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ROYAL COURT
(Samedi Division)

21st January, 1993 15

Before: The Bailiff, and
Jurats Bonn and Herbert

Police Court Appeal:

Robin Phelps Davison

- v -

The Attorney General.

Appeal against conviction and sentence on 3 charges of larceny (charges 1, 15 and 16 of the Charge Sheet) and against an award of £200 costs against the appellant under Article 2(3) of the Costs in Criminal Cases (Jersey) Law, 1961. (See: (2nd June, 1992) Jersey Unreported Judgment).

Appeal against conviction on three charges of larceny. Definition of larceny. Magistrate found that the elements of the offence of larceny were to be gleaned from the definition in Le Geyt's "Traité des Crimes" rather than from the definition in section 1 of the Larceny Act 1916. Appellant argued, *inter alia*, that the Magistrate erred in his interpretation of the authorities relating to the law of larceny and then applied the wrong principles to the evidence presented to the Court.

Held (in the words of Le Geyt) *"le larcin est un maniement frauduleux, pour profiter de la chose, de son usage ou de sa possession"*. Regard may be had to the definition of 'fraudulently' as applied in the Larceny Act, 1916, to ascertain whether *mens rea* is established. In this case, the Magistrate had applied the right test to the evidence which established ample grounds for the convictions (save one matter of quantum).

Advocate J.C. Gollop for the Appellant.
S.C.K. Pallot, Esq., Crown Advocate.

JUDGMENT

THE BAILIFF: The Appellant was convicted by the Magistrate on the 2nd June, 1992, of three charges concerning money belonging to Miss Adriana Claire Machin. I have expressed myself in that way because the Appellant through his Counsel, Mr. Gollop, who has

said and done everything that could be done on his behalf, has suggested that the form of the charge in the Police Court was in some way linked to the Larceny Act, 1916, which is an English Statute and that that form regulated the substantive Law which the Magistrate had to apply. That was not, in the view of this Court, the position in the Police Court. Mr. Gollop has said that the Appellant, and indeed every accused person, should know with precision what it is he or she is charged with. That precision is to be found quite clearly in what is called "the Particulars of Offence". Now this method of charging in the Magistrates Court is not one that has statutory authority; it is lifted from the Indictments (Jersey) Rules, 1972, which govern indictments in this Court and it is not appropriate for that form to be used in the Police Court. But having said that, in the Particulars of Offence are to be found sufficient details, in the opinion of this Court, to enable the Appellant to have known what it was he was being charged with. The particulars are as follows -

> *"The said Robin Phelps Davison, with having on the 21st November, 1990, in the Parish of Saint Helier, criminally stolen thirteen hundred pounds and this to the prejudice of Adriana Claire Machin".*

There could be no clearer statement of what it is he is said to have done. In addition to that there were a number of other charges in the same form, two of which related to £1,200 said to have been stolen on 25th January, 1991, and £300 said to have been stolen on 30th January, 1991.

It is not necessary for us to go through the history of the case and the various steps which led eventually to the Magistrate acceding, first of all, to a submission of no case to answer in part and reducing the charges to five and then eventually, at the end of the whole hearing, reducing the charges to three and finding the Appellant guilty on those three. It is necessary, however, for me to say something very briefly about the background to this Appeal and the events that led up to the charging of the Appellant by the Police.

The Appellant formed a relationship with the Complainant. It is not important what the nature of that relationship was, but clearly she trusted him and allowed him to have access to her bank accounts. They were made joint, the Appellant and Complainant being the joint signatories. In addition to that she was asked (and here there is a conflict of evidence between herself and the Appellant: the Magistrate preferred her evidence and we can see no reason to differ from him on that score) to sign a Power of Attorney. She, herself, said in evidence she did not think it was necessary, but she did it because she had trust in him. That Power of Attorney was executed in England and had been brought here by the Appellant for that purpose. Now, it has been suggested from the wording of that Attorney by Mr. Gollop, that so

wide are the powers conferred on a person to whom such a power has been given, that those powers virtually can be exercised (Mr. Gollop did not say this, but it was implied) without restraint. That is not the position in Jersey. The position as regards Powers of Attorney is clearly laid down by Jean Poingdestre: Les Lois et Coutûmes de l'Ile de Jersey (1928 reprint), at p.201:

> ***"Encore touchant l'Administration du bien d'autruy et du deuoir de ceux qui ont le maniement".***
>
> ***Tout homme qui est Administrateur du bien d'autruy, comme Tuteurs ou Meneurs, Curateurs, Procureurs, Facteurs, Recepueurs, etc. sont tenus à administrer Arbitrio boni viri, au dire d'un homme de bien, c'est à dire auec autant de soing fidelité et diligence, comme un bon mesnager à de coustume de faire paroistre en ses propres affaires".***

That is the duty which anyone assumes upon becoming someone's attorney. At the end of the trial Mr. Gollop made various submissions to the Magistrate. In the course of the trial, however, there had been a suggestion by the Magistrate from the Bench when the trial had been adjourned at one of its stages that Mr. Gollop should refer to Le Geyt rather than the Larceny Act, 1916. That suggestion was made in April, 1992, I believe, and Mr. Gollop replied in May, 1992, in a letter setting forth very much the same arguments which he advanced in this Court today.

I now turn to the grounds of appeal which have been set out very helpfully in outline submissions prepared by counsel. The grounds are:

1. The learned Magistrate erred in his interpretation of the authorities relating to the Law of larceny.

2. The learned Magistrate failed to require counsel to address him on his (the Magistrate's) interpretation of the authorities.

3. Having misinterpreted the authorities, the learned Magistrate then applied the wrong principles to the evidence presented to the Court.

4. There was insufficient evidence before the Court upon which the learned Magistrate could properly convict particularly having regard to the fact that the learned Magistrate had already dismissed at the close of the prosecution case nineteen other charges of larceny brought against the Appellant.

As regards the second ground of appeal, namely that the Magistrate failed to require counsel to address him on his (the Magistrate's) interpretation of the authorities relating to the Law of larceny, the Court finds no merit in that. The Magistrate either got his Law right or he got it wrong. The fact that

counsel was not asked to address him further is not, in the mind of this Court, a serious irregularity sufficient to set aside the conviction. In any case, counsel had had the opportunity of putting his views clearly to the Magistrate by letter, which he did. As regards the fourth ground of appeal, that having dismissed nineteen other charges of larceny, in some way that weakened the evidence in relation to the other three, that is not an argument which, with respect to Mr. Gollop, is logical. The Magistrate had to examine the evidence on each of the counts before he arrived at his conclusion. Mr. Gollop urges that we should consider the whole of the evidence and the Magistrate of course had to do the same, and we can find nothing in the transcript which showed that he did not apply his mind very carefully and very fully to the whole of the evidence and in some way or other picked out of the charges the three which are the subject of today's appeal and applied the wrong tests to those three and therefore the second and fourth grounds of appeal are dismissed.

I now turn to the remaining grounds of appeal Nos. 1 and 3 above. What is the Law on larceny or theft or stealing (whichever word you use) in this Island? There is a complaint, as I have said, by Mr. Gollop on behalf of the Appellant, that the Magistrate preferred, so to speak, Le Geyt to the Larceny Act, 1916. Now, if one looks at the leading case of Foster (20th January, 1992) Jersey Unreported C.of.A., we find the following passage at the bottom of p.20 and over to 21:

> ***".....the practice of charging offences in the terms of the Larceny Act did not supplant the common law of the Island but took place within it".***

That was a merely procedural form and did not alter the substantive law. From the passage I am going to continue with, it is clear that the Court did not intend that it should be read into their judgment that the substantive law was going to be altered by the form or procedure adopted. The Judgment continues:

> ***"The development of this practice did not preclude, to use the language of the Commissioners already quoted, an enlargement of the range of punishable crimes. The criminal character of conduct covered by the Larceny Act is derived in Jersey from the common law. The development of the practice has not changed this derivation of criminality. It means only that conduct which is both criminal by the common law and also within the ambit of the Larceny Act may be prosecuted according to the provisions of that Act. This is convenient for both prosecution and defence for it substitutes the relatively clear requirements of the Act for the boundaries hitherto vague and ill-defined of the common law offence".***

Mr. Gollop has suggested that by charging in the form the Police did, they adopted the substantive law of the Larceny Act and were bound by it. That is an argument which I have already said this Court does not accept.

Mr. Pallot, for the Attorney General, with equal cogency and application as Mr. Gollop has shown throughout this appeal, drew our attention to the common law of Jersey as ascertained in our local authorities. The main authority is Le Geyt's "Traité des Crimes", at p.385 of which the author defines *"larcin"*. I think it is not important whether the term *"larcin"* or *"vol"* or *"theft"* is employed (each of those words is common enough and has an ordinary meaning as well as a technical meaning), but the Court can find no relevant distinction whichever term is employed. Le Geyt's definition is as follows:

> ***".....en un mot, le larcin est un maniement frauduleux, pour profiter de la chose, de son usage ou de sa possession.***
>
> ***Voilà la définition et le caractère du larcin".***

That definition itself, it may be said, has a good deal in common with the customary law of northern France before the French Revolution and what that law was is set out by M. le Comte Merlin in his Répertoire Universel et raisonné de jurisprudence (4th edition) of October, 1815, and we find a number of references in section 1 on p.701 where he refers to the ***"nature et caractère du vol"*** which lend support to my suggestion that there is no real difference between the words - whether you use the words *"larcin"* or *"vol"* or *"theft"* or *"stealing"*. He says this:

> ***"Le vol est défini par les lois romaines, un maniement frauduleux qu'on fait de la chose d'autrui, en se l'appropriant contre son gré ou même en le privant de l'usage ou de la possession qui lui en appartient pour en faire son profit particulier".***

That is very clear to us and it is also clear that there is a common link between the definition given by Le Geyt and our Norman cousins of the time. It is interesting, of course, to look at what Archbold says about the meaning of the word "fraudulent". In my opinion, there is not a great gap between the concept of dishonesty applying to *"vol"*, *"larcin"* and larceny at the common law in England. If one looks at what "fraudulently" has been found to mean in the Larceny Act (which of course itself is no more than a codification of what Mr. Pallot called the law of the Anglo-Saxon jurisdiction - but it is interesting to read it) the word "fraudulently" in the definition of "larceny" contained in section 1(1) is intended to add, and does add, something to the words, and the author quotes the well-known statutory words ***"without a claim of right made in good faith"***, which means that the taking must be intentional and without mistake and with the

knowledge that the property of another person is being taken. Then the well-known case of Williams (1953) Cr.App.R.71, is cited. That surely does no more than express what Merlin has said as to ***"maniement frauduleux"*** then there must be the necessary mental element in that action just as much as there must be the necessary mental element under the Larceny Act. So really what the Court below and what this Court has had to look at was the intention of the Appellant when he admittedly, as he has openly said, drew from the bank accounts (and which he was entitled to draw or used his Power of Attorney as the case may be, it does not matter how it was done) certain amounts of money which formed the object of the charge.

Looking at the background to the case, we have to look at the evidence. So far as the Power of Attorney is concerned, as I have already said, the Magistrate preferred the evidence of the Complainant, and indeed it is interesting to note that at the time the Appellant was arrested, the first thing he asked the Police was whether the arrest was to do with his Power of Attorney. Therefore, turning briefly to the evidence, the question the Court has to ask itself was whether the Magistrate applied the wrong test in law. We cannot find that he did, having already found that there has to be a degree of fraudulence and there has to be that intention at the time the money was taken when it became a fraudulent ***"maniement"*** or not. We have to look at what the intention was and the Magistrate had to do the same. Now, it is the practice of this Court not to interfere with the finding of fact by the Magistrate on an appeal unless the Court is satisfied that there was insufficient evidence on which the Magistrate could convict or that he took into account evidence he should not have taken into account or that he omitted to take into account evidence which he should have.

In our opinion, none of those qualifications apply to this case. Indeed the Magistrate gave the most careful consideration to all the evidence as is clear to us from reading the transcript. He rejected the application of the defence that the payments were just a question of muddle or the withdrawal was a question of muddle, rather, and the repayments followed up in a complete muddle. He reached the conclusion, and these are the words of the learned Magistrate, ***"that the Appellant's evidence was both evasive and unreliable"***. He had the advantage of hearing him in the box and seeing him giving his evidence. Of course one must not attach excessive reliance to that, but it is something to which the Magistrate was entitled to have regard, that is to say, his assessment of the credibility of the Appellant. He also said during the course of the trial (I think at the stage when there was a submission of no case to answer) that the payment (to which I will come in a moment) of £3,700 before the Complainant got back to this jurisdiction, was circumstantial evidence (and that was not challenged by Mr. Gollop that it could be circumstantial evidence). Of course we know the weight to be attached to

circumstantial evidence depends very much on how it came about but the fact of the taking of the money is not disputed. The defence is that having had authority to draw on the bank accounts of the Complainant for a number of purposes to meet her ordinary day-to-day living expenses while she was abroad, but mainly also to fund her Access card account, which he failed to do on at least two occasions and she was left in some difficulties (but that is not necessarily criminal it is just incompetence) he nevertheless re-paid more than he needed to a company of his called "Ricadoo" in respect of a holiday which he and the Complainant were taking in the Galapagos Islands. As regards that holiday, the share of the Complainant came to £921 which was considerably less than his share, but there was no evidence that she intended to pay for his travelling and his expenses. Each party was to pay for their own. It seems to us that he in fact re-paid not only his outgoings in respect of her, but his own outgoings and there is no evidence to suggest that he was entitled to do that.

However, we think the Magistrate erred in this respect; it was accepted that £921 was the proper amount due in respect of her fares and the reason why her fares were less expensive was that she was already going around the world and it was not so difficult for her to reach the Island, as it was for him. We think, therefore, after looking at the evidence that it would be wrong to maintain the conviction in the full amounts; but I just want to say this about the £3,700. It was re-paid at some stage before she returned. Before the Complainant returned to Jersey, from the transcript, there had been clearly some discussion between Mr. Davison and her relations. It was a pity that the relations were not called by the Police. That would have made it clearer, both to Mr. Gollop and to the Magistrate, as to the exact timing of those interviews but, in addition to those interviews, it is also clear from the evidence of the Complainant herself that she felt obliged to consult Advocate Fiott and issued a writ or an Order of Justice for some sixteen hundred pounds and therefore she was not at all happy when she returned, it is clear to us, at the state of affairs and indeed complained to the Police. It is significant, we think, and the Magistrate was entitled to take into account that the £3,700 was paid back not because he felt he ought to do it and had gone through his accounts (although that may of course have applied after he had got down to the accounts) but because of pressure from her family. Therefore, we have come to the conclusion that we cannot say that the Magistrate either misdirected himself in law or failed to apply the proper tests in deciding on the evidence and therefore, apart from the reduction in Charge 1 to £379, Charge 15 is maintained. I just want to say something on Charge 16.

Now, Charge 16 was something quite different. It did not have to do with money expended on behalf of the Complainant; it was in fact a speculative venture in the Stock Market and to our mind there can be no justification for that whatsoever. The

explanation was given that if it had succeeded, she would have got some money and thus it was fair for her to pay the loss. That seems to us to be a totally unjustified explanation and the Magistrate was fully entitled to reject it. Accordingly, the appeal on Count 16 is likewise rejected.

Now we have to hear you on sentence and costs.

Having regard to the circumstances of this case, we think we can properly say that insufficient importance was attached by the Magistrate on the question of mitigation - that is to say that the monies had been paid back and accordingly we are going to reduce the fines, although it is academic inasmuch as they have been paid but there will have to be a refund to somebody and we hope that it will be to the sister. However, that is not for us to decide.

On Charge 1, the fine will be £500
On Charge 15, £500
On Charge 16, £200,
making a total of .....£1,200.

We do not disturb the Order for costs nor the refusal of costs by the Magistrate.

Advocate Gollop, you may have your legal aid costs today.

Authorities

Marriott -v- Attorney General (1987-88) J.L.R. 285 C.of.A.

Archbold (36th Ed'n: 1966) paras. 1451-1535.

Foster -v- A.G. (20th January, 1992) Jersey Unreported C.of.A.

Thomas: "Principles of Sentencing" (2nd Ed'n): p.p. 318-22.

Poingdestre: Les Lois et Coutûmes de l'Ile de Jersey: p.201.

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Anthony -v- A.G. (20th January, 1992) Jersey Unreported: Police Court Appeal.

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Buckland and McNair: "Roman Law and Common Law (2nd Ed'n): Chapter XI: p.352.

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