IN THE FIJI COURT OF APPEAL

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At Suva

Criminal Jurisdiction

CRIMINAL APPEAL NO. 8 OF 1989
(Criminal Case No. 1 of 1988)

BETWEEN:

MICHAEL DESMOND BENEFIELD — APPELLANT

-and-

S T A T E — RESPONDENT

Mr. M. Raza for the Appellant
Mr. I. Matajitoga for the Respondent

Date of Hearing : 27th March, 1992 and 29th June, 1992
Date of Delivery of Judgment : 2nd November 1992.

J U D G M E N T

This is an appeal from a conviction in a case where the trial Judge, and the assessors, were presented with a very difficult problem indeed.

The accused was arraigned on 10 charges of fraudulent misappropriation. The charges were all framed in the same way, so that it is only necessary to quote one of them, as follows:

"COUNT ONE

Statement of Offence

FRAUDULENT CONVERSION: Contrary to Section 279(1(c)(ii) of the Penal Code, Cap. 17.

Particulars of Offence

MICHAEL DESMOND BENEFIELD, on the 17th day of May 1982, at Suva in the Central Division, fraudulently converted to his own use and benefit $5,000.00 received by Munro, Leys & Co. (A Law Firm) on account of PRM Builders Limited."

Nine of the charges related to moneys received by Munro, Leys & Company, on account of PRM Builders, the tenth to moneys received by that firm on behalf of two other people jointly, R M Ragg. He was convicted on 9 of them and sentenced to 12 months imprisonment on each charge to be served concurrently. He appealed against his conviction on each count.

At the time of the events relating to the charges, the accused was a solicitor, a member of the firm of Munro, Leys & Company. As such he had authority to operate on the trust account of the firm. It seems that he was the member of the firm who dealt with the affairs of a Mr. Bott. That gentleman handled the transactions, so far as concerns the legal firm, of a company called PRM Builders Ltd; certainly it appears that considerable sums of money were handed to the firm and banked in the solicitors' trust account as being received on account of that company. In addition, Mr. Bott had some personal moneys which have been called the Sinclair funds or loan; they were also deposited in the solicitors' trust account under the same name. It does not appear that any separate ledger or other separation of these funds was kept or made in the solicitor's firm; these moneys seemed to be lumped together with the moneys deposited by Mr. Bott on behalf of PRM.

Between May 1982 and October 1983 the accused drew various sums of money from the trust account to be debited against the credit balance of PRM Builders Ltd. The times and amounts are set out in 9 of the charges. The remaining sum relevant to this appeal, identified as charge number 10, was debited against the funds in the trust account of the other client or clients of the firm of solicitors mentioned earlier.

All the 10 amounts withdrawn by the accused as specified in the 10 charges, except perhaps one, were claimed to have been used for his own purposes or other purposes unconnected with the company or persons for whom the solicitor's firm held them on trust. They were never repaid by the accused. Eventually the deficiencies were discovered, and the accused charged. It seems that he never made any admissions about anything before the trial. He gave no evidence, made no statement and called no witnesses at the trial.

The first charges appear to have been laid in June 1986, and subsequently other charges were added. The accused was by then living in Australia with his family. He was arrested in Perth in July 1986, and voluntarily returned to Fiji in October 1986. He first came before a magistrate here on 9th October 1986. For various reasons the inquiry before the magistrate was not completed until September 1987. The State filed an information in March 1988, and the matter first came before the High Court in April 1988. For various reasons the trial did not

begin until 12th June 1989 when the accused pleaded not guilty. The hearing proceeded until 18th July 1989, when the three assessors found the accused guilty on 9 of the 10 charges. The trial Judge concurred and passed sentence on 19th July 1989. The accused appealed. The notice of appeal is dated 14th August 1989. The matter was heard by this Court on 29th June 1992.

At the trial it was necessary to prove (i) that the various amounts in the 9 charges on which the accused was arrainged had been withdrawn from the trust account of the firm and debited against the funds held on behalf of PRM Builders Ltd and the 10th debited against the other client(s) (ii) that the various cheques by which this was done had been originated by the accused and either received by him or used in a manner authorised by him (iii) that the various cheques were in favour of various payees who in fact received the various amounts (iv) that the withdrawals from the trust accounts were not authorised by the clients, and (v) that the accused had the necessary fraudulent intent.

Now it is apposite to pause here to explain the way the case was presented against the accused on the matter of fraudulent intent. It was put fairly and squarely on the basis that the accused had no authority to draw the cheques because they were intended for his own use. The State set out to prove lack of authority on the part of the accused to operate on the accounts for that purpose. This is made very clear by the way

the Judge put this aspect to the Assessors (record p 617):

> *"Ultimately however, gentlemen assessors and you may or may not agree, that this case will turn on whether or not you are satisfied beyond all reasonable doubt as to whether or not the accused was entitled or authorised to requisition the cheques in the manner and in the particular form in which they were issued.*
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> *I say this because not only is it the only real issue which is in serious dispute as you would no doubt have gathered from the examination and cross-examination of Mr. Peter Bott but also because if the cheques were not authorised by the clients in any manner, shape or form then you may think, they should not have been requested by the accused in the first place.*
>
> *And if you are satisfied that the cheques were deliberately requested by the accused without any authority then can you be in any reasonable doubt as to the accused's intentions with regard to such unauthorised cheques?"*

It can be said that in spite of considerable difficulties caused by the accounting system then in use by the solicitors' firm, the loss or absence of various relevant documents, the lapse of time, and the effect of delay on the memory of witnesses, the State was able to establish the first 3 of the above ingredients, and that it was open for the assessors and the trial Judge to be satisfied beyond reasonable doubt that it had done so. The problem arose in proving the absence of any authorisation by the clients of the payments, and the presence of a fraudulent intent. It can be added that the accused was the only solicitor at the firm who dealt with the affairs of the two clients involved, and that he had authority to operate on the trust account of the firm.

We take the view that in the circumstances of this case, the mere withdrawal of funds from those standing to the credit of a client in the solicitor's trust account, even if they were applied in some way that showed a connection with the accused, would, without more, not constitute sufficient proof to establish a charge of fraudulent conversion, or, if it were capable of doing so, without the assessors being very carefully warned about it. The office system in use in this firm required no recording of any authorisation by a client before the solicitor who had the charge of the client's affairs was able to draw a cheque; that is hardly surprising. But the assessors in those circumstances would have to be told that they must draw two inferences so adverse to the accused that they had to be satisfied beyond reasonable doubt that there were no other inferences really open for them to draw consistant with innocence, namely (i) an inference, in the absence of evidence, that the accused did not have authority, express or implied, to withdraw the moneys in question, and (ii) that in the absence of authority, and considering the position and duties of a solicitor, he had a fraudulent intent when he did so.

However, as we said earlier the whole case was run on the absence of authority to withdraw the moneys. It is clear that the purpose of withdrawal by the appellant, was, in each charge upon which the appellant was convicted, except one, sufficiently established.

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This was the situation in relation to the 10th count. Neither of the two persons who comprised the "client" were called to give evidence; one was dead. The money was used in a way which pointed to a possible conclusion that it was used for the purposes of the client; certainly the connection between the use of the money and the accused was not adequately established. The assessors' attention was not drawn to the problem in this way. Before us the learned prosecutor virtually conceded that the conviction on the 10th count could not stand.

In no way must this be taken as any criticism of the trial Judge. The trial lasted 12 days, with gaps in between, and a voir dire on the admissibility of evidence that itself went for 4 days. There were a great number of problems. It is very much easier for an appeal court to study and think about questions of law. A solicitor who takes and uses a client's money in his trust account is not likely to receive much sympathetic treatment from a Judge or from members of the public acting as Assessors. However, a criminal charge against such a person must be proved like any other, and he is entitled to the benefit of any deficiencies in the case presented against him. In our opinion there was such a deficiency in relation to the 10th charge, and he is entitled to the benefit of it.

So far as the other 8 charges are concerned, the problem is more difficult. It arose in this way.

Mr. Bott was at all material times the managing director of PRM Builders Ltd or the same company after it had changed its name. He was the one who dealt with Munro, Leys &

Company, and he says that a number of cheques were drawn on that account by the accused acting for the company; the accused was the person he dealt with. He had also placed with the firm some private moneys, known as the Sinclair moneys, amounting to somewhere between $34,000 and $40,000 (record p 497). Although there seems to have been some discussion between Mr. Bott and the accused about a separate account for these moneys, no separate trust account ledger or whatever seems to have been created; these moneys were lumped together with the PRM account; the best that seems to emerge from the evidence is that it was somehow to be kept separate within the PRM account; whether this was done or not does not appear from the evidence. At least one internal cheque requisition form has on it "PRM Builders for a Sinclair Loan" (record p 468). However, the way the evidence was dealt with in relation to the charges is that no internal distinction was made. Because of the way the case proceeded, it was possible to treat all the moneys mentioned in the charges, except perhaps one, as withdrawals from the PRM moneys in the trust account and as being attributable to the Sinclair moneys. Indeed this was the way in which the Judge dealt with the matter (record p 612).

To prove the necessary element of lack of authority of the accused to take and use the moneys the subject of the charges in the way that he did, the State called Mr. Bott as a witness. Somewhat to the surprise, and, it is clear, annoyance of the prosecutor, Mr. Bott proceeded to give evidence that the accused was authorised to use the money. He put it this way, namely that he had given the accused general authority to use the Sinclair money as the accused saw fit (record p 462 & 498); he

was not aware of the various individual ways it had been used, so it could be said that he had not given a particular authority for each withdrawal and use. In spite of some vigorous cross-examination under the guise of leading evidence in chief, the prosecutor was unable to budge Mr. Bott from this; yes, he said, the accused had a blanket authority to use the moneys in any way - hence the particular 9 instances of use were authorised; no, Mr. Bott had not known of and hence in that sense had not authorised each individual use, except, it seems, in one instance. The witness was, of course, referring to the Sinclair moneys.

It might appear that Mr. Bott had made a statement or statements about the charges to some contrary effect at a previous time. However, in spite of prompting from the accused's counsel, the prosecutor refused to request the Judge that he be permitted to treat the witness as hostile; this may have been for a tactical reason to which we will refer. So, of course, the contents of any previous inconsistant statements were never put to the witness. Instead, the prosecution tried a different tack.

First of all Mr. Bott was shown by the prosecutor a letter which he had written on 28th February 1985. It was in the following terms (exhibit 8):

"28th February, 1985

Principal Solicitor,
Munro, Leys & Co.
RE: P.R.M. BUILDERS

Dear Sir,

I have studied your statement, P40=MB, and have examined it very closely, and I find only two

payments that I verify as my own. They are: 7/1/83 to Kasabia Bros. for $578.63 18/2/83 to Burns Philp Trustee for $570.00. The remainder are not mine. On no account did I, or any employee of my company, instruct any partner or employee of Munro Leys & Co. to pay out of our trust account, any other monies listed on the said statement.

Therefore I would be grateful if you would let me have your cheque for the balance of monies in my account.

The balance due to me according to my calculations, is $29,351.37.

We would appreciate your cheque forthwith.

Yours faithfully"

The letter was written following Mr. Bott being told that money had been embezzled; he was given an account which seems to have been a list of payments made from the trust account and asked by the firm if he could identify any of them. He could only identify two. He then wrote the letter claiming the balance of the sums which he could not recognise (record pp 472-5). He was then referred by the prosecutor to a deed. This was executed on 3rd March 1986.

The way in which the letter came to be written is described by Mr. Bott in evidence. Mr. Bott was told that moneys were missing from the trust account, presumably PRM's trust account, that it had been embezzled. He seems to have asked about this, and he was sent a statement; he says it was a type of ledger sheet, and difficult to understand; he did not agree that the document shown to him in Court was the one sent to him. He said

he went through the document that had been sent to him and recognised only two of the payments. He wrote the letter accordingly.

It is to be noted that the total amount of the payments from the trust account that he was not able to identify was $29,351.37. The evidence runs from record p 472 to p 475.

Stopping there, we do not know, and it does not appear from the evidence, whether the statement related to the Sinclair moneys or the PRM trust account generally or partly to each. It appears from an attachment to the letter that the ledger sheet or document that Mr. Bott received and which prompted the letter included all the amounts the subject of the charges, except one. So that the oral evidence that Mr. Bott gave about general and particular authorization referred to earlier is not necessarily inconsistant with the terms of this letter. More particularly is this so when it is remembered that Mr. Bott had been told that the moneys in the statement had gone missing, embezzled, and was asked could he identify any payments that he had authorised. Whatever may have been his authority to the accused, he had never authorised the solicitor's firm to lose the moneys or for them to be embezzled. We shall come back to the letter.

The other matter that the prosecutor sought to rely on in his so-called examination-in-chief of Mr. Bott was a deed between Mr. Bott and the firm executed on 3rd March 1986. This preceeded a payment of $20,000.00 by the firm to Mr. Bott in return for his release of all claims against the firm. By this time, of course, it was apparent that the trust account moneys had gone, and the firm accepted responsibility after, it might be added, considerable delay and, if Mr. Bott were to be believed, treatment of him in relation to reimbursement that might account for antagonism against the firm. These were matters for the assessors.

Now, the problem that faced the prosecution at the conclusion of its case was this. Because it had not sought to be allowed to treat Mr. Bott as a hostile witness, it could not put to the assessors or the Judge that his oral evidence was not to be believed; he was a witness for the prosecution. But unless it could get round his oral evidence in some way, the prosecution could not possibly establish beyond reasonable doubt, or at all, that the accused was not authorised to take and use the money, and to do so for his personal use. It was of course, open to the Assessors to disbelieve the oral testimony of Mr. Bott. But in order to establish the guilt of the accused to the level necessary to secure a conviction, it was necessary for the Assessors and the Judge not only to disbelieve Mr. Bott, but also to rely on the letter, and perhaps the deed, to

establish lack of authority. We take the view that doubt about the credibility of Mr. Bott, and even rejection of his oral evidence that he gave the accused authority to use the money as the accused wished, would not establish lact of authority. It would merely put the State in the position of having to submit to the Assessors - "there is no evidence of lack of authority", exactly as if Mr. Bott had simply never been called as a witness at all; lack of belief would merely neutralise, as it were, the evidence of Mr. Bott. It would not be any positive proof of anything. We could elaborate on this, but we do not believe it is necessary to do so.

Hence it was that the State not only had to neutralise the oral evidence of Mr. Bott, it had to get the letter into evidence. It had to do so in order to prove positively a lack of authority.

The deed, if it were admissible in evidence, which we doubt, could not establish lack of authority. The firm was responsible for the loss of the money whatever may have been the authority, or lack of it, of the accused to use the money in the way that he did.

With regard to the letter, the use of it by the prosecutor, and its admission into evidence, we are of the opinion that the trial miscarried.

It will be recalled that in spite of prompting from the accused's counsel the prosecutor refused to make an application to the trial Judge to be permitted to treat Mr. Bott as a hostile witness. We have no reason to disagree with the following statement of the law or the proper practice to be adopted in circumstances such as presented themselves in this trial to be found in Archbold, Criminal Pleading Evidence and Practice, 1992 Ed, Vol 1 para 8-82:

> *"If prosecuting counsel has in his possession a statement by a witness for the prosecution with is in direct contradiction to the evidence given by that witness, it is his duty at once to show the statement to the judge and ask leave to cross-examine the witness as a hostile witness: (R.V. Fraser (1956) 40 Cr. App. R. 160)"*

We note that even if this course had been followed, there is probably a discretion in the trial Judge to give or refuse leave to cross-examine (ibid). However, the first step of seeking leave was not followed in this case.

But the matter does not end there. Archbold (op cit) at para. 8-87, goes on:

> *"When a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statements whether sworn ... or unsworn ... do not constitute evidence upon which they can act: R.V. Golder (1961) 45 Cr. App. R. 5, 11."*

As we said earlier, failure to adopt this approach, or to give the Assessors a very careful warning along these lines, would cause the trial to miscarry.

But the matter does not rest there either. Firstly, if the inconsistent statement cannot be used as evidence of the facts stated in it (see above), then it is probably not admissible in evidence at all, except with the consent of the accused. Use of it to cross-examine is one thing; putting it into evidence is another. If it cannot prove anything then it is inadmissible; its reception in evidence could have a very prejudicial effect indeed.

Secondly, if the prosecutor sought to obtain a tactical advantage by not seeking to have the witness declared a hostile witness, then it ought not to be entitled to any evidentiary advantage. In other words, if the inconsistent statement cannot constitute evidence if the witness is sought to be declared hostile, then there is even greater reason why it should not do so if the prosecution refuses to make such an application.

Because, in our opinion, there was simply no evidence of lack of authority, whether the letter was or was not able to be introduced into evidence, it means that the State failed to prove an essential ingredient in the proof of the charges. The appeal should therefore be upheld.

But there is a further reason why we believe the appeal should be upheld.

At the very end of his summing up, the Judge said this:

> *"In concluding this aspect of my summing-up gentlemen assessors dealing with the question of authority I leave you with one thought which may or may not have already occurred to you and which you are quite entitled to reject if it does not appeal to you.*
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> *The thought which is singularly my own is this: Consider gentlemen, if there was such a general authority given to the accused as described by Mr. Bott and which did not exclude the accused as a potential borrower of the 'Sinclair-loan' trust account funds, and the accused in authorising the cheque requisitioning forms was acting in terms of that general authority why then you may ask yourselves, was not the nature of the transaction clearly shown on the face of the requisition form?*
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> *To put it in another way, if Mr. Benefield had general authority to borrow the money from the Sinclair-Loan account and use it for his own private or personal purposes, as you may think the prosecution has satisfactorily proved, then why wasn't it recorded or clearly identified on the requisition form by words to the effect that they are payments or cheques represented personal loans to Mr. Benefield?"*

Now there was not a word of evidence that could support a view that this was the practice of the firm, or that it ought to be. We have already stated that the office system in use in this firm required no authorisation by the client before cheques were drawn, nor, naturally enough, did it require any authorisation to be recorded. This suggestion of the Judge was not put to any of the partners, nor to any other witness; we

have no idea what their response might have been. The evidence in fact was that the ordinary practice for requisitioning cheques was followed in the instances here under review. Counsel were never asked about this suggestion nor invited to make any submissions. The trial had commenced on 12th June 1989 and the summing up was on 18th July. This was thrown in at the heel of the hunt. The Assessors might well be expected to have forgotten parts of the evidence, and by this remark led into believing that there was some evidence about it which should operate to the detriment of the accused. Just how much weight it carried in their minds no Court will ever know.

It is unfortunate. The accused is entitled not to have to bear the risk of the Assessors having been adversely affected by it. It is not a case for the application of the proviso to s.23(1) of the Court of Appeal Act.

The system of criminal justice as it operates in this Country and elsewhere is heavily weighted in favour of an accused person. It is so weighted in an attempt to ensure that no one is convicted unless a case against him is proved beyond any

reasonable doubt in accordance with the rules of evidence. Any failure to apply the processes according to the ordinary rules which is followed by a conviction must, unless an appeal court has no reasonable doubt that the conviction was nevertheless correctly reached, be set aside. That must be done here.

The history of this matter makes it clear beyond question that to direct a new trial would not be a proper course to adopt. The appeal will therefore be upheld, and the accused acquitted on all counts.

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Mr Justice Michael M Helsham
President, Fiji Court of Appeal

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Sir Moti Tikaram
Resident Judge of Appeal

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Sir Mari Kapi
Judge of Appeal