J.L. BONAVIA v. R.

COURT OF APPEAL (Fieldsend, P., Davis and O'Connor, JJ.A.): November 9th, 1993

Criminal Law—theft—dishonesty—acting dishonestly by standards of ordinary reasonable people and knowing actions dishonest by those standards—special direction required if accused raises belief in claim of right under Criminal Offences Ordinance, s.171(1)(a)

Sentencing—criminal breach of trust—tariff—2–3 years' imprisonment appropriate for theft of £19,000–69,000 involving breach of trust

The appellant was charged in the Supreme Court with several counts of theft.

The appellant was the managing director and principal shareholder in a company which operated as an insurance broker and agent for a number of English insurance companies. The company earned commission on new insurance business and collected premiums on behalf of the insurers. Premiums collected from policy-holders were paid into the company's client account, from which cheques were drawn for amounts due to the insurers.

When the company experienced financial difficulties, the appellant instructed his bookkeeper to pay future premiums into the office account, from which were met the appellant's own private drawings as well as the office expenses, and to continue paying cheques from the client account. He explained that this was to reduce the large overdraft on the office account. When the cheques were not met, no further cheques were drawn on the client account. The appellant informed one of the insurers that its premiums were being used to keep his business running and suggested that he could pay them from commissions on future sales.

The appellant was charged with theft from the insurers. The total sum stolen was £42,664.52. At his trial he claimed, *inter alia*, that he had not dishonestly appropriated the insurers' money, since he had intended to repay it in future, and that he had negotiated a period of grace for remitting the premiums to allow for his commission to come through. The judge directed the jury to decide whether the appellant had acted dishonestly by the standard of ordinary and honest people and, if they believed so, they had to put themselves in his shoes to decide whether he believed that he was acting dishonestly by that standard. He was convicted on several counts of theft from each of the insurers and sentenced to three years' imprisonment.

On appeal, he submitted that his conviction was unsafe since the trial judge had failed, *inter alia*, to direct the jury (a) on s.171(1)(*a*) of the Criminal Offences Ordinance, under which a person was not to be regarded as acting dishonestly if he appropriated property believing he had a right to do so; and (b) on the proper test for dishonesty, since the subjective question whether the appellant knew he was acting dishonestly was not to be answered by the jury putting themselves in the appellant's place. On appeal against his sentence he submitted that the overall sentence was manifestly excessive.

Held, dismissing the appeal:

(1) The judge had given a proper and adequate direction on the element of dishonesty. He had made it clear that once the jury had established that the appellant had acted dishonestly by the standards of ordinary reasonable people, they must assess his state of mind at the time to decide whether he had done so knowing he was falling short of these standards. Since the appellant had not relied in his defence on a claim of belief that he had a right to the moneys taken, any reference to s.171(1)(*a*) of the Criminal Offences Ordinance would have been inappropriate and inconsistent with other defences raised. Under s.171(1)(*a*), the accused need only show that he had a genuine belief in his right and not that it was objectively justified. Accordingly, the general direction on dishonesty given here would have been inadequate if that defence had been raised (page 227, line 41 – page 229, line 26).

(2) The sentencing guidelines for offences of theft involving breach of trust prescribed a term of two to three years' imprisonment where an amount between £14,000 and £69,000 had been stolen. Accordingly, although some of the terms imposed on individual counts were too high in relation to the amounts stolen and would be reduced, the appellant's total sentence was not manifestly excessive and would be confirmed (page 231, line 38 – page 232, line 7).

Cases cited:

(1) *R.* v. *Barrick* (1985), 81 Cr. App. R. 78; 7 Cr. App. R. (S.) 142, applied.
(2) *R.* v. *Ghosh*, [1982] Q.B. 1053; [1982] 2 All E.R. 689, applied.
(3) *R.* v. *Hector* (1978), 67 Cr. App. R. 224.
(4) *R.* v. *Turner (No. 2)*, [1971] 1 W.L.R. 901; [1971] 2 All E.R. 441.
(5) *R.* v. *Walch*, [1993] Crim. L.R. 714.
(6) *R.* v. *Woolven* (1983), 77 Cr. App. R. 231; [1983] Crim. L.R. 623, not followed.
(7) *R.* v. *Wootton*, [1990] Crim. L.R. 201.

Legislation construed:

Criminal Offences Ordinance (1984 Edition), s.170(1): The relevant terms of this sub-section are set out at page 226, lines 33–35.

s.171(1)(*a*): The relevant terms of this paragraph are set out at page 226, lines 36–39.

J.J. Neish for the appellant;
P.R. Caruana for the Crown.

FIELDSEND, P., delivering judgment on behalf of himself and **DAVIS, J.A.:** The appellant was the managing director and principal shareholder in a company that can be conveniently referred to as "Reliance." Reliance had many interests in Gibraltar, including ownership of various properties and a shareholding in a building society. It also operated as an insurance broker and agent for a number of English insurance companies. Among these were Equity & Law, Liberty Life and the Prudential.

From these companies it earned commission by obtaining insurance business and it collected premiums from policy-holders which it had to remit to its principals. In brief, the system in operation for the collection of premiums was that the money paid by policy-holders each day was paid into a bank account known as the Reliance client account. A daily schedule was prepared for each insurance company showing the amount paid in respect of each policy. Each schedule was sent by fax to the relevant company and a cheque drawn on the client account for the total amount due. The cheques for Equity & Law and Liberty Life were paid into accounts held in Gibraltar by those companies, and the cheque for the Prudential was sent to it in England. These arrangements were all in the hands of a Mr. Gafan, the company's bookkeeper, and had been in operation for some years.

On about March 20th, 1991 the appellant told Mr. Gafan not to pay any future premiums into the client account, but to pay them all into the office account. It was from this latter account that all the office and other expenses of the company were met, as well as the private drawings made by the appellant and his wife. The appellant told Mr. Gafan that this was to be done in order to lower the overdraft of the office account as he was receiving almost daily calls from the bank to do this. The account was then some £57,500 overdrawn. The client account was also overdrawn by about £14,000, and Mr. Gafan was told to go on paying cheques from the client account for the time being. When a number of these cheques were not met by the bank the appellant told Mr. Gafan to stop all cheques on the client account for the time being. Thereafter very few payments were made to the companies on account of premiums, but until the end of June, when he went on leave, Mr. Gafan continued to do the daily paper work in regard to premiums received.

Equity & Law became concerned in July 1991 that a number of premiums had not been paid and made contact with the appellant. The appellant told Mr. Cloke of Equity & Law that he did not have the money

to pay the premiums and that he had spent it, as he had needed it to keep his business running. He suggested that he could repay it from future commissions on future sales.

5 The authorities were then informed and on July 11th the appellant was arrested and his books and papers seized. By order of the Financial Services Director, he was stopped from continuing to trade as an insurance broker.

In April 1993 the appellant appeared in court to answer three separate sets of counts of theft. In respect of Equity & Law there were three counts 10 involving the taking of some £24,500; in respect of Liberty Life, three counts involving some £5,000; and in respect of the Prudential, three counts involving some £13,000. It was admitted at the trial that in each case the sums charged were premiums received by Reliance and that they were not sent to the insurance companies to which they should have been 15 sent. The appellant was convicted on May 12th, 1993 on all counts. It is against these convictions that he now appeals.

The trial was a long one, involving the examination and cross-examination of a number of persons concerned with accounting practices and administrative procedures, particularly of Equity & Law. The under- 20 standing of the evidence was not made easier by some very prolix questions by counsel and by some even more prolix and often irrelevant answers from the appellant. However, on appeal, the very helpful arguments of both counsel have been of the greatest assistance in isolating the issues to be determined.

25 It was, in the event, common cause that the substantive issue was whether or not the appellant's appropriation of the money was dishonest, and it was the learned judge's summing-up to the jury on this aspect that formed the main thrust of the appeal.

Each count had to be considered separately, but the issues in respect of 30 each count in each of the three sets of counts were, in essence, the same. In respect of each set of counts, however, there were some differences in the issues raised.

The basic evidence of the appellant, common to each set of counts, was that in April 1991 he set about reorganizing the basis upon which policy- 35 holders might pay their premiums, in the hope that Reliance might rid itself of the considerable work involved in receiving premiums and forwarding amounts to the insurance companies, and that this in some way inhibited it from sending on premiums until this reorganization was completed in the third quarter of 1991. It was also clear at that time that 40 Reliance was having serious cash-flow problems for a number of reasons. Interest rates were high and the company had substantial borrowings on its various properties and substantial overdrafts at the bank which it was under pressure to reduce. Also, it was doing a considerable volume of new insurance business on which it was paying commission to its sales- 45 men before it received its commission from the insurance companies.

The appellant maintained, however, that he always intended to repay what he had taken and believed that he would be able to do so out of future commissions and, if necessary, from the proceeds of the sale of some of the assets of Reliance, and that he was therefore not dishonest. 5

The appellant also raised somewhat different matters in regard to the Equity & Law counts, but it is difficult to glean from his very diffuse evidence exactly what defence he was raising. He said that in April 1991 he explained to officials of that company that he was reorganizing his premium collection system and that for that reason, and because his 10 commissions on new business were slow in coming through, he sought and obtained a 90-day period of grace for forwarding premiums to the insurer, which would have expired on July 7th, 1991.

In addition, in his cross-examination of the Equity & Law witnesses and in his opening address to the jury, Mr. Finch, who appeared for the 15 appellant below but not on appeal, raised as an issue that Equity & Law owed the appellant in respect of commissions more than the appellant owed Equity & Law in respect of premiums. He said:

> "So where is the dishonesty in that? If somebody owes you £10 and you owe them £5, eventually you take £5. Its as simple as that… So 20 all we're talking about here … are those two major issues and was he dishonest? And if the answer to that is 'No,' that's the end of the case."

The evidence on this aspect was somewhat confused, as the appellant made considerable play of Equity & Law's delays in processing the new 25 proposals he submitted to them, thus delaying the date when commission would become due and payable to him, for this was due only on completion of the insurance contract. In essence, on all the counts, the appellant's answer to the charges was that he was not dishonest because he intended to repay all he had taken and believed that he would be able 30 to do so.

Theft is defined in s.170(1) of the Criminal Offences Ordinance in these terms: "A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it…" In addition, s.171(1) provides: 35

> "A person's appropriation of property belonging to another is not to be regarded as dishonest—
>
> (*a*) if he appropriates the property in the belief that he has in law the right to deprive the other of it…"

Mr. Neish, in a meticulous argument, has made a detailed attack on the 40 summing-up, which he contends should, because of the complexity and length of the case, have been accurate, clear and balanced. In many respects, he contended, it fell short of this. In particular:

1. The judge failed to leave to the jury the issue of whether the moneys allegedly taken from Equity & Law belonged to that company. 45

2. The summing up was defective in that the attention of the jury was not drawn to s.171(1)(*a*) of the Criminal Offences Ordinance.

3. The judge failed to leave to the jury the appellant's evidence that Liberty Life owed Reliance £7,000 and that on July 19th the Prudential was sent a cheque for £9,700.

4. The summing-up did not sufficiently indicate that each set of counts had to be considered separately.

5. There was a lack of balance in the summing-up in that: (a) the defence evidence was not sufficiently particularized; (b) the appellant's defence was belittled and trivialized; (c) the evidence of Mr. Keith Lawrence was almost disregarded; (d) the evidence of Equity & Law having failed to pay commissions was not sufficiently dealt with; and (e) the statement that Reliance was in "terrible decline" was exaggerated and without foundation.

Ownership of moneys in Counts 1, 8 and 9

Mr. Neish argued that under cl. D(ii) of the code of practice forming part of the agency agreement between Reliance and Equity & Law, premiums received by Reliance became its property, and that it merely had to account to Equity & Law for them. This agreement was put in evidence and it was said its terms should have been referred to the jury.

The clause reads:

> "The intermediary [Reliance] shall acknowledge receipt (which unless the intermediary has been otherwise authorized by the office [Equity & Law] shall be on his own behalf) of all money received in connection with an insurance policy."

In the first place, it was never an issue at the trial that the premiums did become the property of Reliance. Not only did the appellant say that the premiums collected belonged to the insurance companies, but Mr. Finch cross-examined Mr. Cloke of Equity & Law to establish this. But in any event, in our view the clause does not vest the premiums in Reliance. It merely provides that the receipt shall be given on behalf of Reliance, and this does not affect the ownership of the money received.

In our view, there is no substance in this point.

Failure to refer to s.171(1)(a)

Mr. Neish argued that this was a proper case for drawing the attention of the jury to the provisions of s.171(1)(*a*) of the Ordinance, to be taken into account in their consideration of dishonesty.

The learned judge gave the jury what has been called a "*Ghosh* direction," based on the decision of the Court of Appeal in *R.* v. *Ghosh* (2). He explained the two tests they had to apply. First, they had to decide whether, on all the evidence, the Crown had proved that the appellant had acted dishonestly by the standards of ordinary and honest people—the

objective test. Secondly, if they were satisfied that he had acted dishonestly by those standards, they also had to decide, putting themselves in his place, whether he must himself have realized that what he was doing was dishonest by the standards of ordinary and honest people—the subjective test. Only if they were satisfied that the appellant had acted dishonestly and must have believed that he was so acting should they convict.

A point raised by the court during argument and adopted by Mr. Neish was whether the instruction to the jury on the second test, that they should put themselves in the place of the defendant to consider the issue, was the right one, in that it might make them think that it was their state of mind which was decisive and not the defendant's. We think it would have been better to have omitted the phrase about putting themselves in the place of the defendant. But looking at the passage as a whole we do not think that the jury could have been misled as to what they had to decide. The learned judge used the words: "Did the *defendant himself*, *must he* have realized that what he was doing was dishonest?" [Emphasis supplied.] This was repeated a little later in the following terms: "You ask yourself 'Must he have realized, with all his ability and experience, and so forth … that what he was doing was dishonest?'"

We do not think that the jury can have taken this as an invitation to decide the issue as if it were their mental state and not the mental state of the defendant that was vital. Thus, later the learned judge referred to the question of the defendant's state of mind when he had told Mr. Gafan to put the premiums into the office account, asking: "Was there a dishonest intention at that time?" He put the issues to the jury in this way: "At that time, by the standards of ordinary and honest people, was that dishonest? And if it was, had the defendant realized at that time that it was, by the standards of ordinary and honest people, dishonest as well?"

The difference between these tests and that to be applied under s.171(1)(*a*) is that in regard to the second subjective test, an accused need only believe that he is acting under a claim of right. The belief must of course be a genuine belief and it may be such even if in fact there is no such right. This was made clear in *R.* v. *Turner (No. 2)* (4), where the judge stressed that the whole test of dishonesty is the mental element of belief.

Had the appellant's defence been a belief in a claim of right, we would have felt that the decision in *R.* v. *Wootton* (7) should have been followed. In the light of specific provisions of s.171(1)(*a*), it is difficult to follow the *dicta* in *R.* v. *Woolven* (6) that in a claim of right case a direction based on *Ghosh* is likely to cover all occasions when a s.171(1)(*a*)-type direction might otherwise have been given. The subjective test under s.171(1)(*a*) is of a genuine belief, whilst under s.170 the subjective test is whether an accused must have believed that what he was doing was dishonest by the standards of ordinary, honest people.

Mr. Neish did not argue and, indeed, on the appellant's evidence, he could not argue that the appellant relied on any claim of right to take the premiums. He may have shown that in delaying processing of a quantity of the business he had introduced, Equity & Law were in breach of contract, but that did not amount to a belief in a claim of right.

In the present appeal Mr. Caruana submitted that no defence of claim of right was raised and, indeed, Mr. Neish could point to no passages in the evidence of the appellant where he made such a claim. It is true that he said that he considered Equity & Law owed him more than he owed them but he did not contend that that gave him a right to appropriate the premiums and was certainly not his contention when first approached in July, when he merely said that he could not pay over what he had collected.

In fact, he set up alternative defences: First, that he had a 90-day period of grace until July 7th, 1991 and, secondly, that he all along intended to repay the money he had taken. It was this plurality of defences together with a vague reference in counsel's opening to some set-off which the jury had to consider in relation to the subjective test of dishonesty.

In overview, a "*Ghosh* direction" was entirely appropriate to the facts of the case before the jury and this the learned judge gave them. It would only have been confusing to have referred to s.171(1)(*a*), because of the impossibility of specifying what claim of right the appellant might have been advancing and the inconsistency of any such claim with the appellant's other defences.

Liberty Life and Prudential

Somewhat the same argument is raised in regard to Liberty Life and the Prudential because of the evidence of the appellant that Liberty Life owed him £7,000 and that he had in July sent the Prudential a cheque for £9,700. It is correct that there is no mention in the summing-up of these two allegations and that the learned judge said that neither of these companies was alleged to have owed Reliance anything. Mr. Neish submits that this is a serious omission.

As to the £7,000, there was no mention of it in the cross-examination of Mr. Phillips of Liberty Life. It was not mentioned by Mr. Finch in opening the defence case and it was not mentioned by the appellant in his evidence-in-chief. Though mentioned by the appellant in cross-examination, he gave no particulars of the debt, nor did he rely on it as a defence to the charge of taking the money from Liberty Life.

As to the £9,700, a question was put to Mr. Atkins of the Prudential in cross-examination about a cheque for £9,700 being sent by Reliance and returned by the Prudential in error—a matter of which he said he had no knowledge. The only other evidence came from the appellant under

cross-examination and was so vague that by no stretch of the imagination can it be said that it was related to any defence advanced by him to the set of counts that concerned the Prudential.

The omission of any mention of these matters from the summing-up cannot be characterized as a failure to leave to the jury a defence reasonably open to the appellant (see *R.* v. *Hector* (3) and *R.* v. *Walch* (5)). Nor can the omission to mention such insubstantial evidence be regarded as a non-direction.

Separation of counts

At the outset of the summing-up the learned judge told the jury clearly that they had "to consider the case against and for the defendant on each of these counts separately" and they could "convict on all or acquit on all, or convict on some and acquit on others." Thereafter, it is true that he did not stress the same thing again, save to say at the end were they "sure the prosecution had proved the defendant guilty of any of these counts." But when the summing-up is read as a whole, it is clear that the evidence on each set of counts was separately dealt with. The issue was dishonesty and counsel for the defendant had submitted in his closing address:

> "Of course you've got to look at all of these charges individually, but if he's guilty of one he's guilty of them all, and if he's not guilty of one he's not guilty of them all, because his state of mind is exactly the same in each and every case. That is the one constant factor."

That, of course, does not exonerate the trial judge from telling the jury that each count or set of counts must be separately considered, and that is what he did.

We do not think that there is any substance in this point.

Lack of balance

On the question of the balance and tone of the summing-up, we have studied it very carefully, both as a whole and in the light of Mr. Neish's detailed criticisms. We cannot say that the appellant's defence was belittled or trivialized, nor can we say that the evidence of the accountant called for him was disregarded or not given due weight. This evidence was not fully analysed, but Mr. Lawrence was the last witness to be called and the jury were told that they must consider it just as they should consider Mr. Canillas.

There is perhaps one passage where strong language was used, namely where the learned judge referred to Reliance as being a company "in terrible decline." There was, however, evidence that for several years it had been running at a loss. Exhibits showed that it had a large number of creditors totalling almost £150,000, as well as overdrafts of about the same amount. The juxtaposed reference to the lifestyle of the appellant

was also not entirely out of place, having regard to the monthly private drawings up to June 1991.

Finally, on the question of what commissions might have been due or potentially due from Equity & Law, this was never lost sight of. It is significant that even Mr. Lawrence could testify only to something in the nature of £395 as being an unpaid amount of commissions actually earned. A further point raised by the court during the hearing and adopted by Mr. Neish related to this point. The learned judge said: "Taking into account all the evidence from the defendant and the Crown, are you sure that there was this big backlog? Was there a lot of commission owing to Mr. Bonavia which should have been paid to him before?"

This is a correct direction in regard to the objective part of the test of dishonesty. But if it related to the subjective test it should have been said that the issue was whether Mr. Bonavia thought there was a backlog if that was relevant to that issue. But the appellant did not specifically raise the backlog as a justification for not having paid, either by relying on set-off or a claim of right. He can only have used the backlog to show that he might have thought he would be able to repay in due course what he had taken, and on that issue any misdirection is of minimal significance.

Despite all Mr. Neish's carefully presented points we cannot find any fault with the summing-up of this long and complicated case such as would justify our interfering with the convictions. The appeal against the convictions must be dismissed.

Sentence

The appellant was sentenced as follows—

Count	Amount	Sentence
Count 1:	£22,521.96	3 years' imprisonment
Count 2:	£11,613.75	18 months' imprisonment
Count 3:	£4,660.22	9 months' imprisonment
Count 4:	£151.18	2 months' imprisonment
Count 5:	£300	4 months' imprisonment
Count 6:	£1,000	12 months' imprisonment
Count 7:	£400	4½ months' imprisonment
Count 8:	£1,018.03	12 months' imprisonment
Count 9:	£1,000.08	12 months' imprisonment

all sentences to run concurrently.

We feel that there must have been a misapprehension of the circumstances involved in Counts 6, 8 and 9, as the sentences on these seem to be out of line with those on the other minor counts. We think that a sentence of 6 months on each of these counts would be appropriate.

The course of conduct upon which the appellant embarked involved the taking of a total of £42,664.52, and the total sentence should be assessed, in our view, on that figure. The present case falls squarely within the guidelines of *R.* v. *Barrick* (1) and, applying the appropriate

inflation factor, it was then said that a term of about 2–3 years' imprisonment would be proper for theft of between £14,000 and £69,000.

On this basis we can see no grounds for interfering with the learned judge's decision to impose a sentence of three years' imprisonment for a total theft of over £42,500. Save that the separate concurrent sentences on Counts 6, 8 and 9 are each reduced from 12 to 6 months' imprisonment, the appeal against sentence is also dismissed.

O'CONNOR, J.A. declined to sign the judgment.

Appeal dismissed.