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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M.599/83

405

BETWEEN

COUNSELL

Appellant

A N D THE POLICE

Respondent

Hearing: 2 February 1984

Counsel: P.F. Whiteside for Appellant
B.M. Stanaway for Respondent

Judgment:

27 MAR 1984

JUDGMENT OF ROPER J.

This is an appeal against conviction only. The Appellant and one Odering were jointly charged that on the 12th May 1980 "with intent to defraud used a document capable of being used to obtain a pecuniary advantage namely a hire purchase agreement which purported that NSC Service Station Limited of Milton sold to Geoffrey Alfred Odering a 1975 Ford D800 truck Reg. No. JJ2666 for the sum of \$22,000 and thereby obtained the sum of \$15,000 from General Finance Acceptance Limited".

Both were convicted and both appealed but Odering's appeal was abandoned.

It seems that the Ford truck in question came into the Appellant's possession as the result of a deal arranged by his

employee Odering between the Appellant's firm, Wholesale Auto Spares, and a firm owned by the brothers McGinty in Wellington and called Porirua Truck and Salvage. It seems to have been a straight "swap" of vehicles and bits and pieces of vehicles, said to have an overall value on each side to the order of \$100,000.

It was then arranged by the Appellant that the Ford truck would be sold to Odering, and it was done in this way. A Mr Ferguson of N.S.C. Service Station Ltd in Milton was asked by the Appellant if he would finance the sale of the truck to Odering. N.S.C. had financed other vehicle transactions for the Appellant in the past, and from about 1976 had been discounting hire purchase agreements with General Finance Acceptance Ltd. On the 12th May 1980 Odering travelled from Christchurch to Milton and attended on Mr Ferguson with a photograph of the truck, the ownership papers, and a written valuation of \$22,000 given by a Mr G.H. Nichol of Truck Part Specialists in Christchurch.

On that same day Mr Ferguson arranged for change of ownership from McGinty to N.S.C. Service Station Ltd, and from his company to Odering, and prepared the necessary hire purchase agreement for discounting with General Finance. That agreement which is on General Finance's standard form provides for the sale of the truck by N.S.C., as dealer, to General Finance and its sale to Odering by General Finance. The price is stated as \$22,000, less a deposit of \$7,000. No deposit was actually paid but Mr Ferguson understood this to be a sum owed by Counsell to Odering as commission for his work with Wholesale Auto Spares. On the 12th May the hire purchase agreement was duly presented to General Finance by Odering who received a cheque for \$15,000 made out to W.H. Counsell. The following day Mr Ferguson received a cheque for \$500 from the Appellant as "commission".

Only two monthly instalments of \$594 were paid under the hire purchase agreement. One of those payments (and possibly both) came from Wholesale Auto Spares. The vehicle was repossessed by General Finance and sold on the 26th June 1981 for \$5,000 to a Mr Shearer of Rolleston Truck and Implement Services Ltd who resold it for \$7,555.

It would appear from the Trial Judge's decision that the prosecution case in the lower Court was presented on the basis that the whole transaction was a sham and that it was never intended that the Appellant's interest in the vehicle should pass to Odering through N.S.C. The Trial Judge said:-

" I find, after considering all the evidence, that the Hire Purchase Agreement was not a description of a general genuine sale in which N.S.C. Service Station was involved but it was a device by which an apparently genuine hire purchase agreement was presented to the General Finance Corporation for the purpose of uplifting \$15,000 for the benefit of Mr Counsell or one of his companies. I find on the evidence that both the defendants were parties to the transaction and it was never intended between them that any interest in the truck would pass to Mr Odering."

And further:-

" Another submission has been made that because the General Finance Acceptance Corporation has sued on the agreement and is treating it as genuine, that is a bar to this prosecution and the convictions being entered. I do not agree with that submission because the hire purchase agreement creates a contractual relationship on the face of it and if, in fact, Mr Odering has been sued on it, it may be open to him to raise the defence of non est factum or possibly illegality. However, the General Finance Corporation is out of pocket arising from it accepting this transaction as a genuine one and it is entitled to

recover and if it should choose to recover by suing on the agreement, I do not find that as a bar to this prosecution."

It was certainly a curious transaction, which provided ample grounds for the suspicion that it was based in fraud, but I must agree with Mr Whiteside that proof of the intent to defraud necessary to the charge is not to be found in the alleged presentation of a "sham" document. There was a vehicle and the documentation passed ownership of it to General Finance with a liability on Odering to make payment for it. There was no evidence that the Appellant had anything to do with the vehicle after 12 May 1980, and he has certainly not asserted any right of ownership. General Finance was never deceived as to "the substance" of the transaction.

Mr Stanaway did not attempt to argue that the whole transaction was a sham but submitted that the intent to defraud lay in the presentation of a document to General Finance in which the stated value of the vehicle was false, and known by the Appellant to be false, with intent that an advantage would be derived which would not have been forthcoming if General Finance had been aware of the true value.

Mr Nichol, whose written valuation of \$22,000 was taken to Milton by Odering, gave evidence that in May 1980 he was asked by Odering to value the Ford truck which was then stored in a warehouse. He said that when he arrived at the premises both Odering and the Appellant were present. The deck of the truck was loaded to capacity with truck engines and parts, and according to Nichol he was asked to value the truck and contents in a global sum. This is his evidence:-

"As a result of that inspection I had a discussion with Mr Odering and Mr Counsell as to the value of it, that is the value of the unit together, the truck and its contents. Regarding what figure I placed on that, we were discussing it and I was under the impression that approximately \$18,000 would have been the limit. Mr Counsell said could it be a wee bit more. I said that that is what I thought it was approximately. It was then agreed myself, Mr Odering and Mr Counsell \$22,000. Mr Counsell had stated he had wanted a valuation similar to this because he wanted to raise money on the units. I finally agreed with that figure of \$22,000. As to what in my opinion would have been the value of the truck itself without the bits on the deck, I thought approximately \$10,000."

And in cross-examination:-

"You claim now, don't you, that this valuation of \$22,000 that you put on this truck was false? No, I did not claim it was false. You don't claim it was false - you say, in fact, the truck, as you stated in your report of 8 May, was worth \$22,000? The whole unit that I viewed, yes. And that was a fair price, you say, for the whole unit that you viewed - firstly, what do you mean by 'whole unit'? The truck and its contents as I viewed it there. So you are saying now that the truck and the contents that you viewed that day in your honest opinion at that time were worth \$22,000? I thought they were, yes. These bits and pieces that were on the truck, they were not related to the truck at all, were they - I mean by that, they were not parts for that truck? No. They were not in the ordinary course of events for use with that vehicle? No. That the vehicle was for the carriage of goods? Yes. What sort of goods was the vehicle designed to carry? Any sort of goods that you could put on a flat deck truck with a maximum weight I would think in the vicinity of 9 or 10 ton. These items that were on the deck of the truck when you inspected it, and you have referred to them all, they had a separate value, didn't they? Yes, they would have. They all could be sold separately and be entirely useful to whoever bought them? Yes. Mr Counsell says that all you were asked to do was value the truck because it was the truck that he was concerned to have sold and you were not asked to value the parts on the truck at all because they had nothing to do with the truck other than the fact they just happened to be

stored there? No, that is not correct - I was asked to be specific on what I thought the Leyland 760 motor would be worth."

He denied that he had been asked to value the truck alone, but later agreed that his first instruction, which was by phone from Odering, was simply to value the truck. He was at something of a loss to explain how he could have arrived at anything like a reliable valuation of all the bits and pieces stacked on the tray of the truck simply by glancing at them. He was also at a loss to explain why his written valuation should read thus:-

"TRUCK PART SPECIALISTS
351 Blenheim Rd
P.O. Box 11017
Sockburn

8 May 1980

To whom it may concern
I value Truck Ford Reg. JJ 2666 as being worth
\$22000.00 on to-days market.

G.H. Nichol"

The Appellant did not give evidence but in a long written statement made to the police two and a half years after the events with which we are concerned he said that in the deal with the McGinty brothers the Ford truck was given a value of \$30,000 and that he left it to Odering to find a buyer for it and the other vehicles that came from the McGintys. His statement then continues:-

" Odering wanted the truck. He claimed and told a lot of people around town that I owed him \$7,000.00. He claimed that this amount was the commission that I owed him on this deal that he had arranged with McGintys.

As far as I am concerned I didn't owe him \$7,000.00 at that time because none or hardly any of the stuff had been sold. It might have been a different story if he had sold all of the vehicles and that, that we got from McGintys. I would be prepared to concede that if he had done that then there would probably have been some commission owing to him.

Because of his claim that I owed him this money and because he was obviously keen to have this truck I told him that I would let him have it so long as he paid me \$15,000.00.

How this figure was arrived at for this truck was that Odering got two valuations from independent truck people. One person, I don't know who that was, of \$22,000.00 and another gave him a valuation of \$24,000.00. This was what Odering told me. I did see one of the written valuations, I think that was the one that he took down to Dunedin.

As far as I was concerned I just wanted \$15,000 for the truck and for my alleged debt of \$7,000.00 with him settled and cleared.

I knew that Odering didn't have \$15,000.00 in cash and I knew he would have to arrange finance on it."

And further:-

" I have been told about an alleged incident where I was supposed to have been at the warehouse when a chap Nichol came to value the truck. I have been told that I was supposed to have not been happy with the valuation given initially by this man Nicholl and asked him to put more on it. I deny that. I cannot recall any such circumstances and in fact was not involved in any discussions over a valuation of this truck.

It is possible that Odering had someone at the warehouse to value the truck and I also was at the

warehouse at the same time. However I am quite sure that I was never involved in any discussions on my own or with Odering and some other person over the valuation of this truck."

There can be little doubt that despite his denials the Appellant was in need of money at that time and did indeed pay Ferguson \$500 for arranging the deal with General Finance.

There was evidence from Mr Shearer that when he first saw the truck in about May 1980 the Appellant was wanting about \$15,000 for it but he was not really interested and did not think it was worth that. After repossession General Finance estimated its value as \$14,000 but it is not clear how that value was arrived at. It seems that by the time of repossession the vehicle was certainly not in the condition it had been in May 1980. Both Nichol and Shearer confirmed that. There was a suggestion that it had been "cannibalised".

In the light of Mr Stanaway's approach to the problem this passage from the Trial Judge's decision is relevant:-

"Neither of the defendants in the course of their statements seem to be very clear about the valuation which was made by Mr Nichol. Mr Odering said that he thought the truck was unladen at the time and that it would not have been possible for Mr Nichol to have valued items which were not in fact on the truck's deck; however, he conceded that he could not be certain about that. Mr Counsell, on the other hand, said that he took little interest in the valuations because they were Mr Odering's responsibility, although Mr Counsell admitted he may have seen one of the valuations that was obtained. I have, of course, Mr Nichol's evidence to which I have referred and his evidence was that in a discussion with the two defendants, the figure of \$18,000 was not acceptable and he was asked to stretch it a wee bit more. I

also have his evidence, which I have said was unshaken under cross-examination, that his valuation included all the items on the deck. I see no reason to doubt Mr Nichol's evidence that his valuation included the truck and the engines and the other equipment and that fact was known to both defendants. I am satisfied that both defendants were aware that despite the nature of the written valuation, they were both aware that \$22,000 was not a genuine value to be placed on this truck and that it's true value was considerably less."

Mr Stanaway submitted that Nichol's evidence was the key to the matter, but having regard for the clear and unequivocal terms of his written valuation it was a case requiring a cautious approach to his testimony, and requiring a decision as to whether Nichol should be regarded as an accomplice whose evidence required corroboration. Because of the way in which the case proceeded in the lower Court, where there was the primary allegation of sham, the question of value did not assume the importance it has assumed on appeal. That crucial issue now falls to be decided on the testimony of one whom I believe should have been treated as an accomplice. It could be argued with some force that having regard for all the circumstances Ferguson too might well be in the position of an accomplice.

The Appellant clearly told some untruths in his statement but the question remains - did he know that the valuation was of the truck and its load as Nichol now maintains?

Mr Stanaway submitted that if I should find that Nichol should have been treated as an accomplice I should refer the matter back for a rehearing. Having regard for the unsatisfactory nature of Nichol's evidence and the time that has elapsed since the alleged offence, four years, I do not consider that course appropriate.

The appeal is therefore allowed, the conviction is set aside and the sentence quashed.

A handwritten signature in black ink, appearing to be 'A. G. J.', with a date '1951' written above it.

Solicitors:

Wynn Williams & Co., Christchurch, for Appellant
Crown Solicitor, Christchurch, for Respondent