MOATAU TEKABWERE versus REGINAM

HIGH COURT OF THE GILBERT ISLANDS

(O'Brien Quinn C.J.)

Betio, 7th November 1977 Criminal Appeal No 2 of 1977

Criminal Appeal - stealing Government money - irregularities in procedure - standard of proof - appeal allowed.

The appellant was convicted and sentenced to 12 months' imprisonment by the Senior Magistrate's Court for stealing $1000 the property of the Government. The facts found by the Senior Magistrate were that the appellant was given money for the payment of salaries and this money had been checked by the Agency officer of the Bank of New South Wales. When the appellant opened the envelopes containing the money he discovered a shortage of $200 in $20 notes and immediately reported it. The Bank paid up the shortage and on the next day the appellant reported a further shortage of $800 which he again reported; this time to his immediate employer the Commissioner of Police. The Senior Magistrate found that it could not be ascertained how the shortage came about but held that the differences in amount emanated from the appellant resulting from his carelessness either in checking his cash or when he gave out the salaries

and, thus, found him guilty. The appellant appealed against both conviction and sentence on the grounds that the evidence of the persons who checked the money was not reliable and that the evidence given by them should have been carefully scrutinized in view of the fact that other errors had been made on the same day by one of the prosecution witnesses.

HELD: That the prosecution in the Senior Magistrate's Court did not establish its case to the standard required in a criminal trial, namely, beyond a reasonable doubt, and that carelessness on the part of an accused, in a case of this nature, however reprehensible it may be, does not constitute guilt.

Other irregularities were pointed out in the course of the judgment. The appeal was allowed.

Mr. Glyn Lewis-Jones appeared for the appellant
Geoffrey Pimm, Attorney General, for the Crown.

O'BRIEN QUINN C.J.:- In the case out of which this appeal arose the appellant, who was employed as an Executive Officer attached to the Police Headquarters, and one of whose duties was the payment of staff, was charged with stealing from Government the sum of $1,000 on 24th December, 1976.

2. The brief facts, as found by the Senior Magistrate, are that the appellant was given the counted and checked sums of money for the payment of the Police salaries by the Agency officer of the Bank of New South Wales in two large stapled envelopes on 24/12/76 (which date should have been 23/12/76). The appellant opened the envelopes and discovered a shortage of $200 in $20 notes of which he immediately alerted the Bank Agency Officer. The matter was gone into and eventually the Bank made up the sum of $200 to the appellant who proceeded to pay the Police. On the following day the appellant noticed that a further sum of $800 was missing which he reported to the Commissioner of Police and tried to report to the Treasury. The Bank employees and the Treasury employees, whose duty it was to check the amounts of cash and notes which were put into the envelopes in the first place, gave evidence that no mistake could possibly have taken place so far as they were concerned.

3. When the appellant first noticed the discrepancy he noticed that instead of there being 299 $20 notes there were only 249 but, for some reason which he could not explain, he wrote down the figure as 289 thus showing a discrepancy of 10 $20 notes and not 50 $20 notes.

4. The Senior Magistrate found that it could not be ascertained how the shortage came about from the beginning but held that the differences in amounts emanated from the appellant resulting from his carelessness when checking his cash or when he gave he gave out the salaries to the payees, and found him guilty.

5. The appellant has appealed against both the conviction and the sentence of 12 months' imprisonment on the grounds that the evidence of the persons who checked the money was not reliable and the evidence given by them should have been carefully scrutinized in view of the fact that other errors had been made on the same day by one of those witnesses. Such evidence, it was contended, pointed two ways. It was also argued that the standard of proof applied by the Senior Magistrate was not that required in a criminal trial i.e. proof beyond a reasonable doubt. For the Senior Magistrate to say that the differences in the amounts resulted from carelessness on the part of the appellant was not sufficient to make him criminally responsible for theft as theft was not made out. On the question of sentence it was argued that the accused was a senior officer in a position of trust who had been handling money without any complaint as to his honesty for many years and was not a man who was a spendthrift. He was happily married and had no profligate habits.

6. In reply, the learned Attorney General conceded that one of the ingredients of the charge under section 266(a)(1) of the Penal Code was missing namely, that the accused was not proved to be a clerk or servant, which would reduce the offence to one of simple larceny. The learned Attorney also pointed out that there should have been two charges, one in respect of the $200 and one in respect of the $800 but that this defect was curable. He argued that it was clear from the record that the amounts were correctly checked before being given to the appellant and that the fact

that the appellant, even after discovering the loss of $200, continued to pay out salaries and only discovered the loss of the further $800 the following day giving as his excuse "Because I didn't pour the money out of the envelope but just took them out with my hand" was sufficient to lead the Senior Magistrate to find the appellant guilty. The whole record of the case, he argued, was indicative of the guilt of the appellant.

7. I have carefully considered the arguments put forward on both sides and, as I see the facts, it would appear that, apart from the obvious errors on the face of the record, such as the date charged being stated as 24/12/76 when it should have been 23/12/76, the appellant being charged under section 269(a)(i) when he should have been charged under section 266(b)i) of Cap 8, no plea having been taken, no mention as to whether or not section 194(1) of Cap 7 was complied with, no conviction of the appellant recorded, and no evidence to prove that the appellant was a clerk or servant so as to bring him within the scope of the section under which he was charged, that the evidence shows that the appellant received the money with which to pay the Police salaries, that on his initial counting of that money he noticed a loss of $200 which he reported immediately to the Bank and had it paid to him by the Bank as the Bank had realized that, as there had been a shortage elsewhere around the same time, it was likely that there was a shortage in the appellant's case too, that on the appellant's noticing a further loss of $800 on the following day he reported it at once to the Commissioner of Police and, on the Commissioner's instructions, went to Bairiki to report it to the Treasury but could not find any one to whom to report to, it being then Christmas Eve.

8. Reading the judgment of the learned Senior Magistrate it is easy to see the difficulty in which he found himself as, while he believed that the Bank and the Treasury had properly checked the money given to the appellant, and as he believed that the appellant had, at the earliest opportunity, reported the losses to the authorities, he nevertheless found that a loss had occurred for which the appellant could not account. The learned Senior Magistrate found, on what evidence it is not clear, that the

discrepancies resulted from the accused's carelessness when checking his cash or paying out the salaries and, on this, found him guilty as charged.

9. On the evidence of the prosecution it would appear that the cash had been properly checked but, on reading the unchallenged evidence of the appellant as to his interview with the Bank Accountant, grave doubt was cast on the prosecution evidence on this point. Further there is no doubt that the appellant notified the Bank immediately he found the first discrepancy and it would appear from the Record that the further discrepancy of $800 could well have been found also if steps were taken then by the Bank or the Treasury or someone in authority to check the bundles of $20 notes which were then 50 notes, and not merely 10 notes, short. The argument raised on behalf of the Crown that the appellant was less than frank in his reply to cross-examination that he did not know that the $800 was missing as he had not emptied all the money out of the envelope is not a very strong one when one takes into account the fact that once he discovered the loss he reported it immediately and tried to get the money from the Treasury, apart from the fact that the reporting of two discrepancies would tend to put him in a very bad light with his employer.

10. On the whole of the evidence I am not impressed by the cogency of the prosecution evidence and, in my opinion, it does not satisfy the standard of proof required in a criminal case i.e. proof beyond a reasonable doubt. Reading the judgment of the learned Senior Magistrate it is obvious to me that he did not apply the proper standard of proof as carelessness in a case such as this, however reprehensible it may be, does not constitute guilt. And I would say that, even though the learned Senior Magistrate found carelessness on the appellant's part, I am of the opinion that if any carelessness were present it was carelessness on the part of the Crown witnesses and not necessarily on the part of the appellant.

11. In the circumstances, therefore, I must hold that the prosecution in the lower court did not establish its case to the standard required in a criminal trial and I must allow this appeal.

12. A conviction of theft by a clerk or servant is,

accordingly, set aside and the appellant acquitted.

13. Before concluding, I consider that I should point out that in cases such as this the charge should be laid under section 266(b)(i) of the Penal Code and all the relevant evidence adduced to prove each ingredient of the offence even if it means calling the Bank Manager and the Commissioner of Police themselves as not only must justice be done but it must be seen to be done and the case proved to the standard required by law. It is no use proving to the Court that money has been lost; it must be shown to the Court how that money came to lost; that it was stolen and that it was stolen by the accused. If the prosecution cannot establish these points then it were better that the case were not brought at all and the time and money of Government saved thereby.