

SUPREME COURT OF QUEENSLAND

CITATION: *R v Davey* [2004] QCA 103

PARTIES: **R**
v
DAVEY, Kelvyn Arthur
(appellant)

FILE NOS: CA No 372 of 2003
DC No 1155 of 2003

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction and Sentence

ORIGINATING COURT: District Court at Brisbane

DELIVERED EX TEMPORE ON: 7 April 2004

DELIVERED AT: Brisbane

HEARING DATE: 7 April 2004

JUDGES: McMurdo P, Williams JA, Holmes J
Separate reasons for judgement of each member of the Court, each concurring as to the orders made

ORDER: **1. Appeal against conviction dismissed**
2. Application for leave to appeal against sentence dismissed

CATCHWORDS: CRIMINAL LAW – PARTICULAR OFFENCES – PROPERTY OFFENCES – FALSE PRETENCES AND OTHER FRAUDS AND IMPOSITIONS – OTHER OFFENCES – where the appellant was convicted after trial of two counts of fraud – where the first count involved the appellant dishonestly obtaining a sum of money – where the second count involved the appellant dishonestly applying the sum of money to his own use when the money came into the appellant's possession subject to a condition that the money be applied for a particular purpose – whether the two counts of fraud should have been charged as alternative counts
Criminal Code 1899 (Qld), s 408C

COUNSEL: P F Richards for the appellant
B G Campbell for the respondent

SOLICITORS: Walker Solicitors for the appellant
Director of Public Prosecutions (Queensland) for the respondent

HOLMES J: The appellant was convicted after a trial of two counts of fraud. The particulars of the first count were, in essence, that he had dishonestly obtained a sum of money, an amount of \$304,000 from Sanwa Australia Finance Limited, and the second that he had dishonestly applied those funds to his own use when they came into his possession, subject to a condition that they should be applied to the purchase of cold rooms.

A T Davey and Associates Pty Ltd, a company of which the appellant was sole director, made an application for finance to Sanwa. The application specified a number of items of equipment including two new cold rooms to be purchased and offered by way of security, a lease agreement over the equipment, and the appellant's guarantee.

On the approval of finance the applicant was required to provide invoices for the equipment to be purchased. In fact the invoices provided reflected the purchase of a donga from one company and two demountable cold rooms from a refrigeration business, Aussie Air Care, operated by another company of which the appellant was director with his wife, K & L Davey Pty Ltd.

Upon receipt of those invoices a lease agreement was drawn up which stated that Sanwa was the lessee, and included a condition that the equipment remained the property of Sanwa.

Another document completed, a landlord's waiver agreement, permitted the financier to enter on the premises where the equipment was held for purposes such as repossession of the equipment. It specified premises at Ayr as being where the equipment was located. Both documents were signed by the appellant.

A cheque in the amount of \$304,000 to fund the purchase of the cold rooms was paid to the cheque account of Aussie Air Care, reducing an overdraft. An amount of \$100,000 was then transferred into an interest bearing account. No cold rooms as described in the documents in fact existed in the hands of the appellant or either of his companies; nor were any purchased with the funds advanced.

The argument for the appellant was that the two counts should really have been charged as alternative counts. If the moneys were obtained dishonestly because the cold rooms did not exist, they could not have come into the appellant's possession subject to a condition as to their use. The appellant argued that the jury should have been directed along those lines.

I do not think the argument follows. There is no reason that the funds could not be obtained on a false pretence, in effect, as to the basis for their advance as one act of criminal conduct, and as a further criminal act be applied for a purpose other than that for which they were advanced. The

two allegations were separate. One was that Sanwa was led by the appellant to advance the money in the belief there really were two cold rooms of which his company would take possession, the other that having obtained the money which was meant to pay for those cold rooms, he used it for another purpose. The obtaining of the money and the using of it were distinct acts of dishonesty and were properly charged as such.

Certainly in sentencing the learned trial Judge proceeded on the basis that, the events arising out of the same transaction, punishment should be imposed in respect of the first count, but to regard the offences as part of the same set of events is not to say they were alternatives.

In short, I do not think there is any substance in the appeal and I would dismiss it. The application for leave to appeal against sentence was abandoned and should also be dismissed.

THE PRESIDENT: I agree and there is nothing that I wish to add.

WILLIAMS JA: I agree.

THE PRESIDENT: The orders are as proposed by Justice Holmes.
