

26/91

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v WALSH

Crockett, O'Bryan and McDonald JJ

26 October 1990 — (1990) 52 A Crim R 80

CRIMINAL LAW – ATTEMPTING TO OBTAIN A FINANCIAL ADVANTAGE BY DECEPTION – FORGED BANK DRAFT – FORGERY DISCOVERED – PROCEEDS NOT PAID INTO BANK ACCOUNT – WHETHER ATTEMPT TO OBTAIN A FINANCIAL ADVANTAGE: *CRIMES ACT 1958, S82*.

Where a bank customer dishonestly represented to a bank that a forged bank draft was a good and valid order for the payment of money, but the deception was discovered before the proceeds were paid, the customer was guilty of attempting to obtain a financial advantage by deception – the financial advantage being the attempt to establish a relationship of creditor and debtor when no such relationship existed before the deception.

Matthews v Fountain [1982] VicRp 104; (1982) VR 1045, referred to.

CROCKETT J: [1] O'Bryan J will deliver the first judgment.

O'BRYAN J: The applicant stood trial in the County Court in September on a presentment which contained one count of attempting to obtain for himself or another financial advantage by deception. To that charge he pleaded not guilty. The jury convicted the applicant, and he has applied for leave to appeal to this Court on a number of grounds. Although stated in a number of ways, I believe the grounds can be condensed into one ground: that in law a reasonable jury properly instructed could not find that the applicant's conduct would have obtained for him a financial advantage from Westpac Bank. Mr Wild of counsel, who appeared for the applicant, also submitted that a reasonable jury properly instructed could not find that the deception relied upon by the Crown was the effective cause of the applicant obtaining a financial advantage. Eventually this point was not pursued, and it was absorbed in the principal ground to which I have referred.

Section 82 of the *Crimes Act 1958* provides that a person who by any deception dishonestly obtains for himself or another any financial advantage is guilty of an offence. Attention focused upon the meaning of the words "financial advantage". In *Matthews v Fountain* [1982] VicRp 104; [1982] VR 1045, Gray J observed that:

"The concept of financial advantage is a simple one. It is expressed by the use of two common words, each of clear meaning."

[2] I agree that the words should be given their plain meaning and that no narrow construction should be given them. The count in the presentment alleged that at Ringwood on 13th September, 1988, the applicant attempted to dishonestly obtain for himself or United Fundraising Corporation of Australia Pty Ltd (UFC) from the Westpac Banking Corporation a financial advantage, namely credit in the sum of \$US430,000 by deception, namely by falsely representing that a bank draft number E777744 drawn on the Arab Bank Limited was a good and valid order for the payment of \$US430,000.

Briefly, the facts are as follows. The applicant attempted to become a creditor of Westpac Bank in the sum of \$US430,000 by means of a counterfeit bank draft drawn on the Arab Bank Limited, Lebanon, and payable in the United States of America to Barons Pty Ltd when he lodged a counterfeit draft with the Westpac Bank at Ringwood on 13th September with the intention that the draft should be negotiated through the banking system, and when cleared, that the proceeds should be paid into an account which the applicant controlled. In September 1988 the applicant contacted a manager of the Westpac Bank, whom he knew, to enquire about negotiating the bank draft. The manager advised the applicant that the draft would have to be endorsed by the payee to the applicant's company, UFC. The applicant then obtained a seal, which purported to be the seal of Barons Pty Ltd, and endorsed the draft to make it payable to UFC. The draft, so endorsed,

was presented to the [3] manager of Westpac by the applicant on 13th September. He agreed to arrange for collection of the money in New York and for telegraphic transfer to the bank account of UFC at the Elizabeth Street, Melbourne, branch of the Westpac Bank. The scheme failed and no funds were transferred because the Arab Bank in New York recognised the bank draft as a forgery. The jury, by its verdict, rejected the evidence of the applicant given in his defence at the trial, in which he attempted to blame another person and assert that his intention had been to obtain the funds and to use them only if the draft was a genuine draft. One must assume that the jury rejected the evidence of the applicant and found that he acted dishonestly when he represented to the manager that the draft was a good and valid order for the payment of money.

The Crown case went to the jury upon the basis that it was open to the jury to be satisfied beyond reasonable doubt that the applicant had at least practised a reckless deception: See *R v Smith* (1982) 7 A Crim R 437. No challenge has been made to the charge. Mr Wild submitted that s82 is concerned with a tangible financial advantage, being, for example, when payment for services or goods is postponed, or when an existing debt is paid and an extension of credit thereby obtained: see *Matthews v Fountain* (*supra*).

Mr Wild submitted that he has been unable to find a case in which s82 has been used in relation to the use of forged or [4] counterfeit cheques, suggesting that s82 is inappropriate for this purpose. The principal argument of Mr Wild is that the deception alleged, namely that the bank draft was a good and valid order, could not in law be said to be the cause of obtaining anything from Westpac. The deception was merely a step preparatory to presentation of the draft in New York for collection. If the draft had been met by the Arab Bank, then money, not a financial advantage, would have become available in New York for transfer to the applicant at his direction.

Mr Gyorffy, for the Crown, submitted that in essence the applicant attempted by deception to become a creditor of Westpac Bank on 13th September. Had the deception produced the intended result, \$US430,000 would have been placed to the credit of the applicant's account in the Elizabeth Street branch of the Westpac Bank. A financial advantage would be obtained from Westpac, Mr Gyorffy argued, because the applicant would become a creditor of the bank. These results would be produced by the dishonest deception alleged.

It is not to the point that the applicant might have obtained a financial advantage from the Arab Bank in New York: the critical question, indeed an essential element of the charge laid, is whether the applicant attempted to obtain financial advantage from Westpac by his conduct. It is also not to the point that Westpac might not suffer any financial disadvantage by the provisions of a [5] financial advantage to the applicant. A collecting bank, in this case Westpac, is an agent of its customer to receive payment of a cheque from the banker on whom the cheque is drawn and to hold the proceeds at the disposal of its customer: see *Halsbury*, 4th ed, Vol-3(1), p178. In the present case the applicant requested Westpac to place the proceeds of the draft to the credit of his company in a specified account. Had the bank done so, a financial advantage would flow to the applicant or UFC, in that the bank would become indebted to the applicant or UFC for the credit balance standing in the account. Thus financial advantage would be obtained from Westpac, because the commercial consequence of the transaction would produce a relationship between the applicant and Westpac of creditor and debtor, when no such relationship existed before the deception. In my opinion, the ground relied upon fails and the appeal should be dismissed.

CROCKETT J: I agree.

McDONALD J: I agree also.

CROCKETT J: The application is dismissed.

APPEARANCES: For the Crown: Mr T Gyorffy, counsel. JM Buckley, Solicitor for the DPP. For the applicant Walsh: Mr R Wild, counsel. Barton & Partners, solicitors.