

## OTTO LOUIS WENDT v. REGINAM

[FIJI COURT OF APPEAL AT SUVA (Sir George Finlay, Acting President,  
C. F. C. Macaskie and C. J. Hammett, JJ/A), May 21, 1960]

CRIMINAL APPEAL NO. 18 OF 1959

(Appeal from Her Britannic Majesty's High Commissioner's Court at  
Nuku'alofa, Tonga—A. G. Lowe, Chief Judicial Commissioner.)

Larceny Act 1916—whether club treasurer a clerk or servant within s. 17—degree of control—how far receipt of “ownership” of property necessary for conviction of fraudulent conversion under s. 20 (1) (iv) (b)—Pacific Order in Council 1893—power to impose imprisonment with hard labour—not affected by English Statute abolishing this punishment.

The appellant was convicted of fraudulent conversion under section 20 (1) (iv) (b) of the Larceny Act 1916. He was sentenced to imprisonment for three years with hard labour. He appealed against conviction and sentence.

In respect of the appeal against conviction, it was contended firstly that the appellant was in law and fact a clerk or servant and therefore liable to conviction not under section 20 (1) (iv) (b) but under section 17 of the Larceny Act 1916. The appellant had received the moneys, for the fraudulent conversion of which he was convicted, as Treasurer of the Tonga Club. The office of Treasurer was an elective office for which the appellant was qualified by membership of the Club and of the Management Committee. He was paid an annual honorarium of £30.

The second ground of the appeal against conviction was that in a charge under section 20 (1) (iv) (b) of the Larceny Act 1916 it was necessary to establish that the defendant received the ownership of the property which he was charged with having fraudulently converted.

In respect of the appeal against sentence it was argued *inter alia* that in so far as imprisonment with hard labour had been abolished in England, the Chief Judicial Commissioner had no power to impose a sentence of hard labour in the present case.

*Held.*—(1) There was in the circumstances of this case a complete absence of that element of control essential to a clerk or servant relationship between the appellant and the Club: following *R. v. Tyree* (1865) 1 L. R. Crown Cases Reserved Vol. 1 p. 177, the appellant would appear to have been an accountable officer but not a servant.

(2) Ownership in the colloquial sense is not an essential condition for a conviction of fraudulent conversion under section 20 (1) (iv) (b) of the Larceny Act 1916; the subsection extends at least to moneys paid over subject to a liability to account, where the person liable to account is free, as in this case, to change the form of the moneys he receives.

(3) The power to impose a sentence of hard labour being specifically prescribed by the Pacific Order in Council 1893, is not therefore affected by the English Statute which has abolished this form of punishment in England. (The sentence imposed was, however, reduced upon other grounds).

*Appeal against conviction dismissed ; sentence varied.*

Cases cited:—

*Regina v. Murphy* 4 Cox C.C. 101; *The Queen v. Tyree* (1865) 1 L.R. Crown Cases Reserved, Vol. 1; *Leslie Pilkington* (1958) 42 C.A.R., 233.

*M. Tikaram* for the appellant.

*T. Rice* for the respondent.

The appellant was convicted in the High Commissioner's Court at Nuku'alofa on the 25th September, 1959, of fraudulently converting to his own use the sum of £802 5s. 2d. received by him for or on account of the Tonga Club. He was sentenced to imprisonment for three years with hard labour.

He appeals against both conviction and sentence.—The appellant abandoned two grounds of appeal—that in which he alleged that the verdict was unreasonable and could not be supported having regard to the evidence and that in which he alleged that there was no evidence of fraudulent intention sufficient to support a charge of fraudulent conversion. In the result he confined his appeal, so far as the conviction was concerned, to purely technical grounds.

The first of these was that the Judge was in error in holding that the appellant was not a clerk or servant within the meaning of section 17 of the Larceny Act 1916. Phrased affirmatively the submission was that the appellant was, in law and in fact, a clerk or servant and that he was, in consequence, liable to conviction not under section 20 (1) (iv) (b) under which he was, in fact convicted, but under section 17.

A collateral ground of appeal alleged was that on the evidence adduced by the prosecution the case did not fall within the ambit of section 20 (1) (iv) (b).

Having regard to the historical development of the law on the subject and to authority, it is unquestionable that, if the appellant was a clerk or servant of the Tonga Club, then the charge should not have been under section 20 (1) (iv) (b) but under section 17 of the Act or, possibly, under some other provision of the Act relating to larceny. There is no need to consider the latter contingency.

This definition of the legal position thus given invites consideration of the fundamental question whether the appellant was a clerk or servant of the Tonga Club. The Club is an unincorporated body governed by Rules which provide for the position of a Treasurer but contain no directions as to his functions or duties save as to the point of time at which he is to render his annual account. He was paid an annual honorarium of £30. He received, either from the Secretary of the Club or from its Stewards, sums of money from time to time which he was to hold on the Club's account. It was in respect of the money thus paid over to him that the deficiency of £802 5s. 2d. occurred.

In the light of the evidence it is obvious that no measure of control was exercised by anyone over the appellant in the performance of his duties. He could keep accounts in such form as he pleased: He could do such work as his office entailed when and where he pleased: he could retain the moneys paid over to him in specie if he so wished or he could pay them in whole or part if he wished into the Government Treasury, that being the only Bank, apparently, in Tonga. He could at his election discharge the financial obligations of the Club out of the actual cash he received. He was, in fact, the person who on his own initiative opened a deposit account for

the Club at the Government Treasury. What evolves from it all is that he was not required to retain the moneys paid to him in the form in which he received it but could disburse it in the payment of accounts, deposit it in the Treasury or substitute other moneys for it, as circumstances might require.

His obligation was to account for and have available an aggregate sum equal at any point of time to the amounts he had received less proper disbursements on the Club's account.

In the circumstances, there was a complete absence of that element of control which is essential to a clerk or servant relationship between him and the Club. Not only so but any conception of employment is to some extent negated by the fact that his was an elective office for which he was qualified by virtue of his membership of the Club and by his membership as Treasurer of the Management Committee whose function it was to manage the Club's affairs. This latter feature if he were an employee put him in a very real sense in the position of being both master and servant—an impossible state of affairs. When every other circumstance negatives such a character the mere receipt of an honorarium can scarcely convert him into an employee of any type. The circumstances are clearly distinguishable from those involved in *Regina v. Murphy* 4 Cox C.C. 101. They were closely approximate to, if they do not quite coincide with, those dealt with in *The Queen v. Tyree* 1 Law Reports, Crown Cases Reserved, 1865, Vol 1. In the language of the judgment of that case the appellant would appear to have been an accountable officer but not a servant.

The ground of appeal in which it is alleged that the Chief Judicial Commissioner was in error in holding that the appellant was not a clerk or servant therefore fails.

It follows that the case is not excluded from section 20 (1) (iv) (b) of the Larceny Act 1916 because the appellant was a clerk or servant. It is contended, however, that that subsection nevertheless does not apply because it is submitted that it is essential to the application of that subsection that it should be established that the person charged received the ownership of the property which he is charged with having fraudulently converted. For this proposition Counsel for the appellant relied upon the statement to that effect which appears in the final paragraph at p. 1265 of *Russell on Crime* 11th Edition. It is noteworthy that the learned author of that treatise expresses no more than a conclusion of his own achieved by a process of deduction and phrases it in the form of a submission unsupported by precise authority. The statement has, of course, the support of Kenny's *Outlines of Criminal Law*, 17th Edition, p. 316, para. 328, where the statement appears:—

“The only kind of situation therefore which will fit the words of subsection 1 (iv) is one in which ownership was given since there is no available intermediate position between legal possession and ownership.”

Consideration suggests, however, that the term “ownership” as employed by the learned text book writers does not mean absolute and unqualified ownership which is the colloquial meaning of the word. It may well be that it only extends to that form of ownership, if ownership it be, in which a person entrusted is not required to retain the thing entrusted in the precise form in which he receives it so that where moneys are paid over and received there is no obligation to retain the specific notes or coins received. Only

that interpretation will satisfy such authorities as *Leslie Pilkington* (1958) 42 C.A.R., 233. In that case, an estate agent was convicted of fraudulent conversion of sums of money received by him for or on behalf of purchasers of houses. In some instances the money is described in the judgment of the learned Lord Chief Justice as having been received by Pilkington, as a stake holder, on the hypothetical suggestion that the persons paying the money said they were willing to negotiate and would pay over the money in order to show that they were serious negotiators. In one particular instance the money was paid over, not only subject to a stipulation for a contract but also subject to a condition that the appellant would secure a mortgage. In respect of the money so paid in each instance the judgment declares:—

“It was paid to the appellant to hold in his hands till it was found out whether the transaction could go through either by a contract or a contract plus a mortgage being signed.”

The appeal against conviction for fraudulent conversion was dismissed.

It is obvious, of course, that if ownership in the colloquial sense was an essential condition to a conviction for fraudulent conversion, the appeal in *Pilkington* would have had to be allowed. We conclude, therefore, that the subsection extends at least to moneys paid over subject to a liability to account where the person liable to account is free to change the form of the moneys he receives. Indeed, there seems in principle no reason why the subsection should not extend to all circumstances coming within its ambit as are not excluded by interpretation because specifically dealt with elsewhere in the Ordinance. Such a view may or may not involve ownership in any sense.

We think, therefore, that there is no substance in the appellant's contention that the facts proved by the prosecution did not establish a case of fraudulent conversion. That disposes of the appeal against conviction and, in that respect, the appeal is dismissed.

As to the appeal against sentence the Court having regard to all the circumstances, and they are many and diverse, and to the opinions expressed by the assessors as permitted under Article 98 of the Pacific Order in Council, thinks that a sentence of three years imprisonment with hard labour is unduly severe. It does not subscribe to the suggestion by the appellant's Counsel that the Chief Judicial Commissioner could not impose a sentence of imprisonment with hard labour. A sentence in that form is specifically authorized by the Pacific Order in Council and the authority of the Order in Council in that respect is not affected by the abolition of sentences of hard labour by the English Statute. English Law for the purposes of the Order in Council defines the crimes coming within the ambit of the Order in Council but it is the Order in Council itself which prescribes the punishment. Jurisdiction to impose a sentence of hard labour for fraudulent conversion will, we apprehend, remain until the Order in Council is amended. However, the Court is of the opinion that the more merciful, if not the wiser view, is that the sentence in this case should not be expressed as a sentence with hard labour. The sentence of three years imprisonment with hard labour is quashed and a sentence of two years imprisonment to take effect from the date of the imposition of the original sentence is substituted.