[2014] JMCA Crim 45

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 3/2013

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

PATRICIA SCOTLAND v R

Glenroy Mellish for the appellant

Miss Paula Llewellyn QC, Miss Patrice Hickson and Miss Kerri-Ann Gillies for the Crown

24 and 31 July 2013 and 7 November 2014

MORRISON JA

[1] At the conclusion of the hearing of this appeal on 24 July 2013, the court reserved its judgment to 31 July 2013. On the latter date, the appeal was dismissed and the court ordered that the appellant's sentence should run from 13 August 2012. These are the reasons which were at that time promised for that decision, with apologies for the delay.

[2] On 18 May 2012, the appellant was convicted in the Resident Magistrate's Court for the Corporate Area, after trial before Her Honour Mrs Stephane Jackson-Haisley on an indictment charging her with 12 counts of embezzlement. (The appellant was

originally indicted for the offence of larceny by a servant, but at the end of the Crown's case the indictment was amended on the Resident Magistrate's direction to charge embezzlement instead.) On 13 August 2012, the appellant not having availed herself of the opportunity given to her by the court to make restitution should she choose to do so, she was sentenced to 18 months' imprisonment on counts one to three (to run concurrently) and admonished and discharged on the nine remaining counts.

[3] The complainant, Kendel Trade Corporation Ltd ('Kendel') is a distribution company which is involved in the business of importing goods from abroad and selling them to supermarkets and wholesalers island wide. From some time in the year 2008 to 4 January 2010, when she tendered her resignation, the appellant was employed to Kendel as an accounting clerk. Her duties included the receipt and recording of cash and cheques from sales representatives and preparing deposit slips for the lodgment of the amounts received to one of the company's bank accounts with FirstCaribbean International Bank ('FCIB'), National Commercial Bank ('NCB') and/or RBTT Jamaica Ltd ('RBTT').

[4] The evidence accepted by the learned Resident Magistrate described the following system. Each sales representative employed to Kendel was equipped with a collection book, in which he would enter on a daily basis all proceeds of sales collected from customers, both in cash and by cheques. The cash would be handed over to the accounting clerk, who would sign on receiving it. The accounting clerk would then record the receipts on a form described as a cash register or cash reporter form. The accounting clerk would at the end of the day be responsible for making up the bank

cash deposit slips, which should reflect the same amount shown on the cash reporter form, to enable the cash to be sent by courier to the bank.

[5] David Johnson was employed by Kendel as a sales representative. Dealing mostly with cash sales, he was responsible for collections in the areas of downtown and uptown Kingston and Spanish Town areas. On various occasions between 2008 and 2009 he collected cash from several customers and handed it over to the appellant in her capacity as accounting clerk. Whenever he did so, she would sign for the cash received in his collection book, alongside the entry made by him in it. As required by her position, she usually wrote up the cash reporter form and the bank deposit slips. However, in relation to the various sums which became the subject of the charges against her, the evidence was that the appellant neither completed the cash reporter form nor wrote up bank cash deposit slips in preparation for lodgment. The evidence which the Resident Magistrate accepted was that whatever sums were not recorded in the cash reporter form would not have gone to the bank for deposit to one of the company's accounts.

[6] A problem arose towards the end of 2009 when amounts paid by customers, as reflected in Mr Johnson's collection book, did not appear to be recorded on the corresponding cash reporter form. From the standpoint of the company's records therefore, these customers appeared to be delinquent. After initial checks were carried out by its managing director, the company called in its external auditor. The auditor's examination of the collection books, the cash reporter forms and the bank deposit slips revealed that, other than in the collection books, the questioned sums were not

mentioned anywhere else. For the period January to December 2009, the auditor listed a total of 52 sums totalling over $2,300,000.00 which were listed in the collection books as having been collected by the appellant from Mr Johnson, but were never reported in the cash reporter forms and were never written up on any deposit slips for the purposes of lodgment to Kendel's accounts at any of the named banks.

[7] The prosecution did not tender the company's bank statements in evidence at the trial. This led to a submission of no case to answer at the end of the prosecution's case, on the basis that, absent the bank statements, there was no evidence that the various sums had not been deposited to the bank accounts. The Resident Magistrate ruled that there was a case to answer, whereupon the appellant rested on her submission and the matter proceeded to addresses.

[8] At the end of the day, the learned Resident Magistrate agreed that the absence of the bank statements was a lacuna in the Crown's case which rendered inadmissible any reference in the auditor's report to their contents. Nevertheless, the Resident Magistrate considered that there was sufficient in the evidence to be garnered from the collection books, the cash reporter forms and the bank cash deposit slips, that did not relate specifically to the bank statements, as well as the evidence of the other witnesses, to satisfy the court beyond reasonable doubt that the appellant embezzled the sums of money on the auditor's list. The magistrate accepted as true the unchallenged evidence of both the managing director of Kendel and Mr Johnson as to the system which operated at the company. As regards the auditor, she observed that he had been the subject of "much cross-examination", during which both his competence and the details

of his report were challenged. However, having assessed the auditor carefully, the Resident Magistrate concluded that:

> "I found him truthful. I considered all questions posed in cross-examination and he was not discredited significantly. I accept that firstly he was competent to carry out the audit and secondly that he did so with accuracy. I bear in mind also that the evidence he gave of examining the collection books, the cash reporter forms and the bank deposit slips was not challenged. Neither was any challenge presented to his evidence that he found that other than in the collections books, the questioned sums were not noted anywhere else.
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> The court also had to take on the task of examining the documentary evidence. Particular attention was given to the lodgement books to determine whether or not there is any evidence that the questioned amounts were entered in the lodgement books. The court also had to examine the cash reporter forms and the cash deposit slips to see whether these amounts were reflected there. Having done so the court is satisfied that the questioned sums are not reflected in any of these documents…
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> The law…recognises embezzlement to be the fraudulent appropriation of money which has never been in the master's own possession and which the prisoner has received from a fellow servant to give to his master (Archbolds, 14th edition).
>
> I am satisfied beyond a reasonable doubt that the defendant collected the said sums. I am satisfied that she made no report of this and that she never took any steps to have them deposited to the company's accounts in keeping with her duty as accounting clerk. I am satisfied therefore that having collected these sums of money she kept them for herself and they never came into the possession of the company. I am cognizant of the evidence that the defendant would not have been obliged to immediately deposit the sums received on all occasions but up to the point of her resignation and up to the time of trial she has not turned over such sums to her employers. I accept that it was her duty to hand over the sums of money to her employer but she fraudulently retained them. I am satisfied beyond a

reasonable doubt of that. I find her guilty of the offences as charged on the amended indictment being twelve counts of embezzlement."

[9] In the notice of appeal filed on her behalf on 16 August 2012, the appellant challenged her conviction on the following grounds:

> "1. That the learned Resident Magistrate erred in law by not upholding the no case submission.
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> 2. That a fair trial was rendered impossible due to significant non-disclosure by the Crown.
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> 3. That the learned Resident Magistrate erred in law by relying on the evidence of the Accountant which was inadmissible under the hearsay rule."

[10] In supplemental grounds of appeal filed on 18 June 2013, the appellant added a further five grounds of complaint:

> "4. That the learned Resident Magistrate erred in law by not correctly applying the standard of proof in that she felt sure about aspects of the evidence about which the witnesses themselves were not sure.
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> 5. That the trial was unfair in that the learned Resident Magistrate herself undertook the task of examining the documentary evidence to see whether the questioned sums were in any of these documents. The magistrate therefore entered the arena to perform a task which the Crown failed to do by its witnesses thereby depriving the Defence of an opportunity to challenge the counts in the indictment.
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> 6. That the learned Resident Magistrate erred in law by failing to recognise that the Defence had no opportunity to effectively challenge the Accountant on his examination of the records as neither the bank

statements nor the majority of the Cash Reporter Forms and bank deposit slips were in evidence at the time that he gave his evidence in chief. The trial was therefore unfair to the Appellant.

7. That the verdict is unreasonable having regard to the evidence adduced in that

   (a) the prosecution began with the evidence of Mr. David Johnson to show how the various counts in the indictment came to be arrived at but did not complete the proof thereof since…[sic]

   (b) the learned Resident Magistrate erred in law by relying on previous consistent statements of the Accountant in as much as he gave evidence of what he had done to compile his report but failed to demonstrate to the court how the missing sums were identified. This deprived the Defence any opportunity of challenging the evidence of the Accountant since the documents to mount such a challenge were not disclosed and/or put into evidence.

8. The learned Resident Magistrate erred in failing to resolve the conflict in the Crown's case as to whether the Accountant investigated lodgements to NCB for the period January to December 2009. This is particularly important as the prosecution failed despite repeated directions from the magistrate to disclose bank statements for NCB for the period January to December 2009."

[11] Despite the amplitude of these grounds, and indeed of the skeleton arguments provided in support of them, Mr Mellish, who had also appeared for the appellant at the

trial, told us at the outset of his oral submissions that the appeal was essentially about bank statements from FCIB and NCB. His complaint was that, although statements from both institutions, for the periods January to December 2009 and October to December 2009 respectively had been disclosed to the defence at the trial, they were not tendered in evidence. The bank statements were necessary, it was submitted, to (i) complete proof of Kendel's losses; and (ii) afford the defence an opportunity to challenge the auditor's conclusions. Mr Mellish further submitted that, given that the Resident Magistrate accepted the auditor's statement in evidence that he had examined everything, then his working papers should have been exhibited as it was only then that the magistrate could be satisfied that he did all that he said he had done and that he had done it thoroughly. Complaint was also made about the fact that the Resident Magistrate conducted her own examination of the documentary evidence. This was, Mr Mellish submitted, not a task for the magistrate, as it was necessary for the proof of the appellant's guilt to be "adduced in court".

[12] In response to these submissions, Miss Hickson for the prosecution reminded the court, firstly, that the appellant was charged with embezzlement, the essence of which was the stealing of money delivered to or received or taken into possession by her for the account of Kendel, her employer. It was submitted that the evidence clearly established that the offence had been committed, in that while the collection books bearing the appellant's signature showed that cash was collected from the sales representative, those sums were not recorded in the cash reporter forms and the evidence was that only sums so recorded were lodged to the bank accounts. It was

clear from the auditor's evidence, which the magistrate accepted, that he had himself checked the collection books and cash reporter forms and found these discrepancies.

[13] Section 22 of the Larceny Act provides as follows:

> "Every person who –
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> (1) being a clerk or servant or person employed in the capacity of clerk or servant –
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> (a) steals any chattel, money, or valuable security belonging to or in the possession or power of his master or employer; or
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> (b) fraudulently embezzles the whole or any part of any chattel, money, or valuable security, delivered to or received or taken into possession by him for or in the name or on the account of his master or employer;…
>
> shall be guilty of felony, and on conviction thereof liable to imprisonment with hard labour for any term not exceeding ten years."

[14] The learned editor of Archbold (36th edn, para. 1727) validates the approach taken by the learned Resident Magistrate in the passage from her findings of fact quoted above:

> "…the fraudulent appropriation of money, which has never been in the master's own possession, and which the prisoner has received from a fellow-servant to give to his master, is embezzlement: ***R v Masters***, I Den. 332."

[15] The learned editor goes on to state further (at para. 1736) -

> "…where it is the servant's duty to account for and pay over the moneys received by him at stated times, his willfully not doing so is an embezzlement, although he does not actually deny the receipt of them: ***R v. Jackson*** (1844) 1 C. & K. 384 *(b)*. And even where no precise time can be fixed at which it was his duty to pay them over, his not accounting for them, if found by the jury to have been done fraudulently, is equally an embezzlement: ***R v. Welch***, 1 Den. 199."

[16] The evidence in this case clearly established the following. It was the appellant's duty as accounting clerk to (i) collect cash from the sales representatives; (ii) record the collections in the cash reporter forms; and (iii) prepare bank cash deposit slips for the purpose of lodgment of the funds to the bank. In the cases identified in the list prepared by the auditor, evidence was seen from the collection books that cash was collected by the appellant (and this was in any event supported by Mr Johnson's unchallenged evidence), but there was no evidence that the amounts so collected were either recorded on the cash reporter forms or written up on the bank cash deposit slips. Cash not so recorded or written up would not be incorporated in any lodgment to the bank. This was therefore, in our view, on the unchallenged evidence of the accounting system which was in operation at her workplace and of the appellant's duties as accounting clerk, clear presumptive evidence that the cash so received by her was embezzled by her. Looked at in this way, the absence of the bank statements, which Mr Mellish placed at the cornerstone of his case, both before the Resident Magistrate and in this court, was essentially a red herring.

[17] These are the reasons for the decision of the court given on 31 July 2013.