TAKETOMY LIKAUCHE, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Case No. 163

Trial Division of the High Court

Truk District

January 28, 1963

Appeal from conviction in Truk District Court of forgery, in violation of T.T.C., Sec. 394, based on alleged alteration of amount of check stated in figures without any alteration as to amount stated in writing. The Trial Division of the High Court, Chief Justice E. P. Furber, held that evidence presented at trial was insufficient to sustain conviction. The Court further held that only alteration of figures constitutes forgery under Trust Territory law.

Reversed and remanded.

1. Criminal Law—Prosecutor's Error or Omission

Where government in criminal prosecution fails to prove essential point through inadvertence or misunderstanding, and evidence on point is available, accused is not entitled to acquittal but merely to new trial.

2. Forgery—Generally

Crime of forgery requires material alteration of writing or document. (T.T.C., Sec. 394)

3. **Cheating—Generally**
   Altering figures on check or money order without altering writing, and then endeavoring to cash it constitutes crime of attempted cheating. (T.T.C., Secs. 382, 431)

4. **Forgery—Generally**
   Technical interpretation of crime of forgery in some jurisdictions requires that forger have substantial knowledge of law and that document in form meets all legal requirements that would ordinarily be known to lawyers or those dealing with documents of that kind. (T.T.C., Sec. 394)

5. **Forgery—Defective Instrument**
   Use of false or altered document which does not meet requirements of forgery constitutes cheating, on theory that document cannot be considered forgery because it shows on its face that it does not meet legal requirement of form and could not defraud person knowing legal requirement. (T.T.C., Sec. 394)

6. **Forgery—Defective Instrument**
   If forged instrument is obviously defective, law will not presume that it can accomplish fraud which is intended since law presumes competent knowledge to guard against such effect. (T.T.C., Sec. 394)

7. **Criminal Law—Lesser Included Offense**
   Where it is unclear in criminal prosecution in Trust Territory whether crime committed is cheating or forgery, prosecution should be for cheating or attempted cheating rather than for forgery. (T.T.C., Secs. 392, 394)

8. **Bills and Notes—Generally**
   Uniform Negotiable Instruments Act is not applicable in Trust Territory.

9. **Forgery—Defective Instrument**
   Under present state of Trust Territory law, unlawfully and falsely altering amount of check in figures, with intent thereby to defraud, constitutes forgery even though amount in words is not altered, since under conditions now existing in Trust Territory figures on check are likely to have strong influence on those handling it and should be considered to constitute material part of check. (T.T.C., Sec. 394)

Assessor: JUDGE ICHIRO MOSES
Interpreter: F. SOUKICHI
Counsel for Appellant: ANDON L. AMARICH
Counsel for Appellee: ISTARO, R.

FURBER, *Chief Justice*

This is an appeal from a conviction of forgery based on the alleged alteration of the amount of a check as stated

in figures without any alteration as to the amount as stated in words, under Trust Territory Code, Section 394.

Counsel for the appellant in his argument raised two separate grounds of appeal:—

1. That it had not been proved beyond a reasonable doubt that the accused had made the alleged alteration.

2. That even if the accused had made the alteration alleged, this did not constitute forgery, but merely an immaterial change in the check.

In support of these points he pointed out that there was no direct evidence that the accused had altered the check, that an instrument, to constitute a forgery, must be apparently capable of deceiving and that those to whom this check was presented for payment had not been deceived by it, but saw right off something was wrong with it, and, finally, that it has been held that altering the amount stated in figures on a check is an immaterial alteration, not constituting forgery, as long as the amount stated in words is clear, citing 23 Am. Jur., Forgery, §§ 6, 19 (notes 11 and 15 including the addition to note 15 added by the 1962 Cumulative Supplement, p. 39), 25, 28, and 62, and 20 Am. Jur., Evidence, § 149.

Counsel for the appellee argued that it was very clear from an inspection of the check which had been offered in evidence that the amount in figures had been raised from $1.50 to $15.00, and that the government had proved its case beyond reasonable doubt by circumstantial evidence, pointing out that the ordinary rules and principles relating to presumptions in criminal cases generally applied in prosecutions for forgery, citing 23 Am. Jur., Forgery, § 57.

OPINION

The appellant's first point is clearly well taken as a technical matter. It appeared that the credit union's check in-

volved had been issued to the accused by the union's treasurer. The government, for some unexplained reason, went to trial in the District Court when this treasurer was away from the district and so not available to testify, with the result that, as far as the evidence goes, this treasurer might have been the one who made the alleged alteration in the figures on the check before he delivered it to the accused. While this seems unlikely, it leaves room for reasonable doubt as to whether the accused made the alteration and does not leave a firm enough foundation for the presumptions which counsel for the appellee has referred to. After its other witnesses had testified, the government made a belated request for a continuance to get the testimony of this treasurer, which was objected to by the accused and finally denied after counsel for the accused had made a stipulation, the exact terms of which are not too clearly shown in the record, but which is not claimed to have covered the matter of how the amount of the check in figures read at the time it was issued to the accused.

Attention is also invited to the fact that there appears to be an unexplained discrepancy between the accused's name as used in this case and name of the payee on the check. Perhaps it was well known to all those involved in the trial that these were two names for the same person, since no one raised any question about this, but it would be well to have any such apparent discrepancy explained in the record either by evidence or stipulation.

[1] In a situation such as this where the government has failed to prove some essential point, apparently through inadvertence or misunderstanding, and it seems probable that evidence on the point is readily available, this court has previously held that an accused is not entitled to an acquittal on appeal, but merely to a new trial

subject to suitable directions. *Ngirmidol and Others v. Trust Territory*, 1 T.T.R. 273.

[2] The appellant's second point will still be important in a new trial, however, and would, if well taken, finally dispose of the case, and must, therefore, in fairness be considered at this time. As indicated by counsel for the appellant, it has been held a number of times in the United States that merely altering the amount of a check as stated in figures, without altering the amount in words, does not constitute forgery. This has generally been because of the provision in the Uniform Negotiable Instruments Act or some other applicable statute or established rule in that particular jurisdiction, to the effect that in the case of discrepancy between the figures and the words in a negotiable instrument, the amount in words shall control, so that where such a rule has been established, either by statute or decision, the amount stated in figures becomes immaterial. To commit forgery by making an alteration, it is regularly required, as it is by the express wording of Section 394 of the Trust Territory Code, that one "materially alter" the writing or document in question. *People v. Lewinger* (1911), 252 Ill. 332, 96 N.E. 837, Ann. Cas. 1912D 239. *State v. Nelson*, 248 Ia. 915, 82 N.W.2d 724, 64 A.L.R.2d 1024 and annotations following that case in 64 A.L.R.2d. 23 Am. Jur., Forgery, § 19.

[3] A closely similar question came before this court in the case of *Trust Territory v. Sengkichi, A.K.*, Palau District Case No. 71, quoted from pages 33 and 34 of "Rulings and Remarks of (What is now) the Trial Division of the High Court Which may be of General Interest to Those Concerned with Criminal Cases." In that case a motion was made to dismiss the information in proceedings against a delinquent child on the ground that the acts involved (and stipulated to) did not constitute a criminal

offense where the child had altered the amount in figures on a postal money order without altering the amount in words, and endeavored to obtain goods from a mail order house to the value of approximately the raised amount of the money order as shown in figures. The court denied the motion on the ground that the facts stipulated constituted attempted cheating in violation of Trust Territory Code, Sections 392 and 431, citing 22 Am. Jur., False Pretenses, §§ 18, 28, 53, 57, and 80. It is similarly believed that in the present case, if the accused altered the figures of the check and then endeavored to cash it for the increased amount shown in figures, that would constitute attempted cheating.

[4] Attention of District Prosecutors and all others concerned with prosecutions in our District Courts is invited to the fact that forgery in the early common law, was regarded merely as a misdemeanor of the class called "cheats", but, apparently because of the serious imposition which could be made upon reasonably prudent and cautious people by a reasonably skillful forgery and the increased reliance upon writings in substantial commercial matters, forgery has been given by statute a particular name and special punishment and raised to the seriousness of a felony. Thus it seems that courts became particularly strict in construing this crime and that some of them have built up surprising technicalities with regard to it—particularly in construing such words as "of apparent legal weight and authenticity" in Section 394 of our Code. So, while it is a practical impossibility to reconcile all the English and American cases on this subject, one does get the impression that in some jurisdictions, in order to succeed in committing the crime of forgery by making a false document, one must have a substantial knowledge of the law and be sure that the document at least in form meets all legal requirements that would ordinarily be

known to lawyers or those dealing frequently with documents of the kind the document purports to be. 23 Am. Jur., Forgery, §§ 4 and 29.

On the other hand, the crime of "cheating" as it is called in Section 392 of the Trust Territory Code, or "false pretenses" as it is known in some jurisdictions, which also grew out of the common law "cheat", has developed in the opposite way with a leaning toward fewer technicalities. 22 Am. Jur., False Pretenses, §§ 2, 3, and 4.

[5, 6] Courts have repeatedly recognized that incidents involving the use of some sort of false or altered document which they felt did not meet the technical requirements of a forgery, would constitute cheating or obtaining money or property under false pretenses or some similar crime, on the theory that a document which cannot be considered a forgery because it shows right on its face that it does not meet some legal requirement as to form and therefore couldn't defraud a person who knew that legal requirement, or because the alteration in it had not changed its legal effect, may still constitute a false pretense making a person who uses it to deceive, guilty of the crime of cheating or attempted cheating as the case may be. Thus in the case of *People v. Harrison* (1850), 8 Barb. (N.Y.) 560 cited and quoted from in 174 A.L.R. at p. 1309, the court said concerning an allegedly forged deed which lacked proper acknowledgment:—

"If the forged instrument is so obviously defective in its form as this is, the law will not presume that it can accomplish the fraud which is perhaps intended. The law presumes a competent knowledge to guard against any such effect, and that no person can be injured thereby in his rights or property. This certificate has doubtless been used to perpetrate a gross wrong upon the grantee named in the conveyance. He has been induced to accept the deed as valid, and to part with the purchase money for the land. It has been used as a false token, by which money has been fraudulently obtained; but the defendant has not been convicted under the statute

in relation to cheats. If he had been, the conviction would have been good as well as merited. If the forgery, however, is not such as the law condemns as criminal, it cannot be made so by the want of prudence or circumspection on the part of the person actually defrauded."

Similarly in the case of *State v. Nelson*, 248 Ia. 915, 82 N.W.2d 724, 64 A.L.R.2d 1024, the court said at p. 1028 of 64 A.L.R.2d:—

"There is competent evidence that the checks were written by the defendant; that the figures were altered after the instruments were signed and endorsed and while they were in her possession; and that she received the additional moneys. Alberta Deegan either did or did not intend to make these checks payable to Loretta M. Eslava in sums each $60 larger than was due her. We are not told her mental condition or degree of reliance upon others. If she did not intend to so make them, but was misled into signing them by the figures, or by other means, so that her signature was fraudulently obtained thereby, Code, Sec. 713.1, ICA may be applicable. If she did intend to pay Loretta M. Eslava the sums indicated by the checks, the money belonged to Eslava rather than to the defendant and could well have been the subject of embezzlement. But it seems apparent that in charging forgery and uttering a forged instrument the state mistook its remedies."

Compare: 23 Am. Jur., Forgery, §§ 25, 26, and 29 with 22 Am. Jur., False Pretenses, §§ 18 and 27.

[7] To promote substantial justice in the Trust Territory and avoid confusion and disappointments and extended arguments over technicalities, it is recommended that in situations where it is doubtful whether the acts believed to have been committed constitute forgery, but it is clear they constitute cheating or attempted cheating, prosecution be had for the cheating or attempted cheating, rather than for forgery.

[8] Accordingly this court's determination in the Sengkichi case referred to above that the facts stipulated there constituted attempted cheating, cannot fairly be

construed as necessarily holding that they did not also constitute forgery. In the present case we are concerned with the alleged alteration of a check, the original legal weight and authenticity of which is not questioned. The court is neither aided nor limited by any such rule of construction as that in the Uniform Negotiable Instruments Act, that where the sum payable in a negotiable instrument (including a check) is expressed in words and also in figures and there is a discrepancy between the two, the sum stated by the words is the sum payable and that reference need be had to the figures only to fix the amount if the words are ambiguous or uncertain. The Trust Territory of the Pacific Islands has not adopted that Act nor has it adopted any such rule of construction, either by other enactment or applicable decision. The situation is different from that existing in jurisdictions where such a rule of construction prevails and the decisions from those jurisdictions are therefore not applicable in the Trust Territory. In a case arising prior to the adoption of the provisions of the Uniform Negotiable Instruments Act referred to above, it was held that a check which was for one amount in figures and another amount in words presented such an ambiguity that the check was void for uncertainty, clearly indicating that the amount in figures was a definitely material part. 7 Am. Jur., Bills and Notes, § 129, note 6.

Furthermore in the case of *Commonwealth v. Hide* (1893), 94 Ky. 517, 23 S.W. 195, cited and quoted from in Am. Ann. Cas. 1912D p. 240 to 241, and in 64 A.L.R.2d p. 1032, it was held that altering the amount in figures in a check with intent to defraud, but without changing the amount in words, constituted a forgery, the court stating:—

"This check in a material—and we may say a prominent—part, was altered, and it does not matter that the words . . . remained as

written, or that by close observation the merchant could have detected the forgery and prevented the consumation of the fraud."

A similar result was reached by the court in *White v. State* (1907), 83 Ark. 36, 102 S.W. 715, cited and quoted from in 64 A.L.R.2d p. 1031–1032, involving an instrument directing the county treasurer to pay a sum stated both in words and figures in the body of the instrument, and again in figures in the lower left hand corner. The defendant changed the figures in both places, but did not alter the words. He was tried and convicted of uttering a forged instrument, and on appeal the conviction was affirmed. The court, although recognizing that as a general rule the words prevailed where there was a discrepancy between the words and figures in an instrument, held that in this case the figures were changed in the body of the instrument in a material part and in the margin of the left hand corner, and that this repetition tended to show that the writing failed to indicate the amount intended.

[9] The court considers that under conditions now existing in the Trust Territory the figures in a check are even more likely to have a strong influence on many of those handling it than would be the case in the United States, and that they should be considered to constitute a material part of the check. It therefore holds that, under the present state of the Trust Territory law, unlawfully and falsely altering the amount of a check in figures with intent thereby to defraud constitutes forgery within the meaning of Section 394 of the Trust Territory Code, even though the amount in words is not altered.

JUDGMENT

The finding and sentence of the Truk District Court in its Criminal Case No. 1579 are set aside and the case referred back to that court for a new trial subject to the following directions:—

A. The judge who originally heard the case is to reopen it, then proceed as if the prosecution had not rested, consider any motion either side wishes to make, and take any additional proper testimony either side wishes to offer, but he is also to consider the testimony already in the record without its being reintroduced.

B. After taking such additional testimony, the judge is to finish the trial as if there had been no previous finding and sentence, allow the usual opportunity for argument, make a new finding based on all the evidence, and, if the finding is guilty, allow the usual opportunity for hearing on the question of sentence, and impose sentence.