POLICE v IOSEFA (MISA AKERIPA) AND SAO (ANETEROSA)

Supreme Court Apia
22, 23 March; 11, 12 April; 1 May 1978
Nicholson CJ

CRIMINAL LAW (Evidence) - Confessions (Admissibility) - s 18 Evidence Ordinance 1961 - Branch manager and assistant branch manager charged jointly with theft from the Company - Verbal admissions made to regional Manager of Company and later written statements signed by both admitting the theft and setting out their understanding the matter would not be reported to the Police if restitution in full made by a set date - Evidence proving regional Manager had first enquired as to prospects of restitution and one of accused had suggested that if no charges were laid they would be able to repay the money - Judge satisfied means by which confessions obtained not likely to cause an untrue admission of guilt and accordingly admitting statements.

(Offences) - Theft (Information) - Two accused charged jointly as servants of a certain Company with theft of $9,664.02 in their possession as such servants, being the property of the Company - Charge held properly laid under s 85 of the Crimes Ordinance 1961 which creates the offence of theft - Fraudulent or dishonest dealings with property held under an obligation as defined by s 88 of the Ordinance are "deemed to be theft" and it is not necessary to lay a charge under s 88.

- Joint charge -

Proof - Accused proved to have been in joint possession of the funds stolen although each had a separate area of responsibility - Each was proved to have been well aware of what the other was doing.

PROSECUTION for theft contrary to s 85 of the Crimes Ordinance 1961.

Cruickshank for prosecution.
Epati for first defendant.
Va'ai for second defendant.

Cur adv vult

NICHOLSON CJ. The two accused are charged jointly that between 1st July, 1976 and 7th July, 1977 at Salelologa, being servants of Morris Hedstrom Limited, they did steal $9,664.02 in money in their possession as servants of the Company, being the property of the Company. In the alternative, accused 1 Misa is charged separately with theft of $5,700.00, and accused 2 Aneterosa $6,861.02.

The prosecution case shows that on 6th July, 1977 the accused 1, Misa Akeripa Iosefa, was employed by the complainant Company as Manager of the Savai'i branch at Salelologa Village, and the accused 2 Aneterosa Sao was employed as Assistant Manager. The branch was involved both in retail trade and in the purchase of produce, mainly copra and cocoa, from growers. The Company usually relied upon the takings of the retail

side of the business to provide sufficient cash to meet the needs of its purchases of produce. Against the event of the retail takings in hand not being sufficient to finance produce purchases, the Manager maintained a float of $7,000.00 as an emergency. The Manager had his own safe in which he kept (a) his float of $7,000.00, and (b) the proceeds of retail trading ready for banking.

The Assistant Manager was responsible for the book-keeping of the branch and for doing the banking. He would collect takings from the store cashier and after entry of takings and payments out to sellers of produce, he would transfer the surplus cash, (as there usually was a surplus), to the Manager's cash account in the Manager's safe ready for banking.

Banking facilities were available at Salelologa normally once each week. If during the trading day a shortage of cash was experienced by the cashier, the Assistant Manager would prepare a cash voucher and lodge that with the Manager in his cash account, or his float against cash withdrawn to pay to the cashier.

The Assistant Manager also maintained a safe for funds held by him pending entries in the cash book and transfer to the Manager's cash account. All payments of cash by the Company, whether to growers for produce or for transfer of funds between the Manager and Assistant Manager were supported by cash vouchers, which were signed by the recipient of the cash. The Manager did a monthly check of the cash book, which he initialled, and he also initialled all entries of cash transfers in the cash book made to his cash account.

On that date, the 6th July, 1977 officers of the main Samoa Office of the Company in Apia sent a message to the accused 1 informing him of a proposed inspection of accounts and property at the Salelologa branch on the following day, the 7th of, July.

That same evening at about 5 p.m. the two accused came in a Company vehicle to the home of Anuilagi Ainu'u Tasi, the Post Mistress at Salelologa, after work. Accused 2 remained in the vehicle while accused 1 approached the witness and asked if she had any money, "which he could use for payment of cocoa in his Company". He asked for $4,000.00 or more, but the witness was able to give him only $2,900.00 in cash, which was the proceeds of the sale of her vehicle, and she did so on accused 1's assurance that he would repay it the following day.

Next day, she went to accused 1 and asked for the return of the cash and he asked her to wait until the auditors had returned to Apia. When she again approached him, he explained the money was now included in the Company audit, but that she would get it back some day. In fact, accused 1 never returned the cash.

Aita Ah Wa, a businessman at Salelologa, said that the two accused approached him together on 5th July, 1977 after 9 p.m. and told him they needed financial help because of their auditing on the following day. The two accused asked for $5,000.00, and since the witness had no cash, he offered them a cheque. At their request, he made out two cheques, dated 5th and 6th July, 1977 each for $2,500. He said they promised to return the cheques after the auditing, but in fact they did not do so.

Other prosecution evidence shows that Aita stopped payment on those cheques and that in fact the incident that Aita described occurred on 6th July and not the 5th as he said.

On the morning of 7th July, 1977 Mr McMurchy and Su'a Latu arrived at Salelologa to conduct the inspection. Mr McMurchy, who is no longer in the country, conducted a check of cash and Su'a Latu joined him later to find him in the company of the two accused. At this stage, it was found that the Manager's cash account maintained by accused 1 and amounting at that stage to $5,629.04 included the two cheques from Aita Ah Wa, and that a series of cash vouchers totalling $3,015.00 had been credited twice, i.e., once through the cash book and once to the Manager's float with the result that the float was effectively short of $3,015.00. Moreover, the cash voucher representing the $5,629.04 was dated 4th July, 1977 while it had been posted in the cash book on 2 July, 1977, and the two cheques included in that sum were dated the 5th and 6th. The cash box of accused 2 was checked and $1,211.36 was

counted therein.

Afa Lesa, an auditor, told the Court that on 14th July, 1977 he conducted an audit and found that for the period July, 1976 (the beginning of the Company's financial year) to 7th July, 1977 a shortage in the banking of $1,648.80 had occurred. In total, Afa Lesa found a shortage of $9,664.02 cash made up of -

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|---|---|---|
| (1) | short-bankings | $1,648.80 |
| (2) | duplicate crediting of cash vouchers | 3,015.00 |
| (3) | the two dishonoured cheques of Aita Ah Wa | 5,000.00 |
| | | $9,664.02 |

It should be remembered that while accused 1 was employed as Manager throughout the period of the short banking, accused 2 was not employed at the branch until 2nd September, 1976.

Accused 2 when confronted with the double credit of cash vouchers on 7th July in the presence of accused 1 said nothing. He did not dispute that allegation. Su'a Latu told the Court that, from his wide experience in accounting work in the Company and particularly in this branch, he formed the opinion that the double crediting of the cash vouchers for $3,015.00 was done to cover a shortage in the accounts of that sum.

The two accused were summoned to the office of the Manager for Western Samoa, Mr William Keil, on 9th July, 1977. Mr Keil referred to the shortages, administered a strong rebuke, and questioned them about their responsibility for the shortages and the prospects of repayment. Accused 1 admitted taking money, but accused 2 denied taking it himself, but acknowledged responsibility for allowing accused 1 to take money without recording such payments.

As a result of this discussion, the two accused signed a document, which I quote in full.

"A P I A,

9th July, 1977.

The Manager,
Morris Hedstrom Limited,
A P I A.

Dear Sir:

This will confirm our discussions today where we admitted to you, in the presence of Mr Graham McMurchy, accountant for Morris Hedstrom Limited, to the misappropriation of funds, belonging to the Company's Salelologa Branch, totalling $12,564.02.

Through our actions, we have been dismissed from the Company's services as from today, 9th July, 1977.

We understand that the matter will not be reported to the Police provided that restitution is made in full by 4 p.m. Thursday, 14th July, 1977. If not, the matter will then be placed in the hands of the Police.

signed by M.A. Iosefa 9/7/77
Misa Akeripa Iosefa Date

signed by Aneterosa Sao 9/7/77
Aneterosa Sao Date

In the presence of:

.....McMurchy.....Accountant, Morris Hedstrom Ltd

.....W. Keil.....Agreed by Manager, Morris Hedstrom Limited

I, Misa Akeripa Iosefa admitted taking the sum of $5,700.....M.A. Iosefa.....
sgd.

I, Aneterosa Sao, will be responsible for payment of $6,864.02.....Aneterosa Sao.....
sgd."

In addition, accused 2 signed a second document giving his pick-up to the Company as security for his portion of the shortage and authorising the Company to sell it to reduce that shortage. The evidence is unclear as to how those respective sums were assigned to each accused, but it is noteworthy that the total of those sums, $12,564.00, coincides with the sum of $9,664.00 confirmed by the auditor together with the $2,900 loaned by Anuilagi.

On 11th August, 1977 accused 2 made a written statement to the Police in which he said that accused 1 had alone collected the cheques from Ah Wa. He said accused 1 told him it was money to cover up a shortage in the float for which he was responsible. When the $2,900.00 was collected from Anuilagi accused 1 told him that sum was also to fill a shortage in the cash float. He handed over the twice-credited cash vouchers to accused 1 to help him balance his cash shortage, on accused 1's instructions. He placed full responsibility for the shortages on accused 1.

On 24th August, 1977 accused 1 made a written statement in which he stated accused 2 had told him in May, 1977 of a shortage in his cash sales takings which he expected to repay from savings he held. When the warning came on 6th July, 1977 of a check on 7th July, 1977 he questioned accused 2 and found he still had a shortage. He and accused 2 then went to Anuilagi and Ah Wa to obtain funds temporarily to cover up the shortage during the check. He said that as part of the scheme he asked accused 2 to hand him any cash vouchers not entered in the cash book yet to hold in his float against money he handed over to cover other vouchers entered in the cash book. He did not realise that the vouchers given him had been entered in the cash book.

The prosecution adduced evidence that eighteen personal cheques of accused 2 were found in his drawer at the branch premises all dated in March, 1977 and totalling $552.10. They almost all bore the Company crossing and initialling of accused 2, which suggested they had been cashed at the Company's store. However, none of these cheques appear in the banking records of the Company.

The accused 1 gave evidence denying theft and explained that he knew nothing of accounting. He said that when he told accused 2 on 6th July, 1977 of the impending check, accused 2 told him he had a shortage in his cash sales money of $9,000.00. Later, in cross-examination he said the figure was $10,000.00. He explained that out of pity for accused 2 as well as from fear of the consequences of such a large shortage, he took accused 2 with him to raise money from Ah Wa and Anuilagi as they described. The transfer of the $5,629.04 was actually only made to his Manager's cash account on the night before the check. He acknowledged exchanging some cash vouchers in his accounts which he found had also been entered by accused 2 in his cash book for other cash vouchers, which accused 2 assured him had not been so entered. Only during the check next day did he realise that they too had been entered in the cash book. Accused 1 denied admitting theft to Mr Keil. He said Mr Keil asked them to repay the shortage and accused 1 replied, "that if nothing else would happen to us or would be brought against us, then we can repay the amount." Later, in evidence, he said he signed the admission because he was afraid his family would be stranded on Savai'i

and that he would be locked up. He did not read the statement and could not explain how he agreed to taking $5,700.00 in particular.

Accused 2 in his evidence placed the entire responsibility for the shortage on accused 1. He denied telling accused 1 his cash was short on 6th July, 1977. He said he did go with accused 1 to Anuilagi's place and waited outside in the vehicle. He said accused 1 told him he was "going to get the money." He denied that he jointly received the two cheques from Ah Wa. He said accused 1 received them and handled them. He denied doing anything himself with Anuilagi's cash or Ah Wa's cheques.

He agreed to sign the admission in Mr Keil's presence because he believed that the Company would re-audit his books. He said he agreed to sell his pick-up to help pay for the shortage because of the threat by Mr Keil to report the matter to the Police, which would embarrass him as an ex-Police officer.

He explained that he had entered the cash voucher dated 4th July, 1977 relating to the transfer of $5,629.04 in the cash book on 2nd July, 1977 simply to save time. He denied handing over the two Ah Wa cheques with that cash voucher to accused 1. He denied that the transfer was on the night before the check, saying it occurred on 4th July, 1977 and that it was an all cash transfer. Although he refused to say as much, accused 2 by inference was suggesting that accused 1 took $5,000.00 in cash from his Manager's cash account some time between 4th and 6th July, 1977. Accused 2 on the subject of the eighteen personal cheques found in his desk drawer, explained that he had originally bought Company goods with these cheques but withdrew the cheques and paid cash for the purchases as he was unsure whether he had sufficient funds to meet the cheques.

Defence counsel submitted that because two deposit slips were made out and acknowledged by the bank on 31st December, 1976 each for approximately $14,500.00, there was in fact no shortage. I am satisfied from the detailed evidence that was given by prosecution witnesses on this aspect, that both slips represent the same deposit, the second deposit slip having been made out simply to correct exchange rates on certain foreign currency banked.

Defence counsel both submitted that the admissions made and signed before Mr Keil were inadmissible as made to persons in a superior position. Certainly, the common law authorities show that a confession made as the result of inducement held out by persons in authority such as employers may be inadmissible. But the situation here is different. To begin with, I am satisfied that the question of reporting to the Police arose from accused 1's suggestion rather than Mr Keil's. But leaving that aside, I think the position is governed by Section 18 of the Evidence Ordinance 1961 which provides:-

> A confession tendered in evidence in any criminal proceeding shall not be rejected on the ground that a promise or threat or any other inducement (not being the exercise of violence or force or other form of compulsion) has been held out to or exercised upon the person confessing, if the judge is satisfied that the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made.

The terms of the written admission clearly amount to a confession insofar as accused 1 is concerned. As to the accused 2 he admitted misappropriation of funds and undertook to be responsible for repayment of certain funds. Mr Keil said the document was drafted that way because accused 2 denied using the money himself, but acknowledged he had been a party to accused 1 taking cash without accused 2 recording it. In all the circumstances, I conclude that the document and accused 2's verbal admission to Mr Keil amount to a confession by accused 2, in terms of Section 18 of the Evidence Ordinance 1961.

I find that the means by which these confessions were obtained were not likely to cause an untrue admission of guilt. The confessions are therefore admissible.

There was a great deal of other detailed evidence adduced, but the evidence I have mentioned is the really relevant evidence to the charges.

I accept the prosecution evidence as true. Ah Wa is in the category of an accomplice since he was knowingly joining in a cover-up for audit purposes, but his general account is corroborated by the cheques themselves as well as the admissions of the two accused that the cheques were obtained from him. I accept his evidence and I find that both accused made the approach to him for the cheques, as he said.

I accept, too, Mr Keil's account of the sequence of events surrounding the signing of the admissions by the two accused. I find that while Mr Keil did first raise the question of repayment, it was accused 1 who first suggested repayment on condition no charges would be brought against them as I have already indicated. I reject therefore the suggestion that Mr Keil threatened them with the possibility of reporting to the Police to induce their signing of the admissions. I am satisfied that there was in fact a total shortage of $12,564.02 revealed by the evidence if one takes into account the $2,900.00 in cash paid over by Anuilagi, which sum I infer in all the circumstances, was paid into the Company's funds on 6th July, 1977.

I reject the evidence of accused 1 as untrue, in the light of the prosecution evidence. I find accused 1 lied when he denied that he admitted to Mr Keil that he had taken $5,700.00, that he lied when he said he sought funds from Anuilagi and Ah Wa out of pity for accused 2. I find he lied in denying any knowledge of the accounting procedures involved. Finally, I am satisfied he lied as to the reasons he gave for signing the admission before Mr Keil.

As to accused 2 I reject his evidence. I find he lied in his explanation for the premature dating of the cash voucher for $5,629.04, that he lied in denying he jointly with accused 1 asked Ah Wa for funds for the audit cover-up, that he lied as to the reasons he gave for signing the admission. Finally, I reject his explanation for the presence of his personal cheques in his desk. I further conclude from the checking and banking system in use at the Salelologa branch that neither of the two accused could have concealed from the other for any length of time any substantial shortages in the banking or the Manager's cash account. I draw the inference that both accused misappropriated funds to their own use and were forced into the panicky measures described in the evidence when they became aware that the spot check was going to occur on 7th July, 1977.

It should be noted that the shortage in banking of $1,648.80 is calculated from 1st July, 1976 while accused 2 did not assume responsibility for the banking until early September, 1976. As the evidence was presented, it is not possible for me to assign that shortage, or any particular part of it, to the period September, 1976 to 7th July, 1977. I conclude therefore that the prosecution has failed to establish accused 2's responsibility for this shortage, although I find accused 1's responsibility for it proved.

I turn to the charges themselves. The first charge is laid jointly against the two accused that they did steal $9,664.02 as servants contrary to Section 85 of the Crimes Ordinance 1961. Thus the prosecution was required to prove and did prove that the money stolen was in the possession of the two accused as servants of the Company, in the sense that while both had separate areas of responsibility for different portions of the funds, they were on my finding each well aware of what the other was doing with the funds they held. As I have already indicated, the prosecution only charged the two accused for $9,664.02, but proved a shortage of $12,564.02 in fact. But, on the other hand, I am not satisfied that the banking shortage of $1,648.80 has been proved as against accused 2. In balance, therefore, I find the prosecution has still proved against both accused a shortage of at least $9,664.02.

Now both defence counsel have submitted that the charge should have been laid under Section 88 of the Crimes Ordinance 1961, rather than Section 85. I conclude that argument is based upon a misconception of the effect of Section 88. Section 85 contains the familiar definition of theft, and Section 88 merely extends that definition. It begins, "Without in any way limiting the generality of the foregoing definition of theft, every person shall be deemed guilty of theft who . . . ." There then follows a description of dealing dishonestly with property

held under an obligation. The important words are "deemed to be guilty of theft", i.e., guilty of an offence under Section 85. It is not necessary to charge a person with an offence contrary to Section 88. The offence is created by Section 85 and the behaviour described in Section 88 is deemed to be included in that offence. I find both accused guilty on the first charge. I therefore make no finding in relation to the two alternative charges laid.