

**COLE v THE STATE**

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**COURT OF APPEAL FOR SIERRA LEONE**, Criminal Appeal 2 of 1975, Hon Mr Justice E Livesey Luke JA, Hon Mr Justice C A Harding JA, Hon Mr Justice S Beccles Davies JA, 21 December 1975

**[1] Criminal Law and Procedure – Embezzlement – Ingredients of offence – Omission of “fraudulently” from indictment meant charge was defective – Larceny Act 1916 s 17(1)(b)**

The appellant, who worked at the General Post Office, was charged with embezzling Le963.87c representing the proceeds of postal orders and stamps that he had sold to the public and was convicted of embezzlement contrary to s 17(1)(b) of the Larceny Act 1916. On appeal it was argued that the indictment was defective in that the particulars of the offence omitted the averment that the appellant had “fraudulently” embezzled the money in question.

**Held, per Beccles Davies JA, upholding the appeal and quashing the conviction:**

1. The essence of the offence of embezzlement is the fraudulent appropriation by a servant of his employer's money chattel or valuable security. The appropriation must be done by the servant with a fraudulent intention.
2. Where an offence requires a particular intent for its constitution then that intent must be averred in the particulars of offence in the indictment. The identity of the person whom the accused had in mind need not be stated in the particulars unless such identity is essential to the constitution of the offence. The omission of the expression “fraudulently” from the indictment meant that the count was defective and the conviction was therefore quashed. *R v Shaibu Yakubu* 10 WACA 267 followed.
3. There was no evidence that money had been received by the appellant in exchange for postal orders and stamps. This was essential in determining whether the offence alleged to have been committed was embezzlement or larceny.
4. The trial judge placed undue emphasis on the absence from duty of the appellant, as if it was a necessary ingredient in proving the offence. The effect of the judge's incorrect interpretation of *William's case* was to prejudice the minds of the jury. *R v Williams* (1836) 7 C & P 338 distinguished.

**Cases referred to**

*R v Shaibu Yakubu* 10 WACA 267

*R v Williams* (1836) 7 C & P 338

**Legislation referred to**

Larceny Act 1916 s 17(1)(b)

**Other sources referred to**

*Archbold on Criminal Pleading, Evidence and Practice* 34<sup>th</sup> edition para 1708

*Halsbury's Laws of England* 3<sup>rd</sup> Edition Vol 10 para 703 at p 388

**Appeal**

This was an appeal by Patrick Cole against conviction of embezzlement contrary to s 17(1)(b) of the Larceny Act 1916. The facts appear sufficiently in the following judgment.



*Mr M O Mackay for the appellant.*

*Mr Bankole Thompson for the respondent.*

**BECCLES DAVIES JA:** The appellant Patrick Etick Cole was tried and convicted of the offence of embezzlement contrary to s 17(1)(b) of the Larceny Act 1916. This appeal arises out of that conviction.

The appellant was employed at the General Post Office. He was drafted to one of the Public Counters at the Post Office to sell stamps and postal orders to the members of the public. He was so engaged between the 2<sup>nd</sup> and 12<sup>th</sup> days of June 1973. It was during this period that he was alleged to have embezzled an amount of Le963.87c representing the proceeds of postal orders and stamps that he had sold to the public.

The indictment has been subjected to criticism by counsel of the appellant. His contention was that it was defective in that the "particulars of offence" omitted the averment that the appellant had "fraudulently" embezzled the money in question. The indictment after amendment by the trial judge read:

#### 1<sup>st</sup> Count

Statement of offence: Embezzlement contrary to s 17(1)(b) of the Larceny Act 1916.

Particulars of offence:

Patrick Etick Cole on a day unknown between the 2<sup>nd</sup> and 12<sup>th</sup> days of June, 1973 at the General Post Office, Freetown in the Western Area of the Republic of Sierra Leone being a clerk or servant of the Government of Sierra Leone embezzled the sum of Le963.87c the proceeds of sale of postal orders and stamps, received by you for or on the account of the Government of Sierra Leone.

The particulars of the offence in the form of indictment for an offence under s 17(1)(b) as set out in paragraph 1708 of the 34<sup>th</sup> edition of *Archbold on Criminal Pleading, Evidence and Practice* reads:

"Particulars of offence:

A B on the day of C D in the county of E being clerk or servant to J N *fraudulently* embezzled ten pounds in money received by him or in the name or on the account of the said J N his master."

It is clear therefore that the particulars of offence before the trial court omitted the averment relating to fraud.

Section 17(1)(b) of the Larceny Act 1916 provides:

"Every person who being a clerk or servant or a person employed in the capacity of a clerk or servant ... (b) fraudulently embezzles the whole or any part of any chattel, money or valuable security delivered to or received or taken into possession by him for or in the name or on the account of his master or employer ... shall be guilty of felony ..."

The essence of the offence of embezzlement is the fraudulent appropriation by a servant of his employer's money chattel or valuable security. The appropriation must be done by the servant with a fraudulent intention.

Where an offence requires a particular intent for its constitution then that intent must be averred in the particulars of offence in the indictment. The identity of the person whom the accused had in mind need not be stated in the particulars unless such identity is essential to the constitution of the offence. We find the following statement of the law on the point in volume 10 of the 3<sup>rd</sup> edition of *Halsbury's Laws of England* at paragraph 703 at page 388:



"Where any particular intent is a necessary ingredient of an offence, the intent must be stated in the indictment. It is however not necessary in stating any intent to defraud, deceive or injure to state an intent to defraud, deceive or injure any particular person where the statute creating the offence does not make an intent to defraud, deceive or injure a particular person an essential ingredient of the offence."

The "intention to defraud" which is summed up in the expression "fraudulently" as I have already said was omitted from the particulars of the offence in the indictment before the trial court. What then is the effect of such an omission? The predecessor of this court, the West African Court of Appeal in the case of *R v Shaibu Yakubu* 10 WACA 267, had this say on the point at page 268:

"... the objection taken to the conviction of the appellant on count 6 is of a very different character for here the Crown has failed to allege in the "particulars of offence" an intent to defraud which is the very essence of the crime charged and following the judgment of this court in *R v James Ernest Bandoh* delivered at Accra on 26<sup>th</sup> May 1944, in which the English authorities more particularly *R v James & Anor* 12 Cox 127 are discussed, we quash the conviction on this count."

In view of the foregoing, we hold that the count is bad quite apart from the defect in the indictment. There are other aspects of this case which we consider necessary to deal with.

The evidence adduced in support of the count for embezzlement was that the Postmaster, Freetown had issued stamps and postal orders to the appellant. On 12<sup>th</sup> June 1973, the Postmaster issued a supplementary supply of stamps and postal orders to the appellant.

He refused to sign the requisition for the goods. At about 3.30 pm on that day, the appellant closed his counter and left the post office telling the Postmaster, Freetown that he had an appointment to keep with the Establishment Secretary. Two days later, his safe in which his stock of stamps and postal orders was kept was sealed. The appellant was not seen until 23<sup>rd</sup> June, 1973 when he went to the office that evening. He was followed and surveilled by one of the post office watchmen. It was that same day that the second prosecution witness, the Postmaster, Freetown discovered that the seal which had been affixed to the safe had been broken. He informed the CID, the appellant was arrested on 26<sup>th</sup> June 1973. The contents of the safe were examined. There was a deficiency of Le963.87c in the appellant's stock.

The appellant countered by saying that he had not found the contents of his safe as he had left them and that there was a shortage of Le566.56c which was inflated by the second prosecution witness to Le963.87c, the latter having claimed to have made a supplementary supply to him of Le390.37c worth of postal orders.

The appellant had the keys to the lock of the safe and the padlock securing the cross-bar to the safe. It came out in evidence that the duplicate key to the safe was kept in the Accountant-General's department. No evidence was led by the prosecution to rule out the possibility of the duplicate key being made available to any other person. There was also no evidence as to whether the padlock securing the cross-bar to the safe had just the key which was in the appellant's possession.

There was a veiled suggestion in the evidence for the prosecution that the appellant had tampered with the contents of the safe on the night of 23<sup>rd</sup> June as that was the time the appellant was alleged to have gone to the office after 12<sup>th</sup> June. It was after that that the seal which had been affixed to the safe was discovered broken. It is noteworthy to mention that the appellant was put under surveillance by watchmen Santigie Bangura on the instruction of Abu Bangura, during that visit to the office. Santigie Bangura was for some inexplicable reason never called to testify for the prosecution. This was how the learned trial judge dealt with the evidence on the point.



He said:

"Counsel for the defence invited you to say that this evidence is completely irrelevant. What is the prosecution trying to prove? That there is a connection between the disappearance of the stamps and the time when this man came back or are they suggesting that when this man came back on the 23<sup>rd</sup> that everything went topsy turvy? With respect to defence counsel, the prosecution is saying that the accused person was never seen in the post office again until the 23<sup>rd</sup> and he was seen by Abu Bangura. They are only pointed out the period for which he disappeared. He absconded. And that was the very day when in fact Mr Gabbidon found the seal broken and he went to the CID to report ..."

The effect of the evidence relating to the breaking of the seal and the above quoted passage from the summing-up was to create confusion in the minds of the jury. With respect to the learned judge, the case sought to be made out by the prosecution was that the appellant between the 2<sup>nd</sup> and 12<sup>th</sup> June had embezzled the proceeds of the sale of stamps and postal orders, and not that stamps had "disappeared" from the safe. The judge's mind was confused on this point and that confusion was transmitted to the jury. If stamps had been extracted from the safe by the appellant on the night of the 23<sup>rd</sup> June, then the charge should have been larceny of stamps and not embezzlement of money. Even if a charge for larceny had been brought based on the type of evidence that was before the trial court it would have been difficult for the prosecution to succeed having regard to its failure in adducing evidence to rule out the possibility of an interference with the safe by the use of the duplicate key by someone else other than the appellant.

It is unclear from evidence whether the amount alleged to have been embezzled represented the total cost of the postal orders and stamps entrusted to the appellant or whether it represented the proceeds of postal orders and stamps sold by the appellant.

The trial judge in his summing-up said inter alia:

"The accused person received, according to the prosecution, if you believe the evidence, the money in exchange for postal orders and stamps."

With respect to the learned judge there was no evidence that money had been received by the appellant in exchange for postal orders and stamps. This is essential in determining whether the offence alleged to have been committed was embezzlement or larceny. Undue emphasis was put by the learned judge on the absence from duty of the appellant, as if it was a necessary ingredient in proving the offence. He used rather extravagantly the case of *R v Williams* (1836) 7 C & P 338. He made the following comments:

"The accused was never seen again around that building until the 23<sup>rd</sup> of June. We shall come to the question of absconding it is a matter of law, which was decided in one celebrated case."

Later on he said:

"Whatever the figure may be why did the accused fail to turn up at work? In another case that is now an authority a certain woman was sent to collect money for her employer; instead of coming back to the office, to hand over the money which she received on behalf of her employer, she went to Ireland. She was subsequently apprehended, charged, presented and convicted for embezzlement. The learned judge in the Court of Appeal held that the conviction was proper. This is absconding ..."

The above question is obviously a reference to *Williams's* case. The report of that case in the law reports is rather brief. Coleridge J in his summing-up said:



"I think that the circumstance of the prisoner having quitted her place, and gone off to Ireland, is evidence from which you may infer that she intended to appropriate the money; and if you think that she did so intend, she is guilty of embezzlement."

The first point which is clear from the report of that case is that the prisoner was proved to have received money on behalf of her employer and instead of paying it over to her, went off with it to Ireland. The offence of embezzlement lies in the fraudulent appropriation of the employer's money, etc. before they come into the employer's possession. The fraudulent intent is an inference which may be drawn from the circumstances, of a particular case and that was why Coleridge J quite rightly directed the jury that they may infer a fraudulent intent by her running off to Ireland with the money. The case therefore established that there must be a receipt by the servant of the employer's money etc and a fraudulent appropriation of the same. That, lamentably enough, was not the way in which the learned judge approached *William's* case. The effect of the learned judge's interpretation of *William's* case was to prejudice the minds of the jury.

For these reasons we are unable to uphold the appellant's conviction. The appeal is allowed. The conviction is quashed. The sentence is set aside.

Reported by Anthony P Kinnear