KENNY v THE STATE

SC

SUPREME COURT OF SIERRA LEONE, Supreme Court Criminal Appeal 2 of 1982, Hon Mr Justice E Livesey Luke CJ, Hon Mr Justice CA Harding JSC, Hon Mrs Justice AVA Awunor-Renner JSC, Hon Mr Justice S Beccles Davies JSC, Hon Mr Justice FA Short JA, 28 April 1983

[1] Criminal Law and Procedure – Fraudulent conversion — Ingredients of offence – Necessary to prove fraudulent and dishonest intent – Person's acts may provide evidence of intent – Trial judge's failure to make specific finding of fraudulent intent did not result in a miscarriage of justice – Larceny Act 1916 s 20(1)(iv)(a) – Supreme Court Rules 1982 s 74(1)

[2] Criminal Law and Procedure – Committal Magistrate depositions – Depositions not made part of trial records could not be introduced on appeal

On 8 May 1981 the High Court convicted the appellant of fraudulent conversion contrary to s 20(1)(iv)(a) of the Larceny Act 1916 and sentenced him to 2 years imprisonment. On 26 January 1982 the Court of Appeal dismissed the appeal against conviction. The appellant appealed to the Supreme Court on two grounds. First, the appellant argued that the Court of Appeal, having found that the trial judge did not advert his mind to whether or not the misuse of the money by the appellant was "fraudulent and dishonest" (the third ingredient required to prove fraudulent conversion) and having held that "in that regard the appeal can succeed", it erred in law in not allowing the appellant's appeal against conviction. Second, the appellant argued that the Court of Appeal erred in law in not allowing counsel for the appellant to argue new grounds founded on depositions taken before the Committal Magistrate on the basis that it could not look at such depositions as they did not form part of the records before the Court.

Held, per totam curiam, dismissing the appeal, per Awunor-Renner JSC:

1. In order to convict a person of fraudulent conversion it was necessary to prove intent. *R v Bryce* (1956) 40 Cr App R 62, *R v Grubb* (1916) 11 Cr App R 153 and *R v Steane* [1947] KB 997 applied.

2. Generally, a person is taken to intend the natural and probable consequence of his own acts. Where direct evidence of a person's state of mind is not available, a person's act may afford abundant evidence of his intention to produce a particular result although evidence to the contrary is always admissible to rebut this. In the present case the evidence clearly showed that at the time that the appellant received the money, when he knew he had no right to do so, he intended by deceit to induce Mrs Kargbo to act to her detriment and thus intended to defraud. *R v Steane* [1947] KB 997 and *R v Riley* (1853) 169 ER 674 applied.

3. It would have been preferable if the trial judge had made a specific finding of fraudulent intent, but his failure to do so was not fatal. On the totality of the evidence the only reasonable inference to have been drawn by the trial judge was that the appellant fraudulently converted the sum of Le350 to his own use and benefit. Therefore, the Court of Appeal was right to apply the provisions of s 58(2) of the Courts Act 1965 because no substantial miscarriage of justice had occurred.

4. The depositions before the Committal Magistrate did not form part of the record before the High Court or Court of Appeal and therefore the Court of Appeal was right to refuse to allow counsel for the appellant permission to refer to the depositions.

Cases referred to

In Re London and Globe Finance Corporation [1903] 1 Ch 728

R v Bryce (1956) 40 Cr App R 62
R v Grubb (1916) 11 Cr App R 153
R v Lyon Central Criminal Court 28 Sept 1958
R v Riley (1853) 169 ER 674
R v Steane [1947] KB 997
R v Wines (1953) 2 All ER 1497

Legislation referred to
Courts Act 1965 s 58(2)
Larceny Act 1916 s 20(1)(iv)(a)

Other Sources Referred to

Archbold [36th Ed] pp 694, 695, paras [1909], [1912]

Appeal
This was an appeal from the decision of the Court of Appeal on 26 January 1982 dismissing the appellant's appeal from the decision of the High Court on 8 May 1981 which convicted the appellant of fraudulent conversion contrary to s 20(1)(iv)(a) of the Larceny Act 1916. The facts appear sufficiently in the judgment of Awunor-Renner JSC.

TS Johnson for the appellant.
ND Tejan-Cole for the respondent.

AWUNOR-RENNER JSC: On 8 May 1981 at the Freetown High Court the appellant was convicted of the offence of fraudulent conversion contrary to s 20(1)(iv)(a) of the Larceny Act 1916 and sentenced to 2 years imprisonment by Justice DEM Williams sitting as judge alone.

The particulars of the offence are:

"That Franklyn Kenny on 24 April 1978 at Freetown in the Western Area of Sierra Leone fraudulently converted to his own use and benefit the sum of three hundred and fifty leones entrusted to him by Christie Wallace Kargbo in order that he the said Franklyn Kenny might pay the same into the Judicial Sub-Treasury Freetown."

The appellant appealed to the Court of Appeal on 20 May 1981 against his conviction and sentence. On 26 January 1982 the Court of Appeal dismissed the appeal against conviction and allowed the appeal against sentence. It is against that decision that the appellant has now appealed to this court on the following grounds:

(a) The Court of Appeal having found that the trial judge did not advert his mind to the third point that the prosecution had to prove, that is to say, that the misuse of the money was "fraudulent and dishonest", and having found that it is not enough to say that the accused has converted the said amount to his own use and benefit, and that such use and benefit must be "fraudulent and dishonest" and having held that "in that regard the appeal can succeed", it erred in law in not allowing the appellant's appeal against conviction.

(b) Leave of the Court of Appeal having been sought and granted to delete and substitute for the original grounds one and three the following new grounds one and three.

"One: the appellant having challenged PW4 and PW5 respectively at the trial on their testimony as being totally different on material points from that given, the learned trial judge erred in law in ignoring their conflicting and contradictory evidence and in convicting him on the count of fraudulent conversion.

"Three: the learned trial judge misdirected himself on the evidence by holding that the sum of Le350 was not paid into the Judicial Sub-Treasury having regard to the unsatisfactory and

unreliable evidence of prosecution witnesses when compared with their testimony before the Committal Magistrate.

The Court of Appeal erred in law in not allowing counsel for the appellant to argue the said new grounds (one and three) on the grounds that it could not and would not look at the depositions taken before the Committal Magistrate as they did not form part of the records before the Court. The learned presiding justice adding that the only reason counsel for the appellant wanted the depositions looked at, was because he was concerned with the preliminary investigations."

The facts of the case as far as I need to refer to them are as follows. According to the prosecution, at the material time the appellant was working at the Registry of the Court of Appeal, One Mrs Christie Wallace Kargbo on 24 April 1978 handed the sum of Le350 to him in order that he should pay the amount into the Judicial Sub-Treasury on behalf of one Mr Ajai Cole. Mrs Kargbo was then issued with a temporary receipt by the appellant. On the following day she was also issued with a paying-in-slip which he (the appellant) claimed was the official receipt. This amount was never paid into the Judicial Sub-Treasury. The appellant however admitted receiving the sum of Le350 from Mrs Wallace Kargbo on the day in question and then issuing a temporary receipt to her. He claimed that Mrs Kargbo had asked him to keep this amount for her as he had told her that it was insufficient for the purpose for which it was intended. He also stated that when Mrs Kargbo called at his office on the following day he handed over the Le350 to her and he prepared and handed to her a paying-in-slip in triplicate for the sum of Le410 and asked her to pay this amount into the Sub-Treasury. She later returned with two copies of the paying-in-slip with the Sub-Treasury stamp on them. He then retained one copy as usual which he kept in his file and then gave her the other copy. In arguing his ground (a) he submitted that there was nothing in the evidence from which the learned trial judge could have inferred a fraudulent intent on the part of the appellant. He submitted further that in a case of fraudulent conversion the prosecution must prove certain ingredients. He also submitted that where a trial judge sat as a judge and jury, the Court of Appeal should not have applied the provisions of s 58(2) of the Courts Act No 31 of 1965 as fraudulent intent could not be inferred from the evidence. [Editorial note: s 58(2) provides: "On an appeal against conviction the Court of Appeal may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.] Mr ND Tejan-Cole counsel for the respondent in reply to counsel for the appellant submitted, inter alia, that the learned trial judge did advert his mind to the fact that the misuse of the money was dishonest and fraudulent and that he was not obliged to say so in as many words since on the totality of the evidence there was ample material to infer that the appellant dishonestly and fraudulently converted the sum of Le350 entrusted to him.

The ingredients of an offence under the section are conveniently summarised in the case of *R v Bryce* (1956) 40 Cr App R 62, where Hallet J said, and I quote:

"Where a charge is for fraudulent conversion it is essential that three things should be proved to the satisfaction of the jury; firstly that the money was entrusted to the accused person for a particular purpose, secondly that he used it for some other purpose and thirdly that such misuse of the money was fraudulent and dishonest".

See also *Archbold* [36th Ed] p 694 para [1909]. Also in *Archbold* [36th Ed] p 695 at para [1912] it is stated as follows: "In order that a person charged with fraudulent conversion may be convicted he must be found to have had a fraudulent intent."

The intention of an accused person at the time he commits a crime is often a necessary ingredient of the crime and must be proved by the prosecution as any other fact or circumstances in the case. See the case of *R v Steane* [1947] KB 997 where Lord Goddard CJ had this to say:

"Now the first thing which this Court would observe is that where the essence of an offence or a necessary constituent of an offence is a particular intent, that intent must be proved by the Crown just as much as any other fact necessary to constitute the offence."

Further down in the same judgment he continued by saying:

"The important thing to note in this respect is that where an intent is charged in the indictment the burden of proving that throughout remains on the prosecution. No doubt if the prosecution proves an act the natural consequences of which would be a certain result and no evidence or explanation is given, then a jury may on a proper direction find that the prisoner is guilty of doing the act with the intent alleged, but if on the totality of the evidence there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if on a review of the whole evidence they either think that the intent did not exist or they are left in doubt as to the intent the prisoner is entitled to be acquitted."

In the case of *R v Grubb* (1916) 11 Cr App R 153 the appellant was convicted before the Recorder at the Central Criminal Court of fraudulent conversion of money and shares and was sentenced to nine months imprisonment. Lord Heading CJ said, inter alia, at p 157:

"There cannot be a fraudulent conversion without an intent to defraud. Sometimes an intention is incapable of direct proof and this can only be inferred from overt acts done by the prisoner and proved at the trial."

The definition of an "intent to defraud" has been stated in several cases. See the cases of *R v Wines* (1953) 2 All ER 1497 and *In Re London and Globe Finance Corporation* [1903] 1 Ch 728 at 738.

Generally, a man is taken to intend the natural and probable consequence of his own acts. Direct evidence of a man's state of mind is not always available.

However, a man's act may afford abundant evidence of his intention to produce a particular result although evidence to the contrary is always admissible to rebut this. See the cases of *R v Steane*, supra; *R v Riley* (1853) 169 ER 674; *R v Lyon* Central Criminal Court 28 Sept 1958.

Having briefly stated the facts, supra, and the law applicable, I must now proceed to examine the evidence to see how the principles enunciated above can be applied to the present case.

On 24 April 1978 Mrs Christie Kargbo had handed the sum of Le330 to the appellant to be paid into the Judicial Sub-Treasury. This amount was to satisfy the conditions of appeal in the case of Adjai Cole v Alongo Coker. The appellant accepted this amount although he knew that it was not his duty to do so. He then issued a temporary receipt to her in his own hand in the following words. "Temporary Receipt received from Mrs C Kargbo of Wilberforce Barracks the sum of Le350 for Adjai Cole". When asked why he had issued a temporary receipt, he replied that there was no one in the office to issue an official receipt. On the following day when Mrs Kargbo again called on him he issued her with another receipt. The contents of that receipt also read as follows:

"Payment into Judicial Sub-Treasury Cr App 25/77 Adjai Cole v Alongo Coker. Deposit Le350 25 April 1978 by whom paid Adjai Cole."

At this stage I think it will be necessary for me to refer to a few quotations from the statement of the appellant and from his evidence. In his statement he said, and I quote:

"On 24 April I received the sum of Le350 from Mrs Christie Wallace Kargbo and then issued the temporary receipt now in question to her. The following day Mrs CW Kargbo came back to me. I then handed over the sum of Le350 back to her to be filled up to Le410.00. I issued

triplicate paying-in-slip for Le410 to her to enable her to pay the said amount to the cashier at the Judicial Sub-Treasury."

In his evidence the appellant also said, and I quote: "After returning the Le350 no other monies passed between us."

I have referred to the content of the two receipts above because on the evidence, it is quite clear that it was the appellant who wrote out both of them. His own witness Horton admitted that it was the appellant who wrote out the latter receipt and that he was familiar with his handwriting. A witness for the prosecution John Alimamy Saudi also claimed that the appellant admitted preparing it. This is important because although he denied preparing it there is abundant evidence that he did and if this is the case he was surely lying when he said that he returned the Le350 to Mrs Kargbo on 25 April 1978. Apart from the quotations I have mentioned above there are a lot of discrepancies in the evidence of the appellant. Furthermore, his answers as regards most of the exhibits tendered in court were most evasive. Finally, there is evidence that the amount of Le350 was never paid into the Judicial Sub-Treasury and as a result the appeal involving Adjai Cole was struck out for non-fulfilment of the conditions of appeal. Taking all the above facts into consideration, one cannot help but ask what was the appellant's intention at the time he received the money? Right from the beginning one could discern from the acts done by him how his mind was working and that he intended fraudulently to convert the sum of Le350 to his own use and benefit, which he in fact did. I have already stated above what is meant by an intent to defraud and how the intention may be proved.

In the present case I think that the evidence clearly shows that the appellant at the time he received the money, when he knew he had no right to do so, intended by deceit to induce Mrs Christie Wallace Kargbo to act to her detriment and thus intended to defraud. A person is taken to intend the natural and probable consequences of his own act.

I now propose at this stage to refer to the passage complained of in the judgment of Warne JA by counsel for the appellant and I quote:

> "It seems to me that the learned trial judge did not advert his mind to the third point that the prosecution had to prove that is to say that the misuse of the money was fraudulent and dishonest. In the judgment the learned trial judge had this to say: 'He has failed to pay the money into the Judicial Sub-Treasury; he has failed even to return the amount to Mrs Christie Kargbo. He has failed to account for the money otherwise, therefore it is clear on the evidence that the accused has converted the said amount to his own use and benefit.' With respect to the learned trial judge it is not enough to say that the accused "has converted the said amount to his own use and benefit, such use and benefit must be fraudulent and dishonest. In this regard the appeal can succeed, however on the totality of the evidence it is in my opinion, conclusive in support of the indictment. I do not think the verdict should be disturbed because if the judge had properly adverted his mind to the third essential point, the verdict would have been the same. In short the judge's failure to advert his mind to the third point is not tantamount to a substantial miscarriage of justice."

In my opinion, in these circumstances, although it would have been preferable if the judge had made a specific finding of fraudulent intent, his failure to do so was not fatal. In my view on the totality of the evidence the only reasonable inference to have been drawn by the trial judge was that the appellant fraudulently converted the sum of Le350 to his own use and benefit. In my judgment therefore the Court of Appeal was right in applying the provisions of s 58(2) of the Courts Act 1965. This in my view disposes of ground (a).

As regards ground (b), I think that all the contentions should be dealt with together. The facts relating to this particular ground of appeal are as follows. At the hearing of the appeal in the Court

of Appeal, counsel for the appellant had applied for leave to amend the original grounds of appeal which application had been granted by that court. He had claimed that although the appellant having challenged PW4 and PW5 respectively at the trial on their testimony as being totally different on material points from that given before the Committing Magistrate, yet the Court of Appeal had erred in law in not permitting him to argue this particular point as they claimed that they would not look at the depositions as they did not form part of the record.

The question one should now ask is this; was the Court of Appeal right in refusing to look at the depositions for the reason given and thereby depriving him of the right to argue this particular ground of appeal? Quite clearly the depositions did not form part of the record and therefore the Court of Appeal was quite right in refusing to allow counsel for the appellant permission to refer to the depositions. Indeed, learned counsel applied to us to refer to the depositions. He conceded that they were not tendered in the High Court or Court of Appeal. We refused the application. In my opinion this ground of appeal also has no merit.

The appeal is dismissed.

Hon Mr Justice E Livesey Luke CJ: I agree. **Hon Mr Justice CA Harding JSC**: I agree. **Hon Mr Justice S Beccles Davies JSC**: I agree. **Hon Mr Justice FA Short JA**: I agree.

Reported by Anthony P Kinnear