Copy: Mr Justice Kaine

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IN THE FULL COURT)
OF THE SUPREME COURT)
OF THE TERRITORY OF)
PAPUA AND NEW GUINEA)

CORAM : MINOGUE, C.J.
FROST, S.P.J.
KELLY, J.

Friday,
11th September, 1969.

THE QUEEN v. KARL JOSEPH MAGR

REASONS FOR JUDGMENT

1970

Aug 24,25, 26 and Sept 11.

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Minogue, C.J.
Frost, S.P.J.
Kelly, J.

On 26th August we allowed the appeal and quashed the conviction of the appellant and then stated that we would later publish our reasons. This we now do.

This was an appeal against the conviction of the appellant by the learned trial judge on 25th June 1970 at Mount Hagen, on a charge that on or about 29th August 1969 by falsely pretending to one Kewa Simbon that a motor lorry was his complete and unencumbered property he obtained from the said Kewa Simbon the sum of $920.00 with intent thereby to defraud.

There was evidence that the vehicle in question was in March 1969 held by one Reginald Charles Donaldson under a hire purchase agreement from A.G.C., the final payment under the agreement being due in April 1970. At some time in March 1969 the appellant obtained possession of the vehicle from Donaldson and thereafter a number of payments were made by the appellant or on his behalf to Donaldson. There was a conflict of evidence as to the nature and amount of these payments, Donaldson claiming that the monies paid represented hiring charges whereas the appellant claimed that they were instalments of purchase money under an oral agreement for the purchase of the vehicle at a figure which was the subject of calculation and which the appellant says he worked out to be $900.00. Neither Donaldson nor the appellant could produce any record of the payments which Donaldson said were in total over $400.00 and could have been $450.00, while the appellant said he could account for payments totalling $1050.00.

When the appellant first obtained possession of the vehicle it was registered in Donaldson's name and when that registration expired in April 1969 the appellant registered it in his own name. The appellant said that Donaldson told him to do this and a witness Josephson called for the defence said that he had given a message to the appellant from Donaldson to this effect, although this was denied by Donaldson. After registering the vehicle the appellant painted his name on the door. Subsequently, in August 1969 the appellant purported to sell the vehicle to Kewa Simbon and Poiya Pandeba for $940.00 of which $800.00 was paid on 29th August and $120.00 the following day when delivery was taken.

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The balance of $20.00 was to have been paid on a later date but it was subsequently agreed that it would not be paid, so that the total purchase price was $920.00. A document evidencing the sale was drawn up and although dated 29th August it would appear that it was in fact executed on 30th August after payment of the $120.00 on that date and prior to the delivery of the vehicle. On 3rd September registration was transferred to the purchasers.

On 5th September the appellant left Mount Hagen and went to various places in Australia. On 8th December he was arrested in Darwin on a warrant issued at Mount Hagen and on 11th December in the District Court at Mount Hagen he pleaded guilty to a charge of stealing the vehicle. On this charge he was convicted and sentenced to six months' imprisonment with hard labour. On the same day the appellant came before the District Court on the false pretences charge which is the subject of this appeal, but the magistrate declined to deal with that charge on that day.

At the trial the appellant pleaded not guilty and a plea was also entered under Sec.598(5) of the Criminal Code that the appellant had already been tried and convicted of an offence committed under such circumstances that he could not under the provisions of the Code be tried for the offence charged in the indictment. This plea was made in reliance on Sec.16 of the Code, the material part of which for the present purpose is that "A person cannot be twice punished either under the provisions of this Code or under the provisions of any other law for the same act or omission,....." The learned trial judge held that Sec.16 was not applicable and the first ground of appeal is that he was wrong in law in rejecting the defence that the appellant had already been punished for the same act.

The prohibition in Sec.16 is against being punished twice for the same act or omission. The test therefore is whether the act or omission for which the appellant was punished by the District Court is the same act or omission for which he is being punished upon conviction on the present indictment and this involves an analysis of the acts which constitute the elements of each offence. The acts which constituted the elements of the offence of stealing of which the appellant was convicted and punished by the District Court are the fraudulent conversion by the appellant of the vehicle with an intent to permanently deprive Donaldson of his special property in it (Code, Sec.391). The acts which constitute the elements of the offence of obtaining money by false pretences of which the appellant has been convicted on indictment are the making by him of a representation to Kewa Simbon that the vehicle was his complete and unencumbered property, either knowing such representation to be false or not believing it to be true, whereby he obtained from Kewa Simb the sum of $920.00 with intent to defraud (Code, Secs.426,427).

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It is thus obvious that the acts constituting the elements of the two offences are not the same and it is not to the point that the evidence adduced to prove the acts constituting the offence for which the appellant was indicted might also constitute proof of the offence of which he has already been convicted. In R. v. Hull (No.2) (1), Griffith, C.J. pointed out the necessity to distinguish, for the purpose of Sec.16, between the acts which were the elements of the offence and the particular evidence which was adduced to prove the acts. Furthermore, in that case Griffith, C.J. was also of the opinion that when it is alleged that the acts referred to in the two indictments are the same there is implied a unity at least of time and place. With respect, that would certainly seem to be so and there is in this case the further consideration that there is not in any event a unity of time between the acts referred to in the respective charges. By reason of Sec.391(6) the act of stealing was not complete until the appellant had actually dealt with the vehicle by some physical act and the relevant act was parting with possession of the vehicle by handing it over to Kewa Simbon and Poiya Pandeba on 30th August. On the other hand, the false pretence was made by the appellant on 29th August and the money was obtained in part on 29th August and in part on 30th August. There is no real assistance to be derived from the decision of the High Court in Connolly v. Meagher (2) and we consider that the relevant principles for the interpretation of Sec.16 are to be found in R. v. Hull (No.2) (supra)(3). Applying those principles we are thus of the opinion that Sec.16 is not applicable in this instance and that the plea under Sec.598(5) was therefore rightly rejected by the learned trial judge.

We would add that, assuming that the existence of the Code does not take away from the Supreme Court its inherent power to protect its process from abuse, which we would think to be the case, in our view there is no abuse of process if, to a charge which is properly brought before the Court and is framed in an indictment to which no objection can in any way be taken, it is not possible to successfully invoke Sec.16 (see Connelly v. Director of Public Prosecutions (4) per Lord Morris of Borth-y-Gest).

The learned trial judge formed the opinion that the accused was a man of no credit whatever and rejected his evidence. It is clear from the reasons for judgment that this opinion was based on three matters in particular. The first of these was that the appellant had written a letter to Donaldson in June 1970 which His Honour considered to amount to an improper threat of the consequences that would follow if the prosecution the subject of the indictment were not dropped. It was contended for the appellant that the learned trial judge wrongly admitted this letter in evidence but in our view it was properly admitted. However, we do not share His Honour's view that the letter amounted to an improper threat; the letter is certainly written in strong language and undoubtedly contains a threat of the course of action which the appellant

(1) (1902) St.R.Qd.53.
(2) (1906) 3 C.L.R.682.
(3) (1902) St.R.Qd.53.
(4) (1964) A.C.1254 at p.1304.

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proposed to take unless Donaldson complied with his demand regarding the vehicle, but we do not see any impropriety in his writing in those terms. The second matter on which the learned trial judge based his opinion as to the credit of the appellant was that he was shown to have been owing monies to at least two organizations in the Territory for upwards of two years. Whatever view one may take of a person who does not pay his debts, we would not think that such a failure when freely admitted should adversely affect the credit of that person as a witness. Thirdly, His Honour refers to the appellant having withdrawn the larger part of the purchase monies and then having dissipated the remainder of the monies in the process of an extended tour through Australia. On the appellant's story there is no reason why he should not have spent the money in any way he chose and we would not think that the way in which he did spend it could properly be used for the purpose of discrediting him.

We therefore consider that the learned trial judge fell into error in basing a finding of credibility on the above matters. The consequence that ensued from having thus rejected, and in our view mistakenly rejected, the appellant's evidence was that it would appear that he then did not go on to consider whether the appellant had acted in the exercise of an honest claim of right. It was implicit in the defence case that the appellant had so acted and as the offence with which the appellant was charged related to property it was therefore necessary for the learned trial judge to be satisfied beyond reasonable doubt that the appellant had not acted in the exercise of an honest claim of right and without intention to defraud before he could convict (R. v. Pollard(5)). It may well have been that the application of Sec.22 of the Code was not raised at the trial and certainly once he had rejected the appellant's evidence it is probable that His Honour would not have found it necessary to consider Sec.22; at all events there is nothing in the reasons for judgment to indicate that he did consider the application of that Section. In our view it was the application of Sec.22 and the onus of proof thereunder which required consideration rather than Sec.24 as was submitted before us on behalf of the appellant.

For the reasons which we have indicated it appears that because of his approach to the matter of the appellant's credibility the learned trial judge did not direct himself to the question of whether he could be satisfied beyond reasonable doubt that the appellant had not acted in the exercise of an honest claim of right and without intention to defraud. Alternatively, if the learned trial judge did direct himself to this question although not expressly adverting to it in his reasons, he failed to consider it adequately, as he must have excluded from consideration the evidence of the appellant which was relevant to the issue and the effect of the evidence of Josephson.

The consequence is that the conviction could not stand and the verdict appealed against was therefore set aside, the appeal allowed and the conviction quashed. We were not disposed to order a retrial and a verdict of acquittal was therefore entered in lieu of the order appealed against.

Solicitor for the Crown : P.J. Clay, Acting Crown Solicitor.
Solicitor for the Appellant : W.A. Lalor, Public Solicitor.

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(5) (1962) Q.W.N.13.