

488A

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

CORAM : MINYEU, J.  
Monday  
12th August, 1968

at 1, 2, 5,  
6, 9, 12.

R.  
v.

JOHN JAMES POINTON AND ROBERT JAMES CONSTABLE

J U D G M E N T

The accused John James Pointon and Robert James Constable were arraigned before me on two charges - the first, that they being the servants of the Port Moresby Freezing Company conspired together to steal timber the property of the Port Moresby Freezing Company - in or about the month of March of this year; and the second that in or about the same month both being servants of the Port Moresby Freezing Company they stole a quantity of timber valued at approximately \$1200 the property of the Port Moresby Freezing Company. The latter charge refers to a sale of timber to a man named Luai Saleral.

I propose to deal first with the stealing charge for reasons which I hope will become apparent a little later and I propose also as far as I can to deal with the case of each accused man separately.

In March of this year the accused Pointon was the Acting Manager of the PMP Timber Yard and Joinery Works, and I will hereafter refer to this organization as the PMP Joinery. The Manager, one Bain, went on leave on the 29th February and Pointon who was employed actually in the Joinery Works and who was somewhat inexperienced in management was appointed to take his place. Pointon is a young man and was apparently well thought of by his superiors. The accused man Constable was at this time employed by the Joinery as a Maintenance Carpenter. That involved his doing maintenance carpentry work on houses and other buildings owned by the Port Moresby Freezing Company. He had been in business as a boat builder along with a partner but the business was apparently not entirely successful. It may be because of a shortage of capital but at any rate because he was unable to get his accounts in, or to get his money in, he gave up this business towards the end of last year and took employment early this year at the Company.

At the Joinery there was a timber yard where timber was stored and from which timber was sold to building contractors and the like and also a Joinery Works. Pointon on assuming his new duties was both responsible for the day to day management and control

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of sales from the timber yard and for the conduct of the Joinery operations. He had with him a clerk in the office named Rasmussen, who attended to such books and records as there were and also assisted with the selling and with the checking and despatch of timber to purchasers. There was also there one Nelson Petuelli who was responsible for dealing with loads for despatch and orders received. There was a driver, Wonda Konde, who was employed in driving the truck for the despatch of timber and I assume that there were other boys in the yard. So far as material the office system in use was this. When an order was placed by a customer who was allowed credit an order for the timber required was first made out in an order book, a book which had duplicate pages in it. The top copy of the order was sent or taken out to the yard where employees would assemble the timber on the order - that is, to the extent that it was in stock - and a tally sheet was prepared. This on completion of a particular load was returned to the office whereupon a delivery docket was made out and the load despatched accompanied by the delivery docket which I gather was expected to be signed by the consignee. Where the sale was for cash, the system seems to have been rather more rough and ready. The main thing seems to have been to make out a cash sales docket, this being done against the tally sheet, and the cash received against the amount appearing on the cash sales docket after the quantities and prices of timber had been calculated. At that point the order form seems to have been of no further use and from evidence, I think from Mr. Bain, the order books were eventually destroyed or got rid of, and the order books seem to have been of no real use in the accounting system of the Company.

Luigi Salerni is a contractor and builder in a small way. I take him to be an Italian. Apparently from time to time he bought timber for cash from the Joinery and he never had a credit account with the Company. At some time early this year and the evidence points to the time as being in late February or early March the accused Constable approached him whilst he was working on a job and asked him if he would like to get some "discount timber" or "good price timber" as he put it. At this time Salerni had tendered or was about to tender for the construction of some flats at Korobosea and in reply to Constable he said that if he was successful with his tender he would get in touch with him. He was successful and later he went to the Joinery where he saw Pointon. He gave Pointon the list of timber which he required and Pointon worked out the prices which he stated, that is Pointon stated, came to \$1580. Pointon then said to Salerni that he would give him a \$500 discount. Salerni ordered the timber and a short time afterwards Salerni came into the joinery and gave Pointon a cheque made out to cash for \$500. That cheque was dated the 21st March 1968 and was obviously made out by Salerni, in Salerni's

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handwriting and signed by him. I should add that Salerni was not present at the building site when any of the timber in question was delivered. Shortly afterwards Salerni, who is obviously no business man and equally obviously has a very limited command of the English language, came back Pointon and told him that he had been advised that he should not pay for purchases with a cash cheque. This was apparently because of some tax-related difficulty he might have found himself involved in. He had so he told Pointon stopped payment on the cheque, that is on the original cheque - Exhibit A - and he then asked Pointon to make out another cheque to replace it showing a named payee which Pointon did. Salerni signed this cheque and handed it to Pointon. Now that cheque is Exhibit B and it is a cheque for \$580 dated the 1st April 1968. This cheque was taken by Pointon and credited to his account. Later Salerni went to Pointon and a similar procedure was gone through - Pointon made out the cheque, I should add that the Exhibit B was payable to J. Pointon, and so was this later cheque. Salerni signed the cheque and handed it to Pointon. That cheque is dated the 11th April 1968 and was also credited to Pointon's account. And so as Salerni was concerned the transaction was completed.

Rasmussen saw several orders in the order book covering timber for Salerni and he stated, and I accept his evidence, that there were three large and two small orders. A large order he described as being about 10,000 super feet. These orders were in Pointon's handwriting. No tally sheets were brought in from the yard, or at any rate none that Rasmussen could discover, in respect of these orders and they were entered into no other book of account. Rasmussen's suspicions were aroused that timber was sold out of the yard and not being paid for, hence his check in the order book and his looking for the appropriate tally sheets. In addition Rasmussen saw loads going out ostensibly for Salerni. His estimate was that an amount of 12500 worth of timber went to Salerni but I have no means of checking the accuracy of this estimate. One further piece of evidence relating to Pointon was given by Rasmussen and that is that on one occasion he saw Pointon screw up a duplicate, that is the duplicate copy remaining in the order book which I have previously referred to, and throw it into the wastepaper basket. The order books in use during the relevant periods were produced to me and there are in all fourteen pages missing but there is no evidence to show who was responsible for their extraction nor of course any evidence to show what customers' names appeared on those orders save Rasmussen's evidence that he saw Salerni's name on a number of orders at some time, probably late in April, when Rasmussen was checking the Salerni transaction, no page was missing. Rasmussen further stated, that he sometimes saw Constable going out with the Salerni loads. Nelson Petrucci who is a road mechanist employed by the RMP and one of whose tasks at the relevant time was the supervising of the boys in the timber yard and to see that the tally sheets were in order gave evidence, which was not challenged, that on one occasion in March of this year he supervised the preparation of a timber order for Salerni. Both the accused were

present when Pointon gave him the order from the order book with Salerno's name on it. A tally sheet was made out for the order and when the timber loaded, he + Petuelli - went to Pointon for a delivery docket. Pointon said "it's alright" and did not give him a docket. He gave the tally sheet to Pointon. To review the evidence at this point there are undoubted deliveries of PWF timber to Salerno in March, the writing of the orders showing the timber as having been ordered by Salerno and payment for that timber by cheque, either made out to cash or to J. Pointon, such cheques being handed to Pointon and deposited by him in his bank account and credited to that account. There is evidence which I accept that at least one tally sheet was handed to him and that he destroyed at least one duplicate order form and that there were orders for the Salerno timber written in his handwriting at least one such order was handed by Pointon to Nelson to attend to. In my opinion this evidence can lead to no other conclusion than that Pointon intended to sell this timber on his own account and deprive PWF of it. As to that both his verbal admissions to Sub-Inspector Hodder when Hodder questioned him and asked him "why did Luigi Salerno give you a cheque" and when he said "I sold him some timber cheaply" and upon being asked, "did you get this money you received from Luigi Salerno ever go into the banking account of Port Moresby Freezing Company" to which he replied, "No, I got it and Bob Constable got some", and he further stated that the Company knew nothing about this transaction. I pause to note that that of course is not evidence against Constable, that statement. And his statement subsequently taken at the Police Station where he says, "On the 21st March 1966, \$1000 worth of timber was supplied to Luigi Salerno at Boroko. I think it was the same day but Luigi Salerno came into the Joinery Shop and handed me a cheque for \$1000 in payment for the timber delivered." and when you add these admissions to the evidence which I have already discussed the inference becomes to me irresistible.

Mr. Wood, who appeared for Pointon, urged upon me that even if I accepted that evidence, which I do, what Pointon stole was not the timber but the money received in payment therefor. In my opinion this is not so. From the outset in my judgment Pointon intended to convert the actual timber which he sold to Salerno to his own use or to the use of Salerno and when he directed the timber to be assembled and transported to the place designated by Salerno and the timber at his instigation left the PWF Yard he brought himself in my opinion within the four corners of Section 391 of the Criminal Code.

The case against Constable stands on a somewhat different footing. There is no admissible evidence against him that he received any of the proceeds of the sale of this particular timber, nor that he had any knowledge of the total quantity of timber stolen, that is in relation to Salerno. However as a good deal may turn on the view I take of the credibility of the accused Constable and for that matter of the police officers in this case I think it desirable before discussing either this or the other charge against him that I should state my views. Constable gave evidence on oath in deal

of both charges and I must say he gave that evidence plausibly and well. He was cross-examined at length, assiduously and skilfully, without his explanation of innocence in a number of allegedly fraudulent transactions having been dented in any appreciable degree. He has a personable demeanour and is possessed of undoubted intelligence. However on every material point his evidence conflicted with that of Sub-Inspectors Hodder and Fitzgibbon who were handling the investigation into this and allied matters. Where they said he had made a number of admissions he claimed to have made no such admissions and indeed to have given explanations of a number of transactions which went to completely establish his innocence. Further he stated that on three occasions, one at the outset, once during the questioning and finally upon being asked to make a statement, he requested that he be allowed to get in touch with his solicitor. He also stated that he had asked to see a senior officer to make such a request. The Crown case had of course concluded when he was giving his evidence and no questions had been asked of the police officers about this matter. This may have arisen (although it is not now material to make any finding on the matter) because of the somewhat peculiar nature of this trial and because of Mr. Andrews' view that the matter could well have been further investigated on the voir dire which in his view was being held within the trial.

I allowed the two Sub-Inspectors to be recalled and also allowed Superintendent Beattie to be called, he being the senior officer who was concerned in this matter. In the result I am satisfied that where Constable's evidence conflicts on material matters with that of the police officers he is not to be believed. Both Hodder and Fitzgibbon went far to convince me that the accused Constable's main initial concern was that if he made a statement people whom he might mention therein should not be prosecuted. He was seeking some sort of guarantee to this effect. My inclination became conviction when I heard what Superintendent Beattie had to say. Although none of the police officers made a contemporary note of this initial request or the circumstances surrounding its making, and although Superintendent Beattie had obviously only been asked to recall the incident a short time before being called to give evidence, I am satisfied of the substantial accuracy of the latter's recollection and accept his version of events; namely, that the accused - that is Constable - appeared to be upset, that he said that other persons were not going to be named by him because he felt that if there was any trouble he should accept the trouble himself; and I accept that Superintendent Beattie told him that it was not up to him (Beattie) as to whether Constable said anything, that if he provided any evidence such evidence would have to be brought before the Court. And I accept Superintendent Beattie's positive assertion that at no stage was any request made to him by Constable that he see a solicitor. And I am satisfied that Constable's testimony that he had from the outset of his interrogation asked for a solicitor was an afterthought deliberately and untruthfully introduced to add verisimilitude to what I became convinced was an untruthful account of his timber selling transactions. I should also add that McClune was

stated by Constable to be now in Port Moresby and if Constable's story of the transaction leading to the payment by McLune to him of a cheque for \$638 were true, that story should have been easily capable of corroboration.

How then does the case stand against Constable? I find these facts. Constable came to Salerni asking him did he want some cheap timber. I have no credible evidence that at this time Constable had any of his own timber left for sale, that is timber stocks still remaining in his hands after the termination of his business. Following on this conversation Salerni came to Pointon at the premises of the PAF - that is at the joinery - and ordered timber on which he was told he was being allowed a 5000 discount. He believed he was ordering the timber from PAF. Constable was present when Pointon handed Nelson an order for timber to be assembled and delivered to Salerni. Constable went with at least one load of this timber to Salerni's building site. Sub-Inspector Hodder's version of the conversation dealing with the Salerni transaction is that Sub-Inspector Fitzgibbon said to Constable in his presence - this is at the Central Police Station at Boroko - "Very serious allegations have been made regarding the theft of timber from the PAF Joinery Shop, Badili, involving yourself and another man by the name of Pointon." Hodder said he then warned him and went on to relate Fitzgibbon's question: "It has also been alleged that you sold some timber to a man by the name of Luigi Salerni, is this correct", to which Constable replied, "Yes, about 1250 worth" and then went on to deny that he had himself received any moneys from the sale of this timber and to express a lack of knowledge as to whether any proceeds from this timber had gone into the PAF accounting system. Again there is an admission by him to Fitzgibbon, according to Hodder's recollection, that he had a conversation with Pointon after Bain went on leave regarding the selling of Port Moresby Freezing Company timber to various persons in Port Moresby and keeping the proceeds of this sale for themselves (Pointon and Constable), this being done without the prior knowledge or consent of their superior officers. I have also Fitzgibbon's evidence which is substantially to the same effect as Hodder's concerning the initial conversation. And I add to that the admission which I accept as having been made that on the occasion of a visit of one McLune to the joinery he (Constable) and Pointon had agreed to sell PAF timber and keep the proceeds. The versions of the police officers differ somewhat in detail but in my opinion this is brought about in part by a certain confusion in the Crown case. Hodder was in charge of a particular investigation and it was he who questioned Pointon in the first place. Apparently he deputed the questioning of Constable to Fitzgibbon. Both officers are young and neither could be classed as experienced in criminal investigation. There were a number of unauthorized timber transactions which had to be investigated and Salerni's was the first dealt with. It was as it were the opening gambit. The account of both Hodder and Fitzgibbon as to the verbal remarks - or as to the initial remarks - is substantially the same, and I am satisfied that at any rate as regards one load of timber Constable, who had offered cheap timber

in the first place to Salerni took an active part in the delivery of that load, knew that he was assisting Poynton in converting timber belonging to M & F to the use of some person other than M & F and that the proceeds of sale of that timber were to go to some person other than M & F. On his own admission this was part of a series of transactions in which M & F timber was to be sold to various persons and the proceeds kept for either or both of himself and Poynton.

These being my findings it follows that Constable took an integral part in the theft of at least one load of timber although I cannot be satisfied beyond reasonable doubt that he played any personal part in the full amount of timber delivered to Salerni. Accordingly I find that with Poynton, Constable was guilty of stealing - of stealing some timber from the M & F Joinery.

That disposes of the second count, and now I pass to the first count.

In my opinion the circumstances which I have found surrounding the Salerni transaction are such as to bring me to the conclusion that Constable and Poynton conspired together to steal this timber. No other construction seems possible. This conclusion is sufficient for a finding of guilt on the first count.

But this case has been so bedevilled and confused by an attempt on the part of the Crown to prove some wider and larger conspiracy that I feel I should say something about it. According to the statement made and signed by Poynton, Constable approached him a couple of days after Bain went on leave and suggested to him that he supply timber to different people around town without putting the record through the books and that the two of them would go halves in the profits. According to Poynton's statement he was undecided about this - he didn't say no, nor did he say yes - and a couple of days later again Constable approached him and suggested the same thing to which suggestion this time he expressed agreement but as he said, "only in small amounts and only to M & F Constructions." Then follows his version of a series of transactions from which it might be inferred that Constable was conducting a number of transactions with M & F Constructions on his own account, and that he, Poynton, indulged in a private deal with M & F Constructions relative to the making of some cupboards and kitchen fittings. From the statement it is very difficult to conclude how far Poynton was intending to involve Constable in the detailed transactions. From some material in the statement it does appear as if Poynton was unaware of some of Constable's transactions. Poynton did not give evidence and none of the matters contained in his statement was admissible as against Constable. Indeed a good deal of it seems to have been inadmissible against Poynton himself on either of these charges with which he is facing the Court unless and until I could find a conspiracy proved which would allow the admission of statements by him which may conceivably be accepted or adopted by Constable and then show the extent or the ambit of the agreement made between them. Constable as I have earlier stated gave evidence in denial of any

conspiracy. Apart from admissions made by him and apart from his part as I have found it to be in the Salerni transaction there is at most some tenuous evidence connecting him with any conspiracy. Early in this trial I asked the learned Crown Prosecutor if he would indicate with more precision what the conspiracy was and he stated it to be to steal such timber from PMF as Pointon and Constable were able. When testifying as to the admissions made by Constable, Sub-Inspector Hodder relying on a narrative account rather than on direct speech stated that Pointon and Constable had this conversation to which I have already referred regarding the selling of Port Moresby Breeding Company timber to various persons in Port Moresby and keeping the proceeds of these sales for themselves. And then followed a narration by Constable of a number of transactions which is equally open to the construction that these were ventures by Constable on his own behalf as to the construction that they were in pursuance of some agreement between himself and Pointon. Fitzgibbon on the other hand had a somewhat different version of a number of admissions by Constable. None of these of course were evidence against Pointon. I do not attribute any great significance to the remarks made by Constable or alleged to be made by Constable at the end of his statement that he was as much in this as Pointon and he shared the blame. That could well be the product of the upset which he earlier displayed when in the presence of Superintendent Beattie. But there remains the situation in which Pointon is saying that Constable came to him and suggested a fraudulent course of conduct and Constable is saying that it was Pointon who came to him with a similar suggestion. It may be that the real agreement was that each would direct a blind eye to what the other was doing and there seems to be a lot of internal evidence in the admissions made to lead to the adoption of that view. At most based on each man's admissions there can be deduced an agreement to steal some timber and in some way share the proceeds but I would not be prepared to find in any detail how far that agreement extended or what timber it covered. I understand that each man is facing charges in relation to the timber admittedly sold by him and I am afraid that I still cannot see the point of spending a week in considering this charge of conspiracy. However in the result there must be a verdict of guilty against each man on each count.

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Solicitor for the Crown : S.H. Johnson, Crown Solicitor.  
Solicitors for the accused: R. Wood, Esq. (for Pointon)  
J. Andrews, Esq. (for Constable).