C.A.C. No. 126631

NOVA SCOTIA COURT OF APPEAL

Chipman, Freeman and Roscoe, JJ.A.

BETWEEN:		
ALBERT STANLEY JESTY		Appellant appeared in person
	Appellant	
- and -		
HER MAJESTY THE QUEEN		William D. Delaney for the Respondent
	Respondent	
		Appeal Heard: September 19, 1996
		Judgment Delivered: November 12, 1996

THE COURT: Appeal dismissed per reasons for judgment of Roscoe, J.A.; Chipman and Freeman, JJ.A. concurring.

ROSCOE, J.A.:

This is an appeal from a conviction entered on a charge of theft of under one thousand dollars after a retrial heard by a Supreme Court Justice sitting alone. The appellant had been convicted after an earlier trial and on appeal to this court a new trial was ordered after the admission of new evidence. The decision of this Court on the first appeal is reported at (1995), 143 N.S.R. (2d) 224.

The evidence tendered by the Crown and the defence at the second trial was substantially the same as that summarized by Justice Pugsley at paragraphs 11 to 22 of the reported decision of the first appeal and it is not necessary to repeat it in detail. A brief summary will suffice.

Mr. Jesty was a police officer employed by the Town of Sydney Mines. On August 20, 1993 a wallet containing $1130 cash and a cheque was found by Warrren Cousins and turned in to Mr. Jesty at the police station. Mr. Jesty made out a receipt which he had Mr. Cousins sign and which was given to Mr. Cousins. The carbon copy left in the receipt book contained only the word "Aug." in the space for the date. The appellant took the wallet home and put it in his dresser drawer. Approximately six weeks later, on October 7, 1993, he was suspended from service because the police chief suspected that he had committed welfare fraud. He was asked to return the wallet. Although initially, the appellant said that $200 or $250 was "missing", when he returned the wallet, it contained only the cheque and $130 cash. He was charged with theft. Later that day, the appellant borrowed $1100 from his brother-in-law and brought $1120 to the police station to replace the missing money.

On September 2, 1993, the day after his position with the department changed

from part-time to permanent fulltime, the appellant leased a new automobile and made a down payment of $1000 cash and a few days later paid an additional $594.

At the trial, the appellant testified that he paid the down payment for the car from his last pay cheque and from approximately $550 cash his wife had saved and kept in the china cabinet. The $594 came from his salary for the week after buying the car. Much of his evidence concerned the inappropriate handling of exhibits by the chief of police and other members of the department.

In a statement given to police on October 29, 1993, Mrs. Jesty wrote:

> Albert had mentioned that a wallet was found with $3000 dollars in it at my mother's house on a Saturday night. I forgot about it until one day I (sic) cleaning out the dresser drawers, I took two, one hundred dollar bills and spent it. After that I never seen or touched it.

She also indicated in that statement that she did not know that more than $200 was taken from the wallet nor was she aware that her husband had borrowed $1100 or that he had paid $1000 as a down payment on the car lease.

At the trial, Mrs. Jesty testified that she took $1000 of the money from the wallet and used it to buy back to school items for their children, the light bill, and part of the car insurance premium.

After determining that the appellant had not intended from the outset to convert the wallet or any of its contents to his own use, the trial judge stated:

> I am, however, satisfied beyond a reasonable doubt, that Mr. Jesty did take $1000.00 from this wallet and used it as a down payment for his new car. There is no dispute that $1000.00 was removed from that wallet. There is also no doubt that Mr. Jesty made a cash deposit of $1000.00 to Jim Sampson Motors while this wallet, with its contents, was in his

> possession. From this, the only rational or logical inference I can draw is that Mr. Jesty took the $1000.00 from the wallet. I say this for the following reasons:
>
> I do not believe that Mrs. Jesty, as they testified, was able to save funds in excess of $500.00 by September 2, 1993, considering that they were receiving Social Assistance in January of 1993 and also considering their overall financial situation from January 1993 to September 1993. Even with Mr. Jesty's average, net, weekly income of over $400.00 and Mrs. Jesty's pension funds, they had a home to operate and two children to care for. They had bank accounts with no substantial money in them during this time period. They cashed cheques at the bank. It would only make sense that if they could save money, they would have put this money in the bank. If I assume for a moment that they did save a sum in excess of $500.00 during this time period, it would be a feat of frugality on the part of Mrs. Jesty. Why would she then recklessly take $1000.00 from the wallet with the intention of paying it back? She said she had $300.00 left over. Why would she take more than she needed? This appears illogical to me.

After addressing other factors affecting the credibility of the appellant and his wife, the trial judge concluded as follows:

> In short, Mr. and Mrs. Jesty's accounting of the missing $1000.00 is simply not believable. I do not believe them and I reject their testimony in this regard.

Grounds of Appeal

The appellant, who represented himself at the appeal, raised the following grounds of appeal:

> 1. That Justice MacDonald erred in his decision by making findings of fact which go directly against testimony by Crown witnesses.
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> 2. That all the evidence was not reviewed by the Justice as

certain exhibits that were entered in the first trial failed to be marked at this trial.

3. That Justice MacDonald interrupted the Crown in its summation, to point out the lesser charge, thereby showing his tendency to convict of the lesser charge even before reviewing the evidence.

First Ground of Appeal

The appellant argues that the evidence does not support the finding of the trial judge that "Mr. Jesty did take $1000.00 from this wallet and used it as a down payment for his new car". It is submitted that since the evidence was that the cash in the wallet consisted of one hundred dollar bills and fifty dollar bills and that the money presented to the car dealership consisted of four one hundred dollar bills, ten fifty dollar bills and five twenty dollar bills, that it could not have been the same money. The appellant suggests that this difference in the denominations of the money should have resulted in the trial judge having a reasonable doubt.

The decision of the trial judge is not dependant on any finding that the bills from the wallet were the exact same bills that were presented to the car dealership. Since the receipt given to Mr. Cousins did not contain the serial numbers of the bills, nor was there any evidence of the number of hundreds and fifties in the wallet, it would have been impossible to prove that the same bills were used. The trial judge drew an inference that since it was the same amount of money involved, and that it was unlikely that the funds for the car had been saved, that the fund was made available from the monies in the wallet. There was an abundance of evidence leading to that inference. Obviously it would have been simple to change one of the hundred dollar bills into five twenties. In any

event, the sufficiency of the evidence raised by the first ground of appeal is a question of fact, and therefore this Court should not interfere with the decision of the trial judge.

Second Ground of Appeal

In support of the argument on the second ground of appeal the appellant made an application to admit fresh evidence. The evidence sought to be admitted consists of photocopies of pages of a Canadian Imperial Bank of Commerce account pass book, which the appellant said were admitted at this first trial and through inadvertence not introduced at his retrial. The panel received the proposed evidence and reserved decision as to its admissibility pending the hearing of the appeal. This is the procedural approach set out in **R. v. Stolar**, [1988] 1 S.C.R. 480.

At the trial, the Crown presented the evidence of Ann Buffett of the Royal Bank, who tendered a certified copy of a list of all transactions recorded in the appellant's bank account from August 2, 1993 to October 8, 1993 and which was marked exhibit 13. That exhibit showed a balance of $139.86 on September 1, 1993. The trial judge referred to it in his decision:

> If they put all their extra cash in the cream container, and Mr. Jesty spent it as a down payment, as they testified, where did Mrs. Jesty get the $100.00 for insurance? According to Exhibit 13, they did not get this money from the bank.

It is submitted that since the CIBC account book shows withdrawals totalling $500.00, on August 30 and August 31, 1993, that Mrs. Jesty would have had sufficient cash to pay $100.00 on the car insurance on September 2, 1993.

The principles for the reception of fresh evidence on an appeal were stated by

McIntyre J. in **R. v. Palmer,** [1980] 1 S.C.R. 759, at p. 775:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see: **McMartin v. The Queen**.
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
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> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

The appellant submits that it was through an error on the part of his lawyer that the CIBC bank passbooks were not introduced and that in fact they were there on the counsel table during the trial. Although the photocopy of the pass book was not accompanied by an affidavit, it is, on its face, a true copy of a document that is reasonably capable of truly representing the state of the appellant's other bank account on the relevant dates and thus could meet the criteria of the third prong of the test. However, the first part of the **Palmer** test clearly has not been met since the material was available at the time of trial. Nor, in my opinion, does the evidence meet the second and fourth parts of the test. The source of the monies for the $100.00 insurance payment was only a collateral issue, not a decisive one. Mrs. Jesty testified that she used money from the wallet to pay for the insurance. She did not say that the money came from the CIBC account. The availability of the evidence could not reasonably be expected to have affected the result, since it was tendered at the first trial and did not apparently have any significant influence.

Although respondent's counsel said he had "no great objection" to the admission of the evidence, and that "there was no harm in looking at it", neither is there, in my opinion, any merit in its introduction and would therefore dismiss the application to admit fresh evidence.

Third Ground of Appeal

The appellant contends that the trial judge erred by suggesting to the Crown counsel during submissions, an alternative theory of the offence, that is, that the appellant did not intend to convert the wallet when he first took it home but decided at a later time to use some of the money. Even if the trial judge did make the suggestion of the alternative theory it would not have been an error or in any way improper. However, the alternative theory is first mentioned by Crown counsel in cross examination of the appellant, (at page 379) in the following exchange:

> Q. I suggest to you that you may not...you may not have intended to steal that wallet when you took that wallet home that day. But after you secured the full-time job, you thought you deserved to celebrate a little bit and you went out and put $1000. from that wallet down on a car, thinking that if you were ever called upon to return it you would do that at a future time, now that you had full-time employment. Correct?
>
> A. Wrong.

The third ground of appeal should be dismissed.

Crown Submission on Appeal

In its factum the respondent made the following submission:

> The Respondent is of the view that the appeal should be allowed on the basis of the additional ground of appeal

stated by the Respondent at Part II, **supra**.

> **Did the learned Trial Judge err in law in failing to require a voir dire to determine the admissibility of a statement made by the Appellant to a person in authority, when that statement had been put to the Appellant in cross-examination?**

The Crown Attorney at trial cross-examined the Appellant in respect of a statement which the Appellant had made to Inspector Henry Lamond after the Appellant's arrest on a charge of theft. No voir dire had been held with respect to that statement at the second trial and there was no agreement between counsel with respect to the admissibility of that statement. The cross-examination proceeded in the following manner:

> Q. Did you tell the Police at sometime as an explanation for where the money was when you eventually brought in the money you had borrowed from your brother-in-law that it was at home, in fact, your wife had moved it and it was in another drawer?
>
> A. Yes, Sir. I just told My Lord that there.
>
> Q. But that. . .that wasn't true, was it?
>
> A. No, Sir.

The Appellant was questioned by the Court in respect of the same matter:

EXAMINATION BY THE COURT

THE COURT: The evidence that I've heard regarding you finding the money in another drawer. Was that something you told the Police or something you told your wife you told the Police.

A. That's something that I did tell Inspector Lamond first.

Q. Yes.

A. And then when I went home, I told my wife that is something that I told the Police, too. Yes.

...

The Trial Judge did not believe the Appellant's explanation for the fact that money was missing from the wallet when it was returned by him to the Sydney Mines Police Department. The Judge's reasons for not accepting the Appellant's and the Appellant's wife's evidence on this point are set out in the Appeal Book, vol. 2 at pp.571-574. At p.572, after listing several reasons for not believing this evidence, the learned Trial Judge stated:

> Most troubling to me is the response by both Mr. Jesty and Mrs. Jesty to the police investigation. Mr. Jesty, by his own admission, lied to his superior officers when he told them the money was misplaced in another drawer.

The respondent had submitted in its factum that since no *voir dire* was held to establish the voluntariness of this statement, the appeal should be allowed and a new trial ordered. Counsel appeared to change his opinion on this point when it was pointed out in argument that it was the appellant who first volunteered the information that he had indicated to Inspector Lamond that the wallet was in another drawer or another part of the drawer and that is why he did not return it immediately. During Inspector Lamond's testimony there was no mention of any explanation as to where it had been. A few pages before the above noted cross examination of the appellant, at a point when the Crown was asking him how it came to be that at first both he and his wife had said $200 or $250 was missing, are the following series of questions:

Q. Mr. Jesty, you made a comment that was reported to His Lordship by then-Inspector Hank Lamond to the effect - I used $200, $250 of the money. Your evidence before His Lordship was that $200, $250 of the money was gone. Would you agree with me, first of all, there's a big difference between you saying that you used $200, $250 of the money and you simply telling His Lordship that that amount was gone? Would you agree with me, there's a difference?

A. Yes, Sir.

Q. Are you saying that you're correct and Inspector Lamond is incorrect in his recollection of what you said there that day?

A. I believe Inspector Lamond's testimony was that I did not say that I used $200, $250.

Q. Well, that's a matter for His Lordship in his notes to determine. Where did that figure come from? You seem to suggest to My Friend that you just picked it out of the air - ...

A. Yes, Sir.

Q. ...$200. Again, you're aware that while you were in one interview room, your wife was in another interview room giving a statement to the Police, and you know that when she was first asked, her first version of what went on was that she had spent $200 of that money. Is that a coincidence, the fact that you...you both came up with the same amount when you were first originally asked to account for where the money had gone? Is it just a coincidence?

A. That...?

Q. That your wife, when she was originally interviewed, said that she had spent $200 and that just happened to be the figure...$200 to $250 that you had thrown out in speaking to the officers at the Police Station?

A. Yes.

> Q. You were here when your wife gave sworn evidence at the first trial where...when she was asked why, she said $200. In her first statement, she replied, I had told him the story that Albert had told me to tell, the one we concocted together. Look His Lordship in the eye and tell him about that, comment on that.
>
> A. That there was when I had come home after...after I was finished for the day on October the 7th when I was re...charged. When I came home that afternoon, I told my wife that I had just been charged with theft over by Inspector Lamond. I told my wife that I had been home and I had picked up the wallet and returned it. **I had wanted to know what had happened to the money, from her, and I told her that I had borrowed the money and that I had told Inspector Lamond when I went back that I went home and it was in another part of the drawer. Yes. I did say that there, and yes, that there is what I told my wife.** {emphasis added}

In my opinion this is not cross examination on a statement given to a person in authority that required a *voir dire* to determine its admissibility. The appellant was represented at trial by competent experienced counsel who did not intervene to cut off reference by his client to the explanation about the other drawer. In fact, Mrs. Jesty also testified about the plan to say the wallet had been in another drawer on direct examination as follows:

> Q. And can you recall what happened that day, starting at the time when he came home?
>
> **MRS. JESTY**: Could I have a glass of water, please? Thank you.
>
> A. Okay. The day Albert was suspended, he came home around 2 o'clock. I thought he was coming home for lunch.
>
> **MR. NICHOLSON**: Yes.

A. He told me he was suspended with pay for defrauding Social Services in January. He got changed and he left. And while he was gone, I was going through his pay stubs for...for that month and I found two of them. So, when he came back, I gave him those two pay stubs and he was heading back out the door to go to Social Services again and he told me that...he told me to get the wallet with the money in it.

Q. Yes.

A. And I told him that I spent some of it. And he said, Jesus, or something and he left. And I didn't see him again until after 4.

Q. When he left that time, he was going back to Social Services, as far as you knew, with the pay stubs.

A. Yes.

Q. He took his pay stubs.

A. And I believe Hank Lamond had called while he was gone there and I told him he was there, at Social Services.

Q. Yes.

A. Uhm...after 4 o'clock he came back and wanted to know what I did with all the money. And I told him I still had $300 of it left. I didn't spend all of it. And he told me he had to borrow it. Then he told me it would be okay, that he'll take care of it for me. He said that...that **I would just have to say that I put it in a different spot in the drawer and I wouldn't have to be involved.** (emphasis added)

Q. Okay. Yes. So, he told you that he borrowed the money to cover the money that was missing from the wallet.

A. Yes.

Q. Did he tell you who he borrowed the money from, or where he'd obtained it?

A. No. Not at that time.

> Q. Now, Mrs. Jesty, you were questioned by the R.C.M.P. with regard to what, if any, involvement you may have had with this missing money. Is that correct?
>
> A. Yes.
>
> Q. And you gave two statements to the R.C.M.P.
>
> A. Yes.
>
> Q. And in the first statement, I believe you told Officer Urquhart you had only taken $200 of the money.
>
> A. **First, I told him that I put it in a different spot in the drawer**. (emphasis added)

Additionally, defence counsel said in his summation:

> We also...I don't think it's in dispute that Mr. Jesty borrowed money from his brother-in-law that same day and told Officer Lamond and possibly Officer Stewart - it's not quite clear whether Stewart was there or not - that he had found the money in another part of the drawer.

The respondent, in its factum cited **R. v. Erven** (1978), 44 C.C.C.(2d) 76 (S.C.C.) as authority for the proposition that a *voir dire* was necessary in this case. In **Erven**, Dickson, J. stated: at pp. 87:

> I think it can now be taken to be clearly established in Canada that no statement made out of court by an accused to a person in authority can be admitted into evidence against him unless the prosecution shows, to the satisfaction of the trial judge, that the statement was made freely and voluntarily.

Exceptions to that broad statement have been found in a few cases where the statement was not in response to questioning by the person in authority. For example

in **R. v. Moulaison** (1987), 76 N.S.R. (2d) 415 where Macdonald, J.A. for the Court, distinguished **Erven** in the following passage:

> It must be remembered that the statements made by Mr. Erven and his companion were made in direct response to police questions. That circumstance was obviously of importance to Mr. Justice Dickson in reaching the conclusion he did. In rejecting the volunteered approach to statement admissibility, he posed the following question, which he subsequently answered in the negative (p.93):
>
> > "Can it ever be said that an answer given in response to questions asked by a police officer in circumstances of compulsive authority, as in the case at bar, are 'volunteered'?"
>
> In the present case, and unlike **Erven**, the appellant's remark to Constable Faye that he was the driver of the car was not given in direct response to a question asked him by the constable nor did there exist here any circumstances of compulsive authority as found by Mr. Justice Dickson to have been present in the Erven case. These two factors alone, in our opinion, are sufficient to distinguish the present case from that of **Erven**.
>
> The purpose of a *voir dire* is to determine whether an out-of-court statement by an accused to a person in authority was made freely and voluntarily in the sense that it had not been induced by fear of prejudice or hope of advantage exercised or held out by a person in authority.
>
> On the facts here, the situation simply was that the appellant approached Constable Faye on his own initiative, without apparent solicitation by or from anyone. He then told the officer that he was the driver of the car. The constable up to that point obviously had not been in contact with Mr. Moulaison and had not asked him any questions. He had not created an air or atmosphere of compulsive authority. It was the appellant who approached the officer, not the other way around. On the clear evidence there was nothing that Constable Faye could have done to prevent the appellant making the remark he did.

Similarly, in this case, Mr. Jesty came to the police station on his own initiative with the replacement money that he had borrowed and stated that it had been placed in another drawer. There was little Inspector Lamond could have done to prevent Mr. Jesty from offering the explanation. Furthermore, the Crown did not present the statement as part of its case.

The Quebec Court of Appeal, in **R. v. Drakes** (1991), 69 C.C.C. (3d) 274, after quoting extensively from the decision in **Moulaison**, said, per Fish J.A., at page 280:

> Taking into account all of the circumstances, I have come to the conclusion that we are not bound in this case to distinguish **Erven** on the grounds invoked in **Moulaison**. Without so deciding, I am prepared to assume that a voir dire was required by law. On principle, I agree that whenever the prosecution tenders a statement made by the accused to a person in authority, the trial judge is bound to inquire into the circumstances surrounding the giving of that statement. Normally a *voir dire* should be held for that purpose, even if none is requested.
>
> A formal *voir dire* may, of course, be waived, but the waiver must be explicit. Writing for the full Court in **R. v. Park** (1981), 59 C.C.C. (2d) 385 at p. 393, 122 D.L.R. (3d) 1, [1981] 2 S.C.R. 64, Dickson J. (later C.J.C.) stated:
>
> > Although no particular form of words is necessary the waiver must be express. Silence or mere lack of objection does not constitute a lawful waiver. The question is -- does the accused indeed waive the requirement of a *voir dire* and admit that the statement is voluntary and admissible in evidence? If that question is answered in the affirmative I cannot think that any further procedural safeguards are necessary to protect the rights of an accused person.

> In the present case, however, even assuming that there should have been a *voir dire*, I would not set aside appellant's conviction on the ground that none was held. There is uncontradicted evidence before us that the statement was both free and voluntary. It was not made in answer to police questioning, as in **Erven**. As I have already mentioned, there was no objection to its reception in evidence, as in **Erven**. A *voir dire* was not requested by defence counsel, as in **Erven**. There is no issue of credibility or as to the true content of the statement, as in **Erven**.

In **R. v. Demaio**, [1995] B.C.J. No. 2725, (Q.L.) the British Columbia Court of Appeal applied the curative provisions of s. 686(1)(b)(iii) of the **Criminal Code** in dismissing an appeal where a *voir dire* should have been held. The Court was satisfied that there was no substantial wrong or miscarriage of justice because there was evidence to prove that the admission was voluntary and the statement was not used by the trial judge to establish proof of trafficking but only on the issue of credibility.

Based on these three decisions, I am not convinced that a *voir dire* was necessary in this case. The combination of circumstances in which the statement to Inspector Lamond was given by the appellant, himself a police officer, and of how the statement came before the Court including the explicit reference to it by defence counsel in summation, are such that if a *voir dire* was necessary it was effectively waived by the appellant. I would, if necessary apply the provisions of s. 686(1)(b)(iii). In my opinion there is no reasonable possibility that the verdict would have been different if the error, if any, had not occurred.

I would for these reasons dismiss the appeal.

Roscoe, J.A.

Concurred in:

Chipman, J.A.

Freeman, J.A.