A

ATTORNEY-GENERAL

v.

B

VUNAKECE

[SUPREME COURT, 1967 (Hammett J.), 3rd November, 21st December]

Appellate Jurisdiction

Criminal law—charge—fraudulent conversion—particulars alleging conversion of cheque
—conversion limited to proceeds of cheque—aider and abettor charged as principal
C *offender—no proof of fraudulent intent of person aided—Penal Code (Cap. 8) ss.4, 21, 305 (1) (c) (i).*

Criminal law—parties—aider and abettor charged as principal offender—person aided not charged—no proof of fraudulent intent on part of person aided—Penal Code (Cap. 8) ss.4, 21, 305 (1) (c) (i)

D The respondent was charged with fraudulently converting to his own use and benefit the sum of £73-3-0 entrusted to him by the Accountant-General of the Government of Fiji in order that he might apply the said sum for payment to Millers Ltd. for the purchase of a particular refrigerator. The respondent handed the cheque, which was payable to "Millers Ltd. or Order", to that company, which cashed it and held the proceeds. The respondent did not purchase the refrigerator, but some five weeks later purchased from Millers Ltd. a quantity of furniture, and the proceeds
E of the cheque were applied, with the consent of the respondent, towards payment for this purchase. The Magistrate's Court found that the respondent did not act with intent to defraud; the Crown appealed.

Held: 1. Even if, by virtue of the definition of "money" in section 4 of the Penal Code, the Particulars of Offence could properly be said to embrace a cheque for £73-3-0, it was not within the power of the respon-
F dent to convert the proceeds of the cheque to his own use, for the proceeds never came within his possession or control.

2. The conversion was carried out by Millers Ltd. who were aided and abetted in doing so by the respondent.

3. While in principle it is proper to charge an aider and abettor as a principal offender, a necessary element of the conviction of the respondent
G on that basis would have been proof of fraudulent intent on the part of Millers Ltd. as opposed to proof of fraud on the part of the respondent.

4. Fraudulent intent on the part of Millers Ltd. never having been made an issue at the trial, the defects in the charge were more than merely formal and the appeal could not succeed.

H Cases referred to: *R. v. Keena* (1868) L.R. 1 C.C.R. 113; 17 L.T. 515: *Menzour Ahmed v. R.* [1957] E.A. 386.

Appeal by the Crown against an acquittal in the Magistrates' Court.

B. A. Palmer for the appellant.

M. J. C. Saunders for the respondent.

The facts are sufficiently set out in the judgment. A

HAMMETT J.: [21st December, 1967]—

This is an appeal by the Attorney General against the decision of the Magistrate's Court of the first class sitting at Suva whereby the Respondent was acquitted on a charge of conversion contrary to Section 305 (1) (c) (i) of the Penal Code. The particulars of offence were as follows:— B

> "ACA DINA VUNAKECE alias ACA VUNAKECE on the 8th day of September, 1966, at Suva, in the Central Division fraudulently converted to his own use and benefit the sum of £73.3.0. entrusted to him by the Accountant-General for Her Majesty's Government of Fiji in order that the said ACA DINA VUNAKECE might apply the said sum for payment to Millers Limited for the purchase of a Frigidaire Refrigerator Model M.F. 56, Serial No. 663578 by the said ACA DINA VUNAKECE, over which the said Refrigerator the Accountant-General for Her Majesty's Government of Fiji held a Bill of Sale." C

The Crown has appealed against that acquittal on a number of grounds which largely complain against the finding of the Court below that the respondent did not act with an intent to defraud.

I am greatly indebted to the learned Acting Solicitor General for his careful and detailed arguments which, on the issue of an intent to defraud on the part of the respondent, are, in my view, quite compelling. I have have however found this to be an unusually difficult case owing to the singular circumstances under which it arises. D

The particulars of the offence appear at first sight to allege that the Accountant General entrusted the respondent with £73.3.0. in cash to hand to Millers Ltd. for the purchase of a refrigerator and that the respondent instead of handing this money to Millers Ltd. fraudulently converted it to his own use. E

This however was not the case for the Crown against the respondent. At the trial many of the facts were not seriously in dispute and they appear to have been as follows:— F

The respondent is a married man and in his home was a refrigerator owned by his wife. They decided to sell this refrigerator so as to obtain some money with which to buy some furniture they required. The respondent, who is a civil servant, decided at the same time to apply for a loan from Government, repayable by instalments out of his salary, with which to purchase a new refrigerator to replace the one they were selling.

As first steps in carrying out these perfectly proper transactions the respondent set about trying to sell his wife's refrigerator. On 2nd June 1966 he went to Millers Ltd. and selected the new refrigerator he wanted to buy as a replacement. He obtained a "pro forma" invoice for this Frigidaire refrigerator Model MF 56 No. 663578 for £73.3.0. which was dated 2nd June 1966. On that same date he completed an application to Government for an advance of £73.3.0. which he supported with this "pro forma" invoice. G H

His application for an advance was approved by the Accountant General who stated that the advance would be made direct to Millers Ltd. on receipt of evidence of registration of a Bill of Sale in favour of the Accountant General over the refrigerator.

On 18th August 1966, at the request of the Accountant General, the respondent executed a Bill of Sale in favour of the Accountant General over this refrigerator, which he had not in fact yet purchased, to secure the repayment of the advance he had applied for, but in fact had not yet received.

On this, on the same date, i.e. 18th August 1966, the Accountant General issued a cheque for £73.3.0. payable to "Millers Ltd. or Order" endorsed "Service: Frig. Adv. A. Vunakece" and handed it to the respondent to give to Millers Ltd, to pay for the refrigerator. By that date, however, not only had the respondent still been unable to sell his wife's refrigerator but also the refrigerator he had intended to buy from Millers Ltd. had been sold to another customer.

The respondent therefore held, uncashed, the Accountant General's cheque and continued to make efforts to sell his wife's refrigerator but he was still unsuccessful in doing so by 8th September 1966.

On 8th September 1966 the respondent went to Millers Ltd. and spoke to Mr. Gani their accountant. Mr. Gani took him to the firm's cashier to whom the respondent handed the Accountant General's cheque for £73.3.0. made out in favour of "Millers Ltd. or Order." Millers Ltd. cashed the cheque and held its proceeds until 17th October 1966.

On 17th October 1966 the respondent purchased furniture from Millers Ltd. Messrs. Millers Ltd. then applied the proceeds of the Accountant General's cheque for £73.3.0 towards the cost or a part of the cost of such furniture.

There was a conflict between the testimony of the respondent and of Mr. Gani, the Accountant at Millers Ltd., whether this was done at the suggestion of Mr. Gani or the respondent. The evidence of the respondent on this issue was apparently believed by the Court below in preference to that of Mr. Gani. I do not however consider that this materially affected the position in law.

The result was that the proceeds of the Accountant General's cheque for £73.3.0. made out in favour of "Millers Ltd. or Order" was used by Millers Ltd. to cover the cost of furniture supplied by Millers Ltd. to the respondent instead of being used to cover the cost of a refrigerator to be supplied by Millers Ltd. to the respondent as was intended by the Accountant General, and made perfectly clear by the endorsement on the cheque itself. The respondent did not in fact buy a refrigerator from Millers Ltd. at all.

The respondent was charged in the Court below with the conversion of "the sum of £73.3.0. entrusted to him for payment to Millers Ltd. etc. for the purchase of a refrigerator."

It is clear that no cash and no sum of money at all was ever entrusted to the respondent or ever came into his possession. What was handed him was a cheque for £73.3.0. made out in favour of "Millers Ltd. or Order."

At the trial is was contended by the defence that this was a fatal defect in the charge and the case of *R. v. Keena* (1868) L.R. 1 C.C.R. 113 was cited in support of this submission. In that case it was held that an indictment alleging embezzlement of money cannot be sustained by evidence of the embezzlement of a cheque. Montague-Smith J. said in that case: —

"A cheque is not money unless the Statute makes it so."

In this connection however the Crown relied on the provisions of the Penal Code Sec. 4 the material part of which reads:— A

> "In this Code, unless the context otherwise requires.....
> "money" includes bank notes, bank drafts cheques and any other orders warrants or requests for the payment of money."

In the case of *Menzour Ahmed v. R.* [1957] E.A. 386 it was held that the definition of "money" in the Penal Code can be imported into a charge so as to make the words in a charge "the sum of Shs. 3000/: "embrace a cheque for the sum of Shs. 3000/:." In that case the cheque was however in fact made out in favour of the appellant and not, as in this case, in favour of a third party. The question of whether this case should for that reason be distinguished, on this ground, has not been considered. B

But assuming, for the moment that in this case the expression in the charge "the sum of £73.3.0." does or could properly be used to embrace a cheque for £73.3.0. the question arises whether the respondent did convert this cheque to his own use. C

This cheque was not made out in favour of the respondent but in favour of "Millers Ltd. or Order." It was not possible for the respondent to cash this cheque himself. He was entrusted with it to hand to Millers Ltd. and this is what he did. His evidence, which was accepted, was that a responsible person in the employment of Millers Ltd. knew that this cheque which was endorsed "Service: Frig. Adv. A. Vunakece." had been made out to Millers Ltd. for the purpose of Millers Ltd. applying its proceeds to the cost of a refrigerator to be supplied by Millers Ltd. to the respondent. In any event the meaning of this endorsement on the cheque must have been perfectly clear to Millers Ltd. in these circumstances. D E

It was not within the power of the respondent to convert the proceeds of this cheque to the use of the respondent for the purchase of furniture for the simple reason that these proceeds never came into the possession or control of the respondent. Such a conversion could only be effected and was in fact effected, according to the evidence in this case, by Millers Ltd. themselves who had the proceeds of this cheque in their possession or under their control. F

What happened in this case appears to me to be this. The respondent was entrusted with this cheque for £73.3.0. made out by the Accountant General in favour of Millers Ltd. to hand to Millers Ltd. and this is what he did. The Court below accepted the evidence of the respondent, that Millers Ltd. knowing the position accepted this cheque which was itself clearly marked to indicate it was intended for use as an advance for the purchase of a refrigerator by the respondent. Having accepted this cheque Millers Ltd. encashed it. Some five weeks later Millers Ltd. used its proceeds either at the instigation of one of their own employees or the respondent, but in any event with the aid, consent and connivance of the respondent to cover the cost of furniture that Millers Ltd. then supplied to the respondent instead of a refrigerator. G H

In these circumstances the evidence did not in my view amount to a conversion of either the cash or the cheque by the respondent on 8th September, 1966 as averred in the charge or at any time. Both the cheque and the proceeds of the cheque were received by Millers Ltd. It was not

until some five weeks after Millers Ltd. had received the cheque and had cashed it that there was any conversion of its proceeds to the use of the respondent for the purchase of furniture instead of a refrigerator. The conversion in this case was therefore carried out not by the respondent but by Millers Ltd. who were aided and abetted in doing so by the respondent.

The learned Acting Solicitor General clearly appreciated this when in the course of his argument he indicated that in this event the respondent was guilty, and could have been charged properly as a principal offender, of aiding and abetting, under the provision of Section 21 of the Penal Code.

With this contention I do in principle agree. I must however point out that in this event the respondent should have been charged with committing an act of conversion by Millers Ltd. and not by himself. However it was worded the gravemen of the charge would have been that the respondent aided and abetted Millers Ltd. in fraudulently converting the proceeds of this cheque for £73.3.0. to the use of the respondent for the purchase by him from Millers Ltd. of furniture instead of the purchase of a refrigerator which was the purpose for which the cheque had been issued in favour of Millers Ltd.

The essential difference between that offence and the offence with which the respondent was in fact charged is that proof of fraud on the part of Millers Ltd. as opposed to proof of fraud on the part of the respondent was necessary.

Once the cheque in this case was handed by the respondent to Millers Ltd. and was encashed by Millers Ltd., its proceeds of £73.3.0. came into the possession and control of Millers Ltd. If, five weeks after this money had come into the possession and control of Millers Ltd., it was converted, it was only Millers Ltd. who could have converted it. The respondent undoubtedly did on his own evidence aid and abet or possibly even counselled and procured this conversion, but the conversion was that of Millers Ltd. and not the respondent. This was because the money was never reduced to the possession or control of the respondent but remained throughout in the possession and under the control of Millers Ltd.

Before that conversion could amount to the crime of fraudulent conversion it was essential to prove a fraudulent intent on the part of Millers Ltd. Unless and until that was charged and proved then it was not possible in my view for the respondent to be convicted of aiding and abetting the offence of fraudulent conversion in these circumstances. This was not a matter in issue at the trial. No determination was made either on this issue or on the question of whether the facts in this case amounted to a conspiracy by Millers Ltd. or one of their employees and the respondent to defraud.

In these circumstances, the defects in this charge appear to me to be more than merely formal. The variance between the charge and the evidence adduced in support of it was of a most material and substantial character. Even if the Court below had held, as the Crown contends it should have held, that the respondent acted with an intent to defraud, the respondent would still in my view on this charge as it was framed and worded have been entitled, in these circumstances to be acquitted.

For these reasons in my view the appeal against the respondent's acquittal in the Court below must be dismissed.

Appeal dismissed.