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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v SIMMONDS

Phillips CJ, Hampel and Vincent JJ

28, 29 October 1992

CRIMINAL LAW – OBTAINING PROPERTY BY DECEPTION – FALSE BANK BALANCES CREATED – SLIP PRESENTED FOR WITHDRAWAL OF FUNDS – MONEY OBTAINED – NO ORAL REPRESENTATION MADE – WHETHER PRESENTATION OF WITHDRAWAL SLIP A FALSE REPRESENTATION – IDENTIFICATION – WITNESS SHOWN SINGLE PHOTOGRAPH – ACCUSED LATER IDENTIFIED BY WITNESS – WHETHER WITNESS' EVIDENCE OF IDENTIFICATION ADMISSIBLE: *CRIMES ACT* 1958, S81.

S. opened bank accounts in false names at various branches of a bank. He deposited valueless cheques in the accounts and subsequently, by the presentation of withdrawal slips obtained money to which he was not entitled. Upon trial for one count of obtaining and attempting to obtain property by deception, S. submitted that there was no case to answer on the basis that no false representation was made at the time of obtaining or attempting to obtain the property. The trial Judge held there was a case to answer. During the investigation stage of the matter, a bank officer was shown by an investigating police officer a photograph of S. and agreed that it depicted the person who opened the account. The witness subsequently identified S. at the Magistrates' Court hearing and at the trial. The trial Judge refused an application to have the identification evidence examined on a *voir dire*. Upon application for leave to appeal against conviction and sentence—

HELD: Application granted. Appeal allowed. Conviction quashed and sentence set aside. New trial ordered.
1. The presentation of the withdrawal slip implied the assertion of a right by S. to withdraw the amount claimed. Accordingly, the trial Judge was not in error in ruling that there was a case to answer.
***R v Hamilton* (1991) 92 Cr App R 54, applied.**
***R v Beattie*, unrep, NSWCCA, 22 June 1973, distinguished.**

2. In view of the circumstances surrounding the presentation of the photograph, the danger of mis-identification was extremely high. Accordingly, the evidence of identification was inherently unreliable and should have been withdrawn from the jury.

VINCENT J: [1] The applicant was convicted in the County Court at Melbourne of one count of obtaining property by deception and one count of attempting to do so. Sentences of imprisonment were imposed upon him. He now seeks the leave of this Court to appeal against each of these convictions and the effective total sentence which had been handed down in respect of them. As I propose that the verdict of the jury on each count should be set aside and a re-trial ordered with respect to each of them, I do not, at this stage, intend to address the application for leave to appeal against sentence at all and will confine my remarks to strictly essential matters.

Briefly, and perhaps somewhat loosely expressed, the Crown's allegation against the applicant in these matters was that he, in the company of a female, opened bank accounts in false names at various branches of the Westpac Banking Corporation. He would then, it was contended, deposit valueless cheques at other branches and, by the adoption of one or another form of device, create what might be described as false credits in the original accounts. These would enable him to present withdrawal slips and thereby obtain money to which he was well aware that he was not entitled.

The schedule attached to the application for leave to appeal against conviction contains seven grounds. However, Mr Priest of counsel, who appears on behalf of the applicant, announced at the commencement of the hearing that his client wished to argue only two of them. These grounds read as follows: **[2]** Ground 3 – the learned trial judge erred in admitting evidence by the witness, Julie Campton; Ground 5 – the learned trial judge erred in directing the jury that the presentation of a withdrawal slip by the applicant to the bank was capable of amounting to a representation that the account on which the withdrawal slip was drawn was in valid credit.

I propose to deal with these grounds in reverse order. Ground 5: In support of his argument on this ground, Mr Priest submitted that both counts on the presentment upon which his client was tried relied for the element of deception upon the making of false representations by the applicant that the respective bank accounts concerned were in valid credit. He submitted that the case was argued by the prosecution on the foundation that each such false representation was constituted by the presentation of a withdrawal slip. It was never claimed, the argument proceeded, that any oral statement was made when either slip was presented or that the applicant engaged in any conduct other than handing the withdrawal slips to the respective tellers in order to obtain the property alleged. This contention was the subject of a submission, in the course of the trial, that there was no case to answer. It was contended then and before this Court that the withdrawal slips contained no specific representation as to the amounts of ledger balances, or, indeed, that the applicant was entitled to any sums whatever. Mr Priest argued that the learned trial judge, in ruling that there was a case to answer, and in due course by directing the jury in accordance with his finding that by presenting the **[3]** withdrawal slips the applicant represented that there were credits in the accounts to meet them, had fallen into error. He submitted that a withdrawal slip should be regarded as merely a request for payment.

The learned judge's directions on this matter were clearly in accordance with the views expressed by the Court of Appeal when dealing with a similar problem in the case of *R v Hamilton* [1992] 92 Cr App R 54, where Evans J at p58, said:

> "So the appellant in the circumstances of this case had no right to demand payment of the sums which he sought to withdraw from his account. The same conclusion might be reached more shortly on the basis *ex turpi causa non oritur actio* he could not seek to take advantage of his own previous criminal offences did he then make any representation to the effect that he was entitled to make such demands. Can such a representation be inferred from his conduct in making the demands? We agree with the Lord Assistant Recorder that it can. By identifying the account he represented that he was the person to whom the bank was indebted in respect of that account, and by demanding withdrawal of a stated amount he necessarily represented, in our view, that the bank was indebted in that amount to him."

Mr Priest submitted that this approach should be rejected, arguing that the proper analysis of the position is to be found in the judgment of the New South Wales Court of Criminal Appeal in *R v Beattie* (unreported), (delivered 22nd June 1973). In that matter, the case against the appellant was that he took advantage of a mistake made by his bank, which had incorrectly credited to him the sum of $605.51, and presented a cheque for $312 drawn by him and made payable to cash. Lee J identified the issue stating:

> "In this case the only evidence which would be relied upon by the Crown as to the making of any representation was that involved in the presentation by the appellant of the cheque to the **[4]** teller. The evidence was that the appellant did no more than present the cheque, and thus it was this action on his part which was relied upon to support the allegation that he had made a false pretence as alleged in the indictment. Turning now to the indictment, the first question is, what was meant by the allegation that the appellant falsely pretended that the cheque 'was a genuine and available order for the payment of a sum of $315'?"

He then answered that question as follows:

> "The word 'order', to be given any sensible meaning, must refer to an order on the bank upon which the cheque is drawn – in this case the appellant's bank. It is not difficult to hold that when a man gives his cheque to another to obtain goods or money, he represents that it is 'a genuine and available order' for the amount of the cheque, that is, that it will be met on presentation at his bank. *R v Hamilton* (*supra*); *R v Kuff* [1962] VicRp 79; (1962) VR 578; Kenny *Outlines of Criminal Law*, 19th Ed, p359. But, if that meaning is given to the expression 'genuine and available order' in the indictment here, then the representation alleged would be this – that the appellant was representing to the teller, who was the authorised agent of the bank to pay out money, that his cheque, then being shown, would be met by the bank on presentation to it. It is absurd to suggest that this can be the case. Some other meaning must be given to the expression 'genuine and available order' but what is it? I am unable to see what it could be. In the circumstances then the appellant should not have been convicted on this indictment. But the matter should not be allowed to rest there, and the question can be properly be asked: Did he make any representation at all, and, if so, what was it? It might be suggested that the representation made was that he had funds, or reasonably believed he had funds, to his credit to the amount of the cheque, but it seems to me that, as the bank keeps its own records of the state of one's account, the act of presenting one's own cheque to one's own bank to cash cannot be given

> this significance. Such an act, standing alone, in my view, is not to be regarded as a representation as to the state of one's mind in any way at all, but is to be regarded only as a claim or request made to the bank for the amount of the cheque. When one has an account with a bank, the obtaining of funds from the bank requires the making of a request to or claim upon the bank to pay 'cash' or the like is the form in which that request or claim will be received by the bank. No representation as to the state of one's account or one's overdraft, if one has such an arrangement, is involved, nor would I have thought any **[5]** representation as to the state of one's belief on these matters."

For my part I do not consider that the argument of counsel, on this aspect, was well founded. It is important to bear in mind that the Court in *Beattie's case* was presented with a quite different problem from that which has arisen in the present matter. Whatever view might be adopted with respect to the legal effect of handing a cheque to a bank teller, in my view, the situation is much clearer when the device employed to extract money from the bank is the use of a withdrawal slip in a situation of falsely created credit. The argument, adopted by the Court in *Beattie's case*, was clearly based upon the character of a cheque as a genuine and available order for the payment of a sum of money and the perceived incongruity of regarding such an order as a false pretence when presented to the bank itself. Whether or not the bank honoured the cheque did not necessarily depend upon whether there were sufficient funds in the account upon which it was drawn to meet it. The presentation of a withdrawal slip implies the assertion of a right to withdraw the amount claimed, in my opinion, and is, accordingly, quite different. The evidence indicates that the appellant knew or, at least, anticipated that ordinary banking practices relating to the checking of account balances would be carried out before any money was advanced. That, of course, common sense would indicate, was the purpose underlying the creation of false balances in the first place. By the presentation of the withdrawal slip, he asserted a right to withdraw the amount set out in the slip, anticipating, **[6]** as a result of his own actions, that the teller would accept that the account was in credit to a greater sum.

On being invited by the Chief Justice in the course of discussion to advance any arguments which he had at his disposal directed to the reasoning process adopted by the Court in *Hamilton's case*, and, in particular, with respect to this distinction, Mr Priest indicated that the decision could not be attacked at this level, and he was constrained to argue that it should not be followed as it was based upon what he referred to as "policy considerations". Whether or not this was so cannot be determined by reference to the judgment of the Court itself, as no mention of any such influence is made, nor, in my view, is any to be inferred in a case where the judgment is clearly supported by the strength of its own reasoning. In my opinion this ground must fail. A much more troublesome question is presented by the second of the grounds argued before us. It is important, I think, that the evidence of identification by the witness Miss Campton should be placed into an appropriate context, so that its significance in the overall situation might be more easily perceived. This, I think, can be done by reference to the learned trial judge's charge to the jury. He said, in the course of providing instructions to them:

> "You are to consider both the charges quite separately on the facts that you find apply to them. However, in so far as some facts are logically connected to both offences by striking similarity, you may have regard to those facts in considering your decisions. I want to tell you what I mean by striking similarity. In this case, the Crown seeks to rely upon a particular kind of logic arising from the similarity which it suggests exists between some of the transactions with which we are concerned. It points out the following facts: that in the **[7]** three cases which, it said, are proved, new accounts were opened; in each case, with the Westpac branch [I assume that should be "Westpac Bank"); in each case, in branches of the same area; within two days of each other; by a man in his forties wearing glasses and a grey haired lady in her sixties. In each case, they produced Queensland driver's licences for identification and opened two accounts. They spoke of moneys coming from Queensland settlements into these accounts. In each case subsequently, large cheques were paid in. They were all drawn on the Bank of Queensland. They were all drawn on 20th February 1990, and they were all drawn by a person named Madden. But they were all dishonoured with the answer account closed. In each case, the deposit slip contained two mistakes. One: it is suggested, in two cases explicitly and in one case by omission on the face of the deposit slips, that they were deposit slips for cash; on the reverse of the deposit slips in each of the three cases they were stated to be bank cheques but, in fact, when you look at the cheques, they are all personal cheques. In each case, a man in his forties, wearing glasses, sought to draw on the bogus funds within a few days. Finally, the accused is the man who got the money in one case and tried to get it in another. The Crown says that these similarities between one transaction and another are more than one might expect to be due to mere coincidence, and show that the accused engaged in a repeated course of conduct; that evidence of a course of conduct is relied upon by the Crown as showing that the transactions did not occur by accident but by design."

The witness Julie Ann Campton gave evidence that she was a customer service officer employed at the Wantirna South branch of the Westpac Banking Corporation on 27th February 1990, and that on that day an account was opened by a male and a female. These persons possessed the attributes to which the trial judge referred in the course of his charge and behaved in the fashion identified by him as representing a common pattern of behaviour. At a later stage Miss Campton identified the applicant at the Melbourne Magistrates' Court as the male person who opened the account. That particular activity was not the subject of either of the counts before the Court, but its significance may be easily perceived by reference to the **[8]** way in which the matter was put before the jury. Accordingly, the identification of the applicant by this witness assumed a measure of importance in the trial. Mr Just, who appears on behalf of the prosecution before this Court, has frankly conceded that not only was that evidence of importance, but acceptance of it may have had a significant bearing upon the outcome of the trial.

However, a problem arises with respect to the identification of the applicant by the witness Campton due to the circumstances in which it was made. The evidence indicates that one of the investigating police members, in the course of interviewing the witness, produced to her a photograph of the applicant. According to the witness, he asked her if this was the man who opened the account. It would seem that there was no photograph presented for her consideration, and it would seem that what has been termed the investigative stage of the matter had long passed at the time at which this activity was undertaken. It does not emerge, as I understand the position, from the transcript of the trial, exactly what occurred at the time of this initial presentation of the photograph, save that the witness did identify the person depicted as the individual who opened the account in question. She was subsequently present at the Melbourne Magistrates' Court when further identification of the applicant was made by her. The importance of the question of identification was clearly present in the mind of counsel appearing on behalf of the applicant, as at a very early stage of the proceeding in the Court below he sought to have the question examined on the *voir dire*. However, it would **[9]** perhaps be enough to say that His Honour expressed no enthusiasm for this idea, which was rejected.

The Courts have, over a long period of time and in a very large number of cases, stated in different ways the need to exercise the highest measure of care when dealing with issues of identification. The possibility that the presentation of a photograph, prior to the conduct of any identification parade or the undertaking of any other form of identification, may have what is called a displacement effect has long been appreciated and the subject of a number of utterances. I do not think it is necessary here and now to recite the large number of occasions on which this has occurred. The position when an individual is presented with a single photograph presents even greater difficulty. In the present case not only was this course adopted but the witness was asked questions which may very well, in the circumstances, carry to her the implication that the individual depicted was indeed the subject of investigation and the person who had opened the account**.** **[10]** The danger of mis-identification in such a situation must be regarded as extremely high. For my part, perusal of the transcript does not indicate that this danger was satisfactorily addressed either in the course of hearing or through the conduct of a *voir dire* or finally in the directions which were given to the jury about the matter. I consider that the evidence of identification here is so inherently unreliable that it should have been withdrawn from the jury. It is for that reason that I consider and propose that the application for leave to appeal against conviction should be allowed and that a re-trial should be ordered.

PHILLIPS CJ: I agree.

HAMPEL J: I also agree.

PHILLIPS CJ: The order of the Court is that the application for leave to appeal against conviction is granted, the appeal treated as having been instituted, heard *instanter* and allowed. The convictions of the applicant in the Court below are quashed and the sentences set aside. The Court further directs that a new trial of the applicant be had.

APPEARANCES: For the Crown: Mr D Just, counsel. JM Buckley, Solicitor to the DPP. For the applicant Simmonds: Mr P Priest, counsel. Messrs Cahills, solicitors.
