

NMLS

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO: 33/2005

**BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A. (Ag.)**

REGINA v DERRICK DUNN

**Dr. Paul Ashley and Garth McBean for the appellant
Mrs. Simone Wolfe-Reece and Miss Sharon Barnes for the Crown**

March 28, 29, 31 and July 31, 2006

McCALLA, J.A.:

The appellant was convicted in the Corporate Area Resident Magistrate's Court by Her Hon. Miss Judith Pusey and sentenced to six (6) months imprisonment.

The three counts of the indictment on which he was convicted read as follows:

**"Count 1
Statement of offence**

Conspiracy to Defraud, contrary to Common Law.

Particulars of Offence

Derrick Dunn and Mark Chin on divers days between May 2001 and November 2001, in the Corporate Area, with intent to defraud, conspired together to defraud Spectrum Insurance Brokers Limited by forging a Resolution

of the Board of Directors of Spectrum Insurance Brokers Limited dated May 25, 2001 appointing Trafalgar Commercial Bank Limited as Bankers of Spectrum Insurance Brokers Limited and authorizing the operation of a Bank Account at Trafalgar Commercial Bank Limited (hereinafter called the "Resolution") and by uttering the Resolution to Trafalgar Commercial Bank Limited resulting in the opening of Current Account No. 1010867 (hereinafter called "the said Account") at Trafalgar Commercial Bank Limited in the name of Spectrum Insurance Brokers Limited with Derrick Dunn and Mark Chin as authorized signing officers on the said Account and by depositing cheques made payable to Spectrum Insurance Brokers Limited to the said Account and by causing the following sums to be withdrawn from the said Account for purposes other than those of Spectrum Insurance Brokers Limited, viz cheque dated June 22, 2001 for \$50,000.00; cheque dated June 30, 2001 for \$72,800; cheque dated July 4, 2001 for \$215,000.00; cheque dated August 3, 2001 for \$1,450,000.00; cheque dated August 24, 2001 for \$150,000.00; cheque dated September 14, 2001 for \$510,000.00; cheque dated October 2, 2001 for \$300,000.00; cheque dated October 26, 2001 for \$130,000.00; cheque dated November 1, 2001 for \$267,198.81; cheque dated November 9, 2001 for \$500,000.00.

Count 2

Statement of Offence

Forgery, contrary to Section 7 of the Forgery Act.

Particulars of Offence

Derrick Dunn on or about the 25th day of May 2001 in the Corporate Area, with intent to defraud, forged a certain document purporting to be a Resolution of the Board of Directors of Spectrum Insurance Brokers appointing Trafalgar Commercial Bank Limited as Bankers of Spectrum Insurance Brokers Limited.

Count 3**Statement of Offence**

Uttering a forged document contrary to Section 9(1) of the Forgery Act.

Particulars of Offence

Derrick Dunn on or about the 25th day of May, 2001 in the Corporate Area, with intent to defraud uttered a forged document, to wit, a certain document purporting to be a Resolution of the Board of Directors of Spectrum Insurance Brokers appointing Trafalgar Commercial Bank Limited as Bankers of Spectrum Insurance Brokers Ltd."

The prosecution's case arose out of the following circumstances:

In 1988 the appellant was appointed as chief executive officer of Spectrum Insurance Brokers Limited (Spectrum). His terms of employment were not in dispute. At the time of his appointment the financial state of the company was not robust. Consequently certain payments to which he was entitled were with his concurrence deferred, to be dealt with by a committee established for that purpose.

In May of 2001, the appellant prevailed upon Mark Chin, an accountant employed to Spectrum, and together they drafted a resolution authorizing the company to open an account. Thereafter they signed same as chairman and secretary respectively and surreptitiously opened an account at a bank then known as Trafalgar Development Bank.

The appellant then lodged commissions payable to Spectrum from various entities to this account and made withdrawals, all done without Spectrum's knowledge or concurrence.

A disagreement arose between Spectrum and the appellant concerning the acquisition of another brokerage firm. Spectrum discovered the secret account and this led to the arrest, trial and conviction of the appellant in respect of the funds which had been diverted from Spectrum. Mark Chin gave evidence for the Crown at trial.

The Defence

Simply put, the appellant's defence was a claim of right to the money which had been lodged and removed from the secret account. The appellant testified as to the weak financial state of the company. Under his management the company's financial health had improved exponentially. He did not deny that he had used the method referred to, for the purpose of exercising the right he claimed.

The original grounds of appeal filed are as follows:

1. The verdict of the Learned Resident Magistrate is unreasonable having regard to the evidence.
2. The Learned Resident Magistrate erred in Law by failing to sever count one (1) for Conspiracy from the indictment or alternatively by failing to sever counts two (2) and three (3) from the indictment. The Learned Resident Magistrate so erred having regard to the fact the Conspiracy Count charged the Defendant/Appellant with Conspiracy to commit the substantive offences in Counts 2 and 3.

3. The Learned Resident Magistrate erred in failing to deal adequately with the legal and evidential duties or burdens placed upon the Defence and Prosecution respectively where a claim of right has been raised by the defence.

These grounds were argued along with the supplemental grounds filed on November 11 which I now set out in full, as follows:

- “(1) The Prosecution failed to discharge its burden negating the claim of right raised as a defence by the Appellant.
- (2) The Learned Resident Magistrate erred in Law in finding that the Appellant bore the legal burden as distinct from the evidential burden. The Learned Resident Magistrate so erred when she found as follows:
 - (a) That the Appellant's case must reach the required standard.
 - (b) That when the Appellant asserted as his defence that he was entitled to the monies he must prove this.
- (3) The Learned Resident Magistrate erred in finding that the offence of Uttering (Count 3) had been proven by the Prosecution. The Learned Resident Magistrate so erred having regard to the following evidence: -
 - (a) Evidence from Miss Fiona Barnes which indicated that she was unable to say whether the document purporting to be a Resolution of the Board of Directors of Spectrum Insurance Brokers appointing Trafalgar Commercial Bank Limited as Bankers of Spectrum Insurance Brokers Limited was ever received by the said Bank.
 - (b) Evidence from Miss Fiona Barnes that all signatories are required to attend the Bank and have their signatures witnessed by an official from the Bank.

- (4) The Learned Resident Magistrate erred in failing to make a specific finding as to whether the Document which purported to be a Resolution of the Board of Directors of Spectrum Insurance Brokers Limited appointing Trafalgar Commercial Bank Limited as its Bankers was actually received by the said Bank. In failing to so find the Learned Resident Magistrate erred in failing to consider and find that an essential element of the offence of Uttering was not proven by the Crown.
- (5) The Learned Resident Magistrate erred in finding that the offence of Forgery (Count 2) had been proven by the Prosecution. The Learned resident (sic) Magistrate so erred having regard to the fact that there was no evidence that the document purporting to be a Resolution of the Board of Directors of Spectrum Insurance Brokers Limited appointing Trafalgar Commercial Bank Limited as Banker of Spectrum Insurance Brokers Limited was even received by the Bank.
- (6) The Learned Resident Magistrate erred in failing to sever the conspiracy count from the Indictment or to (sic) alternatively to sever counts 2 and 3 from the Indictment.
- (7) The Learned Resident Magistrate erred in finding as she did that the Appellant repaid \$100,000.00 over the amount which he was required to repay and that this demonstrated that he had the requisite **mens rea**. The Learned Resident Magistrate so erred in so finding for the following reasons:-
 - (a) She failed to take into account the evidence which revealed that the amount overpaid by the Appellant was less than \$100,000.00
 - (b) She failed to take into account the Appellant's evidence that:-
 - (i) he knew the figure was about \$5.3 Million

- (ii) he did not have the reconciliation for the month of December so he approximated the figure.
- (8) The Learned Resident Magistrate erred in Law in failing to adequately warn herself of the dangers of acting or relying upon the evidence of Mark Chin who was co-conspirator for count 1 and accomplice for counts 2 and 3.
- (9) The Learned Resident Magistrate erred in finding that the following matters demonstrated the Appellants (sic) insincerity and an intention to defraud on the part of the Appellant
 - (a) That the Appellant filed no lawsuit against the Gleaner for defaming him nor did he seek an apology or retraction.
 - (b) That the Appellant has not sought to recover payment of the monies to which he was entitled.

The Learned Resident Magistrate so erred having regard to the fact that no evidence was elicited from the Appellant or anyone else as to whether he had taken action to recover the monies to which he contends that he is entitled and in relation to the defamatory article.

- (10) The sentence of six months imprisonment at hard labour was manifestly excessive."

**Grounds 1 & 3 of the Original and Grounds 2 & 7
of the Supplemental Grounds**

Citing numerous authorities Dr. Ashley argued that as the appellant's defence was that he honestly believed that he had the discretion and authority to take the money he did, the learned Magistrate erred in finding that he had the necessary mens rea.

Where an honest belief of a right to property exists, a taking in exercise of a bona fide claim of right is not felonious (**R v Williams** [1953] 3 Q. B. 606)

There can be no doubt that the prosecution bears the burden of proof to negative a claim of right. The headnote of **R v Jean McLean** [1967] 10 JLR 273 states :

"On a charge of fraudulent conversion of money it is open to a defendant to set up, by way of defence, a claim of right to the money alleged to have been fraudulently converted and the onus is on the prosecution to negative the claim of right so set up. Where therefore, the appellant was entrusted by her employer with a sum of money to retain in safe custody and, on the evidence led by the prosecution, she had borrowed a part thereof because her employer was unable to pay her the weekly wage due to her, the court held that the prosecution had not negated the claim of right made by the appellant."

Henriques J.A. at page 274 G of the judgment said:

"It is obvious that the appellant was setting up a claim of right to the money which she took from the envelope. The principles which should apply to a matter of this kind are set out in **Glanville Williams' Criminal Law** p. 412. It deals with the principles with regard to the matter of a larceny, but these principles are equally applicable to a case of fraudulent conversion. It states as follows:

'... By the Larceny Act 1916, s(1), (enacting the common law rule), larceny is a taking 'fraudulently and without a claim of right made in good faith.' If there is a claim of right, it is not larceny; and the burden of proving an absence of such claim is upon the prosecution. The expression 'claim of

right' does not refer to actual legal right: it means belief in legal right. Belief in moral right is irrelevant to this question. But in exceptional circumstances belief in moral right may show that the act is not done 'fraudulently'.

Then in another passage at p.413 (*ibid*) the learned author states:

'... The cases go very far in saying that any belief in a legal right to take the thing, however absurd, and even though the belief involves a matter of law, prevents the taking from being larceny. It may be hard for the lawyer to credit the abysmal ignorance of law that may be involved in a genuine claim of right; but where doubt arises the benefit of it must be given to the accused'."

The evidence adduced in cross-examination of the Crown witnesses clearly shows that the company owed money to the appellant. At page 41 of the record the evidence of Mark Chin is to the effect that:

"He told me, not in the initial discussion, but in later discussion that the company had owed him money. From my position that was true.

I did not have in my possession, nor did I compile monies owed to accused by the company."

At page 56 the chairman of Spectrum, Mrs. Dorothea Gordon-Smith testified as follows:

"Accused was paid a salary. He was also entitled to other payments".

At page 63 she gave evidence as follows:

"There is nothing written specifically in his contract of employment that says that the Board has a part to play in relation to his commission."

According to the evidence of Mark Chin at page 44 of the record:

"The role of the President/Chief Executive Officer was to run the company. He could decide on the levels of remuneration. He could decide who gets a loan and the amount. He did determine when bonuses were paid and the amount. He ran things."

The appellant complains that notwithstanding the evidence referred to above, the prosecution failed to adduce evidence to discharge its burden to negative the claim of right asserted.

The appellant contends that the learned Resident Magistrate found that the appellant bore the legal burden as distinct from the evidential burden of proof. The evidence elicited from Mark Chin was that he did not make any compilation of monies which were owed to the appellant by the company.

No investigation of payments made to the appellant was done by the auditor who had been called in. At page 119 of the record the Resident Magistrate in her findings of fact states thus:

"His arrogance took on even greater dimension when he steadfastly outlined all he had done for Spectrum (notwithstanding that what he did was his job) and that he was entitled to the monies. Yet he offered no factual basis for this conclusion.

His Counsel opined that it is the Crown who must prove this. I disagree. He asserts it as his defense (sic) and therefore he must prove it...

It is mooted that the Crown should have provided this information for the Court but the Chairman gave evidence and so did the former financial controller. There was no attempt to get this important piece of information from them. All that was elicited from them was that the accused was owed money." (emphasis supplied)

The learned Resident Magistrate correctly stated that the burden of proof in a criminal case rests on the prosecution but here is the context in which she expressed herself at page 122 of the record:

"It is a cardinal principle of the Criminal Law that the accused is presumed innocent until proof beyond a reasonable doubt is manifest (*Woolmington v DPP*) and it is the burden of the prosecution to prove its case. However, in a situation as this case manifests, where the prosecution proves its case and the accused man admits it, but provides a reason for committing the offences his case must be examined and must reach the required standard to be successful. The accused has not established the absence of the necessary *mens rea* while in contradistinction, the Prosecution has put before the Court evidence that establishes inferentially *mens rea*. I therefore found the accused guilty on all counts"
(emphasis supplied)

Miss Barnes for the Crown submitted that the appellant had an evidential burden to speak to what is owed to him. However, the evidence established that :

- (a) Money was indeed owed to the applicant

(b) What he took is what he said was owed to him.

The prosecution's contention that he took in excess of what was due to him is not borne out by the evidence and the amount he repaid is what he said approximated to the amount he took.

Faced with count 1 of the indictment where the total amount when calculated is less than the amount repaid by the appellant, Miss Barnes eventually had to concede that the evidence does not establish that the appellant took an amount in excess of that which he contended was owed to him and the prosecution had failed to negative the claim of right which the appellant had raised.

Grounds 3 & 4 of the Supplemental grounds

These grounds dealt with count 2 of the indictment which charged the appellant with uttering a forged document. This was in relation to the documents signed by the appellant and Mark Chin which were used to open the relevant bank account.

The offence of uttering is defined in Section 9(2) of the Forgery Act as follows:

"A person utters a forged document, seal, or die, who, knowing it to be forged, and with either of the intents necessary to constitute the offence of forging the document, seal, or die, uses, offers, publishes, delivers, disposes of, tenders in payment or in exchange, exposes for sale or exchange, exchanges, Tenders in evidence, or puts off such forged document, seal or die."

The Crown's witness Fiona Barnes was unable to identify the relevant documents as having been received by the bank. Her evidence was insufficient to establish that the document said to be forged was used in a manner required by the above section.

The reasons given to Mark Chin for opening the secret account were different from those stated by the appellant at trial.

Mrs. Wolfe-Reece sought to support the conviction on the count for Uttering by arguing that the appellant had prepared the documents used to open the secret account and whatever flowed therefrom was the production of the forgery. However, there being no evidence of uttering a forged document as contemplated by the above section of the Larceny Act, these grounds of appeal, in spite of the courageous attempt by Mrs. Wolfe-Reece to resist them must succeed.

Ground 5 of the Supplemental Grounds

This ground concerns the forging of the said resolution used to open the secret bank account. The offence of forgery is defined in section 3 (1) of the Forgery Act as follows:

"... 'forgery' is the making of a false document in order that it may be used as genuine, ... and forgery with intent to defraud or deceive, as the case may be, is punishable as in this Act provided".

The appellant and Chin had signed as chairman and secretary respectively, but neither of them at the material time, held those positions.

As the funds had been diverted from the company, Mrs. Wolfe-Reece argued that the requisite intent to defraud could be inferred. The chairman Mrs. Gordon-Smith in her evidence concerning the conduct of company business at Spectrum, had stated that resolutions said to have been passed were not in fact passed and documents were sometimes signed by persons whose positions were wrongly designated. Mrs. Wolfe-Reece argued that it was this state of affairs that enabled the appellant to commit the crimes of forgery and uttering.

With regard to the requirement of an intent to defraud, it is clear that it was not the bank that was alleged to have been defrauded. Having conceded that the Crown had failed to negative the claim of right being asserted, the necessary intent to defraud can no longer be maintained.

With regard to the counts of forgery and uttering the learned Resident Magistrate was content to make no findings. She was of the view that the appellant having admitted the **actus reus**, there was no need to analyze with any particularity the evidence adduced in support of them. Having regard to that approach taken by her the success of these two grounds of appeal was assured.

Ground 9 of the Supplemental Grounds

This ground which relates to the conduct of the appellant subsequent to the discovery of the account, is irrelevant, and was, quite correctly, not pursued.

Ground 2 of the Original and Grounds 6 & 8 of the Supplemental Grounds

These remaining grounds of appeal relate to severance of count 1 of the indictment and the failure of the learned Magistrate to adequately warn herself in relation to evidence of accomplice. As we found that there is merit in the complaint regarding the claim of right asserted by the appellant as well as in the grounds of appeal relating to forgery and uttering a consideration of these grounds is not necessary for the determination of this appeal.

In parting with this case we refer to the view expressed by the Resident Magistrate that the sincerity of the appellant in opening the account was severely undermined. She made reference to :

- (a) The looseness of the company's operations which facilitated the opening of the account
- (b) The repayment of an amount in excess of the sum claimed to be due to him and his reasons for doing so.
- (c) The fact that he had filed no lawsuit for defamation in connection with publication of the matter and has asked for no apology or retraction, yet his career has been destroyed.

It is apparent that the Learned Magistrate was influenced by the method which the appellant had used to exercise the claim of right that he asserted. In this regard the case of **Regina v Skivington**[1968] 1Q.B.166 offers some guidance. I reproduce the headnote which accurately reflects the judgment in full. It reads as follows:

"The defendant was charged, inter alia, with robbery with aggravation contrary to section 23(1)(a) of the Larceny Act, 1916. On June 21, 1966, he had gone to the officers of the company which employed both him and his wife. He threatened an employee of the company with a knife, demanding wages which he claimed were due to him and his wife, and the employee at the point of the knife, gave him two wage packets from a safe. The defendant submitted that he honestly believed he had a right to the money and that accordingly he could not be guilty of robbery, since an honest belief in a claim of right was a defence to larceny and larceny was an essential ingredient of robbery. The trial judge directed the jury that before they could accept a claim of right as a defence they must be satisfied that the defendant had an honest belief that he was entitled to take the money in the way in which he did. The defendant was convicted.

On appeal against conviction on the ground of misdirection:-

Held, quashing the conviction, that the jury were misdirected, for a claim of right where there was an honest belief in a lawful claim, being a defence to larceny was equally a defence to aggravated larceny such as robbery, in that it negatived one of the ingredients of the offence; and that, therefore it was unnecessary for the defendant to show not only that he had an honest belief that he was entitled to the money

but also that he had an honest belief also that he was entitled to take it in the way in which he did."

At page 171E of the judgment Lord Parker, CJ states:

"In the opinion of this court this matter is plain, namely, that a claim of right is a defence to robbery or any aggravated form of robbery and that it is unnecessary for the defendant to show that he had an honest belief not only that he was entitled to take the money but also that he was entitled to take it in the way that he did".

Having regard to the foregoing, we are of the view that the convictions must be quashed. The sentence of imprisonment on each count is set aside and a judgment and verdict of acquittal is entered in lieu thereof.