

Cite as: R. v. Karam, 1992 NSCO 44

CANADA
PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX

C.R. No.: 11769

I N T H E C O U N T Y C O U R T
O F D I S T R I C T N U M B E R O N E

BETWEEN:

HER MAJESTY THE QUEEN

Plaintiff

- and -

JAMIL Y. KARAM et al

Defendant

Joel E. Pink, Esq., Counsel for the Defendant.
Gary Holt, Esq., Counsel for the Plaintiff.

1992, September 18th, Bateman, J.C.C.: - (Orally)

FACTS:

Jamil Karam and his company, Twin Cities Amusement Centre Limited are charged with 6 counts of theft and fraud. The alleged victims are three charitable organizations for whom T.C.A. operated bingos.

The Crown submits that the company failed to pay to the charities their proper share of the bingo revenues.

The trial spanned 8 weeks. At the outset I dismissed a Defence motion for stay due to unreasonable delay. Attached to this decision are the written reasons, which were provided in an oral judgment at the conclusion of the motion.

All charges can be dealt with together. Bingos were operated for three charities over the 16 month period in question. Each charity received bingo proceeds for certain days of the week.

The charges are not under s. 207 of the Code which specifically concerns gaming. The Crown is not alleging an illegal bingo operation.

As required by the Nova Scotia Lottery laws each charity obtained a license to operate a bingo on certain days of the week. The charities, then, by contract, completely delegated the operation of bingos to T.C.A. The contracts provided a revenue based formula under which the company was compensated for running the bingos. Essentially, the charities received a very small portion of the revenues, with T.C.A. retaining the balance. The contracts are atrociously drafted and close to impossible to interpret.

T.C.A. provided the physical space, workers and paper product, and determined the game and prize structure. Monthly, T.C.A. provided the charities with a cheque for their share of the proceeds, purportedly based upon application of the formula to the revenues. The charities did not dispute the company's interpretation of the contracts.

As required, a monthly report as to revenue, prizes and expenses was filed by the charities with the Lottery Commission. With these reports was submitted a cheque for 2% of the total prizes paid, this being the required licensing fee. All information provided on the Lottery reports was generated by T.C.A., or calculated by the charities based upon information provided by T.C.A.

There is no dispute that the gross revenues reported to the charities and to the Commission were significantly understated, probably by 100%. Actual revenues exceeded the amount reported to the Commission by about 2 million dollars.

Three expert reports were tendered as to the probable level of gross revenue for the period. The police were unable to locate any company records

detailing revenues. The daily bingo revenue records were regularly shredded by T.C.A.

The Crown expert reconstructed probable revenues based upon the consumption of bingo cards over the period. The principal expert witness for the defence prepared his estimate using a computer model of customer buying patterns of bingo cards; projecting his information backward from subsequent years, to the time period in question. A second Defence expert reviewed and critiqued the Crown expert report; adjusting the result due to alleged errors in the assumptions of the Crown report.

The charges are that Jamil Karam and Twin Cities Amusement Centre Limited:

1. At or near Dartmouth in the County of Halifax, Province of Nova Scotia, between the 31st day of December A.D., 1988, did steal a sum of money of a value exceeding one thousand dollars (\$1,000.00), the property of St. John Ambulance, contrary to Section 334(a) of the **Criminal Code**;

2. At the same time and place aforesaid did by deceit, falsehood, or other fraudulent means defraud St. John Ambulance of a sum of money of a value exceeding one thousand dollars (\$1,000.00), contrary to Section 381(1)(a) of the **Criminal Code**.

The four additional charges mirror the above two; but related to the Maronite Church and the Lebanese Association.

Theft is defined in s. 322 of the Code:

"322(1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything, whether animate or inanimate, with intent,

(a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;

(b) to pledge it or deposit it as security;

(c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or

(d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.

(2) A person commits theft when, with intent to steal anything he moves it or causes it to move or to be moved, or begins to cause it to become moveable.

(3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment

(4) For the purposes of this Act, the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material.

(5) For the purposes of this section, a person who has a wild living creature in captivity shall be deemed to have a special property or interest in it while it is in captivity and after it has escaped from captivity."

Fraud is outlined in s. 380:

"380(1) Everyone who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretense within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security,

(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding ten years, whether the subject-matter of the offence exceeds one thousand dollars; or

(b) is guilty

(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(ii) of an offence punishable on summary conviction, where the value of the subject-matter of the offence does not exceed one thousand dollars.

(2) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretense within the meaning of this Act, with intent to defraud, affects the public market price of stocks, shares, merchandise or anything that is offered for sale to the public, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years."

Both offences incorporate "fraud" as an element.

J.D. Ewart in this text 'Criminal Fraud' 1986, Carswell at p. 143 says:

"...mens rea exists where the accused has knowledge of the facts which are found to constitute the physical elements of the offence, or is reckless in relation thereto, and desires or foresees the facts constituting the consequence which the offence forbids."

The law does not punish incompetence or carelessness. A person is reckless within the above definition if he knows that the relevant circumstances probably exist.

As stated by David Doherty, as he then was, in "The Mens Rea of Fraud" (1983), 25 Crim. Law Quarterly 348, at p. 353:

"On the other hand, if an accused makes a representation which is false but which he believes to be true (or at least does not know to be probably false) then he does not have the requisite knowledge of the circumstances (the falsity of the statement) to render his conduct criminally culpable. This is true, even if he should have known it was false, in the sense that a reasonable man in his position would have known the statement was false. Negligence or carelessness as to the truth of a statement do not constitute mens rea. This is consistent with the fundamental precept that the search for mental states which are relevant to criminal liability must be a subjective one. The question must be, 'what did this accused know?' A consideration of what any reasonable person in his place would have known, while helpful to the trier of fact in determining what the accused knew, is not the ultimate test by which criminal liability is measured." (emphasis added)

See also R. v. Sault Ste. Marie (City) (1978), 40 C.C.C. (3d) 353 (S.C.C.), Dickson J. at p. 362:

"Where the offence is criminal, the Crown must establish a mental element, namely that the accused who committed the prohibited act did so intentionally or recklessly, with full knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such inquiries as a reasonable and

prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law."

It is commonly necessary to rely upon circumstantial evidence and, therefore, inferences from circumstantial facts to prove intent.

The usual rule is that before an inference can be drawn from circumstantial evidence, in relation to the commission of an act, it must be the only reasonable inference in the circumstances. This replaced the Rule in Hodge's Case.

Where circumstantial evidence is relied upon, however, to prove intent, this general rule doesn't apply. In R. v. Mitchell [1985] 1 C.C.C. 155 (S.C.C.) Spence J. at p. 167 says:

"This does not, in the slightest degree, reduce the onus of proof which rests upon the Crown in criminal cases and does not substitute any other rule. The direction in Hodge's case did not add to or subtract from the requirement that proof of guilt in a criminal case must be beyond a reasonable doubt. It provided a formula to assist in applying the accepted standard of proof in relation to the first only of the

two essential elements in a crime, i.e., the commission of the act as distinct from the intent which accompanied that act. The first element, assuming every circumstance could be established by evidence, would be capable of proof to a demonstration. The latter element, save perhaps out of the mouth of the accused himself, could never be so proved. The circumstances which establish the former not only can be, but must be consistent with each other, as otherwise a reasonable doubt on the issue arises. The circumstances which establish the latter, being evidence personal to one individual, will seldom, if ever, be wholly consistent with only one conclusion as to his mental state and yet the weight of evidence on the issue may be such as to satisfy the jury, beyond a reasonable doubt, as to the guilty intent of the accused. The instruction of Baron Alderson in **Hodge's Case** does not apply and was never intended to apply to an issue of this kind." (emphasis added)

I take it to be the law that the inference drawn from circumstantial evidence relied upon to prove intent need not be the only reasonable inference but, rather, must be a proper inference, beyond a reasonable doubt.

Proof of fraud requires proof of dishonesty by the accused. The Crown must prove that Jamil Karam, as the controlling mind of T.C.A., had a dishonest state of mind in relation to the alleged withholding from the charities.

I have not, at this point, determined that the charities received less than their due share of the revenues. For the purposes of considering *mens rea*, however, I am assuming a withholding or, at least, risk of prejudice to the charities. This is not a finding of fact, but an assumption to assist the analysis.

To defraud is to dishonestly deprive. Deprivation is satisfied by proof of detriment, or prejudice or risk of prejudice. Actual economic loss is not essential (R.v. Olan (1978), 41 C.C.C. (2d) 145 (S.C.C.)).

The Crown must prove that Jamil Karam (T.C.A.) knew that he was not giving the charities their appropriate share of the bingo revenues, as determined by the contract. Alternatively, the Crown must prove that Jamil Karam, whether or not the charities received their appropriate share, desired to withhold funds from them or foresaw that a withholding could result. (Risk of prejudice).

In order to have the requisite intent, Jamil Karam must be found to have had adequate knowledge of the true state of financial affairs of the bingos. At the very least, it must be proved that he had knowledge that the portion of the proceeds he was remitting to the charities

was less than their entitlement. While it is not necessary to prove that he knew, with precision, what the gross or net revenues were, he must be shown to have known that the revenues exceeded that amount of revenue suggested by his remittance to the charities.

There is no direct evidence of Mr. Karam's knowledge. He did not testify. His knowledge must, therefore, be inferred. The Crown says the following constitute sufficient indicia to impute knowledge:

1. Mr. Karam is intelligent and an astute businessman. For a number of years he operated other bingos in addition to the ones in question. It is inconceivable that he would not pay close attention to his business affairs.

2. It is reasonable to conclude that he would develop a system to ensure he was knowledgeable as to the bingo proceeds.

3. In 1985 two employees involved in counting bingo proceeds

occasionally saw Mr. Karam observe the money count. Mr. Karam would record the information in a small black book, prior to the revenue sheets being shredded.

4. In 1987 representatives from the charities sometimes obtained the financial information for the Lottery Commission Reports from the bookkeeper and sometimes from Mr. Karam. Therefore, he must have known the revenues generated.

5. Mr. Karam would occasionally call the bingo hall to determine how the session was going.

6. Some employees recall reporting nightly bingo receipts through a telephone beeper system. Mr. Karam sometimes carried a beeper.

7. Mr. Karam was the person who gave the St. John Ambulance representative reports of the

proceeds in the year 1983.

8. Toward the end of 1987 the executive director of St. John Ambulance complained about the low level of receipts by the charities. She was assured by Mr. Karam that proceeds would increase. In early 1988 the proceeds to the charities doubled. The increase in proceeds cannot be explained as there was no corresponding increase in sales of bingo cards. The Crown says, therefore, that revenue was always there and known to Mar. Karam as evidence by his assurances to the Executive Director.

9. Ian Robinson of St. John Ambulance recalled that he discussed a "high" daily rental fee for the bingo premises with Mr. Karam. Although Mr. Robinson felt the amount was too high and thus too risky for the charities, Mr. Karam was prepared to write off the rent

if the bingo proceeds were not sufficient to cover the rental. The Crown submits that Mr. Karam's willingness to forgive any shortfall is evidence that he knew there was more money available than was reported to the charities.

10. A person named Bachir Karam oversaw the bingo hall supervisors and dealt with day to day operations. The Crown says he must have kept Jamil Karam well informed. Bachir Karam was unavailable for trial, having returned to Lebanon.

11. On one occasion one of the session supervisors made a note on a daily report sheet recording a shortage of books. The note is addressed to "Jim". This, the Crown submits, is further evidence that Jamil Karam was in control; as the note must be referring to the accused. There was a further note initialled by Bachir Karam, which

the Crown submits, would only have been made if Bachir Karam was reporting to someone else - Jamil Karam.

12. Jamil Karam occasionally attended at the bingo hall. When he did he would call some games and authorize extra prizes or free games. The Crown says in order to authorize such events, which represented a substantial financial giveaway, he must have known the true financial state of the operation.

13. When one of the charities attempted to assign responsibility for collecting the bingo proceeds to another member, Mr. Karam became incensed, threatened to discontinue the operation and refused to deal with the new representative. This, submits the Crown, is indicative of a man with something to hide.

That a successful businessman must know the true state of his company's affairs is an almost irresistible proposition. The question, however, is do the facts before me support such a premise?

The information as to Mr. Karam's limited involvement in counting the daily proceeds is sketchy and occurred in a time frame prior to the period in question. The evidence is not sufficiently continuous or specific to enable me to conclude that Mr. Karam was involved in the counting in 1987/1988.

The fact that Mr. Karam occasionally provided the financial information to the charities does not tend to show that he knew that the financial information he was providing was incorrect. It goes only to demonstrate that, at least at times, he was sufficiently involved in the operation to be advised as to how the operation was reputed to be performing.

The fact that Mr. Karam ran bingos at other locations is of no assistance. No evidence was called attesting to the relationship of the proceeds from the other bingo operations to the one in question. Additionally, there was no evidence that Mr. Karam's

knowledge as to the financial state of those operations was accurate.

There was no evidence tying the transmission of the daily receipts by beeper, to the beeper carried by Mr. Karam. The person transmitting the information did not know who received it.

The fact that the revenue increased in 1988, after the complaint by St. John Ambulance, does not confirm that Mr. Karam knew the true financial state in 1987.

While a prudent businessman might well have devised a system to keep himself well informed of the bingo proceeds, it is equally conceivable that he might have delegated the specifics of the operation and received only general information as to the operation's financial health.

Mr. Karam's attendance at the bingo is not conclusive evidence that he knew the true financial details.

The note by the supervisor to "Jim" is evidence that she believed him to be in charge of the operation. Upon cross-examination, however, it was clear that her

assumption that he was in charge was not based upon any specific knowledge of the arrangements for supervision.

Does the circumstantial evidence put forward by the Crown cause me to conclude, beyond a reasonable doubt, that Jamil Karam knew that the charities were receiving less than their proper share of the bingo proceeds, or desired that result?

There is no question that the circumstances are suspicious, particularly the unexplained increase in revenue in 1988. I am not satisfied, however, for the purposes of the criminal test, that Jamil Karam knew the actual bingo revenues, or knew that the revenues were greater than the share provided to the charities revealed. I cannot conclude, on the evidence before me, that Jamil Karam had the necessary "dishonest state of mind". Such a finding is essential to underpin the fraud or theft charge. Suspicion is not enough.

In the alternative, the Crown submits that if the management contracts between T.C.A. and the charities were void, then T.C.A. was not entitled to retain any part of the bingo proceeds - all monies belonged to the charities.

As with the prior issue, however, the question is not simply, did T.C.A. retain too large a share of the proceeds, but, firstly, was there the requisite *mens rea*?

The Crown submits that the management contracts contravene the regulations of the Nova Scotia Lottery Commission and are, thus, illegal and void. The Defence challenges the authority of the Commission to prescribe terms and conditions for bingo licenses. In the alternative, the Defence says that if the contracts are illegal they are unenforceable, not void. As a final alternative the Defence submits that even if the contracts are void, they are sufficient to negate *mens rea*. In other words, absent evidence that the Defendants knew the contracts were illegal, they cloak the Defendants with color of right.

For the purposes of this analysis, I will assume that the Commission did have the necessary authority to set terms and conditions. This is an assumption only, at this point, and not a finding of fact or legal conclusion. I will accept, as well, for the purposes of this analysis only, the Crown submission that the contracts breach the Lottery Commission policy and are therefore void.

If the contracts are void both sides concede that all of the bingo proceeds would belong to the charities. Thus, to the extent that the Defendants withheld any funds, the charities did not receive their just share. The Defendants' knowledge of actual revenue is irrelevant.

Fundamental to both fraud and theft is a finding of dishonest intent by Mr. Karam and T.C.A. In relation to the contracts the Crown must prove either directly or indirectly or through circumstantial evidence that the Defendants knew the contracts were illegal.

If the contracts were indeed illegal I am not satisfied, on the evidence before me, that the Defendants knew so. The evidence of the workings of the Lottery Commission leads me to conclude that they followed a largely "hands off" method of operation. The officials who testified could not say with any certainty that the policies or regulations of the Commission were made known to licensees, either systematically or on a ad hoc basis. Internal documents of the Commission reveal that they themselves were concerned as to the validity of their own licensing conditions. The licenses themselves refer to terms and conditions which are not attached. The substance of the monthly reports submitted by the

charities to the Commission was not questioned. As early as 1984 an official of the ST. John Ambulance raised his concern to the Lottery Commission that the charity might not be operating the bingo in compliance with the regulations, in that they were not using their own members to run the bingo. The Lottery Commission took no action.

There is nothing, therefore, in the actions of the Commission that would cause either the charities or the Defendants to know that the contracts (i.e. operating arrangements) were illegal - if that was, indeed, the case.

Additionally, it is arguable that if the contracts were void there was then no relationship between the Defendants and the charities. In such a circumstance the Defendants would be operating an unlicensed bingo, and the proceeds would belong, not to the charities, but to the Defendants. In such a circumstance there could be no fraud or theft. At most it might open the Defendants to prosecution under the gaming provisions of the **Criminal Code**.

In summary then, it has not been proved that Jamil Karam or T.C.A. had the requisite intent. As that

determination is sufficient to dispose of the charges it is unnecessary to decide the following issues:

1. The legal force of the Lottery Commissions policies and regulations;
2. Whether there was, in fact, a withholding of funds due the charities;
3. The legal effect of the management agreements.

As I have found that the Crown has not met the burden of proof on an essential element of the offences, the Defendants Jamil Karam and Twin Cities Amusements Ltd. are not guilty.

Nancy Sullivan

A Judge of the County
Court of District Number
One