In the Supreme Court of Bermuda

CRIMINAL JURISDICTION
2017: No. 15

B E T W E E N:

THE QUEEN

v

MELISSA BURTON

NO CASE RULING #2
(IN COURT)

Date of Hearing: 13th and16th July 2018
Date of Ruling: 17th July 2018

Larry Mussenden and Alan Richards, Office of the Director for Public Prosecutions
Mark Pettingill, Chancery Legal Ltd., for the Defendant

INTRODUCTION

1. Melisa Burton ("the Defendant") is charged in an indictment containing 5 counts of theft contrary to section 337(1) of the Criminal Code 1907 and one count of abuse of a senior, contrary to section 3 of the Senior Abuse Register Act 2008.

2. In its previous no case ruling at the close of the Prosecution case, the court determined that the Defendant had a case to answer. Following that the defendant was put to her defence and indicated that she would not be coming into the witness stand to give evidence and would not be calling any witnesses to give evidence on her behalf.

3. As in the usual case after all of the evidence was concluded, the court discussed the law with counsel in the absence of the jury and the court indicated to counsel whether and how the matters raised would be dealt with in the directions on the law.
4. Thereafter Mr Musssenden for the Prosecution addressed the jury followed after a lunch interval by Mr Pettingill for the Defendant. Time being too short for the summing up to the jury, court was adjourned until Friday the 13th July.

THE CURRENT NO CASE APPLICATION

5. On the morning of Friday the 13th July, Mr Pettingill raised a concern that the indictment was defective in two respects. He made a further "no case submission" to the court. Firstly he contended that the prosecution having charged the Defendant pursuant to section 337(1) of the criminal code failed to establish jurisdiction as the defendant Ms Burton was outside of Bermuda when she carried out the banking transactions complained of in the indictment. And secondly that the transactions on the bank account of the victim Mrs Trimingham did not amount in law to stealing money as pleaded in counts 1-5 on the indictment.

JURISDICTION

6. Section 376 contains reference to Group "A" offences. Section theft as defined in section 331 is specifically included in Group "A" offences. As to jurisdiction, section 377 (2) states that for the purpose of determining whether or not a particular event is a relevant event in relation to a group "A" offence, any question as to where it occurred is to be disregarded. Section 378 provides that a person may be guilty of a group "A" offence if any of the events which are relevant events in relation to the offence occurred in Bermuda. A relevant event is defined by section 377 in relation to a group "A" offence as any act or omission or other event proof of which is required for conviction of the offence.

7. A relevant event in each theft count as pleaded is stated to be the online transfer by the defendant while in the USA of money from the victim Mrs Trimingham's Bermuda bank account into her own bank account in the USA. The question arises, as the defendant has been charged with theft contrary to section 337, whether the Prosecution has failed to establish jurisdiction, and if so

whether they should be allowed to amend the indictment to include wording such as "section 331 as read with section 337".

8. Mr Richards for the Prosecution presented the following argument in answer to Mr Pettingill's complaint:

> *"Section 477 of the Criminal Code does not require an indictment to mention the statutory section that the offence alleged is said to be contrary to. It only requires that the offence be set forth "in such manner and with such particulars… as may be necessary to inform the accused person of the nature of the charge." It further states that "it is sufficient to describe an offence in the words of this Act or of the Act or Act of Parliament of the United Kingdom declaring the offence."*
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> *8. There is only one legal definition of "theft" in Bermuda. That definition is well-recognised and is enshrined in section 331 of the Criminal Code. In prescribing penalties for "theft", section 337 can only be understood to mean "theft as defined in section 331". Section 337 does not create some different offence with different elements. It is clear from the manner, in which he addressed the jury, that Defence Counsel understood entirely the "nature of the charge" that his client faces in Counts 1 – 5.*
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> *9. An amendment to the Statement of Offence for each of Counts 1 – 5 is strictly unnecessary, but no prejudice will flow if, for the sake of clarity, those charges are instead pleaded as "contrary to section 331(1) as read with 337(1) of the Criminal Code".*
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> *Once it is recognised that there is but one offence of theft in the Criminal Code, those submissions become a nonsense. Clearly the Legislature intended theft to be a Group A offence and that section 377 should therefore apply to it. It is ridiculous to suggest that that clearly expressed intention should be thwarted when a particular count of theft is pleaded as contrary to section 337(1), despite everyone being clear that the elements thereof are those set out in section 331(1).*
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> *12. Although the online banking and credit card transactions in this case were perpetrated from outside Bermuda, it is clear that, in relation to each, a relevant event as defined in section 377(1)*

(i.e. the debiting of the relevant account)occurred in Bermuda. Section 377(3) thus confers jurisdiction."

9. The court is of the opinion that Mr Richards has made a correct assessment of the law where he says that there is but one offence of theft in Bermuda. The court accepts that the online transfers and credit card transaction if perpetrated as alleged in the indictment while the defendant was in the US constitutes a relevant event and in the circumstances no question of jurisdiction arises.

10. However, it would appear to the court that section 331 of the Criminal Code makes it clear to anyone seeking to involve them self in a course of conduct what would constitutes theft in Bermuda. That person could then make a decision as to the contemplated course of conduct. It would then necessarily follow that section 337(1) would apply to the course of conduct defined in section 331 punishment and or for sentencing purposes (further information that is available to such a person). The fact that the Crown has always charged theft pursuant to section 337(1) of the code is no good reason to continue that practice.

MONEY

11. Mr Pettingill for the Defendant submits that the prosecution have wrongly pleaded that the Defendant stole money. He makes the following submissions in that regard:

> *i. The difficulty arises in that it is submitted respectfully but forcefully that the case does not involve **'the stealing of money"** as particularized.*
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> *ii. "Money" is of course "property" which is capable of being stolen and is clearly defined as such in s. 334 (1) of The Code. The problem that arises is that the case at Bar is simply not a case of the classic "employee dishonestly stealing **cash** from the till." The Defendant in the current case never actually deals with any "money".*
>
> *iii. It is submitted that "money" in accordance with the Legislation is clearly intended to mean physical property i.e cash or "real money." It is for this reason that section 334 also includes within the "**Property"** definition the terms **"things in action"** and "**other intangible property".***

> *iv.* *The three concepts of Property are quite separate and distinct:* ***(i) money, (ii) things in action*** *and* ***(iii) other intangible property.***
>
> *v.* *Consequently, the Indictment is further flawed in that it is apparent that the Crown now realizes and should logically and fairly accept that what has actually occurred is an external jurisdictional "debiting" of an account in Bermuda and the "crediting" of other accounts in the United States. Consequently, the transfer may involve "property" but it is a "thing in action" as opposed to "money." It may be argued that "a thing in action" can be included in a s. 331 charge of Theft although as will be submitted below, this is arguably the wrong section as relates to the allegations and evidence in this case.*

12. Mr Pettingill went on to suggest that the facts of this case might more readily fit within one of the sections of dishonesty such as obtaining property by deception or obtaining a money transfer by deception. He went on to submit that the distinctions between theft and the obtaining offences in the criminal code are not merely technical issues by go the very core of the definition of theft and that the key elements in the obtaining type of offences are separate and distinct and not interchangeable.

13. He submits that this issue of lack of proof of the pleaded element of money cannot be remedied by the simple amendment at the exit door of the trial. He further submits that an amendment to include theft contrary to section 331 and an amendment to exclude the element "in Devonshire parish" in count two would constitute a rebuilding of the indictment.

14. Mr Richards recognises that "money" is defined in section 3 of the criminal code. The definition is said to include:

> *"…bank notes, bank drafts, bills of exchange, cheques and any other orders, warrants, authorities or requests for the payment of money."*

15. He relies on the provisions of section 479(50of the criminal code:

> *"In an indictment in which it is necessary to mention money, such money may be described simply as money, without specifying any particular form of money; and such an averment, so far as regards the description of the property, will be sustained by proof that the offender obtained or dealt with any coin or anything which is included in "money" or any portion of the value of either, in such a manner as to constitute the offence, although such coin or thing was delivered to him in order that some part of the value thereof should be returned to the person who delivered the same or to some other person, and has been returned accordingly."*

16. Mr Richards went on to submit that the court should not take a restrictive approach to the definition of money because the definition in the criminal code "includes" the items mentioned. In his view the court should take a purposive approach which would allow the court to include a credit balance in the definition of money. He went on to say that this would not be inconsistent with the statute.

17. Mr Richards submitted that he is fortified in his submission of including a credit balance in the definition of money because certain wording in section 479(1) is consistent with the definition of money. He suggests that the above reference to "*any portion of the value of either,"* can amount to (or be a reference to) a credit balance.

18. The court most assuredly does not agree with this submission. The quoted words refer back to the words *coin or anything which is included in "money".* The court finds that his argument is circular and lends nothing to the overall point that he seeks to persuade the court of. Asking the court to include a credit balance in the definition of money is asking the court to read into a section of a statute something that is clearly different in nature from the content of that section. The itemised things said to be included in money are all of a tangible nature. A credit balance is not.

19. Mr Pettingill in his submissions referred the court to Preddy (1996) AC 815 as authority for the distinction between "money" and "a thing in action". Mr Richards points out that the case is really about obtaining property by deception. He takes exception to the fact that Mr Pettingill has

suggested that the facts of this case lends itself more readily to one of the deception charges in our criminal code.

20. Mr Richards referred the court to Hilton [1997] 2 Cr App R 445 which he points out was decided after and in full knowledge of *Preddy*. He points out that the English Court of Appeal said:

> *"…the offence of theft is committed when there is a dishonest appropriation of the property in question (section 1(1)), and when the property consists of a credit balance, in the accepted meaning of that term, then the defendant appropriates it by assuming the rights of the owner of the balance and so causing the transfer to be made out of the account. His instructions to the bank to make the transfer, whether given by cheque or otherwise, are the key which sets the relevant inter-bank (or inter-account) machinery in motion. The fact that a transfer is made is enough to complete the offence, even if there remains an obligation on the bank (as debtor to its customer) to replenish the account."*
> *30. It is apparent that, in England, the preferred course is to plead the stolen property as a "credit balance to the value of…". It is submitted that such words are unnecessary in Bermuda due to the special provisions concerning the broad meaning of "money" and how references to it may be pleaded in an indictment (see paras. 14 and 15 of this document)."*

21. The court is mystified that the charging authority in Bermuda, the Director of Public Prosecutions, would rather rely on a court reading words into a list in a statutory definition that is of a completely different class and nature than the uniform class and nature of the items in that list, when the word "credit balance" is available to them within the meaning of property in section 334.

22. Mr Richards repeats his contention about the meaning of money in reference to count 5 which charges the credit card charges. He submits that the law surrounding the meaning of "money" in Bermuda makes it unnecessary to be more specific in the charge as drafted in the indictment.

23. Mr Richards contends that the indictment does not need to be amended in the circumstances. He argues that the defence has had a second attempt at a "no case submission" on different grounds

than the earlier application. He further contends that if there was any merit in the submission of "no case" the court would have expected the arguments to have been raised sooner.

CONCLUSION

24. The court directed the jury at the start of these proceedings that the law is the province of the judge. In saying so the court was underlining its duty to apply the law to this case. part and parcel of that duty is to give a fair hearing to any counsel that raises an issue of law. at the end of the day it does not matter when a legal issue is raised provided the jury has not been sent out to deliberate on the law as provided. It is true that an attack on the integrity of any charge on the indictment is usually heard at the end of the prosecution case, however the court must be prepared to hear any argument raised that touches upon the directions that the court will give to the jury at the summing up stage.

25. For that reason the court allowed Mr Pettingill to make his submission. It would have been wrong of the court to have denied him that opportunity, especially as the court may have misdirected the jury in the circumstances.

26. The points raised by Mr Pettingill on jurisdiction are rejected by the court. The point on the presence of the words "Devonshire Parish" in count two in the courts opinion amount to sloppy drafting but nothing else. Such are considered to be the type of slip that are readily amended without prejudice to a defendant.

27. Mr Pettingill submission that the five counts on the indictment that include the element "did steal money" is a much more substantial submission. After hearing counsels' submissions, the court finds that the element of "money" is not capable of proof on the facts and the law as the court finds them to be. The court holds that it would be wholly artificial for the court to direct the jury that money includes a credit balance, or that the online transfer transacted by the defendant amounted to her stealing money. Money and a credit balance are mutually exclusive; one is tangible and the other an intangible.

28. Mr Richards has chosen to stand or fall on his sword as he submitted that it was not necessary for the prosecution to seek an amendment to replace "money" with a "credit balance". I can

understand his not seeking so to do, because in his address to the jury Mr Mussenden spoke of "money" simpliciter as did Mr Pettingill at the time. His stance does not come without consequences however.

29. In all of the circumstances the evidence in this case is not capable of sustaining the element of "did steal money" as particularised in the indictment. A jury properly directed on the meaning of money could not convict on it. Therefore the jury will be directed to return not guilty verdicts for each of the counts on the indictment. I remind counsel that early on in a discussion of the law it was agreed that the jury should be directed that if they acquitted the defendant of the theft charges then they should acquit her of the offence of abuse of a senior as charged in count 6.

DATED this day of 2018.

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Charles-Etta Simmons
Puisne Judge