ANTHONY FREDERICK STEPHENS

A

v.

REGINAM

[COURT OF APPEAL, 1990 (Tuivaga P, Tikaram, Kermode JJA) 18 May]

Criminal Jurisdiction

B

Crime: procedure- the role of a Judge in a trial.

Appeal- petition of appeal- skeleton argument- need for particularity.

In dismissing a petition of appeal against conviction which had vaguely complained of misdirections by the trial judge the Court of Appeal pointed out that a Judge presiding over a criminal trial is not merely a referee of the proceedings. It also emphasised that counsel's duty was to present only precise, particular and arguable grounds of appeal and to support them with succinct, particular and referenced argument.

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Cases cited:

R v. Artfield [1961] 43 Cr. App. R 309
R v. Charles (1976) the Times 6 July
R v. Smith [1964] VR 217
R v Sparrow (1972)] 59 Cr. App. Rep. 352

E

Dr. M.S. Sahu Khan for the Appellant
I. Mataitoga for the Respondent

Appeal against conviction after trial in the High Court.

Judgment of the Court:

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On 9 October, 1986 appellant was convicted after trial in the Supreme Court (now renamed High Court) on a charge of fraudulent conversion contrary to section 279(1)(c)(ii) of the Penal Code.

The particulars of the offence were as follows:

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> "Anthony Frederick Stephens alias Tony Stephens on or about the 28th day of October 1982 at Suva in the Central Division, having received a cheque for $14,880 for or on account of Rewa Co-operative Dairy Co. Ltd. fraudulently converted part of the proceeds of that cheque namely $4,650, to his own use and benefit."

Appellant who was sentenced to 2 years imprisonment appeals against both

conviction and sentence.

The grounds of appeal, several in number, which are somewhat loosely cast, raise a number of issues. These may be summarised as follows:- A

1. Inadequate direction and/or misdirection on -

   (a) Mens rea.

   (b) Ingredients of fraudulent conversion. B

   (c) Circumstantial evidence.

2. Inadequate direction on onus and burden of proof in relation -

   (a) to the guilt or otherwise of appellant; and

   (b) to its application to circumstantial evidence. C

3. Inadequate direction of the separate roles of judge and assessors in a criminal trial.

4. Judge's views of evidence expressed too freely (strongly) as to lead assessors to accept them. D

5. Inadequate evaluation of evidence of prosecution witnesses in relation to unsworn statement.

6. Judge erred in taking into account irrelevant matters and in not taking into account relevant matters in considering several items of evidence which were particularised. E

7. Judge erred in putting forward own theories and possibilities about the case not supported by the evidence.

8. Judge erred in giving undue emphasis and weight on prosecution case than defence case and in not adequately evaluating the evidence as a whole. F

In appellant's skeleton argument, on the basis of which the appeal was argued before this Court, three broad issues were dealt with. These are:-

   (i) Mens rea

   (ii) Burden of proof G

   (iii) Misdirections in summing up.

Before we turn to these matters, the basic facts of the case which are undisputed may be noted.

Appellant was at all material times employed by Rewa Dairy Co-operative Compapy Limited ("Rewa Dairy" for short) as Sales Marketing and Product Manager. In October, 1982 appellant had discussions with Pravin Patel, Managing Director of C.P. Patel and Company ("Patel & Co." for short). Patel & Co. operates supermarkets in Ba and Nadi and for quite sometime has been a regular customer of Rewa Dairy for powdered milk and other dairy produce.

The subject matter of the charge concerned part of the proceeds of an undated cash cheque (Exhibit 3) for $14,880 which was drawn by Patel & Co. on the National Bank of Fiji and was received by appellant. The cheque was to pay for 400 cartons of powdered milk at $37.20 per carton.

On or about 22 October, 1982 Patel & Co. received 300 cartons of powdered milk leaving a balance of 100 cartons valued at $4,650. On 28 October, 1982 the cheque for $14,880 was cashed at the National Bank of Fiji at Suva by Ramesh Dayal at the request of appellant, his immediate superior. The cash in the sum of $14,880 was paid over by Dayal to appellant.

Patel & Co. had not by 13 December, 1982 or since received the balance of 100 cartons of powdered milk representing a money value of $4,650. Moreover, no arrangements as such had been made between appellant and Patel & Co. as to how the undelivered 100 cartons of powdered milk on that particular docket were to be accounted for subsequently. For their part Patel & Co. continued to expect that they would be sent the balance 100 cartons of powdered milk for which the cheque for $14,880 was paid.

It was the prosecution case that appellant received from Patel & Co. a sum of $14,880 through a cash cheque (Exhibit 3) for and on account of Rewa Dairy of which he fraudulently converted a sum of $4,650 to his own use and benefit.

On the other hand, it was the defence case that the sum of $14,880 was received by appellant not on behalf of Rewa Dairy but on behalf of Patel & Co. regarding the purchase and delivery of powdered milk expressly for Patel & Co. It so happened that the day in question the stock was insufficient so that only 300 cartons instead of 400 cartons were delivered. The defence case is epitomised in this passage from Stephens' unsworn statement:

> "Pravin (Patel who was managing director of Patel & Co.) made it conditional when he gave me the cash cheque that I was to use the money on his behalf to purchase the powdered milk and to pay for it only after the delivery had been made."

Referring in his summing up to the material conflict in the case for the prosecution on the one hand and the case for the defence on the other with regard to the ingredient of the offence as for whom or on whose account the said sum of $14,880 was received, the learned trial Judge commented to the assessors as follows:

> "You will no doubt observe that Pravin Patel agreed that he had stipulated that the cheque, or its proceeds, "was not to be paid to the account of Rewa Dairy" until and unless he had received the 400 cartons of milk powder.
> That nonetheless does not affect the basic nature of the transaction, nor does the aspect that the cheque was made an open cheque, rather than made out to Rewa Dairy.
>
> In this respect it was Pravin Patel's evidence that it was the accused who had requested that he issue a cash cheque."

In his unsworn statement appellant explained why in the Sales Marketing and Product Department where he was Manager they insisted in accepting cash and open cheques only. This is what he said:

> "The salesmen did not want to accept any cheques on behalf of the customer because if cheques were dishonoured it was the company practice to look to the salesmen to pay for the debt.
>
> So with my experience and knowledge of the customers I kept these cheques whether it was cash, open cheques or "pay cash" in my drawer.
>
> It was common knowledge in the Accounts Department, Production Department and Sales Department knew of this -all staff."

Towards the end of his statement in Court appellant explained the fate of $4,650 in these terms:

> "The $4,650 balance was utilised for sending Rewa Dairy products on a Cash Sales basis. The Despatch Counter Sales, the Vehicle Delivery Sales made to C.P. Patel will clearly show all the deliveries made. Given the opportunity to see all the documents and delivery dockets to C.P. Patel I can verify what I am saying."

The first main ground of appeal is that the learned trial Judge did not direct the assessors fully or adequately as to the requirements of *mens rea* for the offence in question. Nor did he direct as to the stage of "transaction" when the presence of *mens rea* was essential.

Counsel for appellant submitted that the way the case was put to the assessors merely required conversion to be proved to establish the offence of fraudulent conversion which was a misdirection. It was said that the learned trial Judge should have explained clearly that in addition to proving conversion, fraudulent intent and an absence of a *bona fide* claim of right to the money must be proved.

Counsel relied on the evidence of Mr. Finch which according to counsel clearly showed that appellant had a claim of right to the money in his possession and

hence there was at the time of the "transaction" an absence of a fraudulent or dishonest intent on his part.

A Counsel complained that this was not put as clearly or fairly to the assessors.

On the learned trial Judge's directions on *mens rea*, counsel for respondent submitted that given the particular facts in this case the summing up was adequate and correct in law. He contended that the assessors were properly directed on the salient features of the case from which inference of fraudulent intent may be
B drawn as they saw fit.

The directions of the learned trial Judge on the issue of *mens rea* appear at pages 184/185 of the record and bear repeating:

> "It proves convenient at this stage to deal with the fourth and fifth
> C ingredients of the offence charged. In the vast majority of criminal cases, unless there has been a confession by an accused, the prosecution, as in this case, invariably relies on circumstantial evidence, giving rise to an inference of the necessary intent. If, and I stress if, you were to conclude that the first, second and third ingredients had been proved beyond reasonable doubt, namely that
> D the accused had received the cheque for or on account of Rewa Dairy and had converted the $4,650 to his own use and benefit, then you might well be satisfied, as a matter of inference, that he had acted fraudulently in the matter, that is, that he did not have the consent of the owner of the money, namely his employers Rewa Dairy, to convert it to his own use and benefit, that he knew he had
> E no such consent and could not honestly have believed that he had any claim of right to the money. Submissions were made by Dr. Sahu Khan touching upon the defence of a *bona fide* claim of right and further the defence of an honest and reasonable but mistaken belief in the existence of a state of facts. There is no evidence before you of any mistake as to the agreement between Pravin Patel and
> F the accused. Mistake of fact however is relevant in considering whether the accused had a *bona fide* claim of right. Suffice it to say, that the test is just as I have put it, namely you must be satisfied beyond reasonable doubt that the accused did not honestly believe (mistakenly or otherwise) that he had any claim of right to the $4,650. Further, if you were so satisfied, namely that the accused converted
> G the money to his own use, and did so fraudulently, that you might conclude, as a matter of inference, in view of the lapse of time, that the accused intended to permanently deprive Rewa Dairy of the money.

These directions on *bona fide* claim of right and *mens rea* were followed by a careful and detailed discussion of the salient features of the evidence in the case.

Having done so the learned trial Judge then observed as follows:-

> "Those are the salient points of the evidence, depending on whether you accept the particular evidence.
>
> You must consider the evidence as a whole, the evidence for the prosecution and the evidence for the defence, that is the accused's statement in court and his statement to the police, which are part of all the evidence in the case."

Mens rea is a state of mind which unlike confessions may be proved by inference from the evidence and circumstances of the case.

We are satisfied that the directions given by the learned trial Judge to the assessors on the issue of *mens rea* based on the evidence adduced were correct and adequate for the purpose of the case.

In the result this ground of appeal fails.

On the issue of burden of proof it was submitted on behalf of appellant that in a criminal case, where evidence is tendered for the defence in contradiction of prosecution evidence, it is not sufficient for the Judge to direct the assessors that it is for them to ascertain where the real truth lay, but it was necessary to give the further direction that if they were not affirmatively satisfied of the story told by either the prosecution or the defence, then they could not convict as the benefit of the doubt must be given to the accused.

Counsel referred to a number of cases relating to directions on burden of proof. For the purpose of this appeal we need only quote from one of them, namely R. v. Smith [1964] V.R. 217 where the headnote reads as follows:-

> "Where the decision as to an accused's guilt depends principally upon the assessment by the jury of evidence called by the Crown as opposed to evidence called by the accused, the jury must be clearly directed that if in the final result they have a reasonable doubt as to the accused's guilt they must bring in a verdict of not guilty; and care must be taken to ensure that, notwithstanding that the jury are correctly charged as to the onus of proof of the guilt of the accused being on the Crown, further directions to the jury as to how they should deal with conflicting evidence do not overlay an otherwise correct direction as to onus of proof and to create confusion in the jury's mind as to their proper function. "

On this question it is necessary to refer to what the learned trial judge said at page 175 of the record:

> "Counsel have addressed you on the onus or burden and the standard

> of proof in this case. The presumption of innocence is enshrined in our Constitution, that is, an accused person is presumed to be innocent until he is proved to be guilty. Because of this presumption, it is the duty of the prosecution to prove the guilt of the accused: that they must do beyond reasonable doubt. The prosecution must prove each and every ingredient of the offence. There is no onus upon the accused person to prove his innocence. If after consideration of all the evidence therefore you are left in reasonable doubt as to the guilt of the accused, then four individual opinions must be that he is not guilty."

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And again at page 197:

> "If you consider that, or you are in reasonable doubt that he is not guilty, then your individual opinions must be that he is not guilty."

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In the circumstances we cannot accept that the learned trial Judge in his summing up created a confusion on the burden of proof.

Another matter raised by counsel for appellant on the burden of proof was that the learned trial Judge continuously concentrated not on an affirmative prosecution case, but on exhibiting the falsity of the defence case.

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It is not easy to follow this submission as no specific illustrations of the point from the summing up were given as to assist the court in the matter. Legal propositions based on decided cases can be but of little utility if their relevance to the case cannot be clearly demonstrated.

E It appears to us that the learned trial Judge having directed the assessors on the onus and burden of proof did no more than analyse the evidence in the case on the basis of the ingredients of the offence.

Early in the summing up at page 175 the learned trial Judge could not be clearer in leaving the issues of fact in the case for the assessors when he said:

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> "What counsel have said and what I shall say as to the facts of the case was and is intended to assist you. If Counsel or I seem to express a view of the facts with which you do not agree, then it is your duty to reject such view. If I omit to mention evidence which you think is important, then you must take it into account; just as if I stress evidence which you consider is unimportant, then you must disregard the fact that I have stressed it."

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There were other matters based on legal propositions purporting to impugn the learned trial Judge's directions on burden of proof. But again as already-pointed out in another context their applicability to the case in hand has not been demonstrated in a way that might assist this Court. With respect the arguments put forward were vague and loose as were the grounds formulated in the notice

of appeal which are summarised in the early part of this Judgment. Where legal propositions are put forward as the basis for impugning the directions in a summing up, counsel has a duty to the Court to illustrate in what way those propositions affect the case.
This ground of appeal also fails.

The other broad ground of appeal relates to alleged misdirections in the summing up and again this was argued by propounding legal propositions without demonstrating their actual relevance to the case. This has been the cause of much difficulty for this Court in trying to fathom the exact nature of the so called misdirections in the summing up.

It was for this reason the Court intimated its concern about the unsatisfactory formulation of the appellant's skeleton argument through a letter. by the Registrar on 15 November, 1989 in these terms:

> "I am also asked to draw your attention to the fact that the various parts of your written skeleton argument do not identify the grounds of appeal they deal with. Similarly no particulars are given in respect of some very generalised grounds of appeal e.g. ground 9."

In this connection counsel should remind themselves of the purpose of a skeleton argument as set out hereunder:

> "The purpose of a skeleton argument is to identify not to argue the points. A skeleton argument should therefore be as succinct as possible. In the case of points of law, it should state the point and cite the principal authority or authorities in support, with references to the particular page(s) where the principle concerned is enunciated. In the case of questions of fact, the skeleton argument should state briefly the basis on which it is contended that the Court of Appeal can interfere with the finding of fact concerned, with cross-references to the passages in the transcript or notes of evidence which bear on the point." [See Practice Direction (Court of Appeal: Presentation of Argument) [1989] 1 WLR at page 284].

As for the formulation of grounds of appeal, counsel will do well to heed what is said in the book "Criminal Appeals" (1980) by Ian McLean at page 65:

> "In settling grounds of appeal counsel has a duty not only to his client but to the court. His duty to his client does not extend to putting forward grounds of appeal merely because the appellant wishes him to do so. Grounds should be put forward only where they are arguable, and where they afford some real chance of success.
>
> The grounds which are put forward should be settled carefully and accurately, and must be substantial and stated with particularity."

What all this means of course is that when settling grounds of appeal, counsel must ensure that it is done so as to enable an appellate Court to identify the matters of real complaint.

The summing up in the instant case follows closely the standard format. The onus and standard of proof having been explained, the charge is noted followed by the enumeration of the essential ingredients of the offence which had to be proved.

The evidence is then discussed in relation to the ingredients of the offence. This occupied the major portion of the summing. up. In the summing up the prosecution case as well as the defence case was presented in a manner as to make it clear to the assessors what the case was about and what they had to decide.

It may well be that in analysing the opposing evidence in the case the learned trial Judge was too forthright in expressing views about the evidence. It was no doubt a strong summing up. However, it must be remembered that a Judge has a role to play in a trial. As was stated in R v. Sparrow (1972) 59 Cr. App. Rep. 352 at 362:

> "The Judge is more than a mere referee who takes no part in the trial save to intervene when a rule of procedure or evidence is broken. He and the jury try the case together and it is his duty to give them the benefit of his knowledge of the law and to advise them in the light of his experience, as to the significance of the evidence."

The same theme was echoed in the unreported case of R v. Charles (1976) the Times, 6 July where it was said that "the Judge's duty was to analyse the evidence and relate it to the issues so as to help and not hinder the jury in coming to their conclusion."

In this connection it is perhaps useful to refer to the statement which is quoted in R v. Artfield (1961) 43 Cr. App. R309 at pages 312/313:

> "Every summing-up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced. This court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice."

In this case the assessors were adequately warned that they need not accept any evidence except what they believed to be true and if they had any doubts about

the case, these should be resolved in a finding of not guilty.

The main issues of fact upon which the assessors had to adjudicate were made very clearly to them, namely:

(i) whether or not the cash cheque for $14,880 was received by appellant for or on account of Rewa Dairy;

(ii) whether or not he converted the balance amount of $4,650 to his own use and benefit;

(iii) and if so, whether or not he did so fraudulently, that is -

(a) without the consent of the owner;
(b) knowing he had no such consent; and
(c) not honestly believing that he had any claim of right to the sum of $4,650; and

(iv) whether or not he intended to pemanently deprive Rewa Dairy of the $4,650.

The defence case on these factual issues was in our view placed fairly and squarely before the assessors to determine for themselves in the light of the whole evidence in the case. It is clear from their unanimous opinion of guilty that there can be no doubt about their findings on the factual issues as set out above. They reached their conclusions based on the whole of the evidence presented. We are satisfied that on the evidence presented before the trial Court it was open to the assessors to reach the conclusions which they did in this case.

In these circumstances we can find no substance in this ground of appeal.

Accordingly for the reasons given the appeal against conviction must be dismissed.

As regards the appeal against sentence counsel for appellant made no submissions on the issue either in his skeleton argument or orally. This was probably because the question has become of academic interest only in the sense that having been made the subject of a compulsory supervision order a month or so after his incarceration in October 1986 appellant's sentence of 2 years' imprisonment has long since expired.

In these circumstances we will treat the appeal against sentence as having been abandoned.

(Appeal against conviction dismissed.)