held. The danger of such a catalogue is that, despite all warnings, it may come to be treated as exhaustive or the order in which the various factors are listed may come to be regarded as indicative of the comparative weight to be attached to them; whereas there may be factors which in the particular circumstances of some future case might be decisive but which their Lordships have not now the prescience to foresee, while the relative weight to be attached to each one of the several factors which are likely to be relevant in the common run of cases may vary widely from case to case according to its particular circumstances. The recognition of the factors relevant to the particular case and the assessment of their relative importance are matters which call for the exercise of the collective sense of justice and common sense of the members of the Court of Appeal of Jamaica who are familiar, as their Lordships are not, with local conditions. What their Lordships now say in an endeavour to provide the assistance sought by certified question (4) must be read with the foregoing warning in mind.....
>
> In cases which fall between these two extremes there may be many factors deserving of consideration, some operating against and some in favour of the exercise of the power. The seriousness or otherwise of the offence must always be a relevant factor; so may its prevalance; and, where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the accused, which the accused ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the accused. Nevertheless there may be cases where evidence which tended

> to support the defence at the new trial would not be available at the new trial and, if this were so, it would be a powerful factor ordering a new trial.....
>
> Their Lordships in answer to the Court of Appeal's request have mentioned some of the factors that are most likely to call for consideration in the common run of cases in Jamaica in which that court is called upon to determine whether or not to exercise its power to order a new trial. They repeat that the factors that they have referred to do not pretend to constitute an exhaustive list. Save as respects insufficiency of the evidence adduced by the prosecution at the previous trial, their Lordships have deliberately refrained from giving any indication that might suggest that any one factor is necessarily more important than another. The weight to be attached to each of them in any individual case will depend not only upon its own particular facts but also upon the social environment in which criminal justice in Jamaica falls to be administered today. As their Lordships have already said, this makes the task of balancing the various factors one that is more fitly confided to appellate judges residing in the island."

What then are the factors to be considered in the instant case in deciding whether or not to order a new trial ?

In the submissions, Counsel for the appellant submitted that the failure of the prosecution to call the witness Weingart weakened the case for the prosecution as it related to Counts 3, 4, 5, 6. The appellant was charged with the offence of theft of money from a trust. Certain documents were tendered in evidence which on the face of it indicated that they were signed by Weingart and that the cash had been received by him. The prosecution called in evidence a Hand Writing Expert whose evidence disclosed that the hand writing on the documents was not the hand writing of Weingart. Evidence was also tendered to indicate that Weingart was not in the Cayman Islands on the dates when these withdrawals were made. However, the prosecution failed to call Weingart who was the best person to state that the handwriting was a forgery and that he had not received any money from the account.

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A new trial would enable the Crown to call the witness Weingart and this would no doubt strengthen the case for the prosecution as it related to those Counts.

It is to be noted that there was no handwriting expert evidence that the writing on the relevant documents was that of the appellant. The prosecution did, however, present other evidence from which the jury was asked to find that it was the appellant who was responsible for the making of the document.

The offences for which the appellant was convicted were alleged to have been committed in 1985 with the exception of Counts 11, 12 and 13 which were alleged to have been committed by early 1986.

The appellant was interrogated by the police on the 6th and 7th December, 1988 but was not arrested until 6th September, 1989 after another interview by the Police. The trial commenced on 4th November, 1991 some two years after his arrest. The trial was a complex and prolonged one lasting some six weeks. Witnesses had to be brought from overseas at the expense of the Crown. A new trial would involve a great deal of expense and the Court and Jury would be involved in another complex and prolonged trial.

Another factor which this Court has taken into account is the Imprisonment (Ammendment) Law 1981.

Section 31(A)(1) states :

"The Governor acting in his discretion and on such conditions as he may think necessary order the release on licence -

(a) of a convicted prisoner serving a sentence of definite length, and in lieu of any remission that may be granted under Section 29, at any time after he shall have served at least one year's imprisonment or one third of his sentence whichever shall be the greater;"

Section 31(A)(2) provides :

> "A convicted prisoner released on licence under this section shall until the expiration of the licence be under the supervision of a probation officer appointed under the Probation of Offenders Law."

This law is in effect providing for the parole of a prisoner serving a term of imprisonment. But for the pending appeal it would have been open to the appellant to be considered for release on licence by the Governor on the 10th December 1992, having served one year of his sentence of three years.

Taking all the above factors into account, we are of the opinion that it is in the interest of Justice that a new trial should not be ordered.

It is for these reasons that on July 30th, 1993 we allowed the appeal, quashed the convictions and set aside the sentences.

(Reasons formally delivered on the 18th day of August, 1993)