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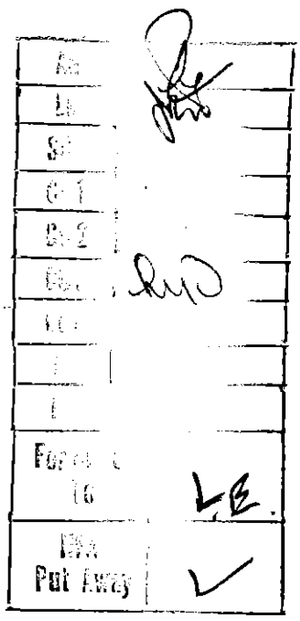
IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN ON 13TH SEPTEMBER 1984.

BEFORE THE HON. SIR JOHN SUMMERFIELD CBE QC JP
CHIEF JUSTICE

CASE NO. 340/84
APPEAL NO. 20a/84



JERISTON BUSH & ANTONIO EBANKS

V

REGINA

THEFT

Mr. Levy for appellants
Mr. Ground for respondent

JUDGMENT

The two appellants were convicted of the theft of a 19 foot Fibercraft boat, serial number FCV912OM74J,(the boat) and each was sentenced to 6 months imprisonment and to pay a fine of $600 or 3 months imprisonment in default. The appeal is against conviction and sentence.

Mr. McLean is the beneficial owner of a company which owns a warehouse and storage yard in a compound in the Lime Tree Bay area. From time to time people use the facilities there to store cars, trucks, boats and similar items. In that compound, at the relevant time, was the boat, parked behind the warehouse on a trailer. It had been there for a considerable length of time, variously estimated at between 12 months and 3 years. It was in a delapidated condition from lack of use and maintenance.

The first appellant was a senior employee of Mr. McLean's company and worked at the compound. The second appellant is an experienced boat engine mechanic who worked for or with a Mr. Parchment at premises in West Bay.

On or about the 10th December 1983 the first appellant approached Mr. McLean and asked him who owned the boat. Mr. McLean said he did not know. The first appellant then said that as the Million Dollar Fishing

Month was fast approaching it would be nice if he (the first appellant) had a boat of his own. Mr. McLean replied that it would be nice if we all had a boat. A discussion followed as to who might be the owner of the boat. The first appellant then said that what he would like to do was take the boat and have it fixed up to use it. Mr. McLean then explained that as the boat was not his he was not able to give him permission to remove the boat.

A few days later the first appellant told Mr.McLean that he was unable to get a boat mechanic to visit the compound to inspect the boat. He said that he would like to take the boat to have it worked on. Mr.McLean reiterated that the boat was not his and therefore could not give permission for its removal and that "he could do as he saw fit" - an expression which the first appellant interpreted in his evidence as "it is on my own head". Mr. McLean was left with the understanding that the first appellant wanted a mechanic to assess the repairs required and the cost whereupon he would seek out the owner and make an offer.

A little later the first appellant called the second appellant to the compound to inspect the boat. The second appellant discovered that two carburettors were missing. The first appellant asked the second appellant if he could fix it and the latter replied in the affirmative, adding that he would have to bring it to his work shop. The first appellant then told the second appellant that when the crew had finished working he would get them to help them put it on the truck.

Later that same day two other employees of Mr. McLean's company assisted the two appellants to hitch the trailer with the boat to a truck and it was taken by them to Mr. Parchment's premises in West Bay.

Shortly after that the second appellant had the boat removed to his mother's home in West Bay, some 5 miles from Mr. Parchment's premises.

The next incident concerned the sale of the boat. On New Year's eve a Mr. Manderson was talking to the second appellant about boats. The second

appellant told him he had a boat. Mr. Manderson expressed interest and went to examine the boat. It was still in a poor condition. The second appellant gave a price of $1200, adding that that was the price he had paid for it. In fact he had paid nothing. A deal was struck and the second appellant helped Mr. Manderson to transport the boat to his premises in Savannah. The deal was struck on or about the 5th January 1984.

In his evidence the first appellant admitted removing the boat as outlined above and the gist of the conversations with Mr. McLean. He said he removed it to find out how much it would cost to repair and then seek out the owner and buy it if the repair costs were not too high. He said he was shocked when he learned that the boat had been sold and had no part in that transaction.

The second appellant also gave evidence. He claimed that he had been given the boat by the first appellant as payment for his labour on repairs to be done on Mr. McLean's boat. He had earlier told the Police that he had bought the boat from Mr. McLean. His version conflicted with the version given by the first appellant and the evidence of Mr. McLean. The learned Magistrate had no difficulty in rejecting the implausible and conflicting account given by the second appellant.

The learned Magistrate also, by implication, rejected the defence of the first appellant.

The learned Magistrate saw and heard the witnesses and the appellants and was, therefore, in a position to assess their credibility. It was open to him to conclude on the evidence outlined that the two appellants jointly dishonestly appropriated the boat with the intention of permanently depriving the owner of it.

There were certain unsatisfactory features I should advert to.

A statement of Richard Colin Jones was tendered in evidence

under section 24 of the Evidence Law. The averment in the charge was that Richard Jones was the owner of the boat. Learned counsel for the second appellant objected to the introduction of this statement at the trial on the ground that Mr. Jones was a key witness as the owner of the boat and should be cross-examined.

In fact the statement did not show that the boat belonged to Mr.Jones within the definition of "belonging" in section 211 of the Penal Code. It merely showed that he had been given authority to sell it on behalf of the owner and no more. That falls short of the definition of "belonging". It did, however, relate that the owner was a company known as ARAMCO.

Section 24 of the Evidence Law provides a convenient and speedy method of proving formalities. It should not be invoked in relation to matters which go to the root of a case. When a defendant or his counsel applies to have the author of such a statement attend to give evidence a court should normally accede to such a request unless the application is baseless or frivolous. When such an application is refused for good cause the court should insist on proof of strict compliance with section 24. In any event, it should appear from the record that the requirements of that section have been complied with.

Here, there was no suggestion that the time limits set out in section 24 were not met. Service itself was admitted. And so one presumes regularity. No reason has been given why it would have been in the interests of either appellant to cross-examine Mr. Jones who was not, as it turns out, the person to whom the boat belonged. Showing that the boat belonged to ARAMCO was a pure formality. While the charge wrongly recited Mr. Jones as the owner it does not matter who it belonged to provided that it belonged to another and the article alleged to be stolen was sufficiently identified in the charge. It is clear from the evidence of the two appellants themselves that they acepted and knew that the boat belonged to someone else. There has been no miscarriage of justice by reason of this irregularity.

The invoice, Ex. 2, showing that the boat was shipped to ARAMCO in June 1981 was purportedly admitted under section 23 of the Evidence Law. It

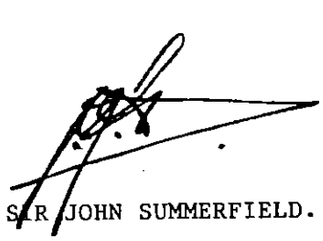
was wrongly admitted. In the first place documents tendered under this section should be tendered by persons having proper custody of them. Secondly, unless admitted by consent, the basis of their admissibility, as coming within the ambit of paragraphs (a) and (b) of subsection (1) of section 23, should be proved.

However, I do not think that there has been any miscarriage of justice for the reasons given in relation to the statement of Mr.Jones. Sections 175 and 176 of the Criminal Procedure Code can properly be invoked.

The learned Magistrate expressed the view that the two appellants were also guilty of the offence created by section 222A of the Penal Code. It should be pointed out that the offence under section 222A cannot be established without calling the owner to prove absence of consent to driving the conveyance away. And "owner" means the actual owner but, where the actual owner gives control and custody to another, that other person would also have to be called to prove absence of consent to driving the conveyance away.

For the foregoing reasons the appeals against conviction are dismissed.

As to sentence, after careful consideration and bearing in mind the ages of the appellants, the absence of any previous convictions involving dishonesty and the evidence of the character witnesses I have concluded that it would be appropriate to suspend the substantive sentences of imprisonemnt. Accordingly they are suspended for a period of two years pursuant to section 23 (4) of the Penal Code. The appeal against sentence succeeds to that extent but is otherwise dismissed.



SIR JOHN SUMMERFIELD.

8th October 1984.