

[HIGH COURT OF SOLOMON ISLANDS]**PHILIP PALMER -V- DIRECTOR OF PUBLIC PROSECUTIONS****Criminal Appeal Case No. 272 of 2002****Honiara: Brown J**

Criminal Law *Appeal from Magistrate – Petition pursuant to S.285 of Criminal Procedure Code – plea of guilty – reliance on “brief facts” for purposes of finding of guilt – whether “facts” sufficient for purposes of proof – reasonable inferences to be drawn-Penal Code (ch.26) S.258(1)*

Criminal Law *Appeal – powers of High Court to make orders – discretion to dismiss “where no substantial miscarriage of justice has actually occurred “- circumstances giving rise to exercise of discretion – Criminal Procedure Code (ch.7) S.273(1).*

Held: *Magistrate recounted facts in his reasons for decision, which, when considered with the implied fact of employment in the “brief facts” presented by the Police and the clear assertion in the charge sheet, gave rise to a clear implication of the employer/employee relationship, sufficient for the purposes of proof on a plea of guilty by a person with a modicum of understanding of process – “no substantial miscarriage of justice” had occurred.*

Cases Cited **No cases were cited**

Date of Hearing: 22nd January 2003

Date of Ruling: 22nd January 2003

PETITION OF APPEAL

Mr. Geoffery Samuel for appellant
Director of Public Prosecution in person

Appeal by way of petition pursuant to S.285 of the Criminal Procedure Code (Ch.7) The appellant had been convicted by the named Magistrate Mr. R. Faulkona after a plea of guilty, on the 30th October 2002. He had pleaded guilty to larceny as a servant under S.273(a) of the Penal Code. Mr. Samuel appeared before me today, for the appellant who had been released from prison following the completion of his 3 months term of imprisonment.

Facts given to the magistrate, on which he accepted the plea were not specifically recorded in his reasons, but a written document, headed "Brief Facts" formed part of the appeal papers before me. This document, it is presumed, had been prepared by the arresting police at the time. A charge sheet, this document entitled "Brief Facts" and the Magistrates three pages of reasons, comprised the appeal book, as it were.

Mr. Samuel appeared today and asserted that the Magistrate should not have been satisfied all the elements of the offence were apparent on the facts before him when he accepted the plea. He did not specifically mention the failure to allege, in so many words, that this appellant was, at the time of this offence, employed as a cashier by the shop owner, although through-out the Magistrate's reasons for decision, he showed clearly that he understood that the relationship of employer/employee existed between the convicted person and the shop owner. He said:

"The facts revealed that both accused were employed by Acor Bookshop, Point Cruz and had been working as cashier and shop assistant respectively.

As further revealed, that both accused during the course of their duties had been concealing the items spelt out in the charge sheet and the set of written facts. Both by their plea admitted and also admitted after the facts had been read to them."

Now what came as a surprise to me was that, immediately Mr. Francis Mwanosalua, the Director of Public Prosecution rose to his feet, his statement that he conceded the appeal on a point of law, for the facts did not aver that the convicted person was an employee. He argued that the facts presented were insufficient, for there was no proof of employment. He went on further, to say that his conscience would not let him mount an argument for the State, against the appeal.

I asked him whether I was bound to follow his concession and allow the appeal without anything further and what were my powers in such a case. He was quite helpless, and could not refer me to authority dealing with my powers in such a case as this. The Magistrate had clearly relied on facts showing employment, the "Brief Facts" implied employment, the accused acknowledged his guilt by his plea (after all, if a cashier, he must be presumed to have had a modicum of understanding of the process he faced). The Director of Prosecution, refused to consider the contrary position to the appellant's asserted petition.

I find the attitude of the Director of Public Prosecution most curious, for the interest of the State in proper administration of justice cannot be advanced where the Director of Prosecution fails, nay, refuses to properly consider the argument.

The States interest in the proper administration of justice includes taking proper cognizance of the fact that the Magistrate may be presumed to follow proper practice leading to the acceptance of a plea of guilty where there is no transcript of what actually was said or what other material, if any was tendered, at the Magistrates hearing. It is reasonable to accept however, that facts were recounted about the accused's employment at the time with Mr. Leung, since the Magistrate, in his written reasons stated that Palmer was employed as a cashier and the other accused, as a shop assistant. It would be contrary to the proper administration of justice were the reasons of the Magistrate to be ignored by this Court, and the connection with facts previously brought to that Court's notice, treated as naught.

The powers of this court on appeals are set out in the Criminal Procedure Code (Ch 7) S.293.

At the hearing of an appeal the High Court shall hear the appellant or his advocate, if he appears, and the respondent or his advocate, if he appears, and the respondent or his advocate, if he appears, and the High Court may thereupon confirm, reverse or vary the decision of the Magistrate's Court, or may remit the matter with the opinion of the High Court thereon to the Magistrate's Court, or may make such other order in the matter as to it may seem just, and may by such order exercise the power which the Magistrate's Court might have existed:

Provided that the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

The Magistrate obviously had facts before him which caused him to write, as he did, of the actual employee status, cashier and shop assistant respectively, when describing the two convicted men, and the statement of facts, on its face, raised a presumption of employment when one reads the words:

Being 29-10-02 between 12.30 hrs – 14.00 hrs at Acor Wharehouse, Point Cruz. Defendants: 1. Michael Inge and 2. Philip Palmer were asked to repair a filing cabinet."

To repair a filing cabinet supposes a work relationship, and on the face of the charge sheet, the goods alleged to have been stolen, were property "belonging to *his employer*, namely Hadley Leung."

Hadley Leung was the complainant so named in the "Brief Facts".

Clearly then the assertion in the charge sheet, coupled with the circumstances mentioned in the Brief Facts, satisfies me the magistrate had sufficient evidence of "employment" so necessary to prove in S.273(a)(i) of the Code.

The absence of a direct assertion in the Fast Sheet is not fatal when, the facts recounted in the sheet coupled with knowledge in the Magistrate, reflecting a greater awareness of the employee's positions with Mr. Leung, give rise to a clear implication of employment, not denied by the accused when charged.

The Arguments

Now I do not propose to ask Mr. Mwanasalua to address me on the other elements of the charge. If he adopts the attitude he adopted in relation to his concession on the employment question, when clearly the State's interest is to support the conviction because of the serious criminality of the steps taken to conceal this larceny, his argument will lack authority.

I have heard Mr. Samuel. His assertions seldom went beyond that. He did not grapple with the actual facts presented, to show how they could not be construed so as to reach the degree of probability required by the Magistrate to convict. He asserted the facts did not connect his client with the offence, but did not convince me.

The one pertinent point, which he raised in argument, concerned the *taking* of the clothing from the shop to the workshop adjacent. The Brief Facts show that the cabinet was broken open and the clothes found secreted in it, before the cabinet left the premises of the owner, Mr. Leung. Mr. Samuel said that was not a "*taking*" for the purposes of the section.

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My reasons

Now often shoplifters are allowed out of the store before being apprehended to avoid the argument about *taking*. Persons accused of shoplifting could claim and do, while the goods are in their possession in the shop, that they intended to pay for the goods when they completed their shopping in the store.

But they are not similar facts to these we have to deal with here.

The cabinet was checked to see that nothing was inside before going for repair. Both Michael Inge and Philip Palmer were asked to carry out the cabinet for repair. It was found that the cabinet was then locked. When forced open, clothing belonging to the owner of the shop was found inside. The cabinet could fairly be seen as the receptacle by which these goods of the shopkeeper were to be taken or removed, from the owner. The owner clearly had not given his consent for he "suspiciously believing someone is trying to steal something from the shop, concealing them in the filing cabinet." When asked, both agreed with the facts.

I must, therefore consider whether the elements of the offence have been satisfied, on these facts, for not withstanding the appellants admission, it is the law that a conviction can only follow where a court is satisfied on the facts presented, that all the elements of the offence are present. So let us look at the elements. Stealing is defined in S258(1) of the Penal Code.

"A person steals who, without the consent of the owner, fraudulently and without claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof."

The first element "without the consent of the owner" clearly has been satisfied. Mr. Leung clearly gave nobody the right to secrete his clothing in a cabinet leaving his shop for repair. The second "fraudulently", is concerned with the honesty or dishonesty in the accused while responsible for the cabinet. Remember they had responsibility to take the cabinet out of the shop and they had possession of it for repair for that purpose. Not for the purpose of carrying clothing from the shop in it. On the face of it, the dishonest purpose, to use the cabinet to conceal the removal of the clothing in the shop, is clear. The taking from the owner, Mr. Leung by placing the clothes in the cabinet is fraudulent.

So the taking is not necessarily taking from the shop, but taking from its proper place (wherever that might be) in the shop, to the hiding place in the cabinet. That is the *taking*, for the purposes of the section.

The clothing has no reason to be in the locked cabinet in the control of the accused, unless as shown, the dishonest reason to steal.

I am prepared to exercise my discretion for I consider no substantial miscarriage of justice has occurred.

From all these reasons I dismiss the appeal, both as to conviction and sentence.

I direct that this judgment and reasons be conveyed to the Central Magistrates Court, Honiara in accordance with Criminal Procedure Code (Ch.7) S.295.