

NOVA SCOTIA COURT OF APPEAL

Pugsley, Jones and Flinn, JJ.A.
Cite as: R. v. Hines, 1996 NSCA 261

BETWEEN:

MARLENE OLGA HINES

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

) Lisa Teryl
) for the Appellant

) Dana Giovannetti
) for the Respondent

) Appeal Heard:
) November 22, 1996

) Judgment Delivered:
) November 22, 1996

THE COURT: Leave to appeal is granted and the appeal is dismissed per oral reasons for judgment of Jones, J.A.; Pugsley and Flinn, JJ.A. concurring.

JONES, J.A.:

The appellant, Marlene Olga Hines, was convicted at trial before Judge MacLellan on April 16, 1996, on a charge that she did, between April 1, 1995 and

July 24, 1995, at or near Garlands Crossing, Hants County steal the property of Pizza Delight of a value not exceeding \$5,000.00 contrary to s. 334(b)(i) of the **Code**. A fine of \$300.00 was imposed.

The appellant had been employed for a number of years at Pizza Delight, beginning as a waitress and later promoted to shift supervisor. Although she had been considered a model employee, other employees became suspicious of her in late March or early April, 1995.

The alleged thefts occurred in the processing of customers' bills. For each customer served the waitress must prepare a bill which contains a serial number. She must insert her own number and the table number on the bill. After taking an order she must process the bill through a cash register which records the order on the bill and the cash register tape. When the customer is finished he or she brings the bill to the counter and pays the bill. The bill is again processed through the cash register and the totals recorded on the bill and the register tape. At the end of the day the bills, tapes, and cash are balanced.

Leanna O'Leary, a waitress, testified that she saw the appellant process a customer's bill by ringing in "no sale" on the cash register. This causes the cash register drawer to open, so that the money can be deposited and the change given, but it leaves no record, other than a "no sale" entry, on the cash register tape. The appellant was holding a blank bill and no bill had been processed in the usual fashion by putting it into the cash register so that the particulars of the transaction would be printed on the bill.

Later that day, O'Leary brought this to the attention of Laurie Crowell, a supervisor. They checked the cash register tape and the customers' bills. They could not find any record matching this particular transaction. Crowell thought that there could have been a mistake and she simply instructed O'Leary to keep an eye on the appellant.

O'Leary testified on cross-examination that it was possible she could have been mistaken about the particulars of the order and consequently she and Crowell may have been looking for the wrong order.

Another waitress, Elizabeth Coffill, testified to witnessing essentially the same type of suspicious "no sale" procedure employed by the appellant. A subsequent check revealed no entry for the customers' order, but again the evidence admitted a possibility that Coffill could have been mistaken about the particulars of the order. Coffill advised Crowell, but Crowell did not advise the general manager, Richard Gallupe, or the owner, Doug Gallupe.

In his decision the trial judge held that there was a reasonable doubt as to whether theft had occurred on either of these two occasions. However, he held that there was no reasonable doubt concerning a third incident that occurred on July 24, 1995. The evidence concerning that incident was as follows.

Annette Lunn, a supervisor, testified that on July 24, 1995 she saw regular customers, known to her personally, apparently waiting for their bill at their table. The appellant was their waitress. Lunn was not able to locate the bill where they are usually kept. Eventually the customers came to the counter and indicated to Lunn that they had not yet received their bill. Lunn asked the appellant if she had the bill and the appellant said that she had not rung it in. She then saw the appellant, holding a blank bill, ring in the order, accept the money from the customers and give change, and put the blank bill in her pouch. The blank bill was not served by putting it in the cash register machine.

Lunn testified that the order was for two buffet, a small buffet and a pop. This was corroborated by the evidence of the customer, Jocelyn Hood. Hood testified that she and her fiancé and her cousin were in at lunch hour and

they never received a bill and no bill was processed through the cash register.

The next morning Lunn and O'Leary examined the cash register tape (Exhibit 1) and the customers' bills (Exhibit 2). They could find no entry on the tape and no bill matching Hood's order. Nevertheless, there was no additional money in the till. Further, Hood testified that it was about 1:15 p.m. when she approached the cash register to pay. Exhibit 1, the cash register tape, indicates that there was a "no sale" processed by "01", i.e. the appellant, at 1:27 p.m.

The general manager of the store testified as to the procedure to be followed when processing an order. He stated that there should always be a bill and matching tape entry for every transaction. He checked the tapes and checks for July 24th. There was no check to cover the transaction with the customer, Jocelyn Hood. There were two "no sales" recorded on the register at that time. There was no evidence of a cash surplus at the end of the day.

The appellant testified that she had no recollection of this transaction. She testified that if she could not locate a bill when the customer was prepared to leave, it was more convenient to ring in "no sale" than to process another bill. There was evidence that the proper procedure was to start another bill.

In convicting the appellant on the third transaction the trial judge accepted the evidence of Annette Lunn. He was satisfied that there was no other rational explanation but that the appellant had taken the money on the third transaction.

The appellant has appealed essentially on the ground that the verdict was unreasonable and cannot be supported by the evidence. She maintains that there were missing guest checks on July 24th and that the tapes and checks did not balance. There was evidence on the trial that unserved checks were on occasion missing. What is important here is to focus on the evidence as presented. That evidence shows that an order was processed at noon on July 24th. That a blank check was produced

and not processed and that no sale was recorded although the customer had paid the account. Two "no sales" were recorded on the tape at that time. No record of the sale was found at the end of the day and the checks and tapes balanced. There was no cash surplus. The trial judge accepted that evidence. With respect, we are of the opinion that there was

ample evidence to support the conviction and accordingly leave to appeal is granted and the appeal is dismissed.

Jones, J.A.

Concurred in:

Pugsley, J.A.

Flinn, J.A.

