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SUPREME COURT OF VICTORIA — FULL COURT

R v DEVENISH

Winneke CJ, Gowans and Gillard JJ

5, 6 June 1969 — [1969] VicRp 95; [1969] VR 737

CRIMINAL LAW – THEFT OF MONIES FROM AN EMPLOYER – FORGED RECEIPT USED AS EVIDENCE AGAINST DEFENDANT – HANDWRITING EXPERT EXAMINED THE DOCUMENT AND COMPARED IT WITH A DOCUMENT WRITTEN BY THE DEFENDANT AND FOUND THE HANDWRITING TO BE THE SAME – DEFENDANT COMMITTED FOR TRIAL – DOCUMENTS LOST SUBSEQUENTLY – PHOTOGRAPHIC EVIDENCE OF DISPUTED HANDWRITING TAKEN AND ADMITTED INTO EVIDENCE BY TRIAL JUDGE – DEFENDANT FOUND GUILTY – WHETHER JUDGE IN ERROR.

HELD: Appeal allowed. Convictions set aside.
1. There were considerations which were sufficient to call for the exercise of discretion by the trial judge, as they were capable of so distorting the substantial effect of the evidence adduced by the Crown as to render its prejudicial effect, having regard to the purpose to which it was directed, so great as to make it unfair to the accused to admit the evidence. The trial judge ruled that there was no legal basis upon which he could exclude the evidence and that it followed that in fact he did not exercise a discretion at all. In this he erred and in the circumstances of this case the discretion should have been exercised in favour of excluding the secondary evidence and, therefore, the expert opinion evidence which was based upon it.

2. The loss and absence of the original receipt at the trial placed the defendant at such a grave disadvantage in meeting the case made against him as to make it unfair in the interests of justice for the evidence to be admitted against him, notwithstanding its undoubted relevance. In reality the loss and absence of the original document left the applicant with his arm tied behind his back in attempting to defend himself against the charges contained in the third and fourth counts. The absence and loss of the document so substantially diminished the probative value of the evidence having regard to the purpose to which it was directed as to make the prejudicial effect of it out of due proportion and so as to render it in the circumstances of this case unfair to admit it against the defendant in the overriding interest of justice. Without the evidence that should have been excluded, there was no case made out against the defendant on the third and fourth counts, and, accordingly, the convictions on those counts were quashed and a verdict of acquittal was entered thereon.

THE FULL COURT: (Winneke CJ, Gowans and Gillard JJ): The applicant, Ronald Leslie Devenish, was presented in the County Court at Melbourne at the April sittings on a presentment containing eight counts. On a trial extending over several days he was eventually convicted on counts one, three and four and counts six, seven and eight, the jury failing to reach agreement on the second and fifth counts. He was sentenced to a substantial term of imprisonment by the learned judge.

The first count charged him that at St. Kilda on or about 9 December 1959, being a clerk or servant of Le Mans Motors Pty Ltd he stole from the company a cheque for the sum of £1200. That company was one engaged in the buying and selling of motor cars. The applicant at the relevant time was employed by it in the capacity of a salesman, and the charge arose out of a transaction concerning the purchase and sale of a motor car. The third count charged the applicant that at North Balwyn on or about 27 April 1960, being the clerk or servant of Torino Motors Pty Ltd, he stole from the company the sum of £343. The fourth count charged him with the theft as a clerk or servant from the same company of the sum of £100 on or about 29 April 1960. The sixth count charged the applicant that on 31 August 1960, being the bailee of a motor car the property of Custom Credit Corporation Ltd, he fraudulently took or converted the same to his own use, and so stole it. The seventh and eighth counts charged the applicant that on 31 August 1960, and 23 September 1960, he obtained the sums of £350 and £1100 respectively from one Douglas George Elliott by false pretences.

It is convenient in the first place to deal with the convictions on the third and fourth

counts in the presentment. At the time of those alleged offences the applicant was employed by the company, Torino Motors Pty Ltd as a manager. The company was one engaged in the buying and selling of motor cars and the applicant's duties related to that business. In 1960 a Miss Marshall purchased a Hillman motor car through the company and placed a Humber motor car with the company through the applicant for sale. The allegation against the applicant in both counts was that the moneys he was charged with stealing were stolen in the course of this transaction with Miss Marshall. The applicant at all material times, and in the course of his evidence at the trial, denied all knowledge of these moneys and denied that he had taken them or any part of them. In relation to these counts it was alleged by the prosecution that the applicant had for the purpose of stealing the moneys raised by writing out in his own handwriting a false receipt in respect of the sum of £343 in the name of a fictitious person, one ST Cowell.

The existence of this false receipt and the making of it by the applicant were crucial links in the prosecution evidence against the applicant on both counts three and four to connect him with the theft of the moneys. Indeed, the existence of the false receipt and the making of it by the applicant were the basis of the Crown case against him on both these counts. At the time of the committal proceedings the document said to constitute the false receipt was in existence but the evidence is somewhat conflicting as to whether it was or was not put in evidence at those proceedings as an exhibit. Following the committal proceedings the document was given to Senior Constable Timewell, a police handwriting expert, for examination. Constable Timewell compared the handwriting in the document with an undisputed specimen of the applicant's handwriting, and formed the opinion based on that document and another document, said to be a letter written by the applicant to his wife, that the handwriting in the false receipt was that of the applicant. Between the time when the committal proceedings were concluded and the time of the trial, both documents, that is the document said to be the false receipt and the letter said to have been written by the applicant to his wife, were lost, and despite intensive searches both in the Police Department and the Crown Law Department, could not be found. It should be said that a considerable number of years has elapsed between the date of the committal and the date of the trial, the long delay being due to the fact that the applicant had absconded on several occasions during the intervening period. In these circumstances the Crown sought at the trial to lead secondary evidence of the contents of the alleged false receipt and then expert opinion evidence of Senior Constable Timewell that it was, in his opinion, in the handwriting of the applicant.

It was only during the trial that notice was given to the applicant of the Crown's intention to adduce this evidence as additional evidence. Although such a late notification would not render the evidence inadmissible, it was in breach of a well-recognized rule of practice that reasonable notice of intention should be given to an accused person if it is proposed to adduce additional evidence against him upon his trial. It is necessary in the interests of the orderly administration of justice that this rule of practice should be observed and in this regard we refer to the decision of the Full Court in the case of *R v Brown* (1869) 6 WW and A'B (L) 239; 1 AJR (NC) 59.

At the trial the applicant objected to the evidence sought to be led against him. The basis of his objection was that it would permit the Crown to lead expert evidence, opinion evidence, based upon a comparison of the undisputed specimen of his handwriting with the whole of the document said to be a false receipt, whereas the accused would be, on account of the loss of the document unable similarly to use it and thereby have the opportunity of availing himself of expert opinion evidence to the contrary of that to be adduced by the Crown. The applicant also based his objection on the ground that the Crown proposed to use against him enlarged photographs of selected words taken from the missing document in order to demonstrate points of similarity between the undisputed specimen of handwriting and the handwriting in the missing document. The applicant contended that it would be unfair to him to allow this evidence to be adduced, as the absence of the document denied him any opportunity of adducing evidence on points of dissimilarity in the handwriting contained in the two documents.

After hearing argument, the learned trial judge ruled that there was no legal basis on which he could exclude the evidence proposed to be led by the Crown, and, accordingly, he ruled that the evidence should be admitted. He then took evidence on a *voir dire* relating to the loss of the document and upon being satisfied that it had been lost, after strict inquiry and search had been made for it, he ruled that secondary evidence should be admitted of the existence and the contents of the missing receipt. Evidence was then given by several witnesses that such a

document had been in existence at all relevant times. That evidence was given only in general terms, none of the witnesses purporting to be able to give either the full or precise terms of the document. Indeed one of these witnesses, Staynes, an accountant who had been employed with the company at the relevant time, on the *voir dire* testified that the receipt was signed by the applicant himself, but when he came to give evidence concerning the document before the jury, he testified that the document was signed not by the applicant but by Cowell. Senior Constable Timewell after being qualified as an expert in the comparison of disputed handwritings, deposed that after comparison of the handwriting contained in the missing receipt with the undisputed specimen of the applicant's handwriting he was of opinion that the receipt was in the handwriting of the applicant. Constable Timewell also produced a chart of enlarged photographs of selected words from the original missing receipt in order to demonstrate what he said were points of similarity between the handwriting in the missing document and in the undisputed specimen of the applicant's handwriting.

In the course of the defence case another handwriting expert, one Mendelssohn, was called as a witness for the defence. In the course of his evidence he expressed the opinion that any photographic enlargements of an original specimen handwriting constituted auxiliary and supplementary evidence only, and that such enlargements could be misleading. He expressed the opinion that it was essential in all cases in order to form a sound opinion to go to the original document. He said that in the absence of the original document it was impossible by reference simply to the chart of selected words prepared by Senior Constable Timewell to form an opinion whether the missing document was in the handwriting of the applicant.

Subject to the operation of the statutory provision to which we will refer, there is no doubt, we think, that the secondary evidence was in the circumstances proved, relevant and admissible.

The provision we refer to is s148 of the *Evidence Act* 1958. It reads:

> "Comparison of a disputed writing with any writing proved to the satisfaction of the court or person having by law or by consent of parties authority to hear receive and examine evidence to be genuine shall be permitted to be made by witnesses; and such writings and the evidence of witnesses respecting the same may be submitted to such court or person and the jury or assessors (if any) as evidence of the genuineness or otherwise of the writing in dispute."

It may be that that section requires, as a condition of the admissibility of the genuine writing for purposes of comparison, that the disputed writing must itself always be submitted for examination by the jury. (See the history set out in *Adami v R* [1959] HCA 70; (1959) 108 CLR 605, at p616; 33 ALJR 391.) But we put that aside and assume that the secondary evidence was admissible.

There was, nevertheless, in our opinion, a number of circumstances disclosed by the evidence which called for consideration by the trial judge whether its prejudicial or detrimental effect to the applicant was such as to make it undesirable in the interests of justice to admit the evidence. If it was, the circumstances called for the exercise of a discretion by the trial judge to exclude the evidence in fairness to the accused and in the interests of justice. That a judge presiding at a criminal trial has such a discretion is plainly established.

In *Kuruma Son of Kaniu v R* [1955] AC 197, at p204; [1955] 1 All ER 236, at p239, Lord Goddard in delivering the opinion of the Privy Council said:

> "There can be no difference in principle for this purpose between a civil and a criminal case. No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. This was emphasized in the case before this Board of *Noor Mohamed v R* [1949] AC 182; [1949] 1 All ER 365; 65 TLR 134; 93 Sol Jo 180, and in the recent case in the House of Lords, *Harris v DPP* [1952] AC 694; [1952] 1 All ER 1044; 36 Cr App R 39; [1952] 1 TLR 1075; 116 JP 248. If, for instance, some admission of some piece of evidence, e.g. a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out."

In *R v Ames* [1964-5] NSWR 1489, at p1492, the Full Court of New South Wales said:

> "There is no difference in principle for this purpose between a civil and a criminal case, though in the

> latter the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused person. See the judgment of Lord Goddard CJ in *Kuruma Son of Kaniu v R* [1955] AC 197, at p204; [1955] 1 All ER 236. One factor which although not conclusive, is a guide to the trial judge in exercising his discretion, is if the probative value of the evidence is slight and would be outweighed by its prejudicial aspect or because it would be unfair to the accused in the circumstances."

We refer also to the recent decisions of this Court in *R v White* [1969] VicRp 25; [1969] VR 203, at p206, and *R v Doyle* [1967] VicRp 82; [1967] VR 698, at p699.

We have referred to the existence of a number of considerations which, in our view, called for the exercise of such a discretion. Those considerations include the following. First, that the alleged false receipt was a crucial link in the chain of evidence tending to prove the guilt of the applicant. Indeed, it is said it was the foundation of the Crown case against him on the third and fourth counts.

Secondly, the document was lost whilst in the custody of the prosecution and its loss was, therefore, not the responsibility of the applicant.

Thirdly, the absence of the original document rendered impossible the procurement of expert opinion evidence contrary to that adduced by the Crown and based upon a study of the handwriting contained in the original.

Fourthly, the loss of the document left the Crown with enlarged photographic evidence of alleged points of similarity between the handwriting in the original document and the undisputed specimen of the applicant's handwriting, whilst at the same time denying to the applicant the possibility of adducing like evidence indicative of points of dissimilarity.

Fifthly, and not without considerable importance, the loss of the document deprived the tribunal of fact, the jury, of the opportunity of examining for itself the handwriting contained in the alleged false receipt.

These considerations were, in our opinion, sufficient to call for the exercise of discretion by the trial judge, as we think they were capable of so distorting the substantial effect of the evidence adduced by the Crown as to render its prejudicial effect, having regard to the purpose to which it was directed, so great as to make it unfair to the accused to admit the evidence. As we have said, the learned trial judge ruled that there was no legal basis upon which he could exclude the evidence and that it follows that in fact he did not exercise a discretion at all. In this, in our opinion, he erred and, accordingly, in accordance with well-established principles which govern the functions of an appellate court in a matter of this kind, we must consider for ourselves the proper manner in which the discretion should have been exercised. In this regard and notwithstanding the argument submitted to us by Mr Dixon on behalf of the Crown, we have no doubt in the circumstances of this case that the discretion should have been exercised in favour of excluding the secondary evidence and, therefore, the expert opinion evidence of Senior Constable Timewell which of course was based upon it.

The considerations to which we have already referred lead us to conclude that the loss and absence of the original receipt at the trial placed the applicant at such a grave disadvantage in meeting the case made against him as to make it unfair in the interests of justice for the evidence to be admitted against him, notwithstanding its undoubted relevance. In reality the loss and absence of the original document left the applicant with his arm tied behind his back in attempting to defend himself against the charges contained in the third and fourth counts. We think the absence and loss of the document so substantially diminished the probative value of the evidence having regard to the purpose to which it was directed as to make the prejudicial effect of it out of due proportion and so as to render it in the circumstances of this case unfair to admit it against the accused in the overriding interest of justice. Without the evidence that should, in our opinion, have been excluded, there was no case made out against the applicant on the third and fourth counts, and, accordingly, the convictions on those counts should be quashed. As in our opinion it is impossible to make out a case on either of those counts without the missing documents, we think that we should direct judgment and verdict of acquittal to be entered thereon.

In these circumstances it becomes necessary to consider the effect of the quashing of the convictions on the third and fourth counts on the other counts upon which the applicant was convicted, that is counts one, six, seven and eight. As we have said, the first count related to the theft of £1200 from his employer. The sixth count alleged the fraudulent conversion of a motor car being purchase on hire-purchase terms. The seventh and eighth counts alleged the obtaining of money by false pretences arising out of the transaction relating to the car which was the subject of the sixth count. It will be observed that all these charges involved allegations of fraudulent intent against the applicant, which in each case was denied by him.

It is plain, therefore, that in relation to each of these counts the view taken by the jury of the credit of the applicant was a vital consideration. In the course of his charge the learned judge directed the jury as follows:

> "But in reaching your decision on any particular charge, you are entitled to look at the general conduct of the accused man, as has been disclosed by the evidence in relation to the other matters, in determining the weight you attach to the evidence in respect of that particular charge, and also to determine—if you find it to be so—that there was some systematic conduct to obtain money to which he was not entitled in respect of one more of these charges, to take that fact into account when you are considering your verdict in respect of any particular charge."

In that passage the learned judge was directing the jury that they were at liberty in considering any of the charges in the presentment to have regard to the circumstances relating to the other charges made against the applicant. As the jury convicted the applicant on the third and fourth counts, it must have found that he had drawn up and written out the false receipt in the name of a fictitious person. That would, of course, be a finding which could not fail to reflect most adversely on the credit of the applicant in the eyes of the jury. Having regard to the way in which the learned judge directed the jury that they might make use of any such material, we find it quite impossible to say that had the impugned evidence been excluded, a reasonable jury properly directed would inevitably or without doubt have convicted the applicant on counts one, six, seven and eight. For the reasons we have given we are of opinion that the charges so far as the fraudulent intent is concerned, were interconnected.

The test applicable in such a case is illustrated by the recent decision of this Court in *R v White* [1969] VicRp 25; [1969] VR 203, at p207. The consequence is that the convictions on the first, sixth, seventh and eighth counts must necessarily fall with the convictions on the third and fourth counts. We should add that there was a number of other grounds of appeal raised by the applicant. None of those grounds was, however, of such a kind as to require that judgment and verdict of acquittal be entered other than on counts three and four, and in view of the decision to which we have arrived, we find it unnecessary to deal with the other grounds raised by the applicant.

The application is granted. The appeal is heard instanter and allowed. The convictions on counts one, three, four, six, seven and eight and the sentences imposed thereon are set aside. There will be a direction that judgment and verdict of acquittal be entered on counts three and four and an order for a new trial on counts one, six, seven and eight.

Solicitor for the Crown: Thomas F Mornane, Crown Solicitor.
