

REGINA

v.

VINCENT LOBENDAHN

[SUPREME COURT, 1972 (Goudie J.), 10th-12th, 18th January]

Criminal Jurisdiction

Criminal law—evidence and proof—secondary evidence of original document claimed to have been lost—photostat copies—proof of existence of original—evidence of due and diligent search—Penal Code (Cap. 11) s.340.

At the commencement of the trial of an accused person in the Supreme Court on charges of fraudulent false accounting, counsel for the Crown said he would be tendering in evidence a number of photostat copies of documents, the originals of which had been irretrievably lost. As a question of law, in the absence of the assessors, the court considered the admissibility of one of the photostat copies (Exhibit 2) and heard the evidence tendered on that issue.

Held: 1. The law on this question required —

- (a) It must be established that the original itself formerly existed, would have been admissible in evidence, and that the copy tendered is a true and faithful reproduction of the original.
- (b) The original must be proved to have been lost or destroyed and, if lost, due and diligent search must be established.
- (c) It must be shown what happened to the original up to the time when it was lost, and how the copy was made and came into the hands of the person tendering it.

2. This entails that there must be sworn testimony from a person who saw the original and can swear to the whole of the details from personal recollection, or who had checked the copy with the original, and can swear that it is a faithful reproduction thereof, and this principle is not affected by reason of the fact that the copy tendered is a photostat.

3. In the instant case the Court was not satisfied with the evidence as to the existence of an original document, or of a due and diligent search for the same, and Exhibit 2 would not be admitted in evidence.

Cases referred to:

R. v. Collins (1960) 44 Cr. App. R.170; [1960] Crim. L.R.490.

Fisher v. Samuda (1808) 1 Camp. 190; 170 E.R.925.

Ruling by the Supreme Court on the admissibility of a photostat copy of a document claimed to have been lost, considered as a preliminary question of law.

R. Davies for the Crown.

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Ramrakha for the accused.

The facts sufficiently appear from the ruling.

18th January 1972

GOUDIE J. :

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On the Original Information the accused was charged on Seventeen Counts of Fraudulent false accounting, contrary to Section 340 of the Penal Code.

At the commencement of the trial in this Court the Crown informed the Court that it was intended to proceed with the first eleven counts only, but that the remaining six counts should remain on the Information. The accused was accordingly arraigned on the first eleven counts only, to all of which he pleaded NOT GUILTY.

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From the depositions, on which the accused had been committed for trial, it appeared that practically all documents relied upon by the Crown to establish the charges, altogether some eighty (80) documents had been exhibited in the form of photostat documents.

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Objection was taken at the Preliminary Inquiry to the admissibility of all the photostat documents. The objection was over-ruled on the ground that it was not for the Magistrate hearing the Preliminary Inquiry to decide on the issue of admissibility but that this was a matter for the Supreme Court if the accused was committed to trial. Before the photostat copies were admitted the Legal Officer conducting the Preliminary Inquiry for the Crown had stated that "the originals have been irretrievably lost."

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After the accused had pleaded NOT GUILTY to the first eleven counts in the Information the Crown asked that a preliminary point of law be decided on the admissibility of photostat copies of documents, the originals of which he intended to prove had been lost. Accused's counsel raised no objection to this procedure and the Court proceeded to hear evidence on this preliminary issue, in the absence of the Assessors, as a matter of law.

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One witness gave certain evidence in regard to a number of photostat documents, which included Exhibit 42 in the Lower Court and was admitted, for identification purposes only, as Exhibit 2 in this Court. The second witness then also gave a considerable amount of evidence in regard to a number of photostat documents, which again included exhibit 2.

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The Crown then stated that it had been noted that this Court had indicated that it took the view that, as a matter of law, even a photostat copy was not admissible unless it could be proved that the purported copy had been compared with the original. Since it did not appear that

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A the Crown could prove this, it was considered doubtful whether there was any object in continuing adducing further evidence to try to establish the admissibility of any of the photostat copies.

B The Court stated that the Crown had correctly indicated its present view of the law but that it was open to persuasion on legal submissions and that it could not give any ruling on a hypothetical case, particularly when the evidence was not complete. The decision, therefore, rested with the Crown whether or not to continue adducing further evidence, and then to try to persuade the Court on the admissibility of the photostat documents. An adjournment was then granted to enable the Crown to consider the position. When the Court resumed, Mr. Davies for the Crown said that he proposed to ask the Court to rule on the admissibility of Exhibit 2 only after confining himself to the evidence in regard to this one specific photostat document. In the light of this Ruling the Crown would then
C consider whether or not to ask for other photostat documents to be admitted.

The Court agreed to this procedure but at the same time made it clear that this was a criminal trial and that the admissibility or otherwise of Exhibit 2 could not properly be regarded as a sort of "test case". The Court would, therefore, give a ruling, after hearing all the evidence in
D support of the admissibility of Exhibit 2 alone, and the Crown must then decide whether or not it wished to pursue the matter of asking the Court to hear evidence and rule on the admissibility of any other photostat documents.

I will now deal in outline with the evidence produced by the Crown in support of the admissibility of the photostat document Exhibit 2.

E Inspector Singh (P.W.1) said that as Investigating Officer he took possession of a considerable number of original documents from a Mr. Dowdell, the then Senior Accountant of the Treasury, on the 23rd November 1970. These original documents included what Inspector Singh said was the original of the photostat document (Exhibit 42 in the depositions) admitted in this Court as Exhibit 2 (for identification purposes only). He
F put all the original documents, including the original of Exhibit 2, in a briefcase which he locked, and when not in use the briefcase was kept in a safe of the District Crime Officer. "Months later, on a date he could not remember, he took all the original documents to the police photographer and was present when one copy of each original was photographed. He inspected each photostat copy to ensure that it was clearly legible but did not examine the contents of each photostat document
G against each original to which it related.

At this stage the process of photographing all the documents was clearly only intended to be a routine matter so that the photostat copies, rather than the original documents, could be used as working copies. This is evidenced by the fact that Exhibit 2, and numerous other photostat documents, were marked with a brief description of what they pur-
H ported to be. Thus, Exhibit 2 at the top was marked *

* "PHOTOSTAT COPY OF L.P.O. 258489 DATED 20/8/70 FOR PASSAGE OF (A-50)"

There is, however, no evidence to suggest that this heading was intended to indicate, or could properly have indicated, that the photostat was ever compared with the original document. The photostat document (Exhibit 2) was also allotted a docket number "D159" and marked accordingly.

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After all the original documents had been photographed the originals were all placed in one file and the photostat documents in another file. The originals were placed in the District Crime Officer's safe but the photostat documents remained with Inspector Singh. Apparently some time later he handed over the photostat documents to Mr. Bale of the Director of Public Prosecutions Office on some indeterminate date.

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About two weeks before the Preliminary Inquiry was due to take place Mr. Bale (P.W.1) asked for all the original documents to be taken to his office at the Director of Public Prosecutions as he had been detailed to conduct the Preliminary Inquiry on behalf of the Crown.

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Inspector Singh says he took all the Original documents relating to this case from the safe, "sorted them out" and placed them in 8 envelopes which he marked numbers 1 to 8. The envelope marked "Number 8" was said to contain all the original documents directly concerned with the specific charges which had at that time been preferred against the accused. The envelope was said to have been sealed and marked on the outside with its contents briefly described. Inspector Singh said he then parcelled up all the original documents, consisting of all the eight envelopes, into a brown paper parcel which was tied up with string and he then handed the parcel to Crime Writer Constable Shiu Kumar (P.W.4). Without checking the documents this officer wrote in his register (Exhibit 6) what each envelope was supposed to contain according to the details written on the outside of the sealed envelopes. Both Inspector Singh and Constable Shiu Kumar then took the brown paper parcel to Mr. Bale's Office and on his instruction they were placed on a table or form outside his office. At this time Inspector Singh said that he was told to open the parcel and that he specifically pointed out envelope No. 8 as the one which contained all the original exhibits in respect of the charges which were then laid against the accused and that he told Mr. Bale not to mix these with the others "or he would be mixed up". He also said that No. 8 envelope was placed on top of the parcel. Mr. Bale was busy with other matters and did not check any of the documents but bracketed the documents referred in the register Exhibit 6 and signed for the receipt of all the items mentioned, in all some forty-seven separate entries. On the 3rd of August 1971 Inspector Singh was informed that envelope No. 8 was missing and he said that he assisted Mr. Bale and others to look for this envelope at the Director of Public Prosecutions Office and at the Police Exhibit Room. None of the missing documents were found.

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Mr. Bale (P.W.1) corroborated substantially the way in which the parcel was said to have been delivered to his office. He was extremely straightforward in admitting that he had "signed blind" for the items said to have been delivered to him. He thought that "one or two" envelopes had been specifically mentioned as containing the originals of documents relating to specific charges then preferred against the accused, and said that there were at that time eighteen counts against the accused. He said that after Inspector Singh had left he "carted" the parcel into his own

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A office, and did not have time to examine any of the documents, as he had intended to do, until the morning of the Preliminary Inquiry, on the 3rd of August 1971. On that morning he looked for the originals of the documents relating to the 18 counts against the accused at the time of Preliminary Inquiry but none of the originals could be found. A thorough search was conducted in the Crown Law Office, at the Director of Public Prosecutions Office, particularly Mr. Bale's Office, and at the Central Police Station Exhibit Room, but Mr. Bale said he did not go to the Central Police Station as Inspector Singh had said in evidence. Quite clearly the security in Mr. Bale's Office was practically non-existent as the walls of his office were only head high and quite easy to climb over.

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C Ram Chandra Reddy (P.W.3), the Police Constable in charge of the document photographing machine, described how he made photostat copies of each of the original documents supplied to him, handed in by Inspector Singh. He said that he had destroyed the negatives from which each photostat copy was developed, and he did not appear to have a great deal of knowledge of the capabilities of the machine.

D Constable Shiu Kumar (P.W.4) said that he entered in his book register (Exhibit 6) items as described on the sealed envelopes handed to him by Inspector Singh, but he did not actually inspect the documents themselves for the purposes of checking them into his register.

E SALOTE KOROIBANUVE VUKEIONO (P.W.5) said that she was able to identify certain hand writing appearing on Exhibit 2 as being a photograph of her hand writing. She was, however, quite unable to recollect having made out the original Local Purchase Order of which Exhibit 2 was said to be a photostat copy. She further said what was self-evident, that the photostat signature showing the person by whom the Order was authorised was "a photo of the signature of Vincent Lobendahn." She was not asked whether she knew the signature of any person of this name. It was, therefore, not proved from this witness whether or not the signature was that of the accused. The witness further said that the amount "ninty" (sic) dollars and the figures "\$90.00" were not in her hand writing nor was the quantity "5" or rate "S/R". Additionally, the words "(Ref. our D/N5928 of 25/8/70)" were not in her hand writing. Again she did not profess to be able to identify any of the written words or figures not in her own hand writing.

G It now remains to consider whether this evidence is sufficient to entitle the Court to permit the photostat document Exhibit 2 to be admitted in evidence.

The law in regard to the admissibility in evidence of copies of documents, the originals of which are said to have been stolen or lost, may, in my view, be outlined as follows :—

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1. It must be established that the original itself, in fact, formerly existed.
 2. That such original itself would have been legally admissible in evidence.

3. There must be clear and reliable evidence to establish that the copy which the party wishes to tender as secondary evidence is a true and faithful reproduction in all respects of the original document.

In this connection, it must be carefully borne in mind that there must be either sworn testimony of the exact contents of the original document by someone who saw the original, scrutinised it carefully in all its aspects, and is able to swear on oath, from personal recollection, the whole of the details of the original document; or sworn testimony by someone who has checked the copy tendered with the original document (or possibly with a proven examined copy of same) and who is accordingly able to swear on oath that the copy tendered is in fact a true and faithful reproduction of the original document (*R. v. Collins* [1960] Crim. L.R. 490). Unfortunately, not only in respect of Exhibit 2, which is the document with which I am specifically concerned in this Ruling, but in respect of all the documents relative to the charges in which the accused has been arraigned, there must have been a considerable time lapse since anyone prepared, or made a detailed examination of, the original documents and there is at this stage no evidence to suggest that anyone compared, or was likely to have compared each of the original, or perhaps it would be more accurate to say the supposedly original, documents in the bundle of "originals" with the bundle of supposed photostat copies of originals.

In case it be thought that I am demanding too high a degree of proof in insisting on evidence of the contents of the original from the recollection of a witness at the date of trial I refer to the following passage in *Roscoe's Criminal Evidence* (16th Edition) at page 18:

"For even if secondary evidence is admissible, a copy of a document is, in itself, no evidence of the contents of the original; and it can only become so when verified by the oath of a witness: *Fisher v Samuda* (1808) 1 Campb. 190".

I have studied the case of *Fisher v. Samuda* as reported in Volume 170 of *The English Reports* at page 925. It is not necessary to detail the whole of the facts on which this action was founded. I think, however, that it is important to note that it was a Civil case and that, in practice anyway, the laws of evidence are not usually quite so stringently applied as in Criminal cases. The following quotation from the report makes clear the issue involved, the decision, and the ratio decidendi.

"Evidence was given that beer was delivered in May 1806 to be shipped to Gibraltar in the following autumn; and that in July it was discovered to be of a bad quality and unfit for the purpose intended. To prove that the plaintiff had then desired the defendants to take it back a letter was called for (under a notice to produce it), supposed to have been written at that time by the plaintiff to the defendants. The letter not being produced, the plaintiff's letter book, into which it had been copied in his own hand, was offered as secondary evidence of its contents, which it was contended must be admitted as sufficient for the necessity of the case, as the defendants did not choose to produce the original, and this was the only copy which had been preserved." But — per Lord Ellenborough (at page 926), "Where secondary evidence is let in it is subject

A to the same rules as to the best evidence which the case admits of. The evidence as to the contents of written instruments, when they cannot be produced themselves, must be of a nature which the law would receive in other instances; and the purport of this letter must be proved by the testimony of some indifferent witness who took a copy of it, or who actually read it."

B It is may be unlikely that in 1808 photostat copies were in use but I do not think this affects the principle of the decision, which is, in my view, that there must be someone who can swear as to the fact that the document copied was an original and that he can recall its exact contents or can testify that he examined the copy against same so as to be able to vouch for the precise accuracy of the copy as a true and faithful reproduction in all respects of the original.

C It was argued for the Crown that a witness could be shown what purported to be a photostat copy of what was said to have been an original document "to refresh memory" as to the contents of the original. I think this is a fallacious argument. If we call the original 'X' and the alleged copy 'Y' I think it must be obvious that you cannot prove 'Y' to be a copy of 'X' by showing someone 'Y' and saying "having seen Y, which I am seeking to tender in evidence *because* I hope to prove it is a copy of X, does it remind you that X was Y in its original form?" Obviously, D one would be attempting to refer to the contents of a document which had, at that stage, only been admitted for the purposes of identification, one would be leading the witness, and one would be producing no more than self-serving evidence.

E 4. The original must be proved to have been lost or destroyed and the Court must have evidence before it from which it can be satisfied that the original is no longer in existence or that it could not, by any reasonable amount of effort be found.

F 5. If a document is said to have been lost or possibly destroyed it must be established that "due and diligent search" has been made for the missing document before a copy can be tendered.

G 6. It must be shown, if necessary by a proper chain of evidence, what happened to the original from the time the original was made out or first known to be in existence until it was lost. Similarly, it must be established when, where, and how the copy was made and how it came into the hands of the person seeking to tender it in evidence.

H 7. All of these matters must be established to the satisfaction of the trial Court "beyond reasonable doubt." What amounts to "due and diligent search" is a matter entirely for the determination of the trial Court and must be to such degree as the Court considers reasonable in the circumstances of the particular case.

Applying the above rules, I do not see how Exhibit 2 can properly be admitted in evidence for the following reasons (inter alia):

1. I was not impressed at all with the evidence of the Investigating Officer, Inspector Singh. I was not satisfied that he carried out a careful examination of the "original" documents to see that they were originals or scrutinised these documents in detail, as distinct from the photostat copies. A

His evidence was contradicted by that of Mr. Bale in certain detail, particularly his alleged reference to the dangers of "muddling" the documents, and whether Mr. Bale went to the Central Police Station to search. Unlike Mr. Bale, who did not try to evade responsibility for loss of the documents, he tried to throw every iota of blame elsewhere, first on to Mr. Bale, and then on to his subordinate officer, the constable Crime Writer. The lady called to say she made out the original document could not recall making it out at all but was only able to recognise a *part* of the photostat as being a photographic image of her handwriting. There was no evidence of how, even assuming this lady did make out the original, this document passed into the hands of the Chief Accountant at the Treasury before Inspector Singh took possession of it. B
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On such evidence I cannot be satisfied as to proof of the existence of an original document.

2. Even if there was sufficient proof of the existence of an original document there was no chain of evidence proved which would have been, in my view, sufficient to permit what Inspector Singh said was an original taken from the hands of the Chief Accountant to be admitted in evidence as an original document. D
3. The so-called "original" and the copy were not proved to have been physically compared at any time, even by Inspector Singh, and no sworn evidence was given as to the contents of the original documents. E

There was evidence that one VINCENT LOBENDAHN was shown on the photostat as having authorised the payment but his signature was never identified as that of the accused nor was there any evidence of identification of the words or figures or reference appearing on the photostat copy. F

4. As I am not satisfied as to proof of the existence of an original document it must follow that I cannot be satisfied that one could not reasonably be found or that there is not one still in existence, but perhaps this is not a particularly relevant conclusion in the circumstances. G
5. I am by no means satisfied that a "due and diligent search" was conducted for these missing documents. This investigation had taken some nine months or more of police time. There was a possibility, that evidence had been deliberately destroyed or stolen. At the least I would have expected evidence of a full scale investigation by a fairly senior police officer but for all the Court knows a few office staff and a few persons responsible for the documents not being properly checked in and out and properly registered were the only people who looked for a number of missing documents in the more obvious places. If H

A there was an investigation and a mass of statements taken and search carried out the Court was told nothing of this whatsoever. In this connection, I cannot ignore the last paragraph of the deposition of Inspector Singh "I have been in C.I.D. 1961 — early 1971. I can recall other times when Exhibits have been lost in Crown Law Office and I had followed same procedure." If this is true, and not just another example of Inspector Singh refusing to accept any responsibility when something goes wrong, it supports my view that a full scale investigation was merited.

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6. I think I have already made it clear that I am not satisfied in regard to the chain of evidence showing how the documents, whether or not they were all originals, came into the hands of the Chief Accountant. It is certainly not sufficient for Inspector Singh merely to say that he took possession of a bundle of documents from someone who was obviously at the "end of the line" so far as proof of the origin of the documents was concerned."

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In considering whether to try to prove the other documents required to establish these charges by means of photostat copies the Crown will no doubt bear in mind that, in my view, there is a considerable basic improbability that witnesses will be able to swear on oath and convincingly that they are able to remember the entire details of original documents not seen by them for a year or more, that this Court will require a very high degree of proof of photostat copies when every single document put in at the Preliminary Inquiry, numbering more than eighty documents, was only a photostat copy, that photostats were done in "bundles" and never compared with originals, and that the registration of what were intended to become Court Exhibits and the acknowledgement of the handing over and taking over of such documents was by "signing blind" without even a sight of the actual documents.

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I am well aware that it is only too easy to be wise after the event and I have no wish to criticise for the sake of criticising, but, in the hope that this sort of thing may be prevented from recurring, I must record that there was, in my opinion, gross negligence in the treatment and preservation of important documents in a case which must have taken a number of police officers, in addition to Inspector Singh, many months of investigation. Whether this resulted in deliberate destruction of theft of documentary evidence I am not in a position to say.

Exhibit 2 will not be admitted in evidence.