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April 17

THE POLICE
v.
PERICLES
PAPA
IOANNOU.

(GRIFFITH WILLIAMS AND HALID, JJ.)

THE POLICE, *Appellants*,

*v.*

PERICLES PAPA IOANNOU, *Respondent*.

(*Case Stated No.* 21.)

*Larceny—False pretences—Date of offence charged—Duplicity—Water rates—Property of His Majesty—Government Waterworks Law*, 1928—*Cyprus Criminal Code*, 1928 *to* 1937.

The appellant was employed in the public service as a tax collector, and, as such, it was his duty to receive from various persons sums of money payable to the Kafizes Waterworks Fund. In a form he was required to fill in he inserted as unable to pay the names of persons from whom he had in fact received payment, and misappropriated the money he had received from them.

*Held:* 1. A person who collects money by virtue of his employment and does not pay it to the person entitled thereto and misappropriates it commits the offence of larceny and not false pretences.

2. Sums of money raised by water rates are the property of the Government as much as money raised by any Government tax.

3. The practice is well established that a count charging "between such a day and such a day" is good.

4. When the offence charged is furnishing false statements on a form, the offence is committed by furnishing the form which contains the false statements, and it is immaterial whether that form contains one false statement or more. The charge would not on that account be bad for duplicity.

Appeal by way of Case Stated, at the instance of the Attorney-General, from the decision of the District Court of Nicosia.

*Stelios Pavlides*, Solicitor-General, for the appellants.

*P. N. Paschalis* for the respondent.

The facts sufficiently appear in the judgment of the Court which was delivered by :—

GRIFFITH WILLIAMS, J.: This is a case stated by the President of the District Court of Nicosia (Mr. W. Dupré) on the application of the Attorney-General under section 23 of the Courts of Justice Laws, 1935 to 1940.

The Police instituted proceedings on behalf of the Crown against one Pericles Papa Ioannou, before the Magisterial Court of Nicosia, charging him on seven counts. The case was only heard on Count 7 and was dismissed on the evidence; the other counts being dismissed on legal grounds.

As appellant's application to state a case is confined only to Counts 1, 2, 5 and 6, we may entirely omit Counts 3, 4 and 7 from our consideration.

Counts 1 and 2 are alternatives and are as follows :—

*Count* 1. The accused being a person employed in the public service, between the 24th August, 1941, and the 6th October, 1941, in the District of Nicosia, did steal the sum of £1. 10*s*. collected by him from one Nahid Moustafa Bektash of Lefka which said sum was the property of His Majesty.

*Count* 2.—(Alternative to Count 1). The accused being a person employed in the public service, at the time and place in Count 1 hereof mentioned, did steal the sum of £1. 10*s*. collected by him from one Nahid Moustafa Bektash of Lefka, which said sum came to the possession of the said accused by virtue of his employment in the public service.

The facts found by the learned President were :—

(*a*) That on 24th August, 1941, accused collected from Nahid Moustafa Bektash the sum of £1. 10*s*. for the Kafizes water rates.

(*b*) That he gave no receipt for it.

(*c*) That the accused collected this sum by virtue of his employment in the public service as a Tax Collector.

(*d*) That he did not pay the £1. 10*s*. to the person entitled thereto (on the dates mentioned).

(*e*) That he failed to account for it on the date mentioned in the charge-sheet.

It was contended on behalf of the appellant that on the facts found by the Court the learned President, District Court, took a wrong view of the law in not calling upon the accused on Counts 1 and 2.

The learned President did not call upon accused on Counts 1 and 2 on the following grounds :—

(*a*) That on the facts before the Court, not the offence of larceny but the offence of obtaining money by false pretences was committed.

(*b*) That the sum of £1. 10*s*. collected by respondent from one Nahid Moustafa Bektash was not the property of His Majesty, but the property of the Kafizes Waterwork Fund.

(*c*) That the date given in Count 1, viz. : " between the 24th August, 1941, and the 6th October, 1941 " is vague.

The legal distinction between larceny and a mere obtaining by false pretences is often hard to trace. The definition of " false pretences " given in section 285 of the Cyprus Criminal Code is as follows :—

> " Any representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence."

The offence of obtaining goods by false pretences is defined in section 286 of the Code, and is as follows :—

> " Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour, and is liable to imprisonment for three years."

The points to be proved on a charge for false pretences are the following :—

(i) The pretence and its falsity.

(ii) That the property or some part thereof was obtained by means of the pretence.

(iii) The intent to defraud.

It is clear that none of the elements which are necessary to constitute the offence of obtaining money by false pretences exists on the facts found in this case ; it therefore follows that the learned President, District Court, was wrong in holding that the facts found by him disclosed the offence of " false pretences " and not " larceny ".

The next point raised by the learned President, District Court, is that the sum of £1. 10*s*. collected by respondent from one Nahid Moustafa was not the property of His Majesty but the property of the Kafizes Waterworks Fund. This immediately raises the

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question what is the nature of Kafizes Waterworks Fund. Under section 3 of Law 26 of 1928, the title of which is " The Government Waterworks Law, 1928 ", (*a*) all underground water, and (*b*) all water running to waste from any river, spring, stream or watercourse, and (*c*) all other waste water, shall be deemed to be the absolute property of the Government. Under section 4, for the purpose of taking or utilizing water, the Government may construct any waterworks; and under section 5 the Government shall from time to time determine the waterworks to be undertaken under the provisions of this law. Under section 14, all water in respect of which any waterworks have been undertaken may be sold or disposed of by the Government. Under section 29, all rates or charges leviable under this law may from time to time be revised or amended by the Governor in Council. Under section 31, all rates or charges leviable under this law may be levied and recovered in the same manner as any amount in respect of taxes or excise duty under the provisions of the Tithe and Tax Collection Law, 1882. Under section 34, the Governor in Council may, by order, make regulations for carrying out the purposes of this Law, and among other things may fix the rates or charges.

In exercise of the powers vested in the Governor by the Government Waterworks Law, 1928, the Governor made regulations regarding Kafizes waterworks (see *Cyprus Gazette* No. 485 of 4th May, 1934). Under these regulations the yearly rate to be paid for each hour of water is fixed at £1. 10*s.* and a fund to be called " The Kafizes Waterworks Fund " is established under the management and control of the Commissioner.

Under regulation 9, any moneys in the Kafizes Waterworks Fund shall be applied by the Commissioner in the following priority, that is to say :—

(*a*) For the payment of the annual instalment for interest and sinking fund due to the Loan Commissioner.

(*b*) For the payment of cost and expenses required in maintaining, repairing and administering the water and the waterworks.

(*c*) For the payment to Government of an annual rent of £16. 16*s.* for the water.

The Government Waterworks (Kafizes) Regulations, 1934, are made in exercise of the powers vested in the Governor by the Government Waterworks Law, 1928. It is clear that the Government has constructed the Kafizes waterworks and agreed to sell the water to the persons benefited by it; but the price, instead of being paid by a single payment, is spread over several years, and a yearly rate fixed for the payment of the annual instalment for interest and sinking fund.

The yearly rates of £1. 10*s.* paid under the Regulations are recoverable in the same manner as Government taxes; they are collected by the Government Tax Collectors and are paid into the Treasury to the credit of the Kafizes Waterworks Fund. Payments can only be made out of this fund by the Commissioner for the purposes mentioned in Regulation 9. The assessments are made for the purpose of paying for the construction of the waterworks which is the property of the Government. We think the sums raised by these assessments are the property of the Government as much as money raised by any Government tax,

At the time of the receipt by the Treasury of rates under the Government Waterworks Law, 1928, such money is by Regulations to be credited, presumably to earmark it, to a special fund instead of being lumped with general revenue; which is, we think, mainly a matter of convenience and book-keeping.

The next point raised by the learned President, District Court, is that the date given in Charge 1 " between the 24th August, 1941, and 6th October, 1941 " is vague. It is true that on page 48 of Archbold there appears the following passage: " Where the exact date is not known the time should be stated as being on a day unknown between stated dates, not merely as between those dates ". On the other hand the following passage occurs in Paley on Summary Convictions, 9th Edition, p. 319: " It has been held sufficiently certain to charge in the information that the offence was committed between such a day and such a day ". Archbold does not cite any authority for his statement.

Under clause 82 of the Cyprus Courts of Justice Order, 1927, it is stated that the charge " shall be so framed that the accused may know what facts are alleged to constitute the offence with which he is charged, and that if he is ever charged with the same offence in respect of the same facts, he may be able by giving evidence of his trial on the charge to prove that he was previously acquitted or convicted thereof ". The test then, in our opinion should be whether the generality of the charge embarrasses or prejudices the accused in his defence. In this case, we do not see how the accused could possibly be enbarrassed or prejudiced in his defence.

At any rate, both in England and here the practice is uniform and well established, that a Count charging " between such a day and such a day " is good and the Counts 1 and 2 in this case were regular for that reason. This disposes Counts 1 and 2.

We now come to Count 5 which is as follows:—

" Count 5. The accused being a person employed in the public service, in a capacity requiring him to furnish statements touching sums of money payable to the Government of Cyprus, to wit, statements on Form C. 9 regarding persons unable to pay sums due to taxes, etc., did, on or about the 6th October, 1941, in the District of Nicosia, make statements on Form C. 9, touching a matter as aforesaid and in particular relating to fees payable in connection with the Kafizes waterworks under the Government Waterworks Law, 1928, and the Government Waterworks (Kafizes) Regulations, 1934, which was to his knowledge false in material particulars, to wit, statements in substance and to the effect that Nahid Moustafa Bektash of Lefka was unable to pay the sum due because he was ' very poor with no movable property and unable to procure any food (going hungry) ' and that Mehmed Emin Agha of Lefka (*alias* Mehmed Reshad Emin Agha) was unable to pay the sum due because he was ' poor and impossible to pay '."

The accused was not called upon this count on the ground that there are two separate offences in the same charge. It is well established that several offences should not be charged in the same count. (*Rex* v. *Thompson* (1914) 2 K.B., p. 99). On the other hand it is equally clearly laid down in Archbold on page 50 that where the offences charged consist of one single act they may be

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made the subject of a single count. It is not always easy to determine whether there is a duplication of offences charged in a count. For example, a conviction under section 1 of the Motor Car Act, 1903, for driving recklessly and at a speed which was dangerous to the public having regard to all the circumstances of the case has been held not bad for duplicity, the driving of the car being one indivisible act which might constitute both the offences charged. (*Rex* v. *Jones ; Ex parte Thomas* (1921) 1 K.B., p. 632). In *Crepps* v. *Durden* (1777) 1 Smith Leading Cases, p. 651, it was decided that when several acts are charged to have been committed, it must depend upon the construction of the statute to which they refer, whether distinct penalties are incurred and ought to be awarded for each, or whether the several acts form but one aggregate offence, and require but one penalty. The test is whether, having charged the offence against which the penalty is directed, it can be proved by giving in evidence several distinct acts committed by the person charged. If so, the acts constitute a single offence, otherwise not. (*Milnes* v. *Bale* (1875) L.R. 10 C.P. p. 595).

In this case the offence charged was furnishing false statements on Form C. 9. It is not the making of false statements that is the offence, the offence is the furnishing of Form C. 9 containing statements which are, to his knowledge, false in any material particular. The offence is committed by furnishing the Form C. 9, which contained the false statements, and it is immaterial whether that Form contained one false statement or more. There could only be one penalty however many false statements Form C. 9 contained ; because it is the false return and not the statements which constitutes the offence against which the penalty was enacted. Applying the above-mentioned test to this case we are of opinion that the charge can be proved by giving evidence of the falsity of the several statements entered by the accused in Form C. 9. Consequently we think the learned President, District Court, was wrong in holding that Count 5 contained two separate offences.

It only remains to consider whether it is necessary that the words " with intent to defraud " should be inserted in a charge of forgery.

Forgery at Common Law is defined as " the fraudulent making of a written instrument which purports to be that which is not ". An intent to defraud being a necessary ingredient of the crime of forgery, at Common Law, in an indictment for forgery the words " with intent to defraud " have to be inserted, as without them the offence is not completely described ; and, if they are omitted, the indictment is bad.

Before the Forgery Act, 1913, the statutes relating to forgery contained no definition of forgery ; consequently relying on the Common Law definition it was necessary in an indictment under former statutes to insert the words " with intent to defraud ".

The Forgery Act, 1913, which consolidated the law relating to forgery, for the first time defined forgery as follows : " Forgery is the making of a false document in order that it may be used as genuine, and in the case of seals and dies mentioned in the Act, the counterfeiting of a seal or die, and forgery with intent to defraud or deceive, as the case may be, is punishable as the Act provides ".

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At Common Law it was necessary that the forger should intend not merely to deceive, but also to defraud. But Statute law has specified many kinds of instruments which it makes it criminal to forge even for the purpose of merely deceiving, without any intention of defrauding. In most forgeries, however, an intention to defraud is necessary; hence in England, the necessity to allege in general terms an intention to defraud or deceive, as the case may be. In Cyprus, however, forgery is defined by section 319 of the Cyprus Criminal Code as "the making of a false document with intent to defraud". Hence the word "forgery" in Cyprus law bears a different meaning to forgery in English Law, as in our law the word itself implies that the act must be done with intent to defraud or it is not forgery.

For this reason the insertion in a charge of forgery of the words "with intent to defraud" would be unnecessary and redundant.

The conclusion at which we have arrived is, that the learned President, District Court, took a wrong view of the law in not calling upon the accused on Charges 1, 2, 5 and 6. We therefore remit the case to the District Court.

*Appeal allowed.*

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[CREAN, C.J. AND GRIFFITH WILLIAMS, J.]

1942
July 31.

THE OTTOMAN BANK OF LIMASSOL, *Appellant*,

*v.*

BERNHARD LOUIS CARSON, *Respondent.*

(*Civil Appeal No.* 3723.)

*Guarantee—Action against surety where principal debtor protected by the Agricultural Debtors Relief Law*, 1940—*Right to sue for full amount of the debt.*

The appellant bank sued the respondent as guarantor of an overdraft given to a customer, by which guarantee the respondent undertook to pay the amount owing on the current account being closed at any time, without the necessity of the bank first instituting legal proceedings against the principal debtor. Before this action was commenced the principal debtor filed an application with the Debt Settlement Board in accordance with the provisions of the Agricultural Debtors Relief Law, 1940, for settlement of his debts. The appellants then filed their claim with the Debt Settlement Board. The respondent based his defence to the action, *inter alia*, on the ground that an application having been made to the Debt Settlement Board by the principal debtor the Court was debarred by section 30 of the Agricultural Debtors Relief Law from entertaining this claim; and also that the appellants by filing a claim against the principal debtor with the Debt Settlement Board had elected to have their claim decided by the Board and could not also sue for it in Court.

*Held:* Where a surety has guaranteed to pay a debt without proceedings being taken in the first instance against the principal debtor, section 70 (2) (c) of the Agricultural Debtors Relief Law, 1940, will not deprive the creditor of his right to sue the surety for the whole of the debt. Nor will the fact that the creditor has filed a notice of his claim against the principal debtor with the Debt Settlement Board affect this right. Section 30 of the Agricultural Debtors Relief Law, 1940, does not oust the jurisdiction of the Court to adjudicate between creditor and surety where proceedings have not in the first instance to be taken against the debtor.

Appeal from a judgment of the District Court of Limassol.

*J. Clerides* for appellants.

*M. Houry* for respondent.

The Court took time for consideration.