

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 154/67

BEFORE: The Hon. Mr. Justice Henriques, Presiding
The Hon. Mr. Justice Moody
The Hon. Mr. Justice Shelley

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REGINA v. JEAN MCLEAN

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Dr. Lloyd Barnett for Appellant

Mr. D. Bingham for the Crown

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Tuesday, 5th December, 1967

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HENRIQUES, J.A.:

The appellant in this matter was convicted by the learned Resident Magistrate for the parish of St. Ann of the offence of Fraudulent Conversion, the particulars of offence being as follows: "That Jean McLean, on the 15th day of April, 1967, at St. Ann's Bay, being entrusted with the sum of £9.6.9 by Allan Arscott to retain the same in safe custody, fraudulently converted the sum of £3 to her own use and benefit".

The Prosecution's case arose out of the following circumstances: Allan Arscott, who resides in St. Ann's Bay, operates a betting shop for Merrick Watson's Betting Shops, Ltd., and the appellant was for some months prior to the 15th of April employed as a clerk in that shop. Her duties were to sell bets and to pay out dividends. The dividends were given to her in an open envelope, the number of the winning voucher written on the envelope, and the date of the race. Each pay-out was put in a separate envelope, and she had instructions to check the money to see that the money in the envelope was the same as the amount written on the envelope and also to seal the envelope. Her duty then was to take the envelope with the money along with other similar envelopes to another branch of the Betting Shops, Ltd., and there to pay out the money to the customers who presented the corresponding vouchers.

The appellant was employed at a weekly wage of £5, and it was customary

for her to receive her wages on a Saturday afternoon.

On the 15th of April the appellant was given an envelope by Mr. Arscott, which was open, and with the sum of £9.6.9 in it. She was told to check the money, which she did, and the envelope was sealed by Mr. Arscott. The envelope was then given to the appellant with other envelopes containing money.

According to Mr. Arscott's evidence, the appellant returned to him with the envelope in the afternoon - the same afternoon - and handed it to him sealed. He locked it away in his locker, in safe custody until the appellant would resume duty on the following Tuesday.

On the following Tuesday, the appellant did not present herself for work and the envelope in question was handed to Doris Harrison, the co-employee of the appellant. She refused to take it. Mr. Arscott then opened the envelope, checked it, checked the money in it, and found that the sum of £3 had been deducted from the sum of £9.6.9. He made a report to the police on the Thursday.

Under cross-examination he stated that in the week of the 15th of April that there was some money missing from the betting shop. This was money in the appellant's charge; and that because of the loss of the money he was unable to pay any wages that week. So that the appellant did not receive her customary wages on the Saturday. Subsequently, he said, that the appellant came to him -- this was after he had reported the matter to the police -- and offered him the sum of £3; but he refused it, as he told her the matter had already been placed in the hands of the police.

Evidence was given by Miss Harrison, the co-employee, who gave evidence as to the circumstances in which this money was extracted from the envelope. She said that she was along with the appellant on the 15th of April, that they checked the sales, and that the appellant went over to Mr. Arscott and returned and informed her that Mr. Arscott said that they were not receiving any wages that day. She then had with her the pay-out envelopes, and that she opened one of the envelopes and took out some money. Miss Harrison is alleged to have spoken to her and asked her if she was not afraid to catch trouble, and she said she did not get any pay so she was taking the money. According to Miss Harrison, she then sealed back the envelope and gave it to her, and she took it to Mr. Arscott at the restaurant.

When the appellant was arrested and cautioned she said, "I did not steal the money, I only borrowed it".

The appellant gave evidence to the effect that wages were owing to her, that she had been informed that morning by Mr. Arscott that he was unable to pay her her wages, that she opened the envelope in Miss Harrison's presence, took out £3, and sealed it back and gave her, Harrison, the envelope, and told her to give it to Mr. Arscott and to inform him that she had borrowed the money.

Upon those facts the learned Resident Magistrate convicted the appellant of the offence of Fraudulent Conversion.

Learned Counsel for the appellant has submitted that the verdict of the learned Resident Magistrate is unreasonable and cannot be supported, having regard to the evidence. He elaborates his submissions by illustrations from passages in the evidence which go to show, he submits, a consistency of conduct on the part of the appellant throughout; and he submits that it was unreasonable to say, in face of the evidence, that both fraudulent conduct and dishonest conduct had been established.

He submits that on the authority of Regina v. Bryce, reported in 40 C.A.R., at p. 62, it was necessary for the Crown to establish three ingredients: namely, it must be proved that money or property was entrusted to the prisoner for a particular purpose; that he used it for some other purpose; and that such misuse was fraudulent and dishonest. He submits that the Crown has not established in the particular circumstances of this case, that the misuse of the money was fraudulent and dishonest, and therefore the inferences drawn by the learned Resident Magistrate from the evidence were entirely unreasonable and incompatible with the true circumstances of the case.

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, at 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, p. 413, 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".

Finally, there is this paragraph:

".. That a claim of right need not be a claim to present ownership or to a proprietary right in the thing: it maybe a claim of a ius in personam, or indeed a mere belief by the taker that his conduct was lawful in the circumstances. The essence of the defence is honesty of purpose in respect of the other person's property."

It seems to us on the present facts that the Prosecution have not sufficiently negatived the claim of right which was made by the appellant, and in these circumstances the taking by the appellant was not fraudulent.

The appeal, therefore, is allowed, the conviction quashed, and sentence set aside.

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