to be collected from, of the appellants or of whom. Whoever he was, it seems that he first reported the matter to the police and that his report was such that the C.I.D. made investigations, and interviewed Brown and got certain information from him and examined certain documents in his office. The fact that they considered the result of their investigations to be sufficient to institute a prosecution does not seem to me to make Brown the prosecutor. Nor does it, if coupled with the remark about withdrawing the prosecution. There was no cross-examination as to that and it must be taken that the remark was in fact made; but at the time when it was made Brown could not have withdrawn the prosecution, even if he and no one else had started it.

Of the several grounds of appeal which have been filed, the second and third are these:—

"(2) That the learned trial judge was wrong in law in holding that Mr. Brown held himself out as prosecutor.

"(3) That the learned trial judge was wrong in law in holding that the plaintiff (respondent) was prosecuted by the defendant company acting through their accountant, Mr. Brown."

This appeal is by way of rehearing: we have not seen the witnesses as did the learned judge, and so we are limited to evaluating the evidence, on which he made his findings. I have already set out that relevant to the question of whether Brown was the prosecutor or not, on which the learned judge must have based his finding that he was.

I have already said that, in my respectful opinion, the evidence did not support that finding: but suppose I am wrong and the learned judge was right; there is the question of whether or not it was within the course of Brown's employment for him to institute prosecutions. The judge must have found that it was, although he does not say so in so many words. He does not state the evidence on which he so found. There was evidence that Brown was the accountant, but I can see no evidence to indicate that, as accountant, his duty included the launching of criminal prosecutions. In my opinion this finding was not supported by the evidence.

I think that both these grounds of appeal are good grounds. There are others, but it is not necessary to consider them.

I would allow the appeal and set aside the judgment and enter judgment for the appellants and I would also dismiss the cross-appeal.

[COURT OF APPEAL]

Freetown
March 7,
1962

OSWALD HARDING *v.* REGINA

[Criminal Appeal 24/61]

Ames Ag.P.
Benka-Coker
C.J.
Dove Edwin
J.A.

Criminal Law—Falsification of accounts—Fraudulent conversion—Trial—Trial with assessors—Misdirection by judge.

Appellant was convicted of falsification of accounts and fraudulent conversion. At the relevant time, he was sub-accountant in the Government Sub-Treasury at Moyamba. If a Native Authority wanted to deposit money in

its bank account, the practice was for the Native Authority Treasury clerk to take the money to the appellant, who would cause an equal amount to be paid into the Native Authority's bank account in Freetown by means of a Treasury draft. Appellant would sign the receipt part of the payment voucher and enter the amount received in his cash book.

The case for the prosecution was that on January 25, 1960, the Fakunya Native Authority Treasury clerk paid £350 to appellant for payment by him into their bank account; that appellant received the money and signed the receipt part of the voucher; that he did not enter the amount received in his cash book; that in July, 1960, the District Commissioner checked the accounts of the Fakunya Native Authority and discovered that the £350 had not reached their bank account, and, from an examination of the Sub-Treasury books, discovered that no Treasury draft had been issued; and that no surplus of any amount was found at the Sub-Treasury. It was not, however, clear from the evidence whether the cash in the vault had actually been counted to determine whether there was a surplus. Appellant contended that he had not received the money from the Native Authority Treasury clerk, or, alternatively, that, if he had received it, he might have put it directly into the vault without entering it in his cash book. In his summing-up, the judge failed to instruct the assessors that they would have to decide whether the Native Authority Treasury clerk had in fact paid the £350 to appellant. He also failed to instruct them as to the significance of the question of whether or not the cash in the vault had been counted. He also stated something as a fact as to which there was no evidence.

Held, that the judge committed error in his summing-up to an extent requiring that the conviction be set aside.

Claudius Doe-Smith for the appellant.
John H. Smythe (Solicitor-General) for the respondent.

AMES AG.P. The appellant was convicted of falsification of accounts contra section 1 of the Falsification of Accounts Act, 1875, and of fraudulent conversion contra section 20 (1) (iv) (*b*) of the Larceny Act, 1916, both counts being concerned with a sum of £350. He was at the time sub-accountant in the Government Sub-Treasury at Moyamba. If a Native Authority had money, which it wanted to pay into their bank, the practice was, and may still be, for a Native Authority Treasury clerk to take the money to the appellant, who would issue a Treasury draft, and cause an equal amount to be paid into the Native Authority's bank account in Freetown. A copy of the draft would be given to the Native Authority but in practice not till later, which caused the Central Native Authority Clerk to instruct the Native Authority Treasury clerks that when money was thus given to the appellant they should get him to sign the receipt part of the payment voucher. The appellant had, of course, a cash book in which he should enter all amounts received and paid out by him, and he also had a safe and a vault in which to keep the money of the Sub-Treasury. None of this was in dispute.

The case for the prosecution was that on January 25, 1960, the Fakunya Native Authority Treasury clerk paid £350 to the appellant for payment by him into their bank account; that the appellant received the money and signed the receipt part of the voucher; that he did not enter the receipt of the money in his cash book; that in July 1960 the District Commissioner checked the accounts of the Fakunya Native Authority and discovered that the £350 had not reached the bank account, and from an examination of the Sub-Treasury books he discovered that no Treasury draft had been issued; that he confronted

the appellant with the matter but received no satisfactory reply; that the cash in the appellant's Treasury was checked in February and was found to agree with his account books and no surplus of £350 or of any amount was found; that the appellant was required by the Accountant-General to give an explanation; that his reply was not considered satisfactory.

After the matter was put into the hands of the police, the appellant made a voluntary statement (he had not been charged at the time) on July 30, 1960. No charge was made against him until a year later, namely August 21, 1961, when he was charged with fraudulent conversion of the £350 and, having been cautioned, said that he would say nothing until he had seen his solicitor. He was eventually brought to trial on November 20. He did not give evidence at the trial but relied on his explanation to the Accountant-General and his statement to the police.

The learned trial judge, when summing up to the assessors, put before them the defence of the appellant, as disclosed by those documents. It is only necessary to refer to two parts of the defence. One was that in the pressure of work, due to its being the tax season (which it was), the Native Authority Treasury Clerk might never have given him the £350 and might have obtained his receipt on the voucher fraudulently (in which event, of course, there would not have been any surplus £350 in his cash) and, therefore, no entry in the cash book or register. The other was that, if he did indeed receive the money, he might have put it straight into the vault (owing to the same pressure of work) which might have been why it was not entered in his cash book.

Now, quite apart from whether or not that was to be his defence, the onus was on the prosecution to prove that the money was in fact given to and received by him, and that it was not in the Treasury when the cash was checked.

The prosecution sought to prove the former by the evidence of the Native Authority Treasury clerk, who said that he had paid him, and by the production of the receipted voucher. This allegation was the basis of the prosecution. A receipt is only prima facie evidence of payment and in this case the only evidence is that of the paying clerk and the receipted voucher. Unfortunately, instead of directing the assessors that they would have to decide whether the Treasury clerk was to be believed, the learned judge somewhat categorically directed them that the Treasury clerk "paid to the accused at the Sub-Treasury, Moyamba, the sum of £350, property of the Fakunya N.A."

A little further on in his summing-up he directed them:

> "I told them that applications were made for the Treasury draft by Dick to the accused in respect of the sum of £350 the subject-matter of the counts in the information but none was forthcoming."

There was no evidence of that, and it was a misdirection. Dick was the Native Authority Treasury clerk, and he made payments to the appellant after January 25, and it is possible that failure to ask about the £350 Treasury draft might have given some support to the first limb of his defence.

As to proof by the prosecution that the money was not in the Sub-Treasury, and the defence that it might have been put straight away into the vault, the learned judge directed the assessors that the senior accountant of the Accountant-General's Department (who was sent to investigate the matter) checked the appellant's accounts on February 5 and went on to direct them:

"In doing so he used, inter alia, the cash account, property of the Sierra Leone Government, prepared by the accused for the months of January and February 1960. These were put in evidence and marked 'J.' and 'K.' respectively. He found that the balance shown on the casn account on that date (February 5, 1960) agreed with that in the safe. He found no surplus in the safe."

That was quite correct as far as it went: but the witness also said:

"I checked safe and cash books. I found out that the total cash in the safe and vault agreed with that shown in the cash book."

But he also said in cross-examination:

"When I go to the Sub-Treasury to check, I check everything. In February 1960, only the vault I did not check. The vault is under the control of the D.C. The accused told me that the D.C. had one key for the vault and he had the other."

And in re-examination he said:

"I took the amount shown in the vault register kept by the accused."

In his statement to the police (over a year before the trial) the appellant had said that when the District Commissioner went on tour, he (the appellant) held both keys. The prosecution adduced no evidence to prove who kept these keys of the vault or whether the D.C. was on tour at the time or not.

The District Commissioner gave evidence. Under cross-examination he said:

"I did make a surprise check on the Moyamba Sub-Treasury after the discovery of this discrepancy. I checked on the cash book, the Treasury draft books and the cash in the safes. There were two safes. . . . I might have checked on the vault as well, or I might have accepted that the balance was in accordance with what was entered in the vault book."

He had not been examined as to the matter of the keys of the vault. The assessors were not addressed at all, as to the keys, or as to whether the cash in the vault was, or should or need not have been, checked to prove that the money was not in the Sub-Treasury.

The three assessors found the appellant guilty on the first count and on a count for embezzlement which is alternative to that of fraudulent conversion. The learned judge, with whom the decision rested, found him guilty on the first count and of fraudulent conversion. He gave a short judgment stating his reasons for holding it to be fraudulent conversion and not embezzlement. He did not discuss the case in general: so we must rely on his summing-up to show what operated on his mind.

We think that it would be unsafe, having regard to all circumstances, to allow the conviction to stand, and it will be set aside.