

SIMELI DRODROVEIVALI v STATE (AAU0019 of 2003S)

COURT OF APPEAL — CRIMINAL JURISDICTION

5 WARD P, BARKER and KAPI JJA

24 February, 4 March 2005

Evidence — admissibility — Fraudulently converting State witnesses' money for own use — whether trial judge erred in admitting photocopies of cheques as evidence —
 10 **Appellant convicted of fraudulent conversion — whether directions adequate in summing up — whether State witness credible — Court of Appeal Act s 21(b) — Penal Code (Cap 17) s 279(1)(c)(i).**

The Appellant was a senior loans officer of the National Bank of Fiji (NBF) who managed the current account of State witness Samisone Bale (Bale). Due to the overdraft
 15 in Bale's current account, he approached the Appellant. The Appellant then suggested that Bale open another loan account with NBF with an arrangement that \$7466 would be transferred automatically from the current account to service the loan on a monthly basis. After several months with this arrangement, the Appellant advised Bale that NBF has changed the system of payment of the loan account and that Bale should pay the loan by
 20 issuing cheques. Bale then signed and entrusted the cheques to the Appellant for the purpose of paying the loan account. The State also alleged that Appellant cashed the cheques of Bale instead of paying the loan and fraudulently converted the money to his own use. The State presented photocopies of the cheques in evidence since the originals were lost while in police custody.

The State charged the Appellant with 17 counts of fraudulent conversion. The Appellant
 25 pleaded not guilty. The Appellant was convicted on five counts and not guilty as to the other counts. The Appellant was sentenced to 3 years' imprisonment on each count to be served concurrently. The Appellant appealed against the convictions and alleged whether the trial judge erred in: (1) admitting the photocopies of the cheques in evidence; (2) failing to give direction in his summing up on the failure of prosecution witness 1 (PW1)
 30 to indicate which of the photocopies were tendered in evidence and that the trial judge gave inadequate directions on the weight to be given regarding the alleged photocopying of the originals and the certification of the photocopies; and (3) directing the assessors on the credibility of Bale on the allegation that he signed the cheques when the automatic deductions from the current account were ongoing. The High Court allowed the leave to
 35 appeal.

Held — (1) There was no error on the ruling of the trial judge to admit the photocopies of the cheques as this was open on evidence. It was established that PW1 explained that he: (a) photocopied the cheques; (b) stamped "Certified True Copy of the Original" on the photocopies; and (c) placed his initials and then placed the photocopies in the police
 40 investigation file. During the trial, PW1 was able to identify the photocopies by the stamp and his initials, which was a sound way to identify a document. The photocopies are the true reproduction of the originals. Thus, the cheques were admissible in evidence since sufficient basis has been laid.

(2) The trial judge gave adequate direction on the nature of the photocopies that were relied upon by the assessors and the nature of the evidence relevant to matters of weight.
 45 The trial judge said: "The original cheques are not before you; the police notebook is not before you. You have the photocopies of cheques. It is for you to decide having heard the evidence of Ravin Kumar and defence submissions how much reliance you can place and what weight you can give to photocopies of cheques".

(3) The evidence established that the trial judge gave adequate direction on Bale's evidence and no error was found. Moreover, the trial judge gave adequate direction as to
 50 the elements of the offence.

Appeal dismissed.

Case referred to

R v Vincent Lobendahn (1972) 18 FLR 1, considered.

A. *Rabo* for the Appellant

5 D. *Goundar* for the Respondent

[1] **Ward P, Barker and Kapi JJA.** This is an appeal against convictions by the High Court on five (5) counts of fraudulent conversion contrary to s 279(1)(c)(i) of the Penal Code (Cap 17).

10 [2] The relevant facts relating to the convictions may be summarised as follows. Simeli Drodroveivali (Appellant) commenced employment with the National Bank of Fiji (NBF) initially as a custom service officer, then a teller and eventually transferred to the loans department of the bank. At the relevant time, he was the senior loans officer.

15 [3] Samisone Bale who owned the General Foods Marketing Ltd was in the business of importing rice from Bangkok. He had a current account with NBF. The Appellant managed his account.

20 [4] When the overdraft facility on the current account went higher, the Appellant approached Mr Bale and suggested that he should open a separate loan account. Such an account was opened with a standing arrangement that \$7466 would be transferred automatically from the current account to service the loan on a monthly basis. The Appellant put this arrangement in place with the bank.

25 [5] The State case against the Appellant was that after several months of this arrangement, he came back to Mr Bale and advised him that the bank had changed the system of payment of the loan account, namely, that he would pay the loan account by cheque after confirming the balance in the current account.

30 [6] The State alleged that Mr Bale signed the cheques without endorsing the cheques to NBF and entrusted them to the Appellant to check the balance in the current account and pay the cheques into the loan account.

[7] The State alleged that the Appellant collected the cheques on a monthly basis over a period of time, cashed the cheques and instead of paying the money into the loan account, fraudulently converted the money to his own use.

35 [8] The State charged the Appellant with 17 counts of fraudulent conversion contrary to s 279(1)(c)(i) of the Penal Code. The Appellant pleaded not guilty to all charges. Two counts were dismissed during the trial.

[9] The assessors returned an unanimous verdict of guilty on counts 1, 2, 5 and 6 while two assessors returned a verdict of guilty on count 12. On the rest of the counts, they unanimously returned a verdict of not guilty.

40 [10] The High Court concurred with these verdicts and found the Appellant guilty on the five (5) counts and not guilty on all the other counts.

[11] He was sentenced to 3 years' imprisonment on each count to be served concurrently.

45 [12] The Appellant appealed against the convictions. The grounds of appeal are set out more fully in the further grounds of appeal filed as follows:

(1) That the learned trial judge erred in law in admitting in evidence the alleged photocopies of cheques identified as MF 1-1 to MF 1-17 both inclusive in that—

50 (a) the State failed to establish with any degree of certainty that originals of the alleged photocopies formerly existed and would have been admissible in evidence.

(b) The State failed to establish that the alleged photocopies admitted were true and faithful copies of alleged originals.

(c) There was grave doubts surrounding alleged certification of the photocopies.

5 (d) The State failed to produce independent supporting evidence to establish that diligent search of the originals was carried out.

(2) The learned trial judge erred in law in that he gave no direction to the assessors on the failure of the State witness Ravin Kumar to indicate which of the alleged photocopies was adduced for the State.

10 (3) That the summing up was inadequate in respect of the weight to be given regarding alleged photocopying of originals and certification of the photocopies.

(4) That the summing up was inadequate in respect of the ingredients of fraudulent conversion.

15 (5) That the learned judge erred in law in that he failed to direct on the inability of the State witness Samison Bale to clarify alleged need to write cheques for payment to the loan account given ongoing automatic deductions from the current account.

(6) That the learned judge erred in law in that he failed to direct on the inability of the State to establish all the ingredients of the offence charged.

20 (7) That the verdict is unreasonable and cannot be supported having regard to all the circumstances of the case.

[13] Counsel for the Appellant abandoned ground 4 at the hearing.

[14] The remaining grounds of appeal raise questions of mixed law and fact and leave to appeal is required under s 21(b) of the Court of Appeal Act (Cap 12).

25 We heard arguments on both leave to appeal and grounds of appeal in the event that leave to appeal is granted.

Leave to appeal

30 [15] The Appellant's main complaint is that the trial judge erred in admitting the photocopies of the cheques in evidence. The State was unable to tender the original cheques as they were apparently lost in police custody when the brief case in which the original cheques were kept went missing. The photocopies of the cheques were key evidence to the prosecution case. Without this documentary evidence, the State case might have been a weak one.

35 [16] Having regard to the reliance placed on the photocopies of the cheques in the prosecution case and the nature of the evidence relating to the admission of the photocopies, we would grant leave to appeal.

Ground 1

40 [17] There was no issue at the trial as to the law on admissibility of photocopies of documents. For the present purposes, it is sufficient to refer to a Fijian authority on the law, *R v Vincent Lobendahn* (1972) 18 FLR 1. The head-note reads:

1. The law on this question required—

45 (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.

50 (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.

[18] The onus was on the prosecution to show that each of the photocopies of the cheques was verified, as being—

(a) a copy of the original; and

(b) that it was a first or second and so on, copy as the case may be; and

5 (c) that such copy was made and was verified as copy of the original cheques.

[19] Counsel for the Appellant submits that the prosecution witness, PW1 failed to verify that the photocopies of the cheques were copies of the original. He pointed to evidence by PW1 that there were other policemen who had access
10 to the police file and he agreed that they may well have made other photocopies.

[20] Counsel for the Appellant further submits that PW1 was not a credible witness and should not be believed on his evidence that he certified the the [sic] photocopies as the first copies of the original cheques.

15 [21] The State tendered the photocopies of the cheques on the basis that PW1 photocopied the first copies of the original cheques and placed the copies in the police file.

[22] In considering the evidence of PW1, trial judge held:

20 He explained that he had made photocopies of cheques by photocopy machine and put a 'Certified True Copy of the Original' stamps on the photocopies and placed his initials on them. These were then placed in the police investigation file. He was able to identify the photocopies by the stamp and his initial that is a sound way to identify a document. The photocopies are the true reproduction of the originals. I hold that adequate foundation has been laid for the cheques to be rendered admissible in
25 evidence.

[23] It was open on the evidence to come to this conclusion and admit the photocopies of the cheques. We cannot find any error in this ruling. We would dismiss this ground of appeal.

Grounds 2 and 3

30 [24] The complaint in the two grounds is that the trial judge failed to give any direction in his summing up on the failure of the State witness PW1 to indicate which of the photocopies were tendered in evidence and that he gave inadequate directions on the weight to be given regarding alleged photocopying of the originals and the certification of the photocopies.

35 [25] The trial judge gave the following direction:

The State is relying on the photocopies of the original cheques. The defence says that the photocopies of cheques are unreliable as there is no record of when photocopies were made and when the certified true copies were made. Their dates of certification are not on the cheques. Ravin Kumar accepted in cross-examination that he should have put
40 the dates. He could not say when the photocopies were made except that he made photocopies soon after he collected the cheques. He said he may have noted the date of certification in his notebook that too is lost.

He agreed that other police officers that shared the office with him had access to cabinet in which the investigation file was kept and could have made photocopies of
45 cheques. That would mean there could be more than one photocopy of each cheque. Mr Kumar agreed he recorded two police statements of himself — one on 29th September 1999 and one on 23rd November. He said he made no mention of certification of cheques in those statements. The defence is submitting to you that he had omitted to make such reference to him having certified the photocopies and initialling them because in fact he had not done this by the time when he gave his
50 statements. The defence says that the certified true copy and the initials were made sometimes after November 1999 as an after thought.

The defence counsel says therefore that at the time when the certified true copy stamp and initials were put, the originals had already been lost so there were no originals with which photocopies could be compared. The defence says one cannot say with certainty that the photocopies are the true reproductions of the original cheques.

- 5 The original cheques are not before you; the police notebook is not before you. You have the photocopies of cheques. It is for you to decide having heard the evidence of Ravin Kumar and defence submissions how much reliance you can place and what weight you can give to photocopies of cheques.

- 10 [26] We consider that the trial judge gave adequate direction on the nature of the photocopies that were relied upon and the nature of the evidence relevant to matters of weight. We do not find any merit in these grounds and we would dismiss them.

Grounds 5–7

- 15 [27] These grounds essentially raise the failure of the trial judge to direct the assessors on the credibility of the State witness Samisoni Bale on the allegation that he signed these cheques when the automatic deductions from the current account were ongoing.

- 20 [28] Again we find no merit in these grounds. We can do no better than set out the trial judge's direction on the evidence of Samisoni Bale:

- 25 The first issue you need to resolve is whether or not Samisoni Bale gave the alleged cheques to the accused on various dates. These events occurred in 1993 and 1994. The defence says that there are no written records of such handing over of the cheques to the accused. Samisoni Bale agrees he has nothing in writing to indicate that he gave the cheques to the accused. He is relying on his memory to support these allegations. The accused has denied receiving the cheques ...

... You must consider whether given the passage of so much time Mr Bale and his daughter could recall events accurately as they allege ...

- 30 Secondly you must resolve the issue of purpose for which these cheques were given was in fact loan repayments and nothing else. Again this is not recorded anywhere. It is all from memory. Samisoni relies on his memory. You must consider as the accused has said in his un-sworn evidence that there was arrangement of automatic deduction in place and which had not been varied. Samisoni Bale also agreed that automatic deduction was in place. What was the need then to issue such cheques. Questions had been put to the complainant and denied by him that he had various other commitments and that he was in financial difficulty and that he had in fact cashed these cheques and used the money to meet other obligations. You must consider also if the purpose of the cheques was for loan repayment, then why are they not for the sum of \$7466.00 but some have other sums stated on some of the cheques ...

- 40 The case for the State depends upon you accepting the evidence of its principle witness Samisoni Bale as true beyond reasonable doubt despite the denial by accused and other shortcomings that the defence has drawn to your attention. You do not have to believe that the accused is telling the truth before he is entitled to be acquitted. He is entitled to be acquitted if you harbour any reasonable doubts about the evidence of Samisoni Bale about handing over of cheques or their purposes.

- 45 [29] In our view, the trial judge gave adequate direction on the evidence of Mr Bale and we cannot find any error.

[30] Moreover, we are satisfied that the trial judge gave adequate direction on all the elements of the offence.

- 50 [31] Consequently, we do not find the convictions in all the circumstances unreasonable. It was open on the evidence to find the Appellant guilty of the five (5) counts as charged. We would dismiss these grounds as well.

[32] In the result, the appeal is dismissed and the convictions on five (5) counts and sentence are confirmed.

Appeal dismissed.

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