IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

S. 548/95 - 555/95

BETWEEN: THE POLICE

Informant

A N D: LAKI SCHUSTER of Vaimoso

Defendant

Counsel: P Tanielu for prosecution
T K Enari for accused

Hearing: 6 & 7 May 1996

Judgment: 17 May 1996

JUDGMENT OF SAPOLU, CJ

There are before the Court eight charges of theft as a servant against the accused under sections 85 and 86(1)(g) of the Crimes Ordinance 1961. Section 85 insofar as relevant provides :

> "(1) Theft or stealing is the act of fraudulently or dishonestly "taking or converting to the use of any person, anything capable "of being stolen, with intent -
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> " (a) to deprive the owner or any person having any " property or interest therein permanently of such " thing or of such property or interest".

Section 86(1)(g) then provides :

"Every one who commits theft is liable to imprisonment for a term "not exceeding seven years if the property stolen is anything "stolen by a servant which belongs to or is in the possession of "his employer".

Of the eight charges against the accused, charge S.555/95 has been dismissed for there is no evidence to establish a prima facie case with respect to that charge. That means there are now only seven charges remaining against the accused.

The accused was at the material times employed by the Congregational Christian Church of Samoa (hereinafter referred to as "the Church") as its chief accountant. He was appointed to that post in August 1993 by the finance committee of the Church and he held that post until he left the service of the Church about the end of August 1994. In his terms of appointment the accused was paid an annual salary of $20,000 and an annual travelling allowance of $2,000. According to the accused in his oral testimony his nett fortnightly salary was $544.94 and his travelling allowance was for local travel.

Now the procedure of the Church with regard to the signing of its cheques for payment is that any two persons of the Church's general secretary, treasurer and chief accountant may sign a cheque to make it valid for payment. It was also the practice of the Church that when a cheque was submitted for signing, a voucher was attached to the cheque giving an explanation of the purpose of the payment to be made with the cheque. What the accused has been charged with are salary double payments and travelling allowance overpayments that were made to him with Church cheques from January 1994 to August 1994.

I will deal first with the salary double payments and then with the travelling allowance overpayments. Employees of the Church are paid on a fortnightly basis. At the material times the payrolls and paysheets were prepared by the cashier at the accounts section. Some of the Church employees had their fortnightly salaries paid directly to them but most of the employees had their fortnightly salaries paid into their accounts at the Bank of Western Samoa (hereinafter referred as "the bank"). The accused was one of the employees whose fortnightly salary was paid into his account at the bank. One of his responsibilities as chief accountant was to check the payrolls, the paysheets and the cash payments journal which should record all payments made by the Church to see that all the entries in those documents were correct.

What happened here was that for four fortnightly pay periods the accused paid to himself by four separate Church cheques his salaries for those four pay periods while at the same time the cashier who was preparing the payrolls and paysheets was paying the accused's salaries for the same pay periods into the accused's account at the bank. According to the cashier's oral testimony which I accept, the chief accountant did not inform her and she was not aware that for the four pay periods in question the accused had already drawn Church cheques for his salaries for those pay periods and that was the reason why she continued to pay the accused's fortnightly salaries for the same pay periods into his account at the bank. The details of what happened are as follows.

On 15 April 1994 the accused prepared a voucher for payment of the sum of $544.94 for his salary for the fortnightly pay period ending on 18 April 1994.

The voucher was then attached to a Church cheque prepared by the accused for the same amount. The voucher and the cheque were then given to the treasurer of the Church who signed the cheque. The accused also signed the cheque but it is not clear whether he signed before or after the treasurer had signed. With the treasurer's and the accused's signatures on the cheque, the cheque was valid for payment. From the bank stamp on the cheque and other evidence, it is clear that the cheque was presented the same day, 15 April, to the bank and cashed. For the same pay period ending on 18 April 1994, the cashier without knowing of the salary payment already made to the accused on 15 April entered the accused's salary in the paysheets and payrolls for that period and the accused's salary was paid into his account at the bank. So what happened was that the accused's salary for the fortnightly pay period ending on 18 April 1994 was being paid twice.

Then on 13 May 1994 the accused again prepared a voucher for payment of the sum of $544.94 for his salary for the fortnightly pay period ending on 16 May 1994. That voucher was then attached to a Church cheque prepared by the accused for the same amount. The voucher and the cheque were then given to the treasurer of the Church who signed the cheque. The accused also signed the cheque but again it is not clear whether he signed before or after the treasurer had signed. The cheque was presented the same day, 13 May, to the bank and appears to have been cashed on that day. Again for the same pay period ending on 16 May 1994, the cashier without knowing of the salary payment already made to the accused on 13 May, entered the accused's salary in the paysheets and payrolls and the accused's salary was paid into his account at the bank. So the accused's salary

for the fortnightly pay period ending on 16 May 1994 was being paid twice.

On 20 June 1994, the accused again prepared another voucher for payment of the sum of $544.94 for his salary for the fortnightly pay period ending on 27 June 1994. That voucher was also attached to another Church cheque for the same amount and given to the treasurer who signed the cheque. The accused's signature also appears on the cheque and the same day, 20 June, the cheque was presented to the bank and paid. Again the cashier who was not aware of the salary payment already made to the accused on 20 June, entered the accused's salary in the paysheets and payrolls for pay period ending on 27 June and the accused's salary for that period was paid into his account at the bank. So again the accused was being paid twice for the same pay period ending on 27 June 1994.

Then on 9 August 1994, the accused prepared another voucher for payment of the sum of $544.00 for his salary for the fortnightly pay period ending on 22 August 1994. That voucher was also attached to a Church cheque prepared by the accused and were given to the treasurer who signed the cheque. The accused's signature is also on the cheque. The cheque was presented the same day, 9 August, to the bank and was cashed. Again the cashier who was not aware of the salary payment already made to the accused on 9 August, entered the accused's salary for the same fortnightly pay period ending on 22 August 1994 in the paysheets and payrolls so that the accused's salary was paid into his account at the bank. So the accused's salary for fortnightly pay period ending on 22 August 1994 was again being paid twice.

In his oral testimony, the treasurer admitted to signing the cheques given to him by the accused in April, May, June and August 1994. But he said he signed those cheques because he trusted the accused being the chief accountant of the Church. He also said that he believed that the cheques were in order and nothing wrong was being done. After considering the treasurer's evidence and having observed his demeanour in the witness stand, I accept his testimony as truthful. However, I am also of the view that he should have informed the people in the accounts section who prepared the paysheets and payrolls of the salary payments which were already paid to the accused as already referred to. To leave matters concerning money on one's trust of another can be dangerous and lead to costly consequences as it has happened in this case.

The testimony by the cashier, which I also accept, is that when she prepared the paysheets and payrolls for the fortnightly pay periods in question, she was not aware that the accused had already being paid his salary for those pay periods with cheques he had given to the treasurer with accompanying vouchers for salary payments. Neither the treasurer nor the accused informed her of those payments. As a result she entered the accused's salaries for the pay periods in question in the paysheets and payrolls for those pay periods and the accused was paid his salary twice for each of those pay periods. She further testified that she never saw the vouchers prepared by the accused for payments of his salary. She also stated that the paysheets were supposed to be certified by the treasurer or the accused as chief accountant but no such certification was done.

The oral testimony by the senior accounts clerk is that the normal

procedure is for him to prepare vouchers for payment by the Church on instructions from the treasurer or chief accountant. So for the accused to prepare the vouchers for payment of his own salaries was not in accordance with normal procedure.

There was also evidence given in this case that members of the Church staff may apply to the treasurer or chief accountant for salary advances when they have any 'faalavelave'. I do not, however, find anything in the vouchers and cheques prepared by the accused and co-signed by himself and the treasurer for separate payments of the accused's salary, to suggest that those payments were for salary advances. The words 'advance' or 'salary advance' do not appear in any of the vouchers. The clear impression from the vouchers is that the payments were simply for salary.

With regard to travelling allowance, the accused was entitled to $2,000 per annum. But that travelling allowance was for local travel. On 4 January 1994, the accused prepared a voucher for the amount of $1,000 for payment of his travelling allowance. He also prepared a Church cheque for the same amount. The cheque and voucher were then given to the treasurer who signed the cheque. The accused's signature is also on that cheque. The cheque was presented to the bank the same day and was paid. On 24 January 1994, the accused again prepared another voucher for the sum of $1,000 for payment of his travelling allowance. He also prepared a cheque for the same amount. That cheque and voucher were given to the general secretary of the Church who signed the cheque. The accused's signature is also on the cheque. The cheque was cashed at the bank the

same day, 24 January.

On 25 January 1994 the accused again prepared another voucher for the sum of $1,000 for payment of his travelling allowance. He also prepared a church cheque for the same amount and gave the cheque and voucher to the treasurer who signed the cheque. The accused also signed the cheque. That cheque was also cashed at the bank the same day, 25 March. Then on 26 July 1994 the accused again prepared another voucher for $400 and a cheque for the same amount for payment of his travelling allowance. That cheque was signed by the general secretary of the Church. The accused's signature is also on the cheque.

In all the total amount of travelling allowances paid to the accused from January 1994 to August 1994 was $4,400, which amount exceeded his total annual travelling allowance of $2,000 by $2,400. In his oral testimony, the accused admitted that he was also paid $400 in December 1993 for his travelling allowance. He is not being charged with that amount but it means that from December 1993 to August 1994 the accused was paid a total of $4,900 for his travelling allowance.

Here again the evidence of the general secretary and treasurer was that they trusted the accused as he was the chief accountant. Because of that trust they believed the cheques and vouchers given to them by the accused were in order and correct. So they signed the cheques. There was also evidence that in certain circumstances travelling allowance may be advanced to a staff member who was entitled to a travelling allowance. However, it is clear from all the

vouchers prepared by the accused for payment of travelling allowance to him that they were simply for payment of travelling allowance to him and not for any advance. Even the words 'advance' or 'travelling allowance advance' do not appear in any of the vouchers. What is also startling is that the accused in a matter of nine months from December 1993 to August 1994 had already paid to himself a total of $4,900 which is more than what he was entitled to by way of travelling allowances for two years. The absence of the words 'advance' or 'travelling allowance advance' from the relevant vouchers clearly suggest to me that the travelling allowances paid to the accused were straightout payments of allowance so that he did not have to repay any overpayments to the Church at some time in the future.

The evidence by the senior accounts clerk to which I have already referred is that the normal procedure is for him to prepare the vouchers for payment on instructions from the treasurer or chief accountant. For the accused himself to prepare vouchers for payments to himself was not in accordance with normal procedure. The evidence by the cashier in this respect was that the cheques and vouchers for payment of the accused's travelling allowance did not come to her notice until about the end of August or beginning of September 1994 which must have been the time or after the time that the accused left the employment of the Church. As a result, those payments were not posted in the cash payments journal until about the beginning of September 1994.

The evidence provided by the accused in his caution statement and oral testimony is that he did take the monies with which he has been charged. He

admits in his caution statement that on occasions when he ran out of money before a payday, a Church cheque would be co-signed by himself and the treasurer for a salary advance. However on the payday his salary would still go to the bank and he would use that salary as well. I do not accept that the money the accused received before a payday by filling out a voucher and preparing a cheque for the treasurer was an advance which should be repaid at a later date. There is simply no mention of the word 'advance' in any of the vouchers. If the real purpose of the payment was a salary advance, I would have expected the accused as chief accountant to state that purpose in the voucher. But that was not so. I am of the clear view that what was done were straightout payments of salary as the vouchers clearly show, so that the accused's salary was double paid for the periods in question with full knowledge of the accused. I reject the accused's evidence that he was not aware whether his fortnightly salary was still going to the bank. It was for him to check the payrolls and paysheets for each fortnightly pay period. He should have noticed from those documents that his fortnightly salary was still being paid by the Church to the bank. If he did not check the payrolls and paysheets then I really wonder about what work he was doing when he said that he used to work 80 hours a week, and during every weekend and every public holiday. His evidence that he only looked at the summaries instead of the whole paysheets is not accepted.

With regard to the travelling allowance overpayments, the accused admitted in his caution statement that his travelling allowance was overpaid by $2,900. However he is only being charged with $2,400 of that amount. He also said that the treasurer agreed to let him have the use of a Church vehicle but that was

subsequently taken away from him upon instructions from the Church.

It is clear that under his terms of appointment the accused was given a travelling allowance of $2,000 per annum. There is no mention of a vehicle for his use. Obviously the travelling allowance which he said was for local travel was given in lieu of a vehicle. Otherwise if the Church was also to provide the accused with a vehicle for his use in addition to the travelling allowance for local travel, then there was no point for payment of the travelling allowance. In any event if the treasurer in a private discussion with the accused had agreed to a vehicle for the use of the accused but that vehicle was subsequently taken away from him, the accused must have known that a vehicle was not part of his remuneration package approved by the finance committee of the Church who appointed him.

The accused then says that he had the intention of repaying the monies he had taken from the Church but when this matter was reported to the finance committee of the Church about the end of August 1994, he left his employment with the Church the following day. After careful consideration, I have decided not to accept that the accused had any genuine intention of repaying the Church. From 4 January 1994 to 9 August 1994, the accused without a month being missed was taking money from the Church either by overpaying to himself his travelling allowance or by double paying to himself his fortnightly salaries. There was clearly no attempt to repay so as to give credibility to what he says that he had the intention to repay the monies that he took from the Church. Then when this matter was reported to the finance committee he left the employment of the Church

without any offer of or attempt at repayment. When it is also considered that the accused has a family of eleven and that at the material times he was earning a fortnightly salary of $544.90, it is unbelievable that he genuinely held any intention of repaying the money totalling about $4,500 which he took from the Church.

The accused also stated that he used to work from 6.00am in the morning to 9.00pm at night during normal working days. He worked about 80 hours a week. He also worked during weekends and public holidays. It appears that what the accused was trying to suggest was that the Church owed him money. None of the staff members of the Church who worked with the accused was asked about this while they were giving evidence for the prosecution. So there was no evidence from the prosecution on this point. The only evidence came from the accused after the case for the prosecution had been closed.

I do not find this evidence from the accused to be credible as there were other staff doing the work of the accounts section. It is not clear what work did he do which required him to work almost non-stop for almost every day of the week from 6.00am to 9.00pm including weekends (Saturdays and Sundays) and public holidays. Even some of the office holders who carry the most onerous and demanding public offices in the country do not work quite for such long hours on an almost continuous basis. But even if the accused was working as hard and as long as he said, he knew that there was no provisions for overtime pay in his terms of employment. What he should have done was to ask the Church for overtime pay or a salary increase.

Now the defence raised on behalf of the accused is that the accused's actions were not dishonest. In considering that defence, I turn first to the English position. Section 5(1) of the English Theft Act 1968, insofar as relevant, defines the crime of theft as follows :

> "A person is guilty of theft if he dishonestly appropriates "property belonging to another with the intention of per- "manently depriving the other of it....".

In *R v Ghosh [1982] 2 All E R 689*, Lord Lane CJ in delivering the judgment of the Court of Appeal stated at p.696 :

> "In determining whether the prosecution has proved that the "defendant was acting dishonestly, a jury must first of all "decide whether according to the ordinary standards of "reasonable and honest people what was done was dishonest. "If it was not dishonest by those standards, that is the "end of the matter and the prosecution fails. If it was "dishonest by those standards, then the jury must consider "whether the defendant himself must have realised that what "he was doing was by those standards dishonest. In most "cases, where the actions are obviously dishonest by ordinary "standards, there will be no doubt about it. It will be "obvious that the defendant himself knew that he was acting "dishonestly. It is dishonest for a defendant to act in a "way which he knows ordinary people consider to be dishonest, "even if he asserts or genuinely believes that he is morally "justified in acting as he did....
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> "Cases which might be described as borderline, such as *Baggeln v "Williams [1978] 2 All E R, [1978] 1 WLR 873*, will depend on "the view taken by the jury whether the defendant may have "believed that what he was doing was in accordance with the "ordinary man's idea of honesty. A jury might have come to "the conclusion that the defendant in that case was disobedient "or impudent, but not dishonest in what he did".

In the subsequent case of *R v Clowes (No.2) [1994] 2 All E R 316* Watkins LJ in delivering the judgment of the Court of Appeal stated at pp 330-331 :

> "However, dishonesty is an ingredient of many offences and does "not necessarily depend upon a correct understanding by an "accused of all the legal implications of the particular offence "with which he is charged. The test is that laid down by this "Court in *R v Ghosh [1982] 2 All E R 689, [1982] QB 1053*, namely "whether the accused was acting dishonestly by the standards of "ordinary and decent people and, if so, whether he himself must "have realised that what he was doing was, by those standards, "dishonest".

In New Zealand with differently worded statutory provisions from those in England, the legal position appears to be stated in two cases. The first case is *R v Coombridge [1976] 2 NZLR 381* where Richmond P in delivering the judgment of the Court of Appeal stated at p.387 :

> "We think that in order to act fraudulently an accused person "must certainly, as the judge pointed out in the present case, "act deliberately and with knowledge that he is acting in "breach of his legal obligation. But we are of opinion that "if an accused person sets up a claim that in all the circum- "stances he honestly believed that he was justified in depart- "ing from his strict obligations, albeit for some purpose of "his own, then his defence should be left to the jury for "consideration provided at least that there is evidence on "which it would be open to a jury to conclude that in all the "circumstances his conduct, although legally wrong, might never- "theless be regarded as honest. In other words the jury should "be told that the accused cannot be convicted unless he has been "shown to have acted dishonestly".

In *R v Williams [1985] 1 NZLR 294 at p.308* which was cited by counsel for the accused, the Court of Appeal held :

"In deciding whether the accused was acting dishonestly at the "material time, the jury are entitled to look at all the facts "and statements disclosed in the evidence from which inferences "as to the honesty or otherwise of his belief may be drawn. In "other words, the jury in deciding on the accused's state of "mind - honest or otherwise - (a subjective state) are entitled "to ask themselves whether on the evidence it was reasonably "possible that he was acting honestly, however mistakenly, (a "subjective test) and if this is reasonably possible they must "acquit him. This we think is entirely consistent with the "view taken by the law in the many situations where the state "of a person's mind is relevant in criminal proceedings".

Then a little further on the Court went on to say :

"But when the summing up is examined as a whole we think that "no justifiable complaint can be made about it. The jury "were left in no doubt that they had to consider the state of "the appellant's mind, his knowledge and motives; whether he "was honest, and that if they thought that he may have given "a truthful explanation consistent with an honest belief he "must be acquitted".

Turning back to the English authorities, it seems to me that what is said *Ghosh's* case and *Gloves* case are more relevant to a consideration of the question of dishonesty under our Crimes Ordinance 1961 because of the similarities between the relevant English statutory provision and section 85(1)(a) of our own Ordinance. Applying the test laid down in *Ghosh's* case and later adopted in *Cloves* case to the present case, I am of the clear view as decider of fact that the accused was acting dishonestly by the standards of ordinary and decent people. For him to double pay himself on four occasions without telling the treasurer about it in the vouchers for payment that he prepared, or telling the cashier about it so that his salary will not be paid again into his account at

the bank was clearly dishonest. As an accountant, and as chief accountant for the Church, the accused must have also realised that what he was doing was dishonest by the standards of ordinary and decent people.

Likewise when the accused in a period of eight months from January 1994 to August 1994 overpaid his travelling allowance to himself by an amount which was more than twice the amount of the travelling allowance he was entitled to per annum, that was clearly dishonest by the standards of ordinary and decent people. I am also of the view that the accused must have realised that what he was doing was dishonest by those same standards.

As I have already stated, the monies taken by the accused were not advances which he was supposed to repay. They were simply straightout payments of salaries and travelling allowance. It also appears from the evidence of the cashier that she was never given by the accused copies of all vouchers he prepared for the payments made to him so that she could enter them in the cash payments journal. It was only in the end of August or beginning of September when the accused was leaving or had already left the employment of the Church that she became aware of the aforesaid vouchers.

Turning to the New Zealand cases I have already cited, it must be pointed out that the wording of the provisions of the New Zealand Crimes Act 1961 which were in issue in those cases are quite different in wording from the provisions of section 85(1) of our Crimes Ordinance 1961. However, even if what was said by the New Zealand Court of Appeal in *Coomoridge* case and *Williams* case are

treated as applicable to the present case, I am of the clear view that the actions by the accused were dishonest in the light of the evidence to which I have already referred. I do not accept having regard to all the evidence that when the accused embarked on preparing vouchers and cheques for double payment of his salary and for gross overpayment of his annual travelling allowance in a period of eight months, he had any honest belief or state of mind that he was justified in his actions.

Accordingly the defence based on the absence of any dishonesty must fail.

I am satisfied that the prosecution has proved all of the remaining seven charges beyond reasonable doubt. This matter is adjourned to 17 June 1994 for a probation report and sentencing.

F F M Sapolu
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CHIEF JUSTICE