

ENOCK KEITH KALELA v THE PEOPLE (1970) ZR 55 (CA)

COURT OF APPEAL 30

DOYLE CJ, PICKETT JA AND HUGHES J

15th APRIL 1970

Appeal No. 2 of 1970

Flynote

Criminal law and procedure - Charge - Theft by public servant - Accused 35 failing to account for five different sums of money received on different days - Proper charge to be laid would be of general deficiency.

Headnote

The appellant was charged and convicted on two counts of theft by public servant. By virtue of his employment as a Junior Executive Officer in the Judicial Department, on different days he received five sums 40 of money. His duty was to account for those sums of money either before or after putting them in the Exhibits Room. He did neither of these things and when the Exhibits Room was opened all the money except 30n was gone. The State charged him with two different offences, one comprising of two of the sums of money and the other comprising of the other three sums. On appeal:

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DOYLE CJ

Held:

(i) Since all the money had vanished, it would be usual to charge five different offences. However in these circumstances where the accused was bound to account for the total sum and it was not 5 possible to attribute the balance to any particular sum received, the accused would have been charged with a general deficiency.

(ii) The State should not have charged the accused two different deficiencies for the same period.

(iii) Appeal against conviction on count two allowed and that on count 10 one dismissed.

Judgment

Doyle CJ: delivered the judgment of the court.

The appellant was convicted on two counts of theft by public servant. By virtue of his employment as a Junior Executive Officer in the Judicial Department, on different days he received five sums of money. His duty 15 was to account for those sums of money, either after putting them in the Exhibits Room or before putting them in the Exhibits Room. He did neither of these things and it is quite plain that the

magistrate was perfectly right in holding that the appellant made away with those sums of money. The only question which disturbs this court is that although, when 20 the Exhibit Room was opened, all the money except 30n was gone, the State chose to charge two different offences, one of which comprised two of the sums of money and the other of which comprised the other three. Now it is plain that if all the money had vanished it would be usual to charge five different offences. However, we think that in these circumstances, 25 where the accused was bound to account for the total sum and it was not possible to attribute the balance to any particular sum received, it was possible to charge a general deficiency. We do not think the State can have it both ways and charge, as was done here, two general deficiencies for the same period. Accordingly we propose to allow the appeal against 30 conviction on Count 2, which was the later in time and dismiss the appeal against conviction on Count 1. We quash the conviction on Count 2 and direct a verdict of acquittal to be entered.

We feel that there should be some alteration of the sentence on Count 1 because of the manner in which this case was brought and we quash the 35 sentence on Count 1 and substitute a sentence of eighteen months' imprisonment with hard labour.

Sentence altered

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