

R. v. MILIMO JAMES.

CRIMINAL REVIEW CASE NO. 170 OF 1940.

Embezzlement—fraudulent conversion—general deficiency—proof of theft—form of indictment for offence committed during a period—revision of case when accused acquitted—“doubt”, to justify acquittal, must be “reasonable”.

Prior to the coming into operation of the Criminal Procedure Code (Amendment) Ordinance, 1940, it was possible by virtue of the provisions of section 174 of the Criminal Procedure Code to charge theft on a general deficiency. The Criminal Procedure Code (Amendment) Ordinance repealed section 174 and the present case should now be considered in the light of *R. v. Lawson* 36 Cr. App. Rep. 30, 1952 1 A.E.R. 804, and *R. v. Tomlin* 38 Cr. App. Rep. 82, 1954 2 A.E.R. 272. As also should the cases of *R. v. Samuel Banda* p. 131 *post*; *R. v. Kozi Makokwa* p. 210 *post*; and *Abel Kabaya v. The King* 5 N.R.L.R. 13.

Where the offence of fraudulent conversion or embezzlement is committed between two dates this should be so stated in the charge. The form of so stating it should not be “during the month of” but, e.g., “between 1st January and the 31st January”. (See *R. v. Best Chipoka* 5 N.R.L.R. 685.)

To enable a Court to acquit an accused person, the Court must have a “reasonable doubt” as to his guilt; it is not sufficient that the Court has a “doubt”. Where a Subordinate Court has acquitted an accused person of a charge it is not open to the High Court to interfere with the finding on revision even if the High Court is of the opinion that the finding of the Subordinate Court was wrong.

Law, C.J.: The accused properly accounted to a District Officer for a cash balance of £5 3s. 3d. at the end of April. The accused’s accounts were audited by a Government auditor on the 23rd May when the cash in hand was found to be £3 16s. 9d. According to the books kept by the accused the cash balance should have been £11 4s. 9d. on that date. There was a shortage, therefore, of £7 8s. 0d. There is no suggestion that the books were not kept correctly. The accused was consequently prosecuted for and charged with theft of £7 8s. 0d. during the month of May, under sections 243/249 Penal Code. In view of section 174 Criminal Procedure Code the charge should have been framed to read “between the 30th April, 1940, and the 23rd May, 1940” instead of “during the month of May”. The charge was nevertheless substantially correct. The case against the accused was one of theft by way of a “general deficiency” of £7 8s. 0d.

2. The real question which presents itself in a case of general deficiency is the nature of proof required in order to establish the charge against the person accused of the offence. In *Rex v. Grove* (1835), 1 Mood, p. 447; 7 C. and P., p. 635, a majority of judges decided that an indictment for embezzlement might be supported by proof of a general deficiency of moneys that ought to be forthcoming, without showing any particular sum received and not accounted for. In *Regina v. Jones* (1838) 8 C. and P., p. 288, ALDERSON, B. said, "Whatever difference of opinion there might be in the case of *R. v. Grove*, that proceeded more upon the peculiar facts of that case than upon the law. It is not sufficient to prove at the trial a general deficiency in account. Some specific sum must be proved to be embezzled, in like manner as in larceny some particular article must be proved to have been stolen." In *The Queen v. Chapman* (1843) 1 Cox, p. 47, WILLIAMS, J. said, "It is necessary, in all these cases, to show that money received by the prisoner for the use of the prosecutor has been feloniously abstracted by the prisoner. I will not act on the case of *R. v. Grove*." In the case of *The Queen v. Lambert* (1847) 2 Cox, p. 309, ERLE, J. said, "I think the offence is sufficiently made out if the jury are satisfied that the prisoner received in the aggregate the amount with which he appears to have charged himself, and that he absconded, or refused, when called upon to account, leaving a portion of the gross sum deficient". In *Regina v. Walstenholme* (1869), 11 Cox, p. 313, it was held that to support a charge of embezzlement against the secretary of a company, whose duty it was to receive moneys and pay wages, etc., out of the said moneys, and to account for the balance, proof must be given of a specific appropriation of a particular sum of money. In that case, BRETT, J. said to Counsel, "You must show that he (i.e., the accused) received certain amounts; that it was his duty to account for them; that he did not do so." In *Thomas Coles* (1910), 5 Cr. A.R., p. 36, it was held that, on an indictment for embezzlement, if the prisoner admits that he has the sum charged, he cannot set up the defence of "general deficiency". In *Robert Ernest Sheaf* (1925), 19 Cr. A.R., p. 46, it was held that proof of a general deficiency without reference to specific dates may not be sufficient to support an indictment for fraudulent conversion. At page 49 of that report, AVORY, J. said, "Reference to the authorities relating to embezzlement, it has been made clear that it is not sufficient to charge the embezzlement of a general deficiency unless it appears that by the conduct or course of business it was the duty of the defendant on the date specified to hand over the lump sum which he had received." It seems clear, from the foregoing decisions, that the fact of a general deficiency is not in itself proof of the alleged offence, but must be supported by specific evidence or presumptive proof of some act of theft of part of that amount within the period charged. It is in this sense, therefore, that I would understand the decision in *Rex v. Mardon Mateche*, N.R. Reports, 1931-1937, p. 98.

3. In the present case, and before the audit, the accused told the auditor that he had £9 cash in hand. This was not true, he had only £3 16s. 9d. On the authority of *Thomas Coles*' case (*vide supra*) this false statement by the accused was sufficient to convict him, because the £5 3s. 3d. (that is, £9 less £3 16s. 9d.) was part of the £7 8s. 0d. the theft of which he was charged. The accused should, therefore, have been convicted and not acquitted.

4. The accused's defence was described by the Magistrate as, at first sight, a "cock and bull" story. It was a fantastic story, from beginning to end. It suggested that someone had visited the accused's quarters at night, crept through an aperture over the locked door, abstracted the keys of the safe and the office from his trouser pocket, committed the offence (only taking part of the cash) and then reversed the process in order to replace the keys. The Magistrate has, quite properly, looked for points in favour of the accused, and, in this connection, remarks that there had been no attempted falsification by the accused of his accounts, that the audit was not a "surprise audit", that there had been no suggestion that the accused was in difficulties through gambling or living above his means, and that the accused had given his evidence on oath in an impressive manner. The Magistrate seems to have overlooked, however, the accused's own evidence that the District Officer authorised an advance to him of £4 at the beginning of April in order to get married, the amount to be repaid in certain instalments by the end of August. This loan is reflected in the trial balance, Ex. A. In May, therefore, the accused had to support not only himself but also a wife on a reduced salary. In the latter portion of his judgment, the Magistrate gives the impression that he was considerably influenced by the accused's story of his dream in which an escaped convict was concerned with a theft. Curiously enough, the accused had this dream the night before the audit. Though the Magistrate rightly describes the story as having some obvious weaknesses, yet it had the effect of creating in his mind a belief in the possibility that a particularly audacious and cunning thief with "inside" knowledge had actually carried out this theft. The Magistrate stated that he had a doubt in his mind and consequently acquitted the accused. I would point out, however, that it is not a doubt but a reasonable doubt which entitles an accused person to an acquittal. The accused having been acquitted, however, the High Court has no power to interfere in Revision.

5. In conclusion I would express astonishment that these cases do not more frequently arise. Poorly paid clerks are faced with temptation. Their salaries are frequently not commensurate with their responsibilities. The accused's salary was £2 a month; considerable sums passed through his hands. He was put in complete charge of all moneys paid into and paid out of the Livingstone Native Treasury with infrequent supervision. He was allowed to keep the keys of the safe. It is surprising that the shortage on this occasion was not greater.