REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL
SAN FERNANDO

Magisterial Appeal No. 219 of 2003

BETWEEN

FAZEED MOHAMMED **APPELLANT**

AND

PC COLIN NOEL #11825 **RESPONDENT**

Panel: R. Hamel-Smith, J.A.
R. Nelson, J.A.

Appearances: K. Ratiram Esq. for the appellant
Mr. Boodoosingh for the respondent

Date: March 22, 2004.

JUDGMENT

R. Hamel-Smith, J.A.

The appellant was convicted of fraudulent embezzlement. It was alleged that on March 23, 2002 he converted to his own use the sum of $2300.00, being monies he had received in the name and on account of his employer.

He was employed as a shift operator at Harrilal's Service Station on the Naparima Mayaro Road. As such he was responsible for all the sales and had to account for cash received in the course of his shift. His duties required him periodically to check the cash received. He had to note the amount in what was called "the master sheet." The bundle of cash together with a signed slip of paper noting the time, date and amount of cash accounted for were then placed in the secured vault on the premises. This occurred about seven to eight times per shift.

His employer, Radica Persad was the only one with the combination to that vault. She returned to the station account 9.30 p.m. and opened the vault in the presence of the appellant. On checking the packets, however, she discovered that while the master sheet showed six packets had been accounted for there were only five in the vault.

A packet containing $2300.00 was missing. When confronted, the appellant claimed that he had deposited the packet and could not say what had become of it. According to Ms. Persad, the appellant had been employed for some three weeks and after the first week, she noted that he had departed from the normal procedure when accounting for the monies received in the course of the shift. All he was required to do was to enter the amount of money on the slip, which he attached to the packet before depositing in the vault. He departed from the regular practice and began giving a breakdown of the cash received.

The appellant in his defense confirmed that he had gone through the normal procedure of counting the money and, having entered the amount in the master sheet, attached the slip of paper with his name and breakdown and deposited it in the vault. He was adamant that he had done this and there was no question of a mistake on his part. He simply could not say what had happened to the money after he had placed it in the vault.

While in examination in chief he claimed that he was not present when Ms. Persad opened the vault, in cross-examination he admitted that he was present when it was opened and when the money was counted. Ms. Persad had told the Court that the appellant had discussed repaying the money to her at one time. While this was not challenged in cross-examination, the defence denied that he had made such a promise.

The magistrate rejected the appellant's defence and found that he was indeed present when the vault was opened and the money checked. He was satisfied that had the appellant deposited the money as he had claimed, it would have been in the vault when

Ms. Persad opened it. The only reasonable inference he could draw was that the appellant had appropriated it to his own use.

Counsel filed six grounds of appeal. Five of them were that the magistrate had drawn the wrong inferences from the evidence.

In Ground 1 he claimed that the magistrate had found that the appellant had a motive for departing from the regular practice and submitted that the magistrate erred in law by drawing a negative inference against the appellant. He suggested that one possible inference was that it is entirely possible that the appellant started doing a breakdown to be more efficient and to improve his job performance and the magistrate should have drawn the more favourable inference.

We do not share counsel's view. Given the circumstances under which the money disappeared, it was quite in order for the magistrate to draw the inference that the appellant had departed from the regular practice as a red herring. Once the money was placed in the vault it could hardly disappear without some explanation. It was quite likely therefore that by creating the impression of efficiency he could hopefully deflect any suspicion when the money went missing.

In Ground 2, counsel submitted that the magistrate found that the appellant was present when the vault was opened but contended that it was entirely irrelevant whether or not the appellant was present when the employer opened the vault. He submitted that this would only have been relevant if the appellant was contending that the employer had in fact found the money in the vault, but later dishonestly suggested that she had not.

Counsel's submission misses the mark. The employer had said that the appellant was present when the vault was opened. The appellant never challenged the employer on this but in cross-examination he claimed that he was not present. It was therefore necessary for the magistrate to make a finding on the issue and she did. It was relevant because if he were not present (as he had claimed) the very inference put forward by counsel would have been a reasonable one to make. The chain of custody, so to speak, would have been broken, leaving reasonable doubt as to whether the employer had in fact found the money or not.

Grounds 3 and 4 can be taken together. Counsel contended that the magistrate found that the appellant had not challenged the alleged making of an offer to settle. He did challenge it. While the magistrate may have erred on that issue (the note taken was not absolutely clear) we do not think that such a finding would have caused any miscarriage of justice, given the circumstances of this case. The central issue for resolution was whether he had in fact placed the money in the vault or not. If he had, then there was little likelihood of it going missing. The fact that it was missing the inference to be drawn would be that he had never placed it there. The magistrate resolved this issue in favour of the prosecution and whether the appellant had made an offer to repay or not became irrelevant.

In Ground 5, counsel contended that the appellant could not be convicted by the prosecution showing that he had collected the money but was unable to account for it. There had to be, he submitted, something more than that e.g. an admission or that the money was found on him. We do not share that view, given the circumstances of this case. The appellant claimed to have placed the money in a secure vault that was opened in his presence. The very fact that the money was not there and he was the last person to handle the money, without any explanation, that would have left the magistrate to come to no other conclusion than he had misappropriated the money to his own use.

We were satisfied that in the circumstances of this case the prosecution had established the ingredients of the offence. The appellant, on his own admission, had taken into his possession cash in the name or on account of his employer and claimed to have placed it in a secured vault. The magistrate was quite correct to find, on the facts, that he had never placed it in the vault and therefore had converted it to his own use.

In our view, the magistrate drew the correct inferences from the evidence and the appellant's inability to explain what had happened to the cash was sufficient to find that he had embezzled the money. The appeal was accordingly dismissed and the conviction and sentence affirmed.

R. Hamel-Smith
Justice of Appeal

R. Nelson
Justice of Appeal
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