

SAMUEL SOOLI v THE PEOPLE (1981) Z.R. 298 (S.C.)

SUPREME COURT
BRUCE-LYLE, AG. D.C.J., CULLINAN, J.S., AND MUWO, AG. J.S.
18TH NOVEMBER, AND 18TH DECEMBER, 1980
(S.C.Z. JUDGMENT NO. 29 OF 1980)

Flynote

Criminal law and procedure - General deficiency - Charge of- Test to be applied.

Criminal law and procedure - Theft by public servant - General deficiency - Test to be applied.

Headnote

The appellant was convicted of two counts of theft by public servant. When the appellant's books and vouchers were checked it was found that there were deficits of K2,160.08 and K3,229.07. As for one deficit his defence was that he used the money for General Elections expenses and the other deficit was that it would have been a result of over-payment. The learned trial magistrate failed to direct his mind to the defence put up regarding the first deficit but also rejected the second explanation.

Held:

- (i) In a charge for general deficiency if the accused puts up an explanation which might reasonably be true and which the trial court recognises as such although it does not believe it, he is entitled to be acquitted.

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Cases referred to:

- (1) R. v Tomlin 38 Cr. App. Rep. 82.
- (2) R. v Makokwa 2 N.R.L.R. 210.
- (3) Kabaya v R. 5 N.R.L.R. 13.
- (4) R. v Lawson (1962) 36 Cr. App. Rep. 30.
- (5) Juste Kasosa v The Queen 6 N.R.L.R. 86.

For the appellant: In person.

For the respondent: N. Sivakumaran, State Advocate.

Judgment

BRUCE-LYLE, AG. D.C.J.: delivered the judgment of the court.

The appellant was convicted of two counts of theft by public servant. He has appealed against the conviction and sentence.

The appellant's books and vouchers were checked by PW1 who found that in respect of a General

Elections vote there was a deficit of K2,160.08, the subject matter of the first count there was also a total deficit of K3,229.07 in respect of a Standing Imprest which was the to subject matter of the second count. PW1 produced the necessary vouchers and the field cash book which showed the amounts received as Special Imprest and how the amounts had been expended, and supported the deficits in the two accounts.

The appellant in his defence contended that there could not have been a deficit in the General Elections accounts because there were vouchers totalling K3,795.81 which had not been taken into account by PW1, and that his expenditure although relating to the General Elections vote, were paid for from the Special Imprest and that if that amount had been taken into account there would have been no deficit in the General Elections accounts but that there would have been a credit of K1,635.73 (that is K3,795.81 minus K2,160.08), and that this credit should have been set-off against the alleged deficit of K3,229.07 to reflect the shortage in the Special Imprest which should have been K1,593.34. When PW1 was cross-examined by the appellant he admitted that during the check he saw the vouchers totalling an expenditure of K3,795.81 relating to the General Elections expenses, but that he never took notice of them because it was improper for the appellant to utilise money from the Special Imprest to meet General Elections expenses.

The learned trial magistrate in his judgment failed to direct his mind to this line of defence and we are of the view that, if he had considered the defence and the evidence of PW1 under cross-examination, we are not in a position to say that he would inevitably have convicted on the first count. In our view the learned State Advocate has rightly not supported the conviction on this count.

The appellant's defence to the second count was that he had in fact realised that there was a shortage but did not know the extent, and when cross-examined as to why he did not report the shortage to his superior officer the District Secretary, he stated that he did not at the

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time have the courage to do so. He stated that the shortage could have been as a result of over-payment as he had, during the period 1978 and 1979, to deal with huge amounts of money, some K150,000, for the General Elections and Special Imprest, and had to pay out moneys to over two thousand persons. The learned trial magistrate rejected this explanation.

Before this court the appellant has accepted the figure of K1,593.34 as the shortage in relation to the Special Imprest, but has argued that that was a general deficiency, and in the absence of proof that he had converted specific amounts totalling that figure or a specific part of that amounts the learned trial magistrate erred in law in convicting him on the second count.

PW1 who checked the appellant's books gave evidence in support of the second count as follows:

"I also checked records pertaining to 1978 standing impress amounting to K10,000.00. Total payment vouchers entered in the field cash book page No. 191698. The book is known as a field cash book. In this book the money was K8,022.15. There are some invoices showing goods bought for the rest house out of the K10,000.00 and these amounted to K555.60.

There were personal advances and special impress vouchers not recorded in the field cash book amounting to K540.00 leaving a deficit of K882.25. I checked records pertaining to 1979 standing impress. On 31st May, 1979, there was a cash balance of K1,841.41. On 6th June, 1979, a reimbursement cheque No. 008625 in the sum of K3,152.59 was cashed. The total now was K5,000.00. Out of this I only saw payment vouchers for K1,619.44 also invoices for requisitions for rest house amounting to K63.97. Cash in hand was K969.77 leaving a shortage of K2,346.82." "The K2,346.82 related to 1979 impress and the K882.25 pertains to 1978 standing impress. The two added together give us K3,229.07."

In the case of *R v Tomlin* (1), the Court of Criminal Appeal in England at page 90 said:

"In the ordinary case where it is possible to trace the individual items and to prove the conversion of individual property or money, it is undesirable to include them all in a count alleging general deficiency."

It is clear from the evidence of PW1 who was the sole witness in respect of the count, that there was no evidence in support of an individual item or items of money, and there was no proof of conversion of any item or items of money; hence the nature of the particulars of the offence alleging general deficiency. In *R. v Makokwa* (2), it was held that on a charge of theft based solely on general deficiency without proof that the accused had stolen any specific part of the money, such evidence is insufficient to sustain a conviction. In the present appeal there was the

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sole evidence of PW1 as to a general deficiency and there was no proof that the appellant had converted any specific part of the amount mentioned. In *Kabaya v R* (3), it was held that mere proof of a general deficiency alone is not sufficient to substantiate a charge of theft. There followed two cases in England, *R v Lawson* (4), before Lynskey, J., decided on the North - Eastern circuit, and the case of *R v Tomlin* (1) (supra), in which *R v Lawson* (4) was approved. Somerhough, J., observed in the case of *Jaste Kasosa v The Queen* (5), that although the judgments in *Lawson* (4) and *Tomlin* (1) dealt primarily with the power to charge a general deficiency, nonetheless the cases threw some light on the question of quantum of evidence necessary to support a charge of general deficiency. Somerhough, J., observed that in the case of *Tomlin* (1), the evidence revealed no more than a deficiency between two given dates and went on to observe:

"The appellant denied dishonesty, as has done the appellant in this case, admitted to the police that there was a deficiency, and subsequently made restitution. Here the appellant has also admitted to me that he does not challenge the deficiencies in the charges. Tomlin's only explanation was that there might have been an under-delivery of goods and, ergo, that he might never have had the goods which had been invoiced over to him. The report says of this 'This explanation which was mentioned to the jury in the summing up was clearly rejected by them.' The appeal was dismissed. It seems to me, therefore, that the view taken in *Tomlin's* case was that if the explanations put forward by the appellant are rejected by the jury, there is sufficient to justify a conviction, for that is exactly what the report says. The court was careful to be satisfied that the stocktaking took place and they felt no doubt that the implication of the jury's verdict was that those shoes had been sold and that the

appellant Tomlin was under the duty to account then for the proceeds of sale. It seems to me to be open to this court to take that view if they are persuaded by the view of the Court of Criminal Appeal in England which is posterior to the new taken by Woodman, J., in *Abel Kabaya v The King* (3) (supra), that is to say, that if the Crown establishes that there is a deficiency on a date when there is a duty to pay over of account, and that the count of a general deficiency was properly laid having regard to the observations in Tomlin's case that you must not resort to charging the aggregate when it is possible to trace individual items, that evidence is sufficient to sustain a conviction provided that the explanation of the accused is rejected. This involves the proposition that if the appellant makes no explanation, he is liable to be convicted. If he makes an explanation which might possibly be true and which the tribunal of fact recognise as such although they do not believe it, he is also entitled to be acquitted; but where his explanation is disbelieved and absolutely rejected, it would seem that the Court of Criminal Appeal in

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England have decided that he may properly be convicted; and it is, of course, as I have said, open to this Court to take the same view."

We agree with those observations except that we consider that the word "reasonably" might well be substituted for the word "possibly" above; again where Somerhough, J., speaks of an explanation being "absolutely rejected" we presume that he refers to an explanation which could not be reasonably true. The test applied in the dicta of Somerhough, J., as we see it, is the general test to be applied in any criminal trial, that is to say, where a burden of explanation falls upon the accused. Evidence tending to show that an accused converted either the whole or part of a general deficiency will, of course, be evidence tending to show that his exculpatory explanation cannot, on the issue of credibility, be true.

As to the facts in this case the appellant submits in effect that the shortage could have arisen through inefficiency since, as he says, "no man is at all times wise". The fact that the appellant was charged with a general deficiency in an amount far greater than the actual shortage reflects upon the system of accounting involved. The appellant's approach in the matter displayed a degree of candour and his attitude seems to have been one of co-operation with the authorities. We do not see that any sinister motive must inevitably be drawn from his failure to report the particular shortage to the District Secretary. In all the circumstances particularly in view of the correction in the amount charged, we are not satisfied that it was shown beyond reasonable doubt that the shortage was caused by anything more than inefficiency on the part of the appellant. We consider his explanation in the matter could reasonably be true.

In the result, we find that the convictions cannot stand. The appeal is therefore allowed and the convictions on both counts are quashed and the sentences are set aside.

Convictions set aside
