[SUPREME COURT]

Freetown
Nov. 18,
1960

Bankole
Jones J.

SAMUEL BENSON THORPE . . . . . *Appellant*

v.

COMMISSIONER OF POLICE . . . . . *Respondent*

[Magistrate Appeal 21/60]

Criminal law—Embezzlement—Misdirection—Effect of Defendant's explanation.

Appellant was employed by S.C.O.A. in Freetown as shopmaster in charge of their wholesale shop. On February 6, 1960, he sold sixteen bundles of sheets and received £76 16s. 0d. in payment. He failed, however, to enter this transaction in his books, and was charged with embezzlement.

At the trial, the appellant stated that, owing to the pressure of work, he had forgotten about the transaction and that, when he later discovered that he had surplus cash in his till, he had, following an accepted practice, passed the surplus cash to two separate items in his cash Sales Book. Two other witnesses testified that this was an accepted practice. The magistrate, however, disbelieved appellant's story, found him guilty and sentenced him to six months' imprisonment with hard labour. He appealed to the Supreme Court.

Held, allowing the appeal, that, where the defendant advances a defence which might reasonably be true, a judge sitting alone may not convict him merely because he disbelieves his explanation.

Cases referred to: *Regina* v. *Norman* (1842) C. & Mar. 501; *Regina* v. *Grunshie* (1955) 1 W.A.L.R. 36.

S. Beccles Davies for the appellant.
Donald Macauley for the respondent.

BANKOLE JONES J. The Appellant was charged on February 18th, 1960, before Mr. Marcus-Jones at the Police Magistrates Court No. 1 with two offences of embezzlement each forming a separate count. The amounts involved were £60 and £76 16s. 0d. respectively. As to the first count, the learned magistrate found the appellant not guilty and acquitted and discharged him. He however found him guilty on the second and sentenced him to six months' imprisonment with hard labour. It is against this conviction and sentence that the appellant has appealed.

The appellant was employed by Messrs. S.C.O.A., Kissy Street as shopmaster in charge of their wholesale shop. On February 6, 1960, he sold sixteen bundles of C.I. sheets the property of his employers and received the price for them, namely, the sum of £76 16s. 0d. Nowhere in his books did he enter this transaction. That the transaction took place is not denied because there is evidence that the appellant made out to the storekeeper a requisition for the sixteen bundles and the appellant himself admitted selling and receiving the money. He however stated that owing to pressure of work he forgot about the transaction and when he later discovered that he had surplus cash in his till, following an accepted practice, he passed the surplus cash to two separate items by entering in his cash Sales Book a record of fifty bundles C.I. sheets sold to Choithram instead of forty bundles the quantity actually sold and allocating about £32 to the sale of fishing lines.

The substance of the grounds of appeal against conviction argued by counsel may be considered under two heads namely: (1) misdirection as to law, and (2) that the verdict is unreasonable and cannot be supported having regard to the evidence.

The first ground reads as follows:

> "That the learned trial magistrate misdirected himself in not accepting the excuse made by your petitioner and confirmed by prosecution witness Baudoin Rogers (first prosecution witness) that it was an allowed practice to account for cash receipts whose items the salesman had forgotten to enter by entering such cash against sundry items such as the salesman could remember; and that this practice had been followed by your petitioner and to a large extent explained the shortage upon which the charge of embezzlement was founded, and raised a claim of right on your petitioner's behalf."

Counsel submitted that the learned magistrate dismissed as false the story told by the appellant as to the manner in which he accounted for what he did not then remember represented the price he had received for the sixteen bundles of C.I. sheets. The appellant's story, he continued, amounted to an excuse explaining why he did not enter in his books the transaction as he should have done. Two witnesses for the prosecution he said swore that the appellant was entitled to account for surpluses in the way he did. Baudoin Rogers, the goods manager of Messrs. S.C.O.A., said: "Some shopmasters account for their surplus cash by attributing it to the sale of some other articles." Samuel Walker, clerk, Wholesale Shop, S.C.O.A. said: "Sometimes we have surplus cash. This is passed to other items."

Counsel pointed out what the learned magistrate said about this matter in his judgment. He said:

> "He (the Accused) has not denied the receipt but what he is now saying is that he accounted for the amount by assigning it to two items, that is by increasing the amount on Bill of Sale Exh. 2 page 16095 from £192 to £230, and assigning a further sum of £32 to sale of fishing lines. This is plainly false."

It is difficult, with respect, to understand why the learned magistrate came to the conclusion that the appellant's story was false, and, as a result, found him guilty. The learned magistrate went on:

> "Even if it were so, it does not account for the whole amount of £76 16s. 0d."

But on the evidence it is clear that the appellant did not set out to account for the exact sum of £76 16s. 0d. He set out to account for a surplus which he had in hand and which when worked out amounts to at least £70. The appellant may have accounted for more than this amount because in his evidence he said as follows: "I also included *about* £32 to another sale of fishing lines." Crown Counsel conceded that these extracts from the learned magistrate's judgment were unfortunate.

My attention was directed to Archbold's Criminal Pleading Evidence and Practice, 34th ed., at para. 1736, p. 658. It reads:

> "If, instead of denying the appropriation of the money, the party in rendering his account admits it, alleging a right in himself, however unfounded, or

setting up an excuse, however frivolous, he ought not to be convicted of embezzlement."

Counsel cited the case of *Regina* v. *Norman* (1842) C. & Mar. 501 which is an authority for this proposition.

In the present case where the prosecution admitted that a system existed whereby surplus cash could be allocated to other items of sale and the appellant purported to have followed this system, even though such a system may be considered deplorable as the learned magistrate, in my view rightly, thought, yet it is a defence which was available to the appellant and even though the learned magistrate disbelieved the appellant, it did not necessarily follow that the appellant was guilty. In Shaw's Evidence in Criminal Cases, 4th ed., at p. 61, is found the following:

"In many cases the defence which is put forward may fail to convince the court—they may even think it is untrue—but if it is disbelieved it is not a necessary consequence that the defendant should be convicted; the real point is not whether the defendant has proved his innocence but whether the prosecution have proved their case."

And see also the case of *Regina* v. *Abisa Grunshie*, 1 West African Law Reports, at p. 36.

It seems to me, therefore, with the utmost respect, that the learned magistrate was wrong in convicting the appellant simply because he thought his story false. The appellant did not deny receiving the money but gave an excuse or explanation which appeared substantial even from the prosecution's point of view. On this ground alone the appellant must succeed.

As to the other grounds of appeal, I do not feel myself called upon to consider them in consequence of my finding on the first ground.

It follows that the appeal must be allowed and I order that the conviction be set aside and that the appellant be acquitted and discharged.

[SUPREME COURT]

Freetown
Nov. 18,
1960
Bankole
Jones J.

MURIEL SAMUELS AND RITA JOHNSON . . . . *Plaintiffs*

v.

M. DIALDAS & SONS . . . . . *Defendants*

Landlord and Tenant—Death of lessor before end of term—Plaintiffs continued to receive rents from lessees in manner provided for under lease—Tenancy from year to year by operation of law—Plaintiffs estopped by acceptance of rent—Validity of notice to quit—Periodic tenancy—Expiration at end of current period.

Defendants leased property in Freetown from the mother of one of the plaintiffs by a written lease for a period of five years commencing April 1, 1952, with an option to renew for a further period of five years. The agreed rent was £120 per annum to be paid by equal quarterly payments commencing on April 1, 1952. After the death of the lessor in 1954, plaintiffs continued to receive rents from defendants in the manner provided for under the lease up to and including the period ending on December 31, 1960.

setting up an excuse, however frivolous, he ought not to be convicted of embezzlement."

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Landlord and Tenant—Death of lessor before end of term—Plaintiffs continued to receive rents from lessees in manner provided for under lease—Tenancy from year to year by operation of law—Plaintiffs estopped by acceptance of rent—Validity of notice to quit—Periodic tenancy—Expiration at end of current period.

Defendants leased property in Freetown from the mother of one of the plaintiffs by a written lease for a period of five years commencing April 1, 1952, with an option to renew for a further period of five years. The agreed rent was £120 per annum to be paid by equal quarterly payments commencing on April 1, 1952. After the death of the lessor in 1954, plaintiffs continued to receive rents from defendants in the manner provided for under the lease up to and including the period ending on December 31, 1960.

Plaintiffs' notice to quit was dated August 21, 1958, and called upon defendants to quit and deliver up possession on January 1, 1959. When defendants failed to quit, plaintiffs filed a writ in the Supreme Court on January 16, 1959, claiming recovery of possession, arrears of rent and mesne profits. Defendants pleaded that they were lawfully in possession under the second term of five years provided for in the lease, and, alternatively, that a tenancy from year to year had been created by operation of law and that the notice to quit was defective.

Held, for the defendants, (1) Whenever a person is in occupation of land with the permission of the owner, not as a licensee nor for an agreed period, and he pays rent measured by reference to a year, a tenancy from year to year will arise by operation of law.

(2) The acceptance of rent from defendants measured by reference to a year estopped the plaintiffs from denying that defendants were tenants from year to year.

(3) Where there is a tenancy from year to year, a notice to quit, to be effective, must be a half-year's notice and must be given and served so that it will expire at the end of the current year of the tenancy.

The court also said, obiter, that "even if it were held that the defendants were quarterly tenants . . . , neither in the notice nor in the evidence is it stated when the tenancy commenced," and, therefore, that the notice was bad.

Cases referred to: *Dougal* v. *McCarthey* [1893] 1 Q.B. 736; *Right d. Flower* v. *Darby* (1786) 1 T.R. 159, 99 E.R. 1029; *Lemon* v. *Lardeur* [1946] 2 All E.R. 329.

Kenneth O. During for the plaintiffs.
Alfred H. C. Barlatt for the defendants.

BANKOLE JONES J. The plaintiffs claim the recovery of possession of that portion of premises situate at 21 Wilberforce Street, Freetown, described as "shop and store." They also claim arrears of rent and mesne profits.

In their statement of claim indorsed on the writ which was filed in this court on January 16, 1959, the tenancy was described as one from year to year which was duly determined by notice to quit, expiring on December 31, 1958. When the defendants filed and delivered their defence, they pleaded among other things as follows:

"1. The defendants say that they hold that portion of premises No. 21 Wilberforce Street referred to in the plaintiffs' statement of claim under a lease dated April 1, 1952, which entitled them to occupation for five years from April 1, 1952, and gave them an option to continue on the same terms for a further period of five years after the expiration of the first term of five years.

"2. The defendants say that they are now enjoying the second term of five years which does not expire until March 31, 1962, and that they are entitled to occupation until that date.

"3. In the alternative the defendants say that they are tenants from year to year by operation of law and as such the notice to quit served on them was bad in law."

The plaintiffs within two days filed and delivered an amended statement of claim as they had a right to do, in which the plaintiffs described the tenancy as a quarterly one.

At the trial, one of the plaintiffs, Muriel Samuels, gave evidence and admitted that there was a lease of these premises executed by her mother now deceased in favour of the defendants. She said she signed this lease as a witness although she had objected to the property being leased. The lease was produced in evidence—Exh. B, and it was found dated April 1, 1952. The relevant portion of this lease, for the purposes of this case reads as follows:

> ". . . To hold the same unto the lessees for the term of five years and option of five years as from the 1st day of April, 1952 yielding and paying during the said term the yearly rent of one hundred and twenty pounds sterling (£120) by equal quarterly payments first of such payments to be made on the first day of April, 1952."

The lessor died in 1954 intestate and thereafter the plaintiffs considering themselves joint owners continued to receive rents from the defendants in the manner provided for under the lease, that is to say £30 quarterly and both counsel agree that the plaintiffs have received such rents up to and including the period ending December 31, 1960. Mr. Barlatt in his opening address told the court that he was not relying on such receipt of rent as waiver of the plaintiffs' notice to quit. The notice to quit—Exh. A, relied upon in this action is dated August 21, 1958, and called upon the defendants to quit and deliver up possession on January 1, 1959.

Mr. Barlatt, counsel for the defendants, submitted that on the evidence it is quite clear that after the death of the lessor, the plaintiffs as co-owners consented to the defendants remaining in possession and the defendants consented to remain in possession as tenants. The plaintiffs received the same rents and in the manner provided for under the lease. In such circumstances the plaintiffs were bound by the terms of the lease. He submitted further that even if the lease became void and ineffective on the death of the lessor, the acts of the plaintiffs after this event created a tenancy from year to year in favour of the defendants by operation of law. He cited the case of *Dougal* v. *McCarthy* [1893] 1 Q.B. 736, where (at p. 739), Lord Esher M.R. approved the doctrine laid down by Lord Mansfield in *Right d. Flower* v. *Darby* (1786) 1 T.R. 159; 99 E.R. 1029. Lord Mansfield there said (99 E.R. at p. 1031):

> "If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement which was to hold for a year."

In Cheshire's Modern Real Property, 7th ed., at p. 384, is to be found the following:

> "A tenancy from year to year will arise by operation or presumption of law whenever a person is in occupation of land with the permission of the owner, not as a licensee nor for an agreed period and he pays rent measured by reference to a year."

On a consideration of the evidence in this case, I find there was consent of both parties that the defendants should remain in possession as tenants. The inference to be drawn is that a tenancy from year to year enures on the terms of the old lease, so far as is applicable. Nothing has been said by the plaintiffs to rebut this inference of law. If this proposition of the law is not correct, which I do not say, the evidence however clearly shows that the payment and acceptance of rent measured by reference to a year in all the circumstances

estops the plaintiffs from denying that the defendants were tenants from year to year. In the result I must hold that the notice (Exh. A) is invalid and of no effect because in either case it does not comply with the law that a half-year's notice to quit must be given and served so that it will expire at the end of the current year of the tenancy.

Mr. Barlatt further submitted that even if it was held that the defendants were quarterly tenants they were entitled to a quarterly notice. He said the notice in this case—Exh. A—was bad because it did not comply with the requirements of the law. As I understand the law, a notice for the termination of a periodic tenancy must purport to terminate the tenancy at the end of the current period, that is either at the anniversary of the date of its commencement or on the preceding day. This presumes that the plaintiffs should either in the notice itself or in evidence say when the tenancy began.

Mr. Ken During for the plaintiffs argued that it is implied from the notice given in this case when the tenancy started.

An almost similar argument was presented in the case of *Lemon* v. *Lardeur* [1946] 2 All E.R. 329. This was a case of a periodic tenancy where a tenant who held a four-weekly tenancy was given " a month's notice as from August 1, 1945, to vacate " the premises. No evidence was given of the date on which the tenancy began, and therefore the court had no information before it as to when any particular period of four weeks ended. Morton L.J. one of the Appeal Court judges in this case said inter alia, at p. 330:

> " This court does not know whether the notice to quit which was given in the present case did or did not expire at the end of a four-weeks' period, because the evidence does not show when any period of four weeks began or ended. It was suggested in argument that it was for the defendant to establish that the notice did not expire at the proper date, but I do not agree with that suggestion. The plaintiff has pleaded that the defendant was her tenant; she has pleaded that the tenancy has been determined by a notice and it is for her to establish that the notice was a valid notice."

In the present case even if it were held that the defendants were quarterly tenants as has been urged, neither in the notice nor in evidence is it stated when the tenancy commenced. The result is, and I so hold, that the notice is bad.

Counsel for the defendants presented other arguments which I do not find myself called upon to examine. I am satisfied that on a consideration of those already examined and for the reasons given, the plaintiffs cannot succeed. The plaintiffs claim arrears of rent and mesne profits as well. In view of the fact that counsel for the plaintiffs has admitted that his clients have received rents up to and including December 31, 1960, this claim can hardly be sustained. In the circumstances the action is dismissed with costs.
