

FULL COURT

BEFORE:

Mr. Justice Lucas

Mr. Justice Hoare

Mr. Justice W.B. Campbell

BRISBANE, 26 MAY 1978

BRUCE JOHN CURTIS

v.

JOHN KEES de GRCOT

Ex parte: BRUCE JOHN CURTIS

JUDGMENT

MR. JUSTICE LUCAS: This is an appeal by way of an order to review against a decision of the Stipendiary Magistrate given on 23 February 1978 whereby he dismissed a complaint against the respondent which alleged an offence by the respondent against the provisions of section 16 of the Trust Accounts Act 1973 as amended.

The respondent is a solicitor and section 16 deals with the audit of trust accounts.

Subsection 1 of that section is a definition subsection, and it appears from the definitions of the various terms which are used in the section, which are set out in subsection 1, that the prescribed day for lodging the auditor's report in the circumstances of this case was 1 December 1976, and that was the date charged in the complaint.

It appears that no point was taken before the Magistrate to the effect that that was not the correct date, and in the circumstances I do not think that any argument based on the fact that 30 November was the correct date should be accepted before us. So I treat the matter as though the first day of December was the date upon which the auditor's report was due. The report was required to be given in pursuance of section 16(2) of the Trust Accounts Act, which provides that the audited accounts and reports to which the section refers are to be lodged with the Under Secretary for Justice before the prescribed day, the prescribed day being 1 December. The last day for lodging the reports would accordingly be 30 November.

The respondent gave evidence before the Magistrate, and it appeared from his evidence that he had employed the same auditor for the two previous accounting periods, indeed, ever since he commenced practice on his own account. His practice was to delegate to the auditor the duty of himself lodging the report with the Justice Department, and this had proved satisfactory in respect of the two previous accounting periods. His evidence was that he had telephoned the auditor shortly before the prescribed date and spoken to him personally and had been assured by him that everything was attended to and that he had nothing to worry about. Although the auditor did not tell him in specific terms that the report had actually been lodged when he spoke to him on the telephone, as a result of this telephone call and because of his previous experience with the same auditor the respondent, when he thought about the matter again on 30 November, which was the last day for lodging the report, was completely certain in his mind that

the report had been lodged and he did not think about it again. In fact, of course, the report had not been lodged. It was, in fact, lodged, as the evidence shows, in January 1977.

Before the Magistrate the defendant raised the matter of section 24 of the Criminal Code, and in accordance with the onus of proof which applies when that section is raised, it is the duty of the prosecution to exclude its operation beyond a reasonable doubt. The Magistrate gave a short extempore decision in which he accepted the fact that the respondent had an honest belief that the report had in fact been lodged at the relevant time and decided also that that belief was reasonable in the circumstances.

The complainant now appeals on a number of grounds, the first of which is that the Magistrate was wrong in law in finding that a defence under section 24 was open to the respondent before the Magistrate. In other words, the submission is made that section 24 has been excluded for the purposes of any defence to a charge under the Trust Accounts Act.

The argument is based upon the amending section 16A which was inserted in the Trust Accounts Act by the Amendment Act No. 22 of 1974. This section reads as follows

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"(1) Where a person who is an agent or, as the case may be, employee of a principal or, as the case may be, employer contravenes or fails to comply, in the course of his duties as such agent or employee, with any provision of section 16, that principal or employer shall be deemed to have committed the offence constituted by such contravention or failure to comply and, whether or not that agent or employer is prosecuted in respect of an offence, may be convicted thereof.

The operation of the provisions of section 23 of the Criminal Code is excluded in respect of the

liability of a principal or, as the case may be, employer for an offence so deemed under this subsection to have been committed.

In any proceeding against a principal or, as the case may be, employer for an offence referred to in this subsection, it is immaterial that -

- (a) the offence was committed without the authority or contrary to the instructions of that principal or employer;
  - (b) the offence occurred independently of the exercise of the will of that principal or employer.
- (2) Nothing in this section shall affect the liability of a person who actually commits an offence referred to in subsection (1)."

It is somewhat difficult to find or to imagine circumstances in which that section would have any operation at all, but Mr. Ambrose who appeared for the respondent has suggested that it might have some operation to a matter which could arise under subsections 8 and 9 of section 16. However that may be, it is quite clear, in my opinion, that the section has no operation whatever in relation to the matter which is now under consideration. However, it is argued that because of the form which it takes and because of certain regulations under the Trust Accounts Act the Court should conclude that while section 23 of the Criminal Code has been expressly excluded, or at all events an attempt has been, expressly made to exclude section 23, section 24 has been excluded by implication. Section 24, of course, finishes with the words, "The operation of this rule can be excluded by the express or implied provisions of the law relating to the subject."

I regret that I am quite unable to follow why this should be so. In any event, I should have thought that if the argument was sound it would only apply in the case of prosecutions, if any such can be contemplated, which were

instituted under the provisions of section 16A. I cannot think of any reason why any such implication, if it is to be made in respect of such prosecutions, which I do not decide, should be extended to include prosecutions under other sections of the Trust Accounts Act. It is, of course, a penal section which we are concerned with and accordingly it should be construed in favour of or against excluding defences which would otherwise be open unless that exclusion is expressed in clear terms, which is certainly not the case here, in my opinion. Therefore that argument, in my opinion, fails.

The other argument advanced for the applicant, really, although it has several branches, amounts to a submission that the Magistrate was wrong in finding that the respondent had an honest and reasonable belief that the report had in fact been lodged by the due date. It is not necessary, in my opinion, to canvass the matter in any detail. The findings that the belief was honest and reasonable were findings of fact. There was in my opinion evidence before the Magistrate which he could use as a proper foundation for making findings of that nature and, in my judgment, no reason has been shown to us why those findings should be set aside.

Reference was made to the case of *Thomas v. McEather* (1920) State Reports Queensland, 166, a decision of a specially convened court of six judges. The members of the court dealt with the question, among others, whether when the performance of a statutory duty was committed to a delegate the person upon whom lay the statutory duty could take advantage of section 24. The judges were equally divided in opinion on this aspect of the matter. It must be remembered, as Mr. Ambrose pointed out to us, that that case was decided at a time when it was thought that when section 24 was raised in the case the defence had the onus of establishing it which, of course, as I have said, is different from the situation which obtains now.

I should be very reluctant even if it were possible, which in my opinion it is not, to regard Thomas v. McEather as laying down any general proposition that when a statutory duty is committed to a delegate the person upon whom the statutory duty lies cannot avail himself of the provisions of section 24.

For those reasons, in my opinion, the order to review should be discharged with costs.

MR. JUSTICE HOARE: I agree with the reasons and conclusions of my brother, the Presiding Judge.

MR. JUSTICE CAMPBELL: I agree.

MR. JUSTICE LUCAS: That will be the order of the Court.

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