

IN THE SUPREME COURT)
 OF THE TERRITORY OF)
 PAPUA AND NEW GUINEA)

CRIMINAL JURISDICTION

AT SAMARAI.

CORAM: OLLERENSHAW A.J.

R. v. GORDON REID McKAY

J U D G M E N T

This is the trial before me without a jury of the accused upon an indictment charging, in its amended form, that GORDON REID McKAY in the Territory of Papua between the 31st October, 1953, and the 4th December, 1953, stole money amounting to the sum of £488.10.2., the property of Richard Johnson Paul, and others, members of the R.S.L. Club, Samarai.

Between the dates stated in the indictment, the accused was a member and the Treasurer of this Club, and the sum alleged to have been stolen is part of the moneys which come into his hands at Samarai, lawfully as such Treasurer, between the 31st October and the 27th November, 1953. The full sum that so came into his hands, and there is no dispute about this, was £524.9.2., of which he properly expended £35.19.0. in payment of an electric light account for the Club, leaving a balance of £488. odd, of which balance the accused admits he took £418. from Samarai to Port Moresby. These moneys included bank notes and cheques, and in a formal way the following provisions of the Queensland Criminal Code: the definition of money in Section 1, section 566 sub-section (5) and Section 390, are material.

The substantially material sections of the Code are sections 398, 396, and particularly 391. By section 391 it is provided, in sub-section 1:

"391.(1). A person who ... fraudulently converts to his own use anything capable of being stolen, is said to steal that thing."

Sub-section 2 of that section provides:

"391.(2). A person who ... converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say, -

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(f) in the case of money, an intent to use it at the will of the person who converts it, although he may intend to afterwards repay the amount to the owner."

The other sub-sections of section 391 that are material are sub-sections (3), which provides that conversion may be fraudulent, although it is effected without secrecy or attempt at concealment, and sub-section (4) which provides that in the case of conversion, it is immaterial whether the thing converted is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converted it. That is material, because in this case the moneys that the accused is charged with stealing came lawfully into his possession. Sub-section (6) provides that the act of stealing is not complete until the person converting the thing actually moves it or otherwise actually deals with it by some physical act. I should mention that by virtue of section 396, it is immaterial that the person charged may himself have an interest in the money he is alleged to have fraudulently converted. The accused was a member of the Club from which he is alleged to have stolen the moneys. As I see it, I must be satisfied beyond reasonable doubt that the accused converted the moneys charged to his own use, and in this connection, that there was some physical act on his part analogous to the act in common law larceny. Particularly I must be satisfied beyond reasonable doubt, not only that there was such conversion, but also that it was fraudulent, and that is what counts in this case. I must be satisfied beyond reasonable doubt that the accused converted these moneys with the intention to use them at his own will.

The trial is in its eighth day, and the case for the Crown and the case for the accused have been presented with great care. I have had ample opportunity of observing witnesses called and to form my conclusions as to their reliability. I have also had ample opportunity of considering the issues as they developed, and since the completion of the addresses, I have taken some hours to reflect upon the conclusions that were forming in my mind. There has been a great deal of evidence, and I do not propose to refer to everything that has gone to produce my conclusions, but I should, as is the practice in criminal trials before a Judge without a jury, refer to the salient points that have influenced my conclusions on the facts.

The money is alleged to be the money of the R.S.L. Jubilee Club at Samarai, and I should shortly refer to that Club. It is an associate Club formed by the members of the Samarai Sub-Branch of the R.S.S.A.I.L.A. for the purpose of extending the benefits of

the Club to persons who were not qualified to join the Samarai Sub-Branch. Election to that Sub-Branch as an executive officer automatically operated as election to a similar office in the Jubilee Club. During the relevant period there has been no distinction in the keeping of the moneys of each body. They have been kept jointly at the Commonwealth Bank in a single account. The Jubilee Club, in some sense, supplies to the people of Samarai and surrounding districts some of the amenities previously supplied by the hotels that were here before the war. Substantially its revenue, apart from minor sources, comes from the sales from its bar of liquor, which is purchased from the three stores in Samarai, to members and guests. From the evidence before me it had, in 1953, an annual turnover of some £10,000. It operated during the relevant period by means of its committee, including President, Secretary and Treasurer. Liquor was sold in the Club by members, who volunteered to act as barmen and were approved by the committee. Their services were rendered voluntarily, and, in fact, the Club had very little overhead. It was not disputed by the accused that a 20% gross profit was the basis on which the Club worked.

The Club's banking account, which plays an important part in this trial, is a Savings Bank Account kept at Port Moresby, but it is a particular type of savings bank account known as a Society Account. There was no pass book for the account, and it was operated upon by cheque. A Society Account appears to be the means the Commonwealth Savings Bank offers by which bodies such as clubs, etc. have the facilities of ordinary trading accounts. It gave to this Club the advantage of being able to bank at Samarai, where the Savings Bank had an Agency. It always had been the practice of the Club, through its Treasurer, to bank its revenue, which, as I have said, substantially came from the bar, at this Agency at Samarai. Moneys and cheques to be banked were deposited there with a deposit slip, and the officer there issued to the depositor an interim receipt for the moneys and cheques so deposited. The transaction was ultimately passed through the Agency to the Bank at Port Moresby and a credit entry made in the Club's account at Port Moresby under two dates - the date of deposit at Samarai, and the date of the credit at Port Moresby separated by a horizontal stroke. (See Exhibit "8" - copy of the Club's Bank Account for the relevant period.)

It was the duty of the Treasurer of the Club to collect daily from the barman on duty the takings which were then in the bar, and to bank them at the Agency, to which I have referred, once a week. This weekly banking was directed in a Minute passed at the General Meeting on the 28th June, 1951. Something was attempted to be made, in the address of Counsel for the accused, of the evidence

of the accused that he was never directly told that he should bank the Club's money once a week. However, when asked if he was present at that Meeting when that direction was given, he said he might have been, and did not deny that he was there, and as I understand it, the accused did not contest he should have banked moneys weekly. As Auditor for the previous year, he must have known; in fact, he made this excuse for not doing so - that the Accountant of the firm for which he worked had asked him to keep the money unbanked, to keep it for use as change which, he said, was sometimes in short supply at Samarai. He gave this reason for not banking weekly. The accused at the relevant time was a shipping clerk employed by Burns Philp (New Guinea) Limited at Samarai, and for that purpose he was a Licensed Customs Agent under the relevant Ordinance. He became a member of the Club in March, 1950, shortly after his arrival at Samarai. He was Auditor for 1951/52, and became its Treasurer on the 5th January, 1953, from which date he acted as Treasurer until he left Samarai on the 28th November, 1953. He was not, in fact, elected Treasurer until 10th February, 1953, when his position as Treasurer was confirmed at the General Meeting. He completed his last audit, together with two other members who were auditors at that time, on the 3rd February, 1953, seven days before his confirmation of appointment as Treasurer. He and the other auditors reported upon the previous year's activities; that the Treasurer's accounts were in order, and that the Club had made a profit of £600. for 1952. The accused himself gave and appeared anxious to give this evidence in chief:- He said that it was considered by the meeting that on the sales as shown, the profit was much less than it should have been, and it was decided after the discussion that no concrete means for members could be applied, but every endeavour would be made for more success in the future years. I gathered that he meant means to protect the members. At this time he was Treasurer, and it may be that this hope for more success in future years was, to some extent, due to the interest the accused was showing in the affairs of the Club. It was not fulfilled, and the accused admitted before and during the trial that the financial position of the Club at the end of the period during which he was Treasurer was unsatisfactory.

This period during which he was Treasurer, for the purpose of this trial, may be divided into two parts, the first period being from the 5th January, 1953, to the 26th October, 1953, and the second period from the 27th October, 1953, to the 28th November, 1953. The vital period, with which I am concerned, is the latter period, because it was during this period that the moneys charged came into the hands of the accused. I am not trying the accused for the fraudulent conversion of any of the moneys which came into

his hands up to the 26th October - in fact, up to the 31st October, because that was the last day on which he banked any moneys on behalf of the Club. Although it may be that some moneys received by him between the 27th October and the 31st October have not been accounted for, it has been assumed, for the purpose of this trial, that he did bank all of those moneys on the 31st October. I do not propose to say very much about the relation of the accused to the funds of the Club during the first period. I am not directly concerned. Evidence of his conduct as Treasurer during this first period has been led by the Crown for the purpose of negating an innocent intent in respect of the moneys received by him during the second period with which he is actually charged. The accused admits he took the bulk of these moneys, admittedly the property of the Club and which he should have banked at Samarai, to Port Moresby, where he was arrested.

However, since much of the time of the trial has been taken up with the earlier period and serious charges made against the accused in his office of Treasurer during that period, I think I should say something about it. In fact, the accused and his Counsel have, to a great extent, relied upon that earlier period because they say that there was great laxity on the part of the committee as a whole during the period up to the 26th October, and that there were opportunities for other members of the Club to help themselves to its property and money. When asked in cross-examination whether he would make any specific charges, the accused having particularly, in this connection, referred to the fact that there were five keys to the bar held by persons whom he named, said he made no specific allegations, and used these words - "I would not make a specific allegation about them, but temptation is a strong thing." On the evidence led by the Crown, and led by the accused, I have no doubt that there was laxity and temptation.

I should say that the accused also stated that these other persons, not only holders of the keys, but persons to whom they lent the keys, had ample opportunity to help themselves to both the goods and the money of the Club. He then referred to these members and said he would not make a specific allegation about particular people, but temptation was a strong thing. As I was saying, on the evidence of the Crown, and the evidence produced by the accused, there could be no doubt that he himself had found ample opportunity to help himself to the property and the money of the Club, and to use his own words, to judge him as he would ~~would~~ judge others - "temptation was a strong thing" - and I believe that he found temptation far too strong for him. I would have no hesitation in finding, if it were necessary, that he stole

from the Club during that earlier period. Certainly its moneys, and probably its goods.

I do not propose to deal in detail with all the relevant evidence, but two outstanding matters are: (1) His failure to record, in a book kept for the purpose, the amount of moneys he received from the bar of the Club. He has made many excuses and pretensions during this trial. Amongst them he made the excuse that he did not keep the books entered up because he could not get possession of them from the retiring Secretary until about April of the year in which he became Treasurer. I do not believe him. There could be no doubt that he had every access to Exhibit "4" and it was available for him. That is the book in which, perhaps in the position occupied by him as Treasurer the most important book for him to have kept, the book in which he should have recorded and signed for the moneys received by him from the bar. He did, in fact, record in that book his receipt of moneys almost daily from the 6th January until the 22nd January, 1953, and then he failed to continue to make such record, so that it could never be established what moneys came into his hands, as Treasurer, from the 22nd January to the 27th October, 1953, unless, of course, it were possible that the memories of the various barmen during that long period could furnish that information. I have no doubt the accused knew that no one would be able to prove what money he had received and that that was the reason why he ceased to record against himself the moneys he received from the bar. It is beyond doubt that the accused had in his possession at least one other book (Exhibit "6(c)") containing butts and also receipts signed by him for a period from almost immediately after his election as Treasurer and ending in March, although he says that April was the earliest he could get the books from the Treasurer. He did not report this alleged difficulty about getting the books to the committee. There were monthly general meetings of the Club during this period, and the practice was that each general meeting was followed by a committee meeting on the same evening.

Upon the evidence, I am forced to believe that he deliberately kept the financial position of the Club in his own mind, or to himself in some way, rather than in its books, and that he did this so that he could help himself to its moneys as he required them.

(II) The other main reason is his attitude towards the stock. He has not lost any opportunity to point to the fact that other persons had the opportunity to help themselves to the stock. I agree with that. No doubt a number of people could have helped themselves to money and stock. At first I thought the accused, as

Treasurer, would have no direct contact with stock. However, in this Club, the Treasurer was the person who not only received its moneys from the sale of its stock, but also took stock, usually with the help of another committee member.

During the earlier period the accused took stock on a number of occasions. He gave evidence that he did this practically always on his own. He also said that he could never reconcile the position of stock with the takings that he received from the bar. However, never on any occasion did he report this to the committee, and, in fact, in making his reports to the committee, he included in them stock on hand for the purpose of showing to the committee and general meetings the financial position of the Club, without one word as to his not being able to reconcile the stock with the takings. In fact, I think that his reports to the general meetings - there is one in evidence (Exhibit "12") - were calculated by him to lull members of the Club into believing that all was going well. They, of course, did not know that he had ceased to record against himself the amount of moneys he received from the bar; they did not know that he had ceased to keep the books of the Club entered up, and they did not know that he was presenting to them his records of stock-taking while he could not reconcile the amount of stock on hand with the takings.

In his report as at 30th September, 1953, the Club showed a gross profit of £612. odd. In this Court he first said that that was false, and later attempted to explain that it was correct. I have no doubt that he intended that the meeting to which this was presented should believe that the Club's position in September was better than it had been for the whole of the previous year. I think the accused deliberately intended the meeting to believe that, so that he could keep control of the finances of the Club. I am not here to try him in respect of any particular moneys he may have taken during that period. It would be difficult, if not impossible, to fix any particular amount, and there was opportunity for others to do so as well, even if not to the same extent.

Now I come to the relevant period, and that was ushered in by the election of at least two new committee-men - Mr. Paul as Acting Vice-President, and Mr. Hoeter, as Secretary. Mr. Paul, notwithstanding his title, was, de facto, President of the Club from the 27th October, 1953. The first thing Mr. Hoeter did was to introduce Exhibit "2", which he handed to the accused. This is the receipt book in which were recorded the moneys taken in the bar and in which the accused was obliged to sign for the moneys he received from the barman. Mr. Paul and Mr. Hoeter started a new regime in the affairs of this Club. The moneys alleged to have been stolen by the accused

were moneys that he received from the bar - and I think I have already referred to this - between the 31st October, 1953, and the 27th November 1953. These items are now underlined in red in Exhibit "2". The accused signed for them and does not dispute that he received these moneys. The amount in all is the sum which I have already mentioned. The facts are that the accused did not bank any of these moneys received from the 31st October at any time. The first general meeting to take place after the election of these new officers was on the 23rd November, and the fact is that the accused turned up at that meeting without any report. When asked by Mr. Paul where it was, he said he did not have it with him, and went to his quarters to get it. He subsequently presented to the meeting and read a report (Exhibit "5") in which again he shows certain stock, and as he said, he could never reconcile stock in hand with takings. The most significant feature of this Exhibit is that it shows that the accused reported to this meeting that he had banked £265.1.0., and that he had cash in hand, £57.6.2., these being moneys received since the 31st October, at the latest. The fact is that he did not bank them, as reported to that meeting. Nor did he bank them later. I might mention that at that date - 23rd November - the accused had received, upon the uncontradicted evidence, (Exhibit "2"), at least another £137., which he does not mention in his report, (Exhibit "5") to that meeting. Not publicly, but privately, Mr. Paul told the accused that there would be another meeting on the following Monday, the 30th November, and that the accused was required to present to that meeting a full financial statement, and from another part of his evidence it appears that Mr. Paul also told the accused that he was required to bring to that meeting all his books and other records of the financial position of the Club. That was on the evening of the 23rd November.

By flying-boat at 9.30. on the morning of the 28th of that month the accused left Samarai for Port Moresby. He does not dispute that he took with him £418. odd, being part of the moneys which I have already mentioned that he collected during November, and he does not dispute that he did collect these moneys. They are now in Exhibit "1", and it is important to note that Exhibit "1" contains bank notes and cheques. There are twenty-eight cheques. One of them, the Bonnell cheque, the accused says he put in with Exhibit "1", taking its equivalent in charge for himself. Of the other cheques, twenty-five are made out payable to cash or bearer, and they are for various amounts. Of these others in this Exhibit, one is payable to the R.S.L. or bearer, and two are payable to a named payee or bearer. Obviously, of course, these cheques, when presented to a bank, were as good as bank notes, provided there was

a credit to meet them. There was no record in the Club that they belonged to it. The accused reached Port Moresby that morning, Saturday, the 28th November, and remained there, as far as is relevant for my purposes, till the following Saturday, when he was arrested, and was in possession of Exhibit "1", which was still unbanked, although, as I have said, the Club's account was kept at Port Moresby. He was subsequently brought back to Samarai, where the affairs of the Club were discussed with him by Mr. Paul and Mr. Hoeter, who both gave evidence of discussions they had with the accused. I do not propose to go through this evidence, but to some considerable extent the Crown case is based on that evidence. As I see it, there is no serious conflict between the accused, on the one hand, and Mr. Paul and Mr. Hoeter, on the other, as to what was said at these discussions. There is a conflict on a few minor matters as to the precise words used. If there is any material conflict, I have no hesitation in saying that I would accept, in preference to the evidence of the accused, the evidence of Mr. Paul and Mr. Hoeter. No one could fail to appreciate the way in which Mr. Paul gave his evidence with obvious anxiety to be fair to the accused. No one could have failed to notice the readiness with which Mr. Hoeter answered questions in cross-examination, although the answers were favourable to the accused. This was done without hesitation by Mr. Hoeter, and I was very much impressed by the manner in which both these gentlemen gave their evidence.

There is no doubt that, when arrested, the accused had in his possession £418., and it appears from Mr. Hoeter's evidence that he told him that he had taken £488. to Port Moresby. He himself denies that; but whether or not he did take £488. or £418. to Port Moresby, I think does not matter very much. If he only took £418., it is clear to me, beyond doubt, that he had already, at the date of his departure from Samarai, fraudulently converted the difference to his own use. If he did not take it, that was because he did not have it to take and he had not paid it in to the credit of the Club or accounted for it. In explaining why he did not bank the moneys, as he had reported he had done, and why he took them and later collections from Samarai and then did not bank them in Port Moresby - at first he blamed his ill-health, and later it was because he was too busy to bank. His explanation why he did not bank them in Port Moresby fore his arrest is that he did not have a proper opportunity, and he was attending to his health. I have no hesitation in saying that I do not believe him. I regret to have to say that, because there is no doubt that the accused's health, at the time he left Samarai, was not all it should have been, but I have no doubt it was not his health that he was worried about, but it was the fact that, in what I have called the new regime in the

Club's affairs, he realised that he was being watched, and that his time was up. As early as the 16th September, 1953, he had a Doctor's report about his health, his heart condition, having spent a week prior to that date at the local hospital. Although it would appear that he did make an approach to his Manager to enable him to go South for treatment, or to Port Moresby, he appears to have shown no real concern to leave Samarai at any time before the 23rd November - the date of the first meeting after the appointment of the new officers of the Club. He has gone to some trouble to show that he did not try to leave on the "Malaita" on that date, but I think that his object in getting the Doctor of the "Malaita" to report on his condition was to go on that boat.

He did not leave on that date, and the meeting took place and the incidents then occurred on that day to which I have referred. He then had between the 23rd and the 28th in which to bank moneys which he said he had, if he wished to do so. He said he was too busy. I cannot believe that. He could have sent them to the bank agency by another member. The evidence of Mr. Blackwood and, indeed, I think, the evidence of the accused shows that he did use another member to take moneys to that Agency on more than one occasion; moneys which he collected from the bar and for which he filled in particulars on and signed a deposit slip and then sent them and the deposit slip to the Agency by another member. If he did not himself have time to take the moneys, which, by the 27th November, had amounted to £488., it would have been a simple matter to have sent them, as he had done on previous occasions, by another member. There is evidence that forces me to the conclusion that the accused was relying upon pretences to explain why he did not bank the moneys at Samarai and why he took them to Port Moresby, such as the evidence that he told Mr. Paul that if he had left by the "Malaita," he would have left the money in the hands of Derek Hunt, who was a member, and had been, up to the 27th of the previous month, Secretary. Furthermore, he said that it was on Friday night that he decided to take the money to Port Moresby, but on another occasion he said that next morning he did look for someone to leave the moneys with, but could not find any responsible person. There was no explanation such as that he changed his mind. Business commences here at 8 o'clock. He did not leave until 9.30. I think it a mere pretence. I do not think that he made any effort to find a responsible person. There were a number of them, including Mr. Hoeter and Mr. Paul, living closely to him, having their places of business close to his, and he and they were on the telephone. He himself says he told Mr. Paul he was going to Port Moresby. Mr. Paul cannot remember whether he did or not. If the accused did tell Mr. Paul he was going and did not have time to bank himself, he

could have left the moneys with Mr. Paul.

I do not propose to go through everything the accused has said. He has not denied that he should have banked the money to the credit of the Club in the normal way, that is, through the Agency at Samarai. Counsel for the accused, in addition to relying on the defence of sickness and lack of time, also referred to the lack of concealment on the part of the accused whilst he was counting the money on the evening of the 27th, when three persons, if not at the same time, then a short while after each other, came to his quarters and saw him counting money. The accused said "Yes, this belongs to the R.S.L. Club. I am taking it to Port Moresby to bank." If such incidents occurred, it may be said that he did not conceal from some people what he was doing. These visitors were members of the Club, but none of them held any office in the Club. I think I am right in saying that. He may have revealed to them what he proposed to do, but it was not revealed to the executives of the Club, and having regard to the opinion I have formed of the accused, it is likely that this incident did occur and that he was making preparation for a defence he might need if he were apprehended before he got away with this money. He claims that he told Mr. Paul he was going to Port Moresby, but he did not tell him he was taking the Club's money.

There are numerous inconsistencies in his story. I am quite unable to accept the explanation that he did not have time to bank in Port Moresby. Take Monday when he was driven around Port Moresby. The Shipping Manager of his Company there drove him about wherever he wanted to go, on one occasion, including the hospital, which is not far from the Bank. Tuesday, he spent at the home of the Wards - friends of his - and then later he was asked what he would have done if he had gone South during that week. He said he would have left the money with the Wards and that he was quite sure that it would have been banked. They were people he was living with before he went into hospital on the Wednesday. In fact, Mrs. Ward visited him in hospital, where he still had the money.

I find it quite impossible to believe that the accused was prevented, either by illness or lack of time, from banking moneys at Port Moresby, as he claims he wanted to do. He called, as a witness, Dr. O'Higgins, and Dr. O'Higgins gave evidence that on the Friday the accused had asked him if he might go to do some business in the township at Port Moresby on the following Saturday. Permission was granted. The accused was in conflict with this witness insofar as he said that he asked the Doctor for permission to go to the township to do banking. Even if the accused did say

"banking," I would not be prepared to accept that he intended banking the money, he had there, to the credit of the Club. He asked permission to go to the township to do some business. I do not propose to go through the reasons why the accused went into hospital; Dr. O'Higgins was of the opinion that he should go to Australia for treatment, and wanted him at the hospital for temporary treatment. That, I think, was the opinion of the local Doctor in September.

It is true that when, just before his arrest on the Saturday, at the end of that week, the accused, when asked by the Police about the moneys, said he was just going to bank them. It was Friday when the Police first rang the hospital, and it would not be unreasonable to gather from the evidence that on the Friday the accused knew that the Police in Port Moresby were interested in him. He, readily, handed over the money he had to the Police and, when he came back to Samarai, he readily offered to repay not only the difference between the £418. and £488., but certain other moneys which he, although denying any actual responsibility, regarded himself as morally bound to repay. It is clear that the accused would not have been able to do this from his own resources. He did have credit, he says, with his Company at this time - I think £140. That was not sufficient, and under cross-examination, he could not name any other source which would ~~prove~~ prove sufficient for the payment to the Club of all the moneys for which he was prepared to accept moral responsibility. He at first claimed there was another banking account available to him. An account which he said was kept under the name of the "Schol Syndicate," and he said that this Syndicate was a partnership of which he was one of three members. He also mentioned the manner in which drawings could be made from that account and, although in answer to the question of the learned Crown Prosecutor, he claimed that the business for which this account was kept was not exactly speculative, he agreed that its nature, nevertheless, was such that this account might be reduced in credit to nil at any time. The nature of the business has not been disclosed, but the accused further said that at the time when he came back from Port Moresby, he did not know what was its bank credit.

It may well be that the claims of that business led to the accused yielding to the temptation which I find he did. I do not know the nature of that business, but as another instance of how he seemed to regard the Club's financial affairs as something to be kept as his own, there is the evidence that he used two of the Club's books for entries of his own business. I do not know if it was the same business as the one conducted by the "Schol

Syndicate."

I am convinced beyond reasonable doubt that the accused stole the moneys as alleged from the Club, that he intended to use them at his own will, and that he intended permanently to deprive the Club and its members of all these moneys. I therefore convict him and find him guilty of the charge, as amended.

(SGD.) RUPERT OLLERENSHAW.

A.J.