into consideration that no action was taken until 1963, I think the order of maintenance should be varied by deleting "April 1st, 1963" and substituting "from June 30th, 1964 and at the end of each month thereafter." Subject to this, I think the appeal should be dismissed.

*Order accordingly.*

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## GARBER *v.* REGINAM

COURT OF APPEAL (Ames, P., Bankole Jones, C.J. and Dove-Edwin, J.A.): March 18th, 1965
(Cr. App. No. 49/64)

[1] **Criminal Law—embezzlement—property in subject-matter—subject-matter intended to become property of offender's employer:** The subject-matter of the offence of embezzlement under s.17(1) of the Larceny Act, 1916 is property which was meant to become the property of the offender's employer but did not do so because of the embezzlement (page 238, lines 35–40).

[2] **Criminal Law — embezzlement—storekeeper taking employer's goods from store commits larceny by servant not embezzlement:** Where a storekeeper, having received his employer's goods into the store of which he is in charge, removes the goods from the store *animo furandi*, he commits larceny by a servant and not embezzlement or fraudulent disposal of property (page 238, line 40—page 239, line 4).

[3] **Criminal Law—fraudulent disposal of property—property in subject-matter—subject-matter intended to become property of Crown:** The subject-matter of the offence of fraudulent disposal of property under s.17(2) of the Larceny Act, 1916 is property which was meant to become the property of the Crown but did not do so because of the fraudulent disposal (page 238, lines 35–40).

[4] **Criminal Law—fraudulent disposal of property—storekeeper in public service taking employer's goods from store commits larceny by servant not fraudulent disposal of property:** See [2] above.

[5] **Criminal Law—larceny—larceny by servant—storekeeper taking employer's goods from store commits larceny by servant:** See [2] above.

[6] **Criminal Procedure—assessors—judge's summing-up—fatal misdirection has same consequences as in jury trial:** A misdirection which would be fatal to a conviction by a jury is equally fatal to a conviction by a judge assisted by assessors (page 240, lines 11–18).

[7] **Criminal Procedure — judge's summing-up — direction on reasonable doubt—misdirection to assessors fatal where evidence which might have raised doubts as to guilt:** A misdirection as to reasonable doubt is fatal to a conviction by a jury or by a judge assisted by assessors, where there is evidence which might have raised doubts as to guilt though not perhaps gaining complete belief in the defence (page 239, lines 25–38; page 240, lines 11–14).

[8] **Evidence—burden of proof—standard of proof—criminal cases—defence succeeds by raising reasonable doubt without necessarily commanding belief:** The standard of proof in a criminal case is such that the defence will succeed by causing a reasonable doubt without necessarily commanding belief (page 239, lines 25–38; page 240, lines 11–14).

[9] **Evidence—burden of proof—standard of proof—criminal cases—doubt governing business decisions not standard:** The standard of proof in a criminal case is not proof beyond such doubt as would induce a man to reject a proposed course in the conduct of his own business, for business matters may be determined on the balance of probabilities (page 239, line 39—page 240, line 6; page 240, lines 11–14).

The appellant was charged in the Supreme Court with falsification of accounts and embezzlement.

He was a Ministry of Works storekeeper at Bo. Cement belonging to the Ministry was brought to Bo in railway wagons and transferred to lorries for delivery to the store. The appellant recorded receipts and issues of cement on tally labels. He was tried by a judge assisted by assessors on an information containing seven counts alleging, as eventually amended, the falsification of tally labels by the omission of bags of cement received. In two counts the number of bags was the same as a wagon load; in the other counts the numbers were less. An eighth count, concerning approximately the total number of bags of cement in the other counts, originally alleged their embezzlement contrary to para. (b) of s.17(2) of the Larceny Act, 1916, but was amended to allege their fraudulent disposal contrary to the same paragraph.

The prosecution case was that the appellant received and signed for the contents of four wagons but did not record them on the tally labels and that, though cement was never delivered from wagons direct to working sites, but always to the store, and was never taken from the store without a delivery note signed by the gateman, the

appellant's stock agreed with the balance shown on the tally labels and he produced neither surplus stock, nor delivery notes, to correspond with the contents of the four wagons. It was part of the appellant's case that cement was sometimes taken direct from the wagons to working sites. There was prosecution evidence to support this but only one of the drivers who collected cement from the wagons over the relevant period gave evidence.

In his summing-up the judge told the assessors that if they believed the appellant they must say he was not guilty but if they did not believe him they must say he was guilty, and that they must give him the benefit of such doubt as would induce them, as men of experience, to reject a proposed course in the conduct of their own business. The appellant was convicted on all counts.

On appeal, he contended that he had no duty to enter a receipt of cement until the whole contents of a wagon had been received, that the eighth count charged a general deficiency and that the judge had misdirected the assessors.

Cases referred to:

(1) *Bharat* v. *R.*, [1959] A.C. 533; [1959] 3 All E.R. 292, applied.

(2) *R.* v. *Gaunt*, [1964] Crim. L.R. 781.

Statutes construed:

Courts Act (Laws of Sierra Leone, 1960, *cap.* 7), s.15:

"(1) In criminal proceedings before the Supreme Court . . . the Supreme Court shall . . . be assisted by two or more assessors who shall be selected by the Judge and may be summoned or directed by him to aid the Court accordingly. . . ."

Falsification of Accounts Act, 1875 (38 & 39 Vict., c.24), s.1:

"If any clerk, officer, or servant . . . shall wilfully and with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer . . . or shall wilfully and with intent to defraud make or concur in making any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book or any document, or account, then in every such case the person so offending shall be guilty of a misdemeanour. . . ."

Larceny Act, 1916 (6 & 7 Geo. V, c.50), s.17:

"Every person who—

. . .

(2) being employed in the public service of His Majesty . . . —

(a) steals any chattel, money or valuable security belonging to or

in the possession of His Majesty or entrusted to or received or taken into possession by such person by virtue of his employment; or
(b) embezzles or in any manner fraudulently applies or disposes of for any purpose whatsoever except for the public service any chattel, money or valuable security entrusted to or received or taken into possession by virtue of his employment:
shall be guilty of felony. . . ."

*Marcus-Jones* for the appellant;
*Fewry* for the Crown.

AMES, P., delivering the judgment of the court:

There was filed in the Supreme Court at Bo an information charging the appellant with eight offences. The first seven counts were laid under s.1 of the Falsification of Accounts Act, 1875, and each alleged (to abbreviate them somewhat) that he, being a Ministry of Works clerk, omitted with intent to defraud, "from or in a cash book" of the Ministry, a material particular, namely the receipt of a stated number of bags of cement from one Daniel George Fofana, on a date stated at the start of the count.

There had of course to be a preliminary investigation. One of the objects of a preliminary investigation is to find out if there is a charge upon which the accused person should be put on trial and what that charge should be. The appellant is a storekeeper. He does not handle any cash, he has not got a cash book, he handles cement and timber; no witness mentioned a cash book in the preliminary investigation, or during the case for the prosecution at his trial; they all mentioned store tally labels which are records of cement. Yet it was not until the close of the case for the prosecution at his trial and after a submission by the defence of no case, that an application was made and allowed, to amend each of those seven counts by deleting "cash book" and substituting "store tally label." The application caused argument requiring a ruling from the learned judge and also argument at this appeal about the ruling (which is the subject-matter of grounds of appeal Nos. 1 and 2). All that was a complete waste of everyone's time, in that there ought to have been no occasion to give rise to it. We think that the learned judge was right to allow the amendment. It was a matter of misdescription of the documents which the witnesses had been talking about and handling and putting in evidence. They could so easily have been given their proper description in the information if only a very little care had been given to it.

The dates and amounts of cement were:

| | | | | | |
|---|---|---|---|---|---|
| Count | 1— | February | 3rd, | 1964— | 32 bags |
| „ | 2— | „ | 4th | „ —146 | „ |
| „ | 3— | „ | 5th | „ — 50 | „ |
| „ | 4— | „ | 6th | „ —235 | „ |
| „ | 5— | „ | 7th | „ —250 | „ |
| „ | 6— | „ | 10th | „ — 41 | „ |
| „ | 7— | „ | 14th | „ —250 | „ |

It was proved that the appellant was storekeeper of the Ministry of Works at Bo, in charge of the cement and timber store. Store tally labels belonging to the Ministry were supplied for use by him as records of receipts and issues. None of these items was entered in the store tally labels, and it hardly needs to be said that they were material items.

All receipts of cement came from the Ministry of Works at Freetown by railway in sealed closed goods wagons. A goods wagon can contain 250 bags. Cement is taken from the railway at Bo to the store by Ministry of Works lorries, and if carrying cement and nothing else, the maximum capacity of a lorry is 150 bags. It is an argument of the appellant that he is under no duty to enter a receipt of cement until the whole of the wagon's 250 bags have been received, and that, consequently, when only part of the 250 bags are received on a day he is not under any duty to enter the amount which he received on that day. This sounds very unlikely. There must be store rules of the Ministry, one would think. One good way to prove what his duties were would have been the production of a copy of the rules and evidence that the appellant had been given a copy. That was not done (and it does not appear if there are any rules), but instead evidence was given by a Mr. Wilson that entries should be made daily. He said: "This information should be put down on the store tally label, which is a daily record of receipts of cement and issues."

From November 1962 to March 1964 Mr. Wilson was the supervising storekeeper at Bo. "I am ultimately responsible for their supervision. . . . Store tally labels. . . . It is my duty to supervise these records." His evidence shows that he does. Weekly abstracts of the tally labels are made by the appellant, then checked and signed by Mr. Wilson and sent to Freetown. Four tally labels were put in evidence, covering January 20th to March 14th, 1964 and eleven weekly abstracts, each signed by Mr. Wilson, covering December 19th, 1963 to March 29th, 1964. These show that every issue is entered,

even if as little as two bags and even if there are several issues on one day, but that no receipt is entered except receipts of 250 bags, and the wagon number is quoted against each 250. Moreover being in red ink (Mr. Wilson said they had to be) it is not possible not to see them when checking the weekly returns and Mr. Wilson signed the returns, apparently without comment. So the evidence supports the appellant's version of when he is under a duty to enter a receipt of cement. Consequently there is no proof that the appellant was under any duty to make the entries which counts 1, 2, 3 and 6 say he fraudulently omitted to make, and his convictions on these counts are unwarranted and not supported by the evidence (which is ground of appeal No. 7) and the appeal will be allowed as far as they are concerned.

What about counts 5 and 7? Each is for 250 bags and so should have been entered; but they were not. Both amounts were transferred from the railway in a day, that of count 5 on the 7th and the other on the 14th, according to the delivery note book. Were these items omitted with intent to defraud?

There also remains count 8. Counts 1 - 7 cover 1,004 bags. Count 8 refers to 1,000 of them and, as filed, charged the appellant with embezzlement contrary to s.17(2)(b) of the Larceny Act, 1916. Before any evidence was heard, it was amended by changing embezzlement to fraudulent disposal, and the particulars which were similarly amended became:

> *Particulars of Offence*: Bismark Garber on divers days unknown between the 3rd day of February, 1964, and the 19th day of April, 1964, at Bo, in the Bo Judicial District of Sierra Leone, being employed in the Public Service of Her Majesty the Queen in the Ministry of Works, fraudulent disposal 1,000 bags of cement of the value of £387. 10s. 0d. or Le775 taken into possession by him by virtue of his employment.

In our opinion, what the prosecution should have alleged was not embezzlement or fraudulent disposal under s.17(2)(b), but larceny under s.17(2)(a). Sub-section (1) applies to clerks or servants in general and sub-s. (2) to public servants. Each sub-section has a para. (a) which is larceny and a para. (b) which is embezzlement and, in sub-s. (2), fraudulent disposal. This latter means to embezzle or fraudulently dispose of what was meant to become the property of the master, under sub-s. 1, or the Crown, under sub-s. (2), but did not because of the embezzlement or fraudulent disposal. This cement was the property of the Crown when it was at Freetown and

remained so until it disappeared from the store, assuming that it did. So if the appellant asported it from the store, *animo furandi,* what he did was larceny of the Crown's cement under sub-s. (2)(a) and not fraudulent disposal under sub-s. (2)(b).

The case for the prosecution was supposed to be briefly this: Between February 3rd and 14th, four wagon loads, from wagons S.1533, S.524, S.1706 and S.1588, were unloaded, taken from the railway station and delivered to the appellant who signed for them in the delivery note book. He did not enter them on his tally label. His stock was taken. No surplus was found. Allowing for a very old-standing shortage of 250 bags (nothing to do with him and since written off) his stock agreed with the balance shown on the tally labels. No cement is delivered direct from the railway station to working sites. Cement cannot be táken out from the Ministry of Works yard unless the gateman is shown a delivery note. There should be, in the appellant's custody, one copy of each delivery note which he signed for these 1,000 bags (the other copy remaining in the book); they are all missing. Therefore the appellant must have fraudulently disposed of the 1,000 bags.

There is a ground of appeal that what count 8 charged was a general deficiency, and there are grounds complaining of misdirection.

A few comments are necessary on the evidence by which the prosecution sought to prove their case.

[The learned President reviewed the evidence and continued:]

The ground of appeal about misdirection refers to the following passages in the learned judge's summing-up:

> ". . . if the accused gives an explanation which creates the belief in your mind . . . you cannot say he his guilty. If however you disbelieve the explanation you willl be under a duty to say the accused is guilty."

and also:

> ". . . [I]f you believe the accused . . . you would have to say that the accused is not guilty. If you do not then you would have to say he is guilty."

Mr. Marcus-Jones's argument for the appellant is that these passages indicated to the assessors that for the defence to succeed it must be such as to command belief, and omits to indicate that it is sufficient if it causes a reasonable doubt.

The other passage is towards the end where the learned judge warned them that if they have "any serious doubt" they should give the benefit of it to the accused and then explained that by serious doubt

he meant "such doubt as would induce you, as men of experience, to reject a proposed course in the prosecution of your own business." Mr. Marcus-Jones's argument is that business matters can be, and no doubt often are, determined on the balance of probabilities and he cites a very recent case which supports his argument, namely *R.* v. *Gaunt*(2).

We have all been judges in courts of first instance and know how easy it is for a judge, who knows perfectly well what the law is, nevertheless to use, in the stress of the moment, some unfortunate phrase or phrases, which mislead the jury who do not know the law. We think these misdirections would be fatal to a conviction by a jury, when there was evidence (we have pointed out some but not all) favourable to the appellant which might have raised doubts as to guilt, although not perhaps gaining complete belief in the defence. Does it make any difference that this was a trial, not by jury, but by the Supreme Court assisted by two assessors in accordance with s.15(1) of the Courts Act (*cap.* 7)? The decision of the Privy Council in the case of *Bharat* v. *R.* (1) shows that it does not. The decision is vested exclusively in the judge: but he is required to ask the opinion of each assessor. That is the way in which he is to be assisted by them. Their opinions may even, but need not, have some influence on his mind. Their opinions must be opinions formed upon all proper directions in the summing-up. Opinions given after misdirections will not assist the court, but the opposite.

In our opinion this appeal should be allowed also as to counts 5 and 8, and so the convicition and sentence on each count are set aside and instead a finding of not guilty is to be entered.

*Appeal allowed.*