The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 8 of 2018

B E T W E E N:

THE QUEEN

Appellant

- v -

MELISSA BURTON

Respondent

Before: **Baker, President**
Kay, JA
Bell, JA

Appearances: Larry Mussenden and Alan Richards, Office of the Director of Public Prosecutions, for the Appellant;
Mark Pettingill, Chancery Legal Ltd, for the Respondent

Date of Hearing: **19 November 2018**
Date of Judgment: **23 November 2018**

J U D G M E N T

Form of indictment in a case of theft of "money" in a bank account, appropriate section of the Criminal Code under which an accused person should be charged with theft, description of credit balance in such account, amendment of the indictment and consideration of section 489A(1) of the Criminal Code and the issue of injustice

BELL, JA

Introduction

1. This appeal concerns a ruling by the trial judge, Simmons J, when she directed the jury to acquit the Respondent, Burton, on all of the counts with which she

had been charged, on the ground that there was no case for her to answer. The charges against Burton made by indictment dated 15 March 2017 were:

Counts 1 to 5. Theft contrary to section 337(1) of the Criminal Code Act 1907 ("the Code"). The dates and amounts said to have been stolen were, respectively, $7,462 stolen by online bank transfer on 7 November 2016 (Count 1), $24,590 stolen by online bank transfer on 9 November 2016 (Count 2), $10,000, stolen by online bank transfer on 2 December 2016 (Count 3), a further $10,000 also stolen by online bank transfer on 2 December 2016 (with a different payee) (Count 4), and $4,232.14 stolen by credit card charge between 1 and 7 December 2016 (Count 5), and
Count 6. Abuse of Senior contrary to section 3 of the Senior Abuse Register Act 2008.

2. In ruling that Burton had no case to answer, the learned judge found the indictment to be defective insofar as counts 1 to 5 were pleaded as being contrary to section 337(1) of the Code, rather than contrary to section 331 of the Code; the learned judge further concluded that the reference to money in the particulars of counts 1 to 5 of the indictment could not be read as including a credit balance in a bank or a credit card account. The Notice of Appeal maintained that the learned judge had been wrong in relation to the two primary findings, identifying the proper section of the Code and referring to "money" rather than "a credit balance", and further that the learned judge had failed to exercise her discretion properly so as to permit amendment to the indictment in order to cure such defects as she found to have existed. In particular, it was submitted that the learned judge had erred in finding that there could be any prejudice (or injustice) to Burton from allowing such amendments in the context of the case as a whole, the only live issue being one of dishonesty, and secondly, that the learned judge had taken account of factors that were irrelevant to her consideration of that application.

3. In relation to the sixth count, of abuse of a senior, contrary to section 3 of the Senior Abuse Register Act 2008, it was accepted on both sides that this count arose from the theft charges on the indictment, and that the count could only stand if there was a conviction of theft.

Background

4. The material time covered the period from shortly before until shortly after the death of Katherine Trimingham, for whom Burton had acted as "addiction counsellor/life coach", and who had been so employed since 2014. Mrs Trimingham had been admitted to hospital on 27 October 2016, and had died on 1 December 2016. Following her death, her executor, Winchester Global Trust Company Ltd. ("Winchester"), acting through its Vice President, Neil Halliday, had examined certain accounts held by Mrs Trimingham with HSBC, and had identified a number of suspicious transactions involving transfers together totalling more than $50,000.00. Mr Halliday had called in the Police, who had arrested Burton at Winchester's offices on 23 February 2017. Subsequently, the Police executed a search warrant and interviewed Burton in the presence of her lawyer. Burton was charged on 24 February 2017, and her trial commenced in the Supreme Court on 3 July 2018. The Crown closed its case on 10 July, whereupon counsel for Burton made two no case submissions which are described below.

The Judge's Rulings

5. The judge made three rulings. The first was dated 12 July 2018, following a hearing the previous day, in consequence of the application made by the defence that Burton had no case to answer. This ruling was made at the close of the prosecution case, and the court ruled that it was satisfied that Burton did have a case to answer, on the basis that on one possible view of the facts, that elucidated by the Crown, there was evidence capable of showing Burton's dishonest state of mind as to who had legal control over Mrs Trimingham's finances. The learned judge indicated that it was quintessentially the province of

the jury to determine from the evidence whether or not Burton's belief (that since access to Mrs Trimingham's bank accounts and credit card was unrestricted, without guidelines or parameters, any use by her of that financial access could not be said to be dishonest) was genuinely held. The learned judge noted that the jury would first have to ascertain the state of Burton's knowledge or belief as to her right to make transactions as an executor or trustee of Mrs Trimingham's estate, and once the jury had determined the actual state of mind of Burton's knowledge or belief, the question whether her conduct had been honest or dishonest was a matter for the jury. Accordingly, the judge was satisfied that Burton had a case to answer.

6. Following delivery of that ruling, Burton was put to her defence, and indicated that she would not herself be giving evidence, and would not be calling any witnesses to give evidence on her behalf. Thereafter, Mr Pettingill on Burton's behalf made a further no case submission (No Case Submission #2), contending that the Crown having charged Burton contrary to section 337(1) of the Code, had failed to establish jurisdiction, since Burton was outside Bermuda when she carried out the banking transactions complained of in the indictment. Secondly, he contended that the transactions conducted on Mrs Trimingham's bank account did not in law amount to stealing money as pleaded in counts 1 to 5 of the indictment.

7. The learned judge held hearings on 13 and 16 July 2018 in relation to this second submission that there was no case to answer, and delivered her ruling on No Case Submission #2 on17 July 2018. Having given details of the basis upon which Mr Pettingill based his further no case submission, the judge dealt with the issue of jurisdiction. The basic definition of theft appears in section 331 of the Code. Section 331(1) states that a person is guilty of theft "if he dishonestly appropriates property belonging to another with the intention of permanently deprive the other of it". The following sections, sections 332 to 336 inclusive, break down these words and provide further clarity of meaning. Section 337

sets out the penalty for a person guilty of theft both on summary conviction and conviction on indictment. So prima facie one would expect charges to be laid under section 331 of the Code, rather than under the section dealing with penalty, section 337.

8. Jurisdiction in relation to theft and like offences is dealt with in the sections starting with section 376 of the Code. This section establishes Group A and Group B offences, indicating that an offence of theft under section 331 of the Code qualifies as a Group A offence. Section 377, which deals with jurisdiction in respect of Group A offences defines a relevant event as "any act or omission ….. proof of which is required for conviction of the offence". Subsection 2 of that section states that for the purposes of determining whether or not a particular event is a relevant event in relation to a Group A offence, any question as to where it occurred is to be disregarded.

9. The judge set out the competing arguments in relation to the no case submission made to her. For the Crown, Mr Richards argued that there was only one legal definition of theft in Bermuda, that enshrined in section 331 of the Code. In prescribing penalties for theft, section 337 could only be understood to mean theft as defined in section 331. While maintaining that any amendment to the statement of offence was unnecessary, he submitted that no prejudice to the defendant would flow if, for the sake of clarity, those charges were instead pleaded as "contrary to section 331(1) as read with 337(1) of the Criminal Code 1907". The issue of prejudice, or, properly, injustice to Burton is at the root of this appeal.

10. Mr Pettingill for Burton submitted that the prosecution had wrongly pleaded that Burton had stolen money. He submitted that the facts of the case more readily fitted within one of the other sections dealing with dishonesty, such as obtaining property by deception or obtaining a money transfer by deception. He submitted that the distinction between theft and the obtaining offences in the Code are not

merely technical issues, but go to the very core of the definition of theft, and that the key elements in the obtaining type of offences were separate and distinct and not interchangeable. For the Crown, Mr Richards responded that "money" was defined in section 3 of the Code as including "bank notes, bank drafts, bills of exchange, cheques, and any other orders, warrants, authorities or requests for the payment of money". Section 479 of the Code concerns the rules relating to the contents of particular indictments, and subsection 5 states that "in an indictment in which it is necessary to mention money, such money may be described simply as money, without specifying any particular form of money".

11. Both counsel referred the court to authority. Mr Pettingill relied upon the case of *Preddy* [1996] AC 815, as authority for the distinction between "money" and "a thing in action". Mr Richards referred the court to *Hilton* [1997] 2 Cr App R 445, noting that this case was decided after and with full knowledge as to the decision in *Preddy.*

12. The judge rejected Mr Pettingill's submissions in relation to jurisdiction, but held that in relation to the words "did steal money" contained in the first five counts of the indictment, there was a distinction to be drawn between money and a credit balance, describing the former as tangible and the latter as intangible. The judge indicated that it would be wholly artificial for the court to direct the jury that money includes a credit balance, or that the online transfer transacted by Burton amounted to her stealing money. Accordingly, she found that the evidence in the case was not capable of sustaining the element of "did steal money" as particularised in the indictment and indicated that the jury would be directed to return not guilty verdicts on each of the counts on the indictment.

13. The terms of the second ruling were duly notified to counsel on 17 July 2018, and during the course of an exchange between counsel and the judge, Mr Mussenden for the Crown pointed out that the second ruling had not dealt with the Crown's application that the indictment should be amended, on the basis

that the indictment could be amended without causing any injustice to Burton. The learned judge indicated that she had considered that aspect of matters, and was willing to her amend her ruling to include a reference to that submission. But the judge remained of the view that to allow an amendment would prejudice Burton, and confirmed that the amendment would not be allowed, and a directed verdict would be given. The jury was called back in and gave its verdicts of not guilty in accordance with the judge's direction.

14. After the jury had been dismissed, there was further discussion between counsel for the Crown and the judge regarding the Crown's request that the judge produce an addendum to her second ruling, which in due course she did. The addendum was also dated 17 July 2018, and dealt with the issue of an amended to the indictment, and whether or not the amendment proposed would prejudice the defendant. The learned judge confirmed her view that such amendment would indeed prejudice Burton.

The Appeal

15. The Notice of Appeal related to No Case Ruling #2, and essentially covered the areas mentioned in paragraph 2 above. First, it was maintained that the judge had erred in finding the indictment to have been defective by reason of pleading counts 1 through 5 as contrary to section 337 of the Code rather than section 331. Secondly, by concluding that references to money in the particulars of the indictment could not be read as including a credit balance in a bank or credit card account. And thirdly, by the learned judge's failure to permit an amendment to the indictment in order to cure such defects as the judge had found to have existed, by finding that there could be any prejudice to Burton from allowing the amendment, the case having been run on the basis that the only live issue had been of Burton's honesty or dishonesty, and in this regard took account of irrelevant factors. It is to be noted that the Notice of Appeal used the word "prejudice" rather than the word "injustice" appearing in the relevant section of the Code, section 489A.

16. In regard to the issue of Burton's honesty or dishonesty, the Crown referred to and relied upon Burton's case at trial, contained first in the Agreed Statement of Facts dated 3 July 2018, and in the Defence Statement dated 15 June 2018, to the effect that Burton had at all material times believed that she had authority to act on Mrs Trimingham's behalf with regard to her care and various financial matters, which included the payment of certain monies to herself. The Agreed Facts had been read to the jury during the Crown's opening.

17. The Crown's submissions then turned to consider the appropriate section of the Code for a charge of theft. The learned judge had at the start of the trial raised the issue of whether theft should be charged under section 331 or 337 of the Code, to which the Crown had responded that historically, it had always charged theft under section 337 of the Code. But the Crown acknowledged that the definition of theft was enshrined in section 331, and that section 337 could only mean "theft as defined in section 331".

18. The next issue was whether the judge had erred in her conclusion that "money" did not include a "credit balance", and that the two were mutually exclusive, as the judge held in her No Case Ruling #2. As with the appropriate section under which to charge Burton, the Crown's case was that even if the learned judge had been correct that "money" did not include "credit balance", it would have caused no injustice to Burton to permit an amendment of the indictment.

19. In relation to the issue of whether injustice would have been caused to Burton by allowing the indictment to be amended, the relevant section of the Code is section 489A(1). This provides that where "at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the requirements of the case, unless, having regard to the merits of the case, the

required amendments cannot be made without causing injustice." (emphasis added)

20. The Crown made complaint that the judge in her ruling applied the wrong test, namely one of "prejudice to the defendant" as opposed to "injustice". Further, the Crown complained that the judge failed to identify what was the prejudice to Burton. Finally, the Crown complained that the judge had referred in the addendum to her No Case Ruling #2 to difficulties in making adjustments to her summing up, and that the issue was raised at a late stage of the proceedings.

21. For Burton, Mr Pettingill's submissions argued that the Crown had recognised the need for an amendment and that there was nothing in the learned judge's No Case Ruling #2 warranting interference with the ruling. In relation to the distinction between money and a credit balance in an account, Mr Pettingill relied upon *Preddy*. In relation to whether there would have been injustice caused to his client by a late amendment to the indictment, Mr Pettingill's submissions did not respond in any detail to the Crown's case that the trial had always been concerned with this issue of Burton's honesty or dishonesty, and did not give details of the injustice which amendment would have caused to his client.

22. Those were in summary form the written submissions on both sides, and oral submissions followed the same broad lines. It is convenient to encompass counsel's submissions in the findings which follow.

Findings – the correct section to be referred to in the Indictment

23. Section 477(1) of the Code sets out the requirements of an indictment with reference to the offence, and the particulars thereof. The key words of the subsection appear at the end, where, in relation to the offence, the requirement is that the indictment must set forth the offence with which the accused person

is charged in such manner … "as may be necessary to inform the accused person of the nature of the charge".

24. In my view the particulars of the offences with which Burton was charged were more than sufficient to inform her of the nature of the charges she faced. As the Crown submitted, there is only one legal definition of theft, that enshrined in section 331 of the Code, and that in prescribing penalties for theft, section 337 can only be understood to mean "theft as defined in section 331". And Mr Pettingill accepted that there had been no prejudice to his client by reason of the failure to mention section 331 in terms in the indictment.

25. I would regard it as preferable for an indictment charging theft to have referred to section 331, as the section containing the basic definition of theft, rather than section 337, the section setting out the possible penalties. But I would not regard the indictment in this case as being defective as to form, such as to offend section 477 of the Code.

The Reference to "money" in the Indictment

26. In reaching her conclusion in No Case Ruling #2, the judge seems to have been much influenced by the distinction to be drawn between money and a credit balance in a bank account, as canvassed in *Preddy*. That was of course a case of obtaining property by deception, in the context of what are usually referred to as mortgage frauds. The first of the questions of law certified by the Court of Appeal was whether the debiting of a bank account and the corresponding credit of another's bank account brought about by dishonest misrepresentations amounted to the obtaining of property within section 15 of the Theft Act 1968. It was in that context that the House of Lords addressed the distinction to be drawn between money and the chose in action represented by a credit balance in a bank account, and the question as to when that chose in action is extinguished by a transfer to another account. As Lord Jauncey of Tullichettle pointed out, the money in a bank account standing at credit does not belong to the account

holder. He has merely a chose in action which is the right to demand payment of the relevant sum from the bank. Lord Jauncey then used the word "money" for convenience, as counsel did throughout this case.

27. What is clear from the case of *Hilton*, which was a case of theft, is that it is perfectly possible for there to be theft of a credit balance in a bank account or part thereof. That is sufficient to deal with the amendment aspect of matters to which I will come shortly. But to my mind the reference in the indictment to stealing "money belonging to Katherine Trimingham" is inapposite to cover the theft of part or all of a credit balance in her bank account, and I would regard the indictment as defective for this reason. It may have been possible to correct the defect in any of a number of ways, and it is important to remember that this was a point which came up very late in the day, after counsel's closing speeches to the jury, and in the course of a developing argument that led to No Case Ruling #2.

28. Section 334(1) of the Code defines "property" (part of the definition of theft set out in paragraph 6 above) as including "money and all other property, real or personal, including things in action and other intangible property". So there is no question but that a credit balance in a bank account can constitute property for the purposes of a charge of theft. The question is whether the form of indictment, referring as it did to "money" was sufficient to inform Burton of the nature of the charge. In my view, it did, looking at the wording of the indictment as a whole, at least in relation to the first four counts, all of which include the words "online bank transfer". So Burton would have been well aware that the indictment was dealing with the theft of funds from the credit balance which had been maintained by Mrs Trimingham in her bank account. Technically the indictment would have been better worded had it referred to "property in the form of a credit balance" stolen from Mrs Trimingham's bank account. But I do not believe that failure to word the indictment in this way should have been fatal.

29. In relation to the fifth count, involving stealing money by credit card charge, Mr Richards for the Crown sought to shore up his position by reason of the existence of a credit balance in the credit card statement for the relevant period. For my part, I rather doubt that the position is that simple, and it seems to me that some greater amendment would be required to explain the position clearly. I would, therefore, treat this fifth count as being in a different category than the first four, and hold that the indictment on this count would need some amendment to cure its defective form.

Amendment to the Indictment

30. Section 489A(1) of the Code is set out at paragraph 19 above. Although the Crown in the course of its oral presentation to the judge requested that the indictments be changed by the addition of the words "section 331(1) as read with" before the words "section 337(1)" and by the substitution of "a credit balance" for "money", these proposals were not dealt with by the judge in her No Case Ruling #2, something which led to the point being raised when the second ruling was handed down. The detail of this is set out in paragraph 13 above. The Crown complains that the judge refers in the addendum produced the following day to prejudice rather than injustice, though in practical terms, prejudice to Burton could no doubt be said to lead to injustice so far as she was concerned. But the more important issue is to ascertain what the prejudice or injustice actually was. The fact that it would have been necessary to amend late in the day could be said to have some force if the proposed amendments could be said to be material. But they were not; they were technical matters which no doubt should have been raised much earlier in the case. Indeed, in relation to the appropriate section, that issue had been raised by the judge at the outset of the trial without it being resolved, presumably on the basis that no resolution was needed.

31. In the addendum, the judge first referred to prejudice to the defendant in paragraph 4, but there held that amendment would cause prejudice to the

defendant without saying how such prejudice would arise. She did however expand upon that aspect of matters at paragraph 6, referring again to the late stage of the proceedings, and the fact that defence counsel would not have an opportunity to re-address the jury or have witnesses recalled for the purpose of cross-examination. Both of those two matters could have been provided for in the event that counsel took the view that, without the defence being permitted to take such steps, the required amendments would cause injustice to the defendant.

32. The only other matter mentioned by the judge was the question of the effect the amendment would have on the drafting of the judge's summing-up. The judge referred to the fact that the proposed amendment would require the court to "completely reconstruct" the summing-up. That does seem, with respect, to overstate the position. She also suggested that "in the short period of time now left" there was a risk that the summing-up would fall short of what would safely be required of it. We were not advised that there were any time constraints, and I do not believe that it would have been at all difficult for the judge to re-structure her summing-up as required. The case had been run from start to finish on the issue of Burton's honesty or dishonesty. The Crown's submissions suggested a simple paragraph which would explain the position, and the President of the Court suggested an even shorter form of words during the course of argument. The reality is that very little would need to be changed and one cannot imagine the jury being at all concerned by what was, in any event, a technical amendment. Mr Pettingill argued that Burton would have a perception that she was being disadvantaged in some way. In my view, the reality is that she was not, and I very much doubt that in practice counsel would have wished to address the jury further, and certainly would not have wished to have witnesses recalled for further cross-examination. About what, one might ask.

33. Accordingly I am of the view that if the judge believed the indictment to be defective in its then present form, the two amendments should have been

allowed, on the basis that such amendments would not cause any injustice to the defendant.

Retrial

34. Section 23(2)(b) of the Court of Appeal Act provides that in a case tried on indictment, the Court may, in an appropriate case and if the interests of justice so require, set aside the discharge or acquittal of the accused person and remit the case to the Supreme Court to be re-tried, or make such other order as it may consider just. In my judgment this appeal should be allowed for the reasons set out above, so that the question of whether a retrial should be ordered does arise.

35. For the Crown, Mr Mussenden indicated that their wish was that Burton should be retried. Mr Pettingill referred to his client's past health difficulties, but he was not able to say whether such health issues would prevent her attending trial, and this assertion on his part was not supported by any evidence. He referred to the total sum stolen, approximately $50,000, as being "only $50,000". It is not a great sum, but neither is it insignificant. And on the Crown's case, the thefts do represent a serious breach of trust on Burton's part. In the circumstances I would accede to the Crown request, and order a retrial.

BAKER, P

36. I agree.

KAY, JA

37. I agree.

Bell JA

Baker P

Kay JA