

01/70

SUPREME COURT OF VICTORIA

LAMB v CARNOVALE

Newton J

10 February 1970 — 19 FLR 421

CRIMINAL LAW – FORGERY/UTTERING OF CHEQUE – DEFENDANT FORGED HIS MOTHER'S SIGNATURE ON A CHEQUE AND CASHED IT – CHEQUE MADE PAYABLE TO DEFENDANT'S MOTHER OR ORDER – CHARGES DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: CRIMES ACT (CTH), SS12A, 63(1), 64, 67(b).

HELD: Order nisi absolute. Remitted for hearing and determination by another Magistrate.

1. It was open to the Stipendiary Magistrate to be satisfied beyond reasonable doubt on the evidence that if the writing by the defendant of his mother's purported signature on the cheque fell within paragraphs (d) or (c) of s63(1) of the *Crimes Act* (Cth), then the defendant so acted with the intent that the cheque as purportedly endorsed should be used, acted on and accepted as genuine to the prejudice of the defendant's mother and perhaps also to the prejudice of the Reserve Bank of Australia and the Department of Social Services (which is in effect the Commonwealth of Australia), and also with the intent that the Reserve Bank of Australia in the belief that the cheque as purportedly endorsed was genuine should be induced to do an act; i.e. to pay the amount of the cheque to the defendant.

2. It was also open to the Stipendiary Magistrate to be satisfied beyond reasonable doubt that the defendant had uttered the cheque as forged, within the meaning of s64 of the *Crimes Act*.

NEWTON J: This is the return of two orders nisi to review decisions of the Court of Petty Sessions at Sunshine given on 1 August 1969 whereby two informations against the respondent Carnovale were dismissed.

By one information Carnovale was charged under s67(b) of the Commonwealth *Crimes Act* with forging a document deliverable to a public authority under the Commonwealth, the Reserve Bank of Australia, namely a Social Services Department cheque for \$18 payable to Caterina Carnovale. By the other information Carnovale was charged under s67(b) with uttering the same document, knowing it to be forged.

The Court of Petty Sessions was constituted by Mr WM Murray, Stipendiary Magistrate sitting alone. By consent both informations were heard together. At the conclusion of the informant's case, the Stipendiary Magistrate dismissed each information on the ground that the evidence adduced by the informant, which was not challenged by Carnovale, did not establish either of the offences charged.

The effect of this evidence so far as material was as follows:-

On or about 12 November 1968 Carnovale took from his mother's mail box a crossed not negotiable cheque for \$18 drawn by the Department of Social Services upon the Reserve Bank of Australia and payable to Caterina Carnovale or order. Caterina Carnovale was Carnovale's mother. Carnovale then endorsed the cheque "Mrs. Caterina Carnovale" in his own handwriting, but without his mother's permission, and presented it for payment, again without his mother's permission. The cheque was paid and Carnovale appropriated the proceeds, i.e. \$18.

In the Court of Petty Sessions Carnovale was represented by counsel. He did not appear and was not represented at the hearing in this Court. But affidavits of service were filed and I was informed by counsel for the informant that the Crown Solicitor's office had been informed by Carnovale's solicitors that Carnovale proposed to take no part in the hearing in this Court.

In the Court of Petty Sessions it was conceded by Carnovale's counsel that the Reserve Bank of Australia was a public authority under the Commonwealth. But in the Court of Petty

Sessions Carnovale's counsel submitted in substance that the cheque was at all material times a genuine cheque drawn by the Department of Social Services, and that the fact that Carnovale placed a false endorsement upon it did not turn it into a forgery. The Stipendiary Magistrate accepted this submission, and in consequence dismissed both informations.

In my opinion, the Stipendiary Magistrate was in error in accepting the submission, and the Order Nisi should be made absolute.

Section 67(d) of the Commonwealth *Crimes Act* provides, so far as material, as follows:-

"67. Any person who forges or utters knowing it to be forged—
(d) any document ... deliverable to ... any public authority under the Commonwealth ...;
shall be guilty of an indictable offence."

The two informations were heard in the Court of Petty Sessions with the consent of Carnovale pursuant to s12A of the *Crimes Act*. Section 63(1) of the *Crimes Act* is as follows:-

"63(1) A person shall be deemed to forge a seal, signature, document, register, or record, as the case may be—
(a) if he makes a counterfeit of the seal, or of the impression of the seal; or
(b) if he makes a counterfeit of the signature; or
(c) if he makes a document, register, or record, which is false, knowing it to be false; or
(d) if he, without authority, by any means whatever, alters a genuine document, register, or record, in any material particular,
with intent that the counterfeit seal or impression of a seal or signature, or the false or altered document, register, or record, may be used, acted on, or accepted, as genuine, to the prejudice of the Commonwealth, or of any State or person, or with intent that the Commonwealth, or any State or person, may, in the belief that it is genuine, be induced to do or refrain from doing any act whether in Australia or elsewhere."

Section 64 of the *Crimes Act* is as follows:-

"64. A person shall be deemed to utter a forged seal, signature, document, register or record if he tenders or puts it off, or attempts to tender or put it off, or uses or deals with it, or attempts to use or deal with it, or attempts to induce any person to use, deal with, act upon, or accept it."

In my opinion, paragraph (d) of s63(1) was applicable in the present case. Before Carnovale wrote his mother's name on the cheque by way of endorsement, the cheque was "a genuine document": i.e. a cheque duly drawn by the Department of Social Services and payable only to Mrs Carnovale, unless and until she negotiated it by endorsing it and delivering it to somebody else: see ss8(1), 12(1), 13(3), (4) and (5), 26 and 36(3) of the Commonwealth *Bills of Exchange Act*; *Smith v Commercial Banking Co of Sydney Ltd* [1910] HCA 72; (1910) 11 CLR 667, especially at pp673, 677-8 and 686-8; and Paget's *Law of Banking* 6th Edition pp180-184. But an endorsement of the cheque by Mrs Carnovale would have been an alteration in a material particular, because the cheque after delivery to a third person by way of negotiation would then have become payable to bearer: see ss4, 13(3), 36(3) and 39(1) of the *Bills of Exchange Act*. Hence, when Carnovale wrote his mother's name on the cheque by way of endorsement, he altered the cheque without authority in a material particular within the meaning of s63(1)(d); compare *Halsbury* 3rd Edition Vol. 11 p368 paragraph 599. I consider that in deciding whether the words "Mrs Caterina Carnovale" purported to be an endorsement, the word "Mrs" should be disregarded and the words "Caterina Carnovale" treated as a signature: see s37(a) of the *Bills of Exchange Act* and *Arab Bank Ltd v Ross* (1952) 2 QB 216 especially at p228; [1952] 1 All ER 709. No submission to the contrary was made in the Court of Petty Sessions.

It may be that paragraph (c) of s63(1) was also applicable in the present case. It could be said that if Mrs Carnovale had endorsed the cheque, then it would have become a new or different document, because after delivery by way of negotiation it would then have been payable to bearer. On this view when Carnovale falsely wrote his mother's name upon the cheque by way of endorsement he made a document (i.e. a cheque purportedly payable to bearer) which was false, knowing it to be false, within the meaning of paragraph (c). But it is unnecessary for me to express a final view on this matter. Reference may be made to *Mead v Young* [1790] EngR 2507; (1790) 4 TR 28; 100 ER 876, and *R v Autey* [1857] EngR 37; 169 ER 1013; [1857] Dearsley & Bell 294.

It may here be remarked that my conclusions appear to me to be supported by some of the observations made by Judge Sproule in *Veness v Puls* [1944] ALR 254; [1945] ALR (CN) 501.

It was certainly open to the Stipendiary Magistrate to be satisfied beyond reasonable doubt on the evidence that if the writing by Carnovale of his mother's purported signature on the cheque fell within paragraphs (d) or (c) of s63(1), then Carnovale so acted with the intent that the cheque as purportedly endorsed should be used, acted on and accepted as genuine to the prejudice of Mrs Carnovale and perhaps also to the prejudice of the Reserve Bank of Australia and the Department of Social Services (which is in effect the Commonwealth of Australia), and also with the intent that the Reserve Bank of Australia in the belief that the cheque as purportedly endorsed was genuine should be induced to do an act; i.e. to pay the amount of the cheque to Carnovale; see the last paragraph of s63(1). It was also plainly open to the Stipendiary Magistrate to be satisfied beyond reasonable doubt that Carnovale had uttered the cheque as forged, within the meaning of s64 of the *Crimes Act*. Indeed no submissions to the contrary in relation to any of these matters were advanced in the Court of Petty Sessions.

The form of the information in each case is perhaps open to criticism in that the cheque is described as "a Social Services Department cheque number 02691795 for the sum of \$18.00 and made payable to Caterina Carnovale", whereas a more appropriate description would be "a Social Services Department cheque number 02691795 for the sum of \$18.00 made payable to Caterina Carnovale or order bearing the endorsement 'Mrs Caterina Carnovale'". But no point was made of this in the Court of Petty Sessions, and I shall order that the information in each case be amended accordingly.

I was informed by counsel that Mr WM Murray, Stipendiary Magistrate is no longer sitting at Sunshine, and I shall therefore order a re-hearing *de novo* of both informations. The informations were of course dismissed without the defendant having had the opportunity to call evidence.

Counsel for the informant asked for costs. I shall grant costs in relation to one Order Nisi only. The fact that there were two Orders Nisi did not add significantly to the length of the hearing, and the points upon which the informant has succeeded were not taken on his behalf in the Court of Petty Sessions. And the form of the information in each case was open to the criticisms earlier mentioned. I propose to fix the costs at \$120, being the upper limit prescribed by s161 of the *Justices Act* 1958.

In the Order to Review No. O/R 6522 (the forgery charge) there will be the following orders:-

1. Order that the Order Nisi be made absolute
2. Order that the order of the Court of Petty Sessions at Sunshine dismissing the information be set aside and that the case be remitted to the said Court of Petty Sessions for rehearing *de novo*.
3. Order that the information be amended by substituting for the words "and made payable to Caterina Carnovale" the words "made payable to Caterina Carnovale or order and bearing the endorsement 'Mrs Caterina Carnovale'".
4. Order that the respondent Frank Carnovale pay the costs of the applicant Peter John Lamb of and incidental to this Order Nisi including reserved costs, all of which costs are fixed at \$120.

In the Order to Review No. O/R 6526 (the uttering charge) there will be the following orders:-

1. Order that the Order Nisi be made absolute.
2. Order that the order of the Court of Petty Sessions at Sunshine dismissing the information be set aside and that the case be remitted to the said Court of Petty Sessions for re-hearing *de novo*.
3. Order that the information be amended by substituting for the words "and made payable to Caterina Carnovale" the words "made payable to Caterina Carnovale or order and bearing the endorsement 'Mrs Caterina Carnovale'".
4. No order as to costs.

I wish to thank counsel for the applicant for their careful and helpful arguments. I return the original cheque.

APPEARANCES: For the applicant/informant Lamb: Mr JA Gobbo with Mr BW Nettlefold, counsel. Commonwealth Crown solicitor. No appearance for or by respondent/defendant Carnovale.