NZLR 7/1 Butterworths

IN THE HIGH COURT OF NEW ZEALAND T 107/84

AUCKLAND REGISTRY

1671

THE QUEEN

v

E LEARY

(Theft)

Hearing: 3, 4, 5, 6 December 1984

Counsel: J A Laurenson and P J Smith for Crown
M P Crew and I F Williams for Defendant

Judgment: 14 December 1984

JUDGMENT OF JEFFRIES J.

E Leary is a barrister and solicitor practising his profession in Auckland, and elsewhere in New Zealand. He is principally engaged in court work, mainly at the criminal bar. He faces a charge of theft by fraudulent conversion, being a crime pursuant to S.222 of the Crimes Act 1961. It is alleged on he transferred the sum of $2,790 being the proceeds of the sale of a motor vehicle from the credit in his trust account of a person for whom he had acted, into his own general account, by which act, the Crown says, he committed theft of part of the proceeds. The charge was laid by the police in the District Court but by consent it was removed into the High Court for a trial before a judge sitting alone.

The charge was brought against Mr Leary in 1984. Because of a defence raised by him it is necessary to begin the narration of facts starting in 1975. In that year a man named A Townsend, together with others, was charged with possession of cannabis for supply. He appeared in the Magistrate's Court (throughout I use the nomenclature appropriate to the time) in May 1975 and at that stage was represented by Mr John Haigh, a solicitor in Auckland. He was remanded for the taking of depositions having elected a trial by jury, and Mr Haigh appeared for him at depositions on 24 July 1975, the hearing lasting one day, at the conclusion of which he was committed to the Supreme Court for trial. How many people originally were charged with Townsend is not known to this court, but when he faced trial he did so with one named M Henderson, who was represented by another Auckland barrister. Although Mr Haigh appeared at depositions for Townsend Mr M.B. Williams was to appear as counsel, whose evidence in this trial was that he fixed a fee of $1,500 to conduct the defence. For reasons that need not be explored, Townsend decided to change counsel and some time in late August, or early September, with the trial date fixed at about mid-September, he consulted the accused, Mr Leary. Up to this point Townsend had not met any legal costs arising out of the charge. This matter was canvassed with him by Mr Leary before trial and it was arranged he would make available to Mr Leary the sum of $1,500 in the following way. Townsend had no funds himself but a friend, R Dallimore, had a half interest amounting to $2,500 in a second mortgage which was due for repayment in October 1975. Through Mr Dallimore's solicitors, Messrs Draffin & O'Reilly, it was arranged that accused would take a transfer of Dallimore's half share and would refund $1,000 leaving him with a net gain of $1,500 in payment of Townsend's costs to accused. The Crown case is that the $1,500, made available in this way, was the total agreed fee for the defence, but Mr Leary's assertion is that it was

only half of an agreed maximum fee of $3,000. I return to this later in the judgment under one defence to the charge. The trial of Townsend took place in the Supreme Court before judge and jury and lasted three full days ending in the acquittal of Townsend. Following that acquittal, in October 1975, Mr Leary uplifted for Townsend the exhibits produced at the trial which included his passport, and returned them to him.

In about October 1976 a man named G Ollard, who was apparently then engaged as a promotor of a band, returned from Australia to New Zealand. His home was Mt Maunganui where his parents lived. He arranged with a man named P H who conducted a licensed motor vehicle dealership under the name of Panmure, Auckland, to purchase from him a Holden Kingswood motor vehicle for the sum of $3,600. It is appropriate here to introduce a matter of importance, and it is that G Ollard was at this time, and in the following year, engaged in extensive illegal dealings in drugs. No doubt connected with that activity he adopted an alias, A Wright, and from here on in the judgment unless it assists in the narrative to return to the name Wright, he will be called Ollard.

When Ollard presented himself to Mr H on 26 October 1976 he used the name Wright. Although not entirely free from doubt he apparently paid Mr H the sum of $3,600 in cash for the motor vehicle. Ollard later left the motor vehicle and the purchase papers in the possession of his sister, C Hawira. He then apparently returned to Australia. Mrs Hawira was called to give evidence which consisted of confirmation of taking possession of the vehicle and of parting with the vehicle to one P Fulcher, a friend of her brother's. Mrs Hawira gave other evidence which will be picked up later in this recital. The motor vehicle is the

subject of this charge, and ultimately was taken into possession of the police having been abandoned on Waihi beach in December 1976.

Ollard returned to New Zealand some time in January 1977 and no doubt discovered the vehicle was in the possession of the Waihi police. By chance he met Mr H in a hotel at Mt Maunganui and asked him to take possession of the vehicle on his behalf from the police, and there and then in the hotel wrote out an authority for Mr H with instructions that he sell the vehicle and impliedly hold the net proceeds for him after deduction of expenses and commission. That authority was dated 20 January 1977. Mr H communicated with the police who refused to part with the vehicle.

A day of vital importance in this case is 14 June 1977 being, apparently, the first and only day on which Ollard and accused met. It has now been established that Ollard was murdered in New South Wales on or about 14 September 1977, so that apart from some evidence given by Mr Leary's then secretary, only accused is able to recount the significant events of that day to the court. What passed between accused and Ollard on the day is of central importance to both defences advanced by accused in answer to the charge. Final evaluation of the events themselves is postponed until later in this judgment and here I record mainly accused's evidence. He said he had never met Ollard before and knew nothing of him. He came to his office and introduced himself as A Wright and accused states he accepted that as his name. The sole purpose of the visit, according to Mr Leary, was a wish on Ollard's part to discharge the debt of $1,500 owed by Townsend to accused, being the balance of the fee for the successful defence conducted at trial in September 1975. Ollard proposed to discharge that debt by giving written authority to accused

to take possession of his vehicle from the police, to sell it and to use the funds as set out above. Mr Leary insists an important part of those instructions given to him was that he was not to disclose in a document, or in any other public way it was implied, that Ollard was meeting Townsend's unpaid costs. There is other evidence which suggests the stricture applied to Townsend's name only. As will emerge hereafter this is accused's explanation for the wording of both the written authority itself, and the final bill of costs he rendered to Ollard arising out of this transaction which has resulted in the charge. Both documents are later reproduced. The explanation has no validity to a bill of costs which fulfilled the term of accounting for the expenditure as it passed simply between the parties to the covert arrangement. Little is disclosed in the evidence of the step by step manner in which Ollard would have explained to accused why he wished to settle another's old debt, the history of the car, and especially how it came into possession of the police. One would assume Ollard knew the essential facts about the car being recovered by the police from Waihi beach, and no doubt his sister would have told him the name of the person to whom she originally released the car. Indeed the evidence reveals now Ollard twice had persons attempt to recover from the police the car. This strongly suggests his sole reason for consulting Mr Leary was to instruct him to recover the car and account to him for the proceeds, as a plain reading of the written authority suggests. There is also other evidence that Ollard was in June 1977 short of money to the extent he borrowed from his father to purchase air tickets for himself and Julie Dianne Theilman, a young woman who was accompanying him, to return to Australia. Ollard had in early June 1977 taken a holiday trip with J Theilman, and they also took with them a sister of J , L Theilman. The latter person was called in evidence and she informed the court of a five day touring holiday spent in hotels and motels which was paid for entirely by Ollard, and included a daily supply of

heroin for the three at considerable cost. She said as far as she knew on return Ollard was broke. I observe here Ollard could reasonably have been expected at that stage to recover some money for himself even if $1,500 was to be deducted.

The events of the day concluded with Mr Leary preparing a written authority which Ollard executed, using his alias, together with a signed transfer document for the vehicle to Mr Leary. Accused stated he knew nothing of the deceptions being used on him by Ollard at this point such as he was deeply involved in drug dealing, the vehicle had apparently been used for that purpose, and that his true name was Gregory Paul Ollard.

I conclude the account of the meeting of the 14 June by stating that it was Mr Leary's firm conclusion, reached on that day, he would encounter considerable difficulty, with a definite prospect of litigation under the Police Act 1958, in recovering the vehicle. He says he was aware then of an unsuccessful attempt to recover the vehicle by Mr H in January 1977. I detect an inconsistency in this firmly held belief with his other evidence that he knew nothing of the real identity of the man before him calling himself Wright, or of the background of the drug dealing, and of the use the vehicle had been put to. The expected strong resistance from the police to the release of the vehicle short of a court order mainly concerns Mr Leary's second defence to the charge, which is that he was justified in taking part of the proceeds by the work performed in recovering possession. It also explains why in the written authority itself he should have included a prospective item of counsel's fee in connection with the recovery.

Mr Leary quickly had the car registered in his name and he set about obtaining its recovery. The police resisted

immediately and Detective Chief Inspector Ronald Ian Chadwick acted for the police. Mr Leary himself became the named applicant pursuant to Section 58 of the Police Act 1958 and filed proceedings in the Auckland Magistrate's Court. The application was accompanied by his affidavit, both papers being served upon the police and the Crown Law Office in Auckland. I observe here that Mr Leary's negotiations with the police prior to filing the papers were less than candid and I accept that he never fulfilled the promise to Chief Inspector Chadwick to supply for the perusal of the police the necessary documents upon which he made his claim to possession of the car, other than ownership papers. The case was set down for hearing in the Magistrate's Court on 15 December 1977. By this time Chief Inspector Chadwick had filed a full affidvait in which the named vehicle owner A Wright was revealed to be in fact G Ollard, a man deeply involved in drug dealing in Australia and New Zealand. The affidavit of Chief Inspector Chadwick is not before the court but it contained, apparently, the history of how the vehicle came into the possession of the police, and importantly that the purported Sydney address of Box 9776, G.P.O. Sydney 2001, did not exist. This was the address Ollard had used when purchasing the vehicle in October 1976, and the address also given to accused by Ollard on 14 June 1977. The relevance of this becomes clear later in this judgment.

The hearing before Mr N. R. Taylor, S.M., began at about mid-day on 15 December 1977. An Auckland barrister had been instructed to appear on the application. Unfortunately the written record of the hearing, in the course of clearing away old court records, has been destroyed. Of particular relevance is that during the hearing Mr Taylor thought he observed such a discrepancy between different signatures of "A. N. Wright" that it was halted with instructions that the available documents be examined by the police document examiner

for the purpose of exploring the possibility of a forgery. This, of course, was a dramatic turn of events and entirely unexpected. It is uncertain from what quarter of the hearing this possibility first arose, but it was certainly adopted by the court. The case was adjourned sine die to enable the examination to be carried out. I accept that suspicion fell upon Mr Leary arising out of those events, and that he had every reason to take such a turn of events seriously. Chief Inspector Chadwick said during the course of that hearing at which Mr Leary gave evidence and was cross-examined, that he was quite certain there was no reference to anyone else in relation to services than Ollard.

The next hearing took place on 28 February 1978. However, it is important here to interpolate some of the activities undertaken by Mr Leary, which by now I am satisfied involved not only recovery of the vehicle but also the clearing of his name. The hearing of 15 December had attracted considerable newspaper publicity and the account contained in the New Zealand Herald on the front page on 16 December 1977, is the only written record of the hearing now available to the court. It is accepted by both parties as being reasonably accurate, although incomplete. This publicity, read by Ollard's sister Mrs Hawira, prompted her to communicate with Mr Leary. It seems she did not understand that Mr Leary by then would have been fully informed of the fact Ollard and Wright were one and the same man. A definite reason for Mrs Hawira's action in seeing Mr Leary arose out of a growing concern about the welfare of her brother Greg and to see if he could supply any way of communicating with him, which Mr Leary was unable to do. The last communication the family had had with him was a telephone call on 4 September 1977 to his father from Australia for Father's Day. What had particularly aroused Mrs Hawira's suspicions was not conveyed to the court, but she clearly felt them quite deeply. Mrs Hawira said that Mr Leary was also

interested in obtaining keys to the vehicle. Mr Leary says that he was interested in communicating with Ollard himself so that he could obtain his assistance in clearing his own name. Apparently early in 1978 Mr Leary interviewed Mr and Mrs Ollard. They could throw no light upon where their son might be but because he had said to his father he expected to take a lengthy overseas trip in the Middle East for something like six months, he was not as concerned as his daughter was for his son's safety.

The hearing before Mr Taylor resumed on 28 February 1978 by which time all parties were in possession of the report of Mr John West, the police document examiner, which exonerated Mr Leary and confirmed that the signatures of Wright had all been written by the one man. Mr Taylor graciously offered a public apology to Mr Leary and made an order giving him possession of the vehicle. The other facts that followed from possession are set out hereafter under that aspect of accused's defence.

The above facts are largely agreed upon and so is the law. The charge accused faces is pursuant to S.222 of the Crimes Act 1961 which states:

> "Every one commits theft who, having received any money or valuable security or other thing whatsoever on terms requiring him to account for or pay it, or the proceeds of it, or any part of such proceeds, to any other person, though not requiring him to deliver over in specie the identical money, valuable security, or other thing received, fraudulently converts to his own use or fraudulently omits to account for or pay the same or any part thereof, or to account for or pay such proceeds or any part thereof, which he was required to account for or pay as aforesaid:..."

The elements of the charge in the indictment which the Crown must prove to a standard proof beyond reasonable doubt are:

1. Accused received a Holden Kingswood car.

2. On terms requiring him to account for the proceeds amounting to $2,790 to Gregory Paul Ollard.

3. That he fraudulently.

4. Converted to his own use part of the said proceeds.

Obviously the first element is entirely satisfied as the facts to here testify. The second element is also not in the realms of dispute but some elaboration is called for. First, the Crown case is that accused failed to account for part only of the total of $2,790, it being accepted at the conclusion of the evidence by the Crown, counsel's fee of $1,400 was paid for services in the recovery case. The terms requiring him to account are contained in an explicit written document signed by the vehicle's owner and addressed to accused as a solicitor. The evidence surrounding the transactions conducted between Ollard and accused on 14 June 1977 leave no room for doubt the strict solicitor/client relationship existed, and no other. The accused in his evidence stated he met Ollard only on that one day and had never seen him before, and did not again see him following that day. In such circumstances the basic duty of the accused, as solicitor, receiving instructions from a client to take possession of the vehicle and to sell it and account for the proceeds existed without a written document. The accused is a professional man engaged in public practice as a solicitor in which capacity he frequently takes other people's property and money into his

custody under a plain legal obligation to account to some person for that property or money. These obligations are also enshrined in statute law. However, in this particular case there is not only the underlying duty referred to above but an express written authority prepared, no doubt, for production to others, and to which I now turn.

First I reproduce it in its entirety.

E.P.L.
A.W.
L

"I, A WRIGHT formerly of Auckland, but now of Sydney, Australia in pursuance of your services as my Solicitor hereby transfer to you my 1972 Holden Kingswood motor car - registered number GI. 2943 and this transfer shall serve as an authority for you to uplift my car from the Waihi Police and further in pursuance of this transfer you are irrevocably authorised to sell my car retaining the proceeds of such sale in your trust account and account to me for the expenditure of the proceeds of sale and the services of any Counsel retained by you on my behalf.

TO: Edward Poulter LEARY
Solicitor
Auckland.

DATED at Auckland this 14th day of June 1977

"A.N. Wright"

.....

A WRIGHT

Witness: "E.P. Leary
.....
Solicitor
.....
Auckland"
....."

Ollard, no doubt to maintain verisimilitude, added an "L" to the first name and it was initialled by him, and accused as witness. He did not correct the mis-spelling of his alias elsewhere in the document. There was agreement by counsel, and the accused himself in evidence, it is an inelegantly drafted document but in my view is unambiguous and free from much doubt about its intent. Possibly the only words which might require some interpretation are contained in lines 2 and 3, namely, "in pursuance of your services as my Solicitor". The evidence is that Ollard had never before that day consulted accused as a solicitor and therefore the phrase would appear simply to mean "acting as my solicitor". Slight amendments can be made in more than one way to the wording of the first three lines to clarify further the intention of the document. The first 12 words really add nothing to the document excepting to identify Ollard's former and present permanent residence. It is plainly an authority addressed to accused. If the first 12 words, which do not comprise a complete sentence, are left without further comment the document makes sense.

Proof that the transaction was fraudulent is the most important element the Crown must prove to that high standard of proof beyond reasonable doubt. The Crown must prove the appropriation was fraudulent at the time the money was taken, namely, 3 March 1978. For it to have been fraudulent it must have been done falsely, wilfully and with an intent to deceive. It is a crime of specific intent and there must exist the union, or joint operation of two essential elements, an act or conduct forbidden by law and a certain specific intent in

the mind of the accused, and unless such specific intent exists the crime to which it relates is not committed. To establish specific intent the Crown must prove that accused knowingly did an act which the law forbids, or knowingly failed to do an act which the law requires, purposely intending to violate the law.

The fourth element is converted to his own use part of the said proceeds. In the facts of this particular case it is not denied by accused he took the entire proceeds of the sale of the vehicle on the basis that it was justified and that takes us to the two principal defences that were advanced.

Balance of Townsend's Defence Fee

The basic facts surrounding this defence have already been canvassed and it is now to be evaluated. Accused's taking of the entire proceeds of the sale of the car came under scrutiny first with Ollard's father, Mr R.T.G. Ollard requesting of accused details in a letter dated 15 November 1981. From early 1982 one of accused's defences has been that the sole reason for Ollard's visit to him in connection with the car on 14 June 1977 was to arrange payment of the balance of Townsend's fee for his defence in 1975 amounting to $1,500. It is to be noted, however, that Mr Leary's reply on 19 January 1982 to Mr R.T.G. Ollard's letter, by which date Ollard's injunction to secrecy about Townsend had clearly been dissolved, did not mention the Townsend fee in any way whatsoever. The Crown had been fully informed of this defence and by presentation of evidence, and in argument to the court, it sought to prove the defence was not valid. The Crown, therefore, has undertaken to establish in court a negative proposition. Such a burden by the Crown must be discharged to the criminal standard beyond reasonable doubt. No onus rests, or shifts to the accused at any stage to prove his innocence. The law does not impose upon an accused in such a criminal case

as this the burden or duty, of calling any witnesses, or producing any evidence. I have reached the view the Crown has established beyond reasonable doubt that this defence is not available to the accused. I have reached that view on the evidence presented in the trial and on reasonable inferences, which in my view may properly be drawn from the evidence. An inference is a deduction of fact that may logically and reasonably be drawn from another fact, or group of facts, established by the evidence.

My reasons for upholding the Crown's evidence and rejecting the defence are as follows:

1. The substance of the defence is contained almost exclusively in the oral evidence of the accused himself, together with his prior out of court declarations, that G Ollard secretly instructed him to apply the vehicle's proceeds to settle Townsend's outstanding fee and no disclosure of this arrangement was to be made. That is the explanation advanced by accused for the wording of both the authority and the bill of costs. That explanation is rejected by the court not just because it is highly improbable, which it certainly is, but because of an impartial consideration of all the other evidence about this aspect of the case.

2. I am satisfied the proved circumstances of Ollard's straitened finances at mid-June 1977, together with evidence of two prior attempts to recover the vehicle himself impressed upon him the time had come for active legal assistance to effect the purpose of recovery of his property. For that reason he consulted accused and the language of the written authority given by him is in complete conformity with that block of facts and

inconsistent with a collateral block of instructions to pay an old debt of another for legal fees. The omission of any plainly identifiable reference to Townsend in the private communication of the bill of costs which served also as an accounting to Ollard is inexcusable on any supposed adherence to a command to maintain secrecy. Moreover, from the witness box in this trial Mr Leary conveyed to the court by early 1978 he considered himself then gravely injured by the deceptions Ollard had perpetrated upon him. Loyalty in the face of that is unintelligible.

3. The documentary evidence of the transactions of 1975, which ultimately produced for accused $1,500, contains no reference whatsoever suggesting the $1,500 was not the full fee. The documentary evidence, including accused's own letter to Dallimore's solicitors before trial, contains no qualification that the $1,500 was part only of a total higher fee. Also Mr Leary's letter to Mr R.T.G. Ollard on 19 January 1982 made no mention of the Townsend fee at all.

4. Some professional evidence called for the defence was to the effect $3,000 would have been a reasonable fee for the trial in 1975. Such evidence does not weigh with the court. It may be $3,000 could have been charged with justification in 1975 for the defence, but that is not now the point. A barrister, called by the Crown stated, fees are variable and a matter of negotiation. In any event Mr M. B. Williams, the barrister first instructed, fixed his fee for the trial at $1,500.

5. Dallimore was the source of the $1,500 but not necessarily privy to the final settlement of the fee.

He was called by the Crown but his evidence was undecided on the point of part or full fee, and he was noticeably not cross-examined on the point, no doubt it being considered safer to leave the equivocation where it lay.

6. Mr Leary accepted he had not documented anywhere the fee at $3,000 at any stage before or after trial. Granting the less formal accounting that may take place between counsel and an accused in criminal proceedings, this is an omission of significance. Townsend was acquitted and therefore the expectation of full payment of an agreed fee entirely reasonable. At that point only Townsend was to meet the balance and accused had no prospect of it coming from any other source. Neither is there any documentation after Ollard's visit that the amount of the balance was in fact precisely $1,500. The failure to record the agreement and outstanding balance at the very least in a written bill of costs, or account rendered, after trial is all the more anomalous as the unpaid amount represented, according to accused, <u>half</u> of the total fee. Accused pointed to no concrete step whatsoever taken by him following Townsend's acquittal to recover this so-called outstanding balance of one half of the fee. At the same time accused asks the court to accept that going on for two years later a complete stranger to him arrives unannounced at his office with a proposition whose sole purpose is to meet anonymously this outstanding amount owed by Townsend. The evidence advanced to the court about the inconvenience arising from late instructions together with devoted and lengthy preparation for a trial that lasted three full days in the Supreme Court before a judge and jury, is irreconcilable with indifference to recovery of half of

an agreed fee from end of a successful trial in September 1975 to 14 June 1977.

7. I accept that a lawyer engaged largely in criminal work, for his financial survival, requires his fees to be paid in advance of trial. I further accept, for a variety of reasons, this is not always possible, notwithstanding it might be his announced policy. What I do not accept is that after fixing an agreed fee of $3,000, with the lawyer considerably inconveniencing himself as detailed earlier to secure that half payment he should, following a successful defence, take no active step to recover the other half. In addition he incurred a further $200 after trial discharging in part the costs of Townsend's former solicitor from whom he had taken over the case.

The evidence available to the court establishes beyond reasonable doubt there was no outstanding fee of $1,500 which would have justified accused taking for himself the balance of the proceeds of the car after meeting counsel's fee for acting in its recovery.

Justification on basis of work performed

This defence is independent and alternative to the first defence. In a criminal trial it is quite proper for defences to be advanced in the alternative, and it is not logically contradictory to do so. A court is obliged to examine each defence separately on its merits.

When Ollard consulted accused in June 1977 his vehicle had then been in the hands of the police and stored at Waihi for many months. Ollard's sister, Mrs Hawira, had had

possession of the car and the ~~ownership~~ purchase papers after both had been given to her by her brother. She parted with the vehicle to P Fulcher, and then police had taken possession of the car, it having been abandoned on Waihi beach. The precise knowledge accused had of the history of the vehicle at the time he received his instructions on 14 June was not, as stated, canvassed either in examination in chief or cross-examination. However, accused did state he knew it was in the hands of the police and that a previous attempt to recover it by the original vendor on instructions from Ollard had failed. At that point it was not unreasonable for accused to anticipate some resistance, with the possibility of litigation. Following communication to the police in the ensuing month accused established possession of the vehicle would only result from a court order pursuant to an application under S.58 of the Police Act 1958.

The application was duly filed in the Magistrate's Court at Auckland and came to first hearing on 15 December 1977. Mr Leary himself was the applicant. I accept he fulfiled that function pursuant to his instructions, and written authority. Chief Inspector R. I. Chadwick had filed an affidavit in which apparently the history of the way the vehicle came into the hands of the police and the true identity of Wright was revealed as Ollard. The affidavit was not produced in this trial. It was quite reasonable, even proper, for Mr Leary to instruct counsel to appear as the police clearly conveyed prior to the application an order in Mr Leary's favour would be strongly defended. The police regarded the vehicle as having been used for criminal drug dealings and the public interest demanded opposition to the vehicle falling back to the benefit of known drug dealers such as Ollard. It was clear then litigation of some sharpness was in prospect.

The application was based on the validity of the authority signed by Wright. The whereabouts of Ollard was not known in December 1977 but his sister Mrs Hawira was concerned then for his well being, as she said in her evidence. He clearly was not available as a witness. At what point in the hearing before Mr Taylor, S.M., or from what quarter is not entirely clear, but a suggestion of sufficient strength so as to warrant adjournment and investigation was made that the authority signed by Wright was a forgery. The perpetrator it was inferred, was Mr Leary. There could hardly have been a more serious or worrisome allegation against a professional man. The newspaper account of the allegation brought considerable unfavourable publicity for Mr Leary, and I accept a great deal of extra work and responsibility was necessary to ensure refutation. The police examiner of documents supplied a written opinion that the document had been executed by Wright/Ollard and that was accepted by all parties. The hearing resumed on 28 February 1978 with the Magistrate tendering Mr Leary an apology following which further evidence apparently was called and an order for possession made in Mr Leary's favour.

The vehicle was sold by Mr Leary and he recovered $2,790 for it. This sum was credited in his trust account with the name A.N. Wright AKA G.P. Ollard on the ledger card. The proceeds of the sale of the car reached Mr Leary's trust account on 3 March 1978 and on the same day he transferred the entire amount to his general account pursuant to a bill of costs prepared by him and couched in the following terms:

"Mr. A. N. Wright, also known as G.P. Ollard,
P.O. Box 9776,
G.P.O. 2001,
SYDNEY, Australia. 74-523
=====

3rd March, 1978

Re: Your Affairs.

TO my fees including all matters incidental to Court appearances, instructing Mr P.A. Williams as Counsel, appearing in respect of a bail application on adjournment of trial, travelling to Mount Eden Prison on numerous occasions, conferring with witnesses, numerous conferences with Counsel. My fee as agreed in terms of assignment of your car being a 1972 Holden together with successfully suing the Police in order to obtain same after a two stage hearing in the Auckland Magistrate's Court. Me (sic) fee as agreed.	$2,790 00.	
BY amount received from Messrs. Schofield and Co. Licensed Motor Vehicle Dealers.		$2,790 00
TO Balance owing	NIL	
	$2,790 00	$2,790 00

E. &. O. E.

E. P. LEARY."

It is here appropriate to make some observations on a range of submissions, stemming from the Crown, about the manner in which the proceeds were taken as at the vital ingredient date, namely, 3 March 1978. The very first matter for comment is the addressee's names. Accused's evidence is that at 3 March 1978, about when this account was said to be sent, he knew nothing of Ollard's demise, therefore it is altogether incomprehensible he should have addressed an envelope in that way on almost any view of the facts. It is understandable only if he knew Ollard was dead, or he did not actually post the account, both of which he denied under oath. Staying with the address the box number is

precisely the one given by Wright at purchase of the car and to accused on 14 June 1977. However, by this time accused had Chief Inspector Chadwick's affidavit which testified that Box 9776, G.P.O. 2001, Sydney, did not exist. There is clearly a difference between sending an account to a last known address and to one which is known not to exist. The last known address was that of his home in Mt Maunganui where his parents lived, which, to Mr Leary's knowledge Ollard used when in New Zealand. He also knew of the close and caring attitude of his family for him.

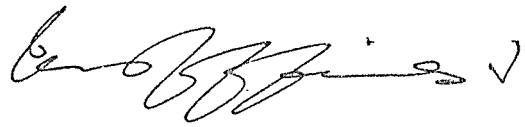
If it could fairly be said the drafting of the authority was just inelegant, but nevertheless done with sufficient clarity to convey the intent, the same cannot be said of the first sentence of the narration of work supposedly done in support of the costs. That narration is obfuscating, and seems hardly to touch the reality of the facts. The second sentence is plainly referable to the recovery proceedings and no other. The words beginning "... appearing in respect, etc" to end of that sentence could have been lifted from almost any bill of costs in a criminal matter in which counsel had been instructed. I have already rejected it as a code to inform Ollard his instructions had been carried out about Townsend. As counsel had fixed his fee one would have expected for several reasons, not the least to support inferentially the reasonableness of Mr Leary's own costs of $1,390, counsel's fee at $1,400 would have been separately itemised as a disbursement. This latter point is even stronger if the Townsend fee aspect could be given any credence at all. Finally, there is the point no covering letter was sent with the bill of costs which the circumstances of the notorious accounts in the newspapers following both hearings plainly called for from a responsible solicitor.

It seemed with the foregoing evidence the Crown was arguing it was circumstantial evidence of the fraudulent ingredient. A finding of guilt to any crime may not be based on

circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory accused is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion. In my view that evidence satisfies the first ground but not the second. The evidence is rejected as proof of guilt because it is susceptible to other rational conclusions such as carelessness, muddlement, oversight, or of like category.

This then is the question the court is left with: was the retention by accused of $1,390 on 3 March 1978 justifiable on the basis of the work done by him in connection with the recovery of the car from the police? The court's answer is that it was. The Crown has failed to prove the taking was fraudulent. In fairness to accused I say explicitly the court's verdict is not based on the Crown's failure to reach the reasonable doubt standard but because it was brought to that conclusion positively on the evidence led at the trial. I was so satisfied after listening to the accused's evidence on this aspect, hearing the testimony of the expert witnesses called by the defence on the reasonableness of the fee measured against the work done in the recovery case itself, which had, as it turned out, a peculiar and quite unforseen twist with an unfounded allegation of forgery against accused. Whatever Mr Leary's intentions were at 14 June 1977 when he first accepted instructions, events from that date to the vital date of taking on 3 March 1978 negatived the element Crown must prove for a conviction, namely, that he falsely, wilfully and with intent to deceive took the money.

The verdict is not guilty.



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