File

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.No.13/84

BETWEEN ANTHONY JAMES WAYGOOD

Appellant

AND POLICE

Respondent

Hearing: 19 June, 1984.

Counsel: G.C. Everard for Appellant.
Miss Linda Shine for Respondent.

Judgment: 19 June, 1984.

(ORAL) JUDGMENT OF VAUTIER, J.

The appellant, Anthony James Waygood, was charged in the District Court at Auckland on 14 September, 1983 on a charge brought in terms of ss.222 and 227 of the Crimes Act 1961 that having received from Digby Richard Nelson the sum of $649.70 on terms requiring him to account for or pay the sum to the Medical Assurance Society of New Zealand fraudulently omitted to account for or pay the same and thereby committed theft. The charge was defended, the hearing of the evidence occupying two days and the Judge having convicted the appellant for the reasons set forth in the record, he was remanded to 26 October, 1983 when he was fined the sum of $1,500 and ordered to pay Court costs of $20. He appeals to this Court against both the conviction and the penalty thus imposed.

The principal facts with which the evidence was concerned are admirably summarised in the judgment and I

adopt for the purposes of this judgment the summary there appearing:

"The charge arose out of dealings between the defendant and a Mr and Mrs Nelson on 15 December 1982. The Nelsons had been shopping around for some alternative insurance for their home, its contents, their motor-car and their pharmacy business. Mrs Nelson had been making the inquiries and one of the companies contacted was the Medical Assurance Society. The person to whom her inquiry was directed in that firm was Mr Waygood and he provided her with some quote over the telephone and by comparison with other quotes received Mrs Nelson decided that she and her husband should place their insurance with that firm. She had a subsequent telephone conversation with the defendant and it was arranged that he should visit the Nelson home to view the assets to be insured.

He visited their home on 15 December 1982 and carried out an inspection. The Nelsons were in a hurry on that day, but there was not a state of confusion referred to by the defendant, there certainly was no confusion on the part of the Nelsons as to what was the arrangement made with the defendant.

The defendant is an employee of the Medical Assurance Society, paid a salary and he went as an employee of that company to arrange insurance for the Nelsons. I am satisfied on the evidence I have heard of Mr and Mrs Nelson, who I found to be careful, conscientious and truthful witnesses, that no question of eligibil-ity was raised at the meeting of 15 December. It was accepted that the Nelsons would become members of the society. They both understood that membership forms had to be signed by the husband because he was the pharmacist. That position was entirely in accord with the policy of the company. As I have heard from the evidence of the matter and I accept that that policy was explained to the defendant as part of his training and would have been within his knowledge.

On that day the proposals were completed and a cheque was made out for the amount quoted by way of premiums payable to the Medical Assurance Society, the figure being provided of course by Mr Waygood. The cheque was left blank as to the payee, because Mr Waygood told the Nelsons that he had a stamp in his car and would comple that portion of the cheque. It was implicit in the whole arrangement whereby the cheque was handed to him incomplete in that respect, that he would complete it by inserting the names of the company by which he was employed and with which he had just arranged insurance for the Nelsons. It was the intention of the Nelsons in writing the cheque in that way and the intention of Mr Waygood in accepting the cheque that it was payable to the Medical Assurance Society for the insurance which he had just arranged.

On the following day Mr Waygood banked that cheque to his own personal account in the Westpac Bank and he completed the payee section of the cheque by inserting the word 'cash'. It was his evidence that he did that following a discussion with the senior representative Mr Miocevic after he had returned to the office with the Nelson insurance proposals. He said that he and Mr Miocevic agreed in that meeting that the Nelsons would not be eligible and that they would implement a scheme which they had operating whereby they would place the insurance elsewhere and in due course when they were billed the money in Mr Waygood's account would be withdrawn and paid to the insurance company or broker involved. He said that there had been previous instances of transactions of that kind between himself and Mr Miocevic. He said that the insurance papers were handed to Mr Miocevic and that when Mr Miocevic was on holiday, sometime after 10 January, he the defendant, visited his home and asked him about the Nelson's insurance, to be told that Mr Miocevic had lost the papers and that Waygood was to be left to arrange the insurance himself or to ascertain the details and put them through the company on the basis that there was further business to follow.

The defendant was dismissed by the Medical Assurance Society on 4 February before he had taken any step, but later that month he approached the Sun Alliance and placed the insurance with that firm for a lower premium than the one he had collected. He said that he was able to complete the proposal for the Sun Alliance from details which he had in his diary."

As regards the law to be applied Mr Everard for the appellant submits that there are three elements of the offenc under s.222 of the Crimes Act which are, (1) receipt of the money on terms such that the defendant has a duty to account, (2) an omission to account and, (3) a fraudulent intent in failing to account. He referred to several decisions in which the law relating to this particular section of the Crimes Act is discussed and to the material to be found in the note in Adams, Criminal Law in New Zealand, 2nd Ed. para. 1801. The cases to which Mr Everard referred were Mead v. The Queen [1972] NZLR 255, Police v. Leaming [1975] 1 NZLR 471 and the decision of the Court of Appeal in

R. v. Scale [1977] 1 NZLR 178. He also drew my attention to an unreported decision of Cook, J., Crooks v. Police M.417/82 Christchurch Registry, judgment 9 October, 1982. These citations certainly show that it is not always easy to apply the terms of the section in particular circumstances. The Court of Appeal, however, in the judgment given by the President in Scales' case at p.181 stated the position succinctly in these words:

> "...we agree that the essence of an offence under s.222 lies in the existence of a 'fiduciary element' or the 'earmarking' of the property in the hands of the accused."

I think it is now generally accepted that it is this element of a trust and a fiduciary relationship that is the important element to be considered.

The decision of Cook, J. to which Mr Everard referred illustrates the type of circumstances in which the application of the section becomes particularly difficult. That is the situation in which the person charged is pursuing an independent occupation and the factor arises of his acting contrary to the terms of his contract with his principal and not handing over to the principal money received from a third party. The difficulty very often in these cases is, of course, that it is the situation that the third person who hands over the money or property knows nothing of the terms of the contract between the principal and the agent and it accordingly is difficult to show that a fiduciary relationship has arisen between the third person and the agent, an element which it seems clear must be shown in order for the

terms of this particular section to be fulfilled. Difficulties of that kind, however, did not arise in any way in my view in this case in that the evidence showed that the appellant was an ordinary employee of the Medical Assurance Society referred to in the charge and accordingly anyone dealing with him would naturally suppose that he was acting on behalf of his employer in the ordinary way.

The submissions on the facts which Mr Everard advance are in furtherance of his contention that in the present case it was not established by the evidence that the money was in fact received by the appellant on terms imposing upon him a duty to account and there was no fraudulent intent in his failing to account. The submissions thus advanced were these: First, that Mr and Mrs Nelson, who were the persons with whom the appellant dealt, showed themselves by their evidence to be concerned about the price which they would have to pay by way of premium for the insurance they were seeking rather than the particular company with which the insurance was to be placed. Secondly, he referred to the factor revealed by the evidence that the manner of operation of the insurance company concerned was such that persons seeking insurance had to complete applications for membership of the Society and the fact that such persons would not automatically be accepted for membership, he said, lessened the strength of the argument that persons who paid over money in the way that Mr and Mrs Nelson did actually required the money to go to the Society. Thirdly, he pointed to the fact that the complainant, Mr Nelson, had, the evidence showed, handed over an open cheque instead of making the cheque payable

to the Medical Assurance Society. In relation to this submission, he said, why would this be done if the intention was that the money was to go to the Society. He also referred in this regard to the evidence as to the very hurried way in which the transaction was carried out and, as he put it, the "state of bedlam" which prevailed in the complainants' household at the time when the dealings were being conducted. This, he said, further indicated the unlikelihood of terms such as is said were required being actually imposed. He referred also to the fact that nowhere in the evidence was it said that the appellant actually stated that the insurance would be effected with the Medical Assurance Society.

As to these submissions, it has to be noted in the first place that there was a complete conflict with regard to what was said at the time when the cheque was handed over. Mrs Nelson in her evidence referred to the fact that she had made inquiries with regard to premium rates with various insurance companies and she made it clear that she had, in the end, decided upon the Medical Assurance Society as the insurer with which she and her husband wished to deal. While she may have been principally concerned about obtaining the lowest premiums possible her evidence made it quite clear that she, having made inquiry as to premium rates, had decided upon the Society alone as the desired insurer. This, of course, was in marked contrast to the evidence given by the appellant himself in which he said that he made references to the position being that the insurance might not be effected with the Society at all but might have to be effected with somebody else and generally made

it clear to the complainants that they would not necessarily be obtaining insurance with this particular insurer.

As regards the point that the complainants would not have been automatically accepted as members of the Society and so have been able to obtain insurance with it, it has to be noted that there is the evidence of the Manager, Mr O'Conno which showed quite clearly that the complainant Mr Nelson, being a pharmacist, he would in accordance with the ordinary practice of the Society and the policy followed by the directors in terms of Article 4 of the Society's Articles of Association, have been entitled automatically to be accepted as a member although, of course, the particular insurance which the complainants were seeking may not necessarily have been made available on the terms that they required

As regards the third point, the handing over of the open cheque, again of course, it has to be remembered that although the appellant himself in his evidence said specifically to the complainants that they should not name a payee in the cheque because the insurance might not be effected with the Medical Assurance Society, the complainants themselves had a completely different explanation for this failur to include a payee. According to their evidence the payee wa certainly to be the Medical Assurance Society and the name was not written in solely because of the mention made by the appellant of his having a rubber stamp which he could use for the purpose and which he would use to show the name of the Society on the cheque and that, coupled with the fact of Mr Nelson being in a great hurry at the time accounted for

matters being done in this way.

In this situation the Judge made certain positive findings as to the facts as he found them to be. With regard to the question of the eligibility of the complainants for insurance, he expressly found in favour of the conclusion that the complainant Mr Nelson was in fact eligible and would have been accepted in the ordinary way because of the policy decisions to which I have referred and as they were exemplified in the exhibit which was produced, Exhibit 6. He found positively that it was the intention of Mr and Mrs Nelson in writing the cheque in the way they did and the intention of the appellant in accepting the cheque that it was/paid to be to the Medical Assurance Society. He further found that the money was received from the complainant with a requirement attached to it that the appellant would account for the sum and pay it to the Medical Assurance Society.

As regards the further question, as to whether or not there was actual fraudulent intent in the action of the appellant in banking the money in his own account as he admitted, of course, that he had done, there is again a positive finding of fact by the Judge when he says:

> "He failed to do that (i.e. pay the money over to the Medical Insurance) placing the money in his own account so that he could have the use of the money, at least for an interim period. That failure to account was fraudulent."

I have perused the record of the evidence and note the various conflicts which arose. There was, of course, a major conflict in the evidence in that the appellant claime

that he and a person holding a senior position in the Society Mr Miocevic, had an arrangement between them whereby in those cases where particular insurance contracts were not acceptable to the Society they themselves would arrange the insuranc with some other company and obtain a commission for themselves by so doing. Mr Miocevic in his evidence denied the existence of any such arrangement. He admitted, however, that there was in existence an arrangement participated in by employees of the Society whereby in cases where advances were made to clients for the purposes of purchase of motor vehicles, the employees obtained a reward for themselves by directing these particular clients to particular motor vehicle dealers.

All this, however, necessitated an assessment and weighing up of the credibility and reliability of the various witnesses and that of course was the task which the Judge was obliged to undertake for the purposes of deciding whether or not the offence alleged was proved beyond reasonable doubt. This clearly is thus a case where the Judge in the District Court had a great advantage over this Court in that he saw and heard all the witnesses and was thus in a position to assess their credibility not only from what they said but from the way in which their evidence was given. It is accordingly very clearly the kind of case to which North, J. was referring in the oft-quoted decision of Kenny v. Fenton [1971] NZLR 1 where, at p.11, it was said;

> "There is no doubt that from time to time their Lordships in the House of Lords have thought it right to warn Courts of Appeal of the danger of preferring the view they form on a reading of the record to the opinion of the Judge who heard and saw the case develop and had the opportunity

denied to them of judging the worth of the oral evidence given by the witnesses. In particular there may be cited the often quoted dictum of Lord Sumner in SS Hontestroom v. SS Durham Castle [1927] AC 37, 47.

> 'If his (that is the Judge who hears the witnesses) estimate of the man forms any substantial part of his reasons for his judgment the trial Judge's conclusions of fact should, as I understand the decisions, be let alone. ... We must, in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong.'"

I myself must, simply from a perusal of the record in this case, form an adverse view as to the credibility of the appellant. I refer in this regard to the statement which he made with regard to his actions in relation to the inquiries which were made by the complainants when the appellant spoke to them later about the question of their insurance. He was talking to them at a time when he knew that on his own statement that Mr Miocevic had, he says, told the appellant that the Society would not accept the insurance of the complainants. Nevertheless, he, on his own evidence, speaks of having talked to the complainants in a manner which would reassure them as to the matter having all been properly dealt with and their property having been insured. He at that time clearly on his own evidence had no justification for giving these people the assurances which he did.

I find myself quite unable to conclude that the Judge acted wrongly in accepting that the necessary elements of this particular charge were established by the evidence. The evidence of the complainants themselves, if accepted, certainly in my view went amply far enough to show that they handed over the cheque in question entirely on the basis

that they were handing this money to the appellant as an employee of the Medical Assurance Society understanding and believing that he would account for the money to his employer in the ordinary way. The evidence showed, of course, that he did not do this. I am unable to accept the submission that the actions of the appellant in effecting an insurance later with the Sun Alliance Insurance for the property in question provides an indication that the appellant had no fraudulent intent. The evidence clearly indicates in my view that the complainants were left uninsured for a lengthy period when they thought that the situation was otherwise and, moreover, at the time when the appellant effected this other insurance it had become clear to him on the evidence, as I see it, that he was certainly not going to be able, in the circumstances, to effect an insurance with the Medical Assurance Society as no doubt he had intended in due course to do, having in the meantime had the use of the complainants' money, as the Judge himself concluded.

The appeal against conviction must accordingly be dismissed.

There is an appeal advanced against sentence also, it being submitted that the fine of $1,500 imposed was an excessive penalty having regard to the fact that, in the end, the complainants did not suffer any loss and having regard to the fact that the appellant had gone ahead and effected the other insurance to which I have referred before any inquiry was made of him by the police about the matter.

I find myself unable to conclude that either of these factors is of sufficient weight to justify a conclusio that a substantially lesser penalty should have been imposed than that which was imposed. The appellant, as I have alrea indicated, at the time when he effected the insurance with t Sun Alliance was clearly, as the Judge himself thought, in the situation where he must have known that sooner or later the whole matter would come to light and he would be in grav difficulties in explaining his actions. The misapplication of moneys which have been received by an employee in the course of his employment must always be regarded by the Courts, in my view, as a serious offence. It constitutes a serious breach of trust. The amount here was not insubstantial and in my view the appellant really should consider himself fortunate that he was treated by way of a fine and not some more severe form of punishment.

The appeal against sentence is accordingly also dismissed.

SOLICITORS:

Nicholson Gribben & Co. Auckland, for Appellant.
Meredith Connell & Co. Auckland, for Respondent.