

(RUPERTO MAGANA
(EUSTAQUIA TORRES

APPELLANTS

BETWEEN

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(THE QUEEN

RESPONDENT

Court of Appeal
Criminal Appeals Nos. 2 and 3 of 1988
2nd June, 1989

SIR JAMES A. SMITH P.
KENNETH ST. L. HENRY J.A.
SIR JOSEPH A. LUCKHOO J.A.

Criminal Law - False Accounting - Theft - Whether possible to charge a general deficiency between specific dates of fraudulent conversion - Elements of the offence of False Accounting - Distinction between "made for an accounting purpose" and "required for an accounting purpose".

REASONS FOR JUDGMENT

The Appellants Rupert Magafia and Miss Torres were civil servants employed at Orange Walk Sub Treasury. He was the accountant in charge of the Sub Treasury and she was the cashier. His appointment took effect from 1st April 1982; she became a substantive cashier on 6th June 1983, having acted as cashier or as checker of accounts (a more senior post) since the beginning of 1983. The appointments of both were terminated on 14th May 1986.

According to Miss Cleland, the Accountant General the respective duties of Accountant and Cashier were:-

"The District Accountant is responsible for the running of the sub Treasury in the districts i.e. collecting of revenue, dispersing, or making payments of revenue, and he is the overall supervisor of the district Treasury. The cashier does the actual collection of revenue and actual payment of revenue and balancing of the cash book.

The cash book is a book where all revenues and expenditures are recorded. The responsibility falls upon the cashier, though a more junior clerk can make entries but the cashier's duty is to see that it balances. The books should be checked by the Accountant and **both** officers should sign the cash book. When this is done the original cash book should be sent to Belize City. The cash book is in "loose leaf" sheets form. The loose leaf cash books should be sent three days after the end of the week to the Accountant General's Office in Belize City. The week ends on Friday. So the cash book should be dispatched by the Wednesday after Friday.

In addition to the cash book the sub Treasury has to send the original copy of the payment vouchers and the second copy of the original receipt because the first goes to the payer.

The cash kept by the district, varies from district to district, but cash balance at the bank should not exceed \$75,000.

When collecting revenue by a cheque payment, the cashier should lodge the cheque within 24 hours of receipt of such cheque. No signatures are needed except a stamp of the Treasury for deposit of the cheque to the Account of the Government of Belize. When a cheque is made out by the Treasury it should bear two signatures, the Accountant's and the cashier's. The bank has specimen signatures of Accountant and Cashier.

At the beginning of each working day the cashier opens his or her own safe which she operates on a daily basis. If there is a large amount at hand, and if there is a larger safe in the district, the cashier keeps the cash in that bigger safe. In a large district there is a larger safe with smaller compartments inside the bigger safe. The Accountant keeps one key to the larger safe, and the cashier keeps a key to the smaller compartment in the safe. Duplicates of all keys held by the Accountant and cashier are kept in Belize City.

The district Accountant has a duty to "call" Headquarters in Belize on every day and give the cash balance and the Bank balance at hand. At the end of every week the district Accountant is obliged to send a statement, a cash statement, showing the cash situation in his district.

This has been happening in respect of Orange Walk District Treasury all the time."

Control over the accounts of a sub treasury was further maintained by a system of surprise cash surveys, where an inspecting officer or officers from the Treasury in Belize City appeared unannounced at a Sub Treasury to check cash books and cash in hand to ensure that all revenue received and expenditure made, had been entered up in the cash book and balanced with the cash in hand in the cashier's and/or the accountant's safe at the Sub Treasury.

On 7th May 1986 an apparent discrepancy of \$250,000 in the funds of Orange Walk Sub Treasury was discovered by Miss Johnston, an officer of the Accountant General's department in Belize City, when checking the Sub Treasury accounts. The matter was reported to Miss Robateau, the acting Accountant General who directed Miss Johnston to make a surprise cash survey of the Sub Treasury at Orange Walk next day. When the inspecting officers arrived on the following morning 8th May Magaña was absent. He turned up in the afternoon. In his presence, the contents of his safe were checked by Miss Johnston and found to contain \$6,700 in bank notes and coins, and ten cheques totalling \$243,300. These items were recorded on a cash survey form which Magaña signed, the contents of the safe and the cash book balance being apparently correct. Miss Johnston returned to Belize City and next morning she reported to the acting Accountant General who herself checked the Sub Treasury records at Headoffice and found there were no copy receipts for the payments by cheque as there should have been.

The Accountant General, Miss Cleland resumed duty on 12th May. She phoned Magaña and directed him to pay all the cheques into the Sub Treasury bank account at Orange Walk and to report to Head office when this was done. On 13th May the Accountant General phoned to ask if he had complied. He admitted he had not and sought an interview to explain. They met later the same day. She asked him why he had not done as instructed. She said he replied "the cheques were not valid as "they were written from his personal cheque book"; that "the cash was short"; that he "had invested it".

He also said "he had been using duplicate cash books" and "that was why the shortage had not been discovered before". He asked for time to pay, which she refused.

On 14th May 1986 Miss Robateau accompanied by Miss Johnston and Mr. Nicholas from the Auditor General's department conducted another survey at Orange Walk Sub Treasury in the presence of Magaña and Miss Torres. When asked for the safe keys and the cheques, Magaña said he had destroyed the cheques, adding "Did (Miss Robateau) think he would keep evidence against himself". The cash survey taken that day showed a deficit of \$280,000.10. Both Magaña and Miss Torres refused to sign the cash survey form prepared by Miss Robateau. Miss Torres said " I did not get anything of that money".

On 19th May 1986 the police found hidden behind a cupboard 18 pages of cash books, the postings in which turned out to be duplicates of the originals sent to Head Office for 5th to 13th May 1986 by Orange Walk Sub Treasury, the entries in both sets of cash books being similar except that the cash balance in the duplicate cash books did not show the deficit. All these duplicate cash books were in the writing of Miss Torres as cashier. Both Magaña and Miss Torres had signed all except two, Magaña alone signed on 12th May and Miss Torres alone on 13th May.

Mr. Nicholas, the auditor, was directed to conduct an audit examination of the Orange Walk Sub Treasury accounts for the period from 3rd January 1983 to 14th May 1986 inclusive. In his report dated 17th August 1986 (Exh. P31) he stated in para 2:

"2. Deposit of cheques into Bank: It was observed that all cheques received were not being deposited into the bank daily or in the morning following where cheques were received after closing hours of the bank as required by Financial Order 203. It was further noted that the total amount listed as being cheques on hand by the Accountant were far less than the total value of cheques deposited for the month. Instead of these cheques being deposited into the bank to increase the bank balance, drafts were sold to the bank for cash. This would indicate that cheques were being held for indefinite period".

The original indictment contained eleven counts which fell into four groups. In counts 1 to 5 both Appellants were jointly charged with offences of false accounting contrary to section 166(1)(a) of the Criminal Code. In count 6, which was withdrawn during the trial, Magaña alone was charged. Magaña alone was also charged in Count 7 under the same section of the Criminal Code with falsifying a document required for accounting purposes, namely a cash survey form dated 8th May, 1986 by concurring in the entry of a material particular in the cash survey form, namely, the sum of \$243,300.00 entered as the total amount of cheques held at the Sub Treasury knowing the same to be false. In counts 8 and 9 Miss Torres alone was similarly charged with concurring in the entry of \$9,402.62 in Count 8 and \$9,213.12 in Count 9 as the total cash balance held at the Sub Treasury on 30th May 1984 and 26th March 1985 respectively knowing same to be false. In Counts 10 and 11 both Appellants were jointly charged with theft, the particulars of Count 10 being that they stole \$192,160.00 between 3rd January 1983 and 23rd March 1985 the property of the Government of Belize; and in Count 11 with stealing between 24th March 1985 and 14th May 1986 the sum of \$87,959.54 also the property of the Government of Belize.

We pause here to comment that when the original Count 6 was withdrawn the learned trial judge purported to renumber the remaining counts as 6 to 10, instead of 7 to 11. No such amendment appears to have been endorsed on the original indictment, and consequently in this appeal we have referred to the counts as they appear in the original indictment, namely Counts 1 to 5, Count 7, Counts 8 and 9 and Counts 10 and 11.

At the close of the case for the prosecution it was submitted by counsel on behalf of Magaña and Miss Torres that neither of them had a case to answer. These submissions were rejected by the learned trial judge who called upon each Appellant to proceed with their defence. Neither of them called any witnesses; neither chose to give evidence on oath but each Appellant elected to make a statement from the dock which in his summing up the learned trial judge drew to the attention of the jury.

Each Appellant was separately represented by counsel. Counsel for Magaña supported by counsel for Miss Torres argued the verdict was unreasonable having regard to the evidence and submitted the learned trial judge erred in rejecting the "no case" submission. These two grounds of appeal tended to overlap and may be considered together.

The charges of theft in the last two counts of the indictment were based upon a general deficiency of a total aggregate sum of \$280,119.62 split into two counts. In count 10 the Appellants were jointly charged with stealing \$192,160.08 between 3rd January 1983 and 23rd March 1985 and in the last count, with stealing \$87,959.54 between 24th March 1985 and 14th May 1986. Defence counsel submitted there should have been separate charges of stealing a specific sum on a specific day. In the present case the disappearance of individual sums of money on specific days could not be traced in detail although there was evidence of fraudulent conversion over a period of time. In those circumstances it is, permissible to charge a general deficiency between specific dates.

In *R. v. Lawson* (1952) 36 Cr. App. R. 30, Lynkskey J. said:

I agree that in the ordinary case where it is possible to trace the individual items and to prove conversion of individual property or money, it is undesirable one should include them all in one count alleging general deficiency.... but where individual items cannot be traced in detail or where the evidence makes it clear there has been fraudulent conversion the prosecution is entitled to frame their counts in the way they have been framed here.

This view of the law was approved on appeal in *R. v. Tomlin* (1954) 33 Cr. App. R. 82.

As to defence counsel's submission that the verdict was unreasonable having regard to the evidence, counsel drew attention to the fact that none of the prosecution witnesses could say when the shortages of Government funds from Orange Walk Sub Treasury began, except that two prosecution witnesses thought they had started before either of the Appellants became respectively accountant and cashier at Orange Walk Sub Treasury. We do not consider that the fact that shortages may have existed prior to the time when the Appellants became respectively accountant and cashier at the Orange Walk Sub Treasury would make the verdict against them unreasonable.

In each of the counts 1 to 5 (except Count 2) the Appellants were jointly charged with offences contrary to sec. 166(1)(a) of the Criminal Code the particulars in each case being similar except for dates of offence and the false sum entered:

RUPERTO MAGAÑA and EUSTAQUIA TORRES on the day of May, 1986, at Orange Walk Town, in the Northern District of the Supreme Court, dishonestly with a view to gain for themselves falsified a document required for accounting purposes, namely, a Government of Belize Cash Book dated 5th May, 1986, by concurring in the entry of a material particular in the said Cash Book, namely the sum of entered as the total cash balance held at the Orange Walk Sub-Treasury for the said date knowing same to be false.

Sec. 166 of the Criminal Code reads:

166.-(1) Where a person dishonestly, with a view to gain for himself or another or with intent to cause loss to another -

(a) destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purposes; or

(b) in furnishing information for any purpose produces or makes use of any account, or any .such record or document as aforesaid, which to his knowledge is or may be misleading, false or deceptive in a material particular,

he shall, on conviction on indictment, be to imprisonment for term not exceeding seven years.

(2) For purposes of this section a person who makes or concurs in making in an account or other document an entry which is or may be misleading, false or deceptive in a material particular, or who omits or concurs in omitting a material particular from an account or other document, is to be treated as falsifying the account or document.

Counsel for the Appellants submitted there was a distinction to be drawn in sec. 166(1)(a) between a document "made for an accounting purpose" and "one required for an accounting purpose. In support of this proposition counsel cited the opinion of the Court of Appeal in Attorney General's Reference (No. 1 of 1980) (W.L.R. (1981) 38) held:

"that the words "made or required" in section 17(1)(a) indicated that there was a distinction to be drawn between a document made specifically for the purpose of accounting and one made for some other purpose but which was required for an accounting, purpose; that a document might fall within the section if it was made for some purpose other than an accounting purpose but was required for an accounting purpose as a subsidiary consideration; and that, in the present case, the nature and content of the form was such that the question referred was to be answered in the affirmative."

The issue in that case was whether a person who dishonestly falsifies a personal loan proposal form in material particular which he sends thereafter to a finance company and which they used in their accounting process falsifies a document required for any accounting purpose.

The issue in our present case is whether the duplicate cash books containing alleged false balances prepared by the Appellants to be produced for scrutiny by inspecting officers at a surprise cash survey with the intention of deceiving them into accepting the figures in the false cash balance as

genuine constituted documents required for an accounting purpose. The duplicate cash books would await the time until there was a surprise cash survey. The fact that the necessity might not arise in the event does not, in our opinion, mean that the information was not required in the first instance for the eventual accounting purpose.

We allowed the appeal on Count 2 because the charge as framed was defective in that a material particular, to wit, "with a view to gain for themselves", had been omitted from the particulars of crime.

In Count 7, Magaña alone was charged. The particulars stated that he -

"dishonestly with a view to gain for himself falsified a document required for accounting purposes, namely a cash survey form dated 8th May 1986 by concurring in the entry of a material particular in the said cash survey form, namely, the sum of \$243,300.00 entered as the total amount of cheques held at the Orange Walk Sub-Treasury for the said date knowing the same to be false."

It was submitted by counsel for Magaña that while it was agreed that cheques totalling \$243,300 were held at the Sub-Treasury, this statement that they were so held was not false as their validity or worth was not relevant. This we considered to be a specious argument. Magaña knew they were not genuine cheques as he had himself made out these cheques from his personal cheque book in the names of the persons listed on the back of the cash survey form, nine of whom gave evidence indicating the cheques were false and thus valueless. This was known to Magaña and consequently his certification was false. Between 8th and 14th May 1986 he had on his own admission destroyed these cheques.

It was Magaña's duty to submit weekly certificates to the Treasury in Belize City.

As the learned trial judge pointed out to the jury Mr. Nicholes who conducted an audit of the Sub-Treasury of Orange Walk compiled a list in serial order of the weekly certificates Magaña had sent to the Treasury in Belize City from 1st January 1983 and the cheques which Magaña had kept or allegedly kept in the safe escalated from \$72,489.00 on 8th January 1983 to \$252,450.00 in the last certificate which he sent on 1st May 1986.

From 1 June 1985 to 31 July 1985 Miss Rodriguez acted as cashier at Orange Walk Sub-Treasury while the Appellant Miss Torres was absent on leave. In her evidence at the trial Miss Rodriguez said that as cashier she collected revenue, paid out vouchers and at the end of the day wrote up the cash book which was checked by Magaña the accountant. Her cash books were sent to the Treasury at Belize City. At the trial she was shown the cash books (Exh. P13) for the period in question and said, they "are not mine and are not signed by me". She recognised the signatures on the cash book for 25th July as those of Magaña and Miss Gomez, a temporary employee. Miss Rodriguez said she was the cashier on that day. On other cash books in the said period she saw the signature of Leiva, the messenger. In answer to a question by the Court she said there were two safes at Orange Walk Sub Treasury, one in the accountant's office and one in the cashier's office, the accountant's safe being the larger. Miss Rodriguez used to lock the cash and cheques in the cashier's office safe. Miss Rodriguez also said in cross examination that during a cash survey, the inspecting officer would

check the cash in the cashier's cage and then the cashier would be called to sign the cash survey form.

Ricardo Leiva also gave evidence which the trial judge described to the jury as follows:-

He swore to you that Miss Rodriguez took over as cashier throughout this period of Miss Torres' absence between June 15th and towards the end of July '85. The examination of Leiva after a while proceeded along the following lines: Crown Counsel: "Look at Exhibit P13 for the day (P 13 is the cash book) for the day 3.7.84". He looks, and this is his answer. "Yes, it is a cash book. I do recognize the signatures at the foot of the document. They were Mr. Magaña's and mine. It was not my responsibility to sign this book in the Treasury". Crown Counsel: "Why did you sign it if it was not your job-" Answer: "Magaña instructed me to". He then added that Magaña would ask him to help him when writing one cash book to the other. He says and I quote " I myself did not enter these. I would read them out from cash book and ticking them on another". Mr. Leiva admitted that if Magaña asks him to sign he would sign; he signs. In answer to the question which was put by the Court Leiva says and I quote " I had one cash book and Magaña had another cash book. I would read from the cash book of the cashier and he would tick another cash book".

On this evidence the learned judge said to the jury:

You must ask yourself what exercise was Magana doing in the absence of Miss Torres on leave, what kind of exercise- He himself does not have to say anything of course but what are the inferences that you are able to draw, if you believe these facts- Why should Mogana be engaged in the exercise of removing the cash book signed by Miss Rodriguez for the period of Miss Torres' absence and then Magana himself signing the cash book with a messenger as a signatory a few times; and Miss Gomez, a temporary clerk- You have to make your own inferences. The inferences that you draw must be irresistible and unequivocal. Was he wasting his time with Gomez and Leiva; was he negligent, careless or incompetent, or was he preparing a duplicate cash book- That is for you to decide.

By their verdict the jury clearly decided that Magana was involved in the preparation of duplicate cash books.

In Count 8 Miss Torres alone was charged with dishonestly falsifying with a view to gain for herself a document required for accounting purposes being a cash survey form dated 30th May, 1984 by concurring in the entry of a material particular in the said cash survey form namely the sum of \$9,402.62, entered as the total cash balance held at Orange Walk Sub-Treasury for the said date knowing the same to be false. She was similarly charged in Count 9 that on 26th March, 1985 she concurred dishonestly with a view to gain for herself, in the entry of a material particular namely, the sum of \$9,213.12, entered in the cash survey form as the total cash balance held at Orange Walk Sub-Treasury knowing the same to be false.

Miss Torres would have known from the cash book sent to the Treasury for 29th May 1984 that the balance carried forward was \$193,584.71 while the "Revenue or cash book balance" Shown on the cash survey form (Exh. P20) was \$9,402.62. This figure of \$9,402.62 represented the total cash in revenue received by Miss Torres on that day. It was submitted that this figure purported to represent the accumulated cash balance carried forward which at that time was said to be \$193,584.71 Miss

Torres signed the certificate on Exh. P20 which reads "I agree with the position set out above so far as cash is concerned". It was contended for the prosecution that the word "cash" in the certificate meant "cash balance" and the learned trial judge adopted this view in his summing up to the jury. It may be noted that when Miss Rodriguez was acting as cashier in June/July 1985 when Miss Torres was on leave, she participated in a cash survey and said the inspecting officer would check the cash in the cashier's cage and she would then be called upon to sign the cash survey form and would sign if she agreed. That evidence indicated that the certificate as worded meant cash in hand in the cashier's safe and no more. For that reason we allowed the appeal on Count 8. We also allowed the appeal on Count 9 which relates to a similar situation.

As to the point made by Counsel for Miss Torres, that during the period that she was cashier there were several other persons who acted as cashier in her absence. That may be, but the persons who acted as cashiers were only so engaged for comparatively short periods of time. Miss Torres on the other hand continued as checker or cashier from early in 1983 until her appointment was terminated on 14th May 1986. A scrutiny of those cash books discloses that the vast majority of them were in her handwriting, and signed by her as cashier or checker. It was her responsibility to see that revenue received, whether notes, coins or cheques were paid into the bank daily or at the first opportunity. Yet she certified as correct the ever increasing balances which were forward from day to day over a period of years. Each time she returned to work after absence on leave and continued to allow the apparent balances carried forward to increase and in the end there was a deficit of over \$280,000. The scheme devised to cover up the fraudulent conversion of the funds was manipulated by Magana, but both were engaged in a joint enterprise sustained by criminal conduct.

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