Lawi v. The State

Supreme Court of Justice
Kidu C.J., Amet and Cory JJ.
13 April 1987

Criminal law – fraudulent embezzlement – section 383A of the Criminal Code – whether a Member of Parliament who applies K16,000 to his own use does so dishonestly – whether an intention to repay is a defence – section 383A(3)(b)

Lawi, as an M.P. and one-time Minister of the Crown, received cheques for K10,000 and K6000 in 1983 for road construction and agricultural projects respectively. Most of the moneys were applied to Lawi's own use during 1983; by early 1985, the two accounts, where the cheques were deposited, contained in total less than K100. The appellant wrote in 1985 that the money was "still pending". Lawi was prosecuted on two charges of "dishonest application" under section 383A of the Criminal Code and convicted on both charges at trial before a judge alone. Lawi appealed against both conviction and sentence. Counsel for Lawi argued that Lawi had not "dishonestly" applied the K16,000 to his own use.

HELD:

(1) (Kidu C.J., Amet J. and Cory J.) Although the two cheques made out to Brian Kindi Lawi for K16,000 were to be applied and paid out with some discretion by him, there was no doubt that the sums of money were grants for particular public purposes to be expended on those public purposes (roading and agricultural development): *ll.* 155, 388. The Government of Papua New Guinea continued to have a legal interest in or claim to the property.

(2) (Amet J.) The test of "dishonesty" is subjective. On the facts as found by the trial judge, the defendant "must have realized" what he was doing was dishonest: *ll.* 553-567. *R.* v. *Landy* [1981] 1 W.L.R. 355; [1981] 1 All E.R. 1172; 72 Cr. App R. 237.

(3) (Amet J.) As a preliminary step, the trier of fact must establish, objectively, that defendant's course of conduct was dishonest according to the ordinary standards of reasonable and honest people from the Western Highlands or Papua New Guineans generally: *l.* 580. *R.* v. *Ghosh* [1982] 1 Q.B. 1053; [1982] 3 W.L.R. 110; [1982] 2 All E.R. 689; 75 Cr. App R. 154.

(4) (Amet and Cory JJ.) An intention to restore property afterwards does not alter the finding of dishonesty: section 383A(3)(b): *l.* 833.

(5) (Amet J.) An exercise of constitutional rights [declining to answer questions put to defendant by police investigators] ought not be held against defendant in meting out sentence: *l.* 639. [Article 37(10) of the Constitution of Papua New Guinea provides that "No person shall be compelled in the trial of an offence to be a witness against himself". No mention was made of the Constitutional Leadership Code, which applies to Members of Parliament, and which prohibits the use of office for personal gain: Articles 26 and 27.]

OBSERVATION: The Court of Appeal of New Zealand in *R.* v. *Williams* [1985] 1 N.Z.L.R. 294, usefully reviewed the British and Australian cases which considered the subjective and objective components of "dishonesty" and "fraudulently". The instant case can be read together with *Toritelia* v. *R,* decided by the Court of Appeal of the Solomon Islands, infra at p. 313.

Other cases referred to in judgments:
Benmax v. *Austin Motor Company Ltd.* [1955] A.C. 370; [1955] 2 W.L.R. 418; [1955] 1 All E.R. 326
John Kasaipwalova v. *The State* [1977] P.N.G.L.R. 257
Karo Gamoga v. *The State* [1981] P.N.G.L.R. 443
Nambuga Mara v. *The State* (unreported, S.C. 320)
R. v. *Baruday* [1984] V.R. 685
R. v. *Bonollo* [1981] V.R. 633
R. v. *Feely* [1973] Q.B. 530; [1973] 2 W.L.R. 201; [1973] 1 All E.R. 341; (1973) 57 Cr. App R. 312
R. v. *Gilks* [1972] 1 W.L.R. 1341; [1972] 3 All E.R. 280; 56 Cr. App. R. 734; (pet. dis.) [1972] 1 W.L.R. 1347
R. v. *Royle* [1971] 1 W.L.R. 1765; [1971] 3 All E.R. 1359; 56 Cr. App. R. 131
R. v. *Salvo* [1980] V.R. 401
R. v. *Waterfall* [1970] 1 Q.B. 148; [1969] 3 W.L.R. 947; [1969] 3 All E.R. 1048; 53 Cr. App. R. 596

Legislation referred to in judgments:
Appropriations Act 1983
Crimes Act 1958, section 81(1) (Victoria)
Criminal Code (Ch. 262), section 383A
Public Finances (Control and Audit) Act (Ch. 36), section 26.
Theft Act 1968 (U.K.)

N. Roberts and *K. Naru* for the appellant
V. Noka for the respondent

KIDU C.J.

Judgment:

This is an appeal against conviction and sentence.

The appellant was on 10 February 1987 convicted of the following charges laid under section 383A of the Criminal Code (Ch. No. 262).

(1) That he between 31 March 1983 and 15 January 1985 dishonestly applied to his own use K6000 the property of the Government of Papua New Guinea.
(2) That he between 31 March 1983 and 26 April 1984 dishonestly applied to his own use the sum of K10,000 the property of the Government of Papua New Guinea.

He received a sentence of two years I.H.L. for the first charge and a sentence of five years I.H.L. for the second charge. The five years was to be reduced to three years if the K10,000 was paid back to the State. The sentences were to be served concurrently.

At the trial there was no dispute as to the following facts:

(1) The appellant received two cheques from the National Government – a cheque for K6000 from the Primary Industry Sectoral Fund and K10,000 from the Rural Transport Sectoral Fund.

(2) The cheque for K6000 was made out in the appellant's name and was deposited with the Bank of South Pacific Ltd., Mt. Hagen branch, in a cheque account styled as "Mrs Cathy and Brian Kindi Lawi". The appellant was the sole signatory to the account. The cheque for K10,000 was deposited in a savings account styled as "Mr Lawi Brian Kindi T/F Western Highlands Transport Fund Account". Again the only signatory to the cheque was the appellant.

(3) Neither the K6000 nor the K10,000 were spent on projects the moneys were intended for as at 15 January 1985.

(4) In November 1985 the appellant gave K6000 in cash to the Mt Giluwe Investment Corporation.

(5) The K10,000 was never used for the road project it was intended for – evidence is that it was for the Tumun-Anglimp Road.

(6) At the time of the trial it was revealed that lawyers for the appellant had been given K10,000 by their client and the money is even now in the Lawyer's Trust Account.

Section 383A, Criminal Code

Lawyers for the appellant contend that section 383A of the Criminal Code was misapplied in this case. It reads:

(1) A person *who dishonestly applies to his own use* or to the use of another person –
   (a) property belonging to another, or
   (b) property belonging to him, which is in his possession or control (either solely or conjointly with another person) subject to a trust, direction or condition or an account of any other person, is guilty of the crime of misappropriation of property.

(2) An offender guilty of the crime of misappropriation of property is liable to imprisonment for five years except in any of the following cases when he is liable to imprisonment for ten years –
   (a) where the offender is a director of a company and the property dishonestly applied is company property;
   (b) where the offender is an employee and the property dishonestly applied is the property of his employer;
   (c) where the property dishonestly applied was subject to a trust, direction or condition;
   (d) where the property dishonestly applied is of a value of K2000 or upwards.

(3) For the purposes of this section –
   (a) property includes money and all other property real or personal, legal or equitable, including things in action and other intangible property;
   (b) *a person's application may be dishonest although he is willing to pay for the property or he intends to restore the property afterwards or* to make

restitution thereof to the person to whom it belongs or *to fulfil his obligations afterwards* in respect of the property;

(c) a person's application of property shall be taken not to be dishonest, except where the property came into his possession or control as trustee or personal representative, if when he applies the property he dies not know to whom the property belongs and believes on reasonable grounds that such person cannot be discovered by taking reasonable steps;

(d) *persons to whom property belongs* include the owner, any part owner, any person having a legal or equitable interest in or claim to the property and any person who, immediately before the offender's application of the property, has control of it. (My emphasis).

It is to be emphasized that the two lots of moneys were given to the appellant by the State for two specific purposes – the K6000 was given to him for agricultural projects and the K10,000 was for a particular road project – the Tumun-Anglimp Road. So it cannot be seriously contended that the moneys were given to the appellant for his own use or to do whatever he liked with it.

There is no doubt that the appellant deposited the cheques into two accounts with the Bank of South Pacific in Mt. Hagen. Also there is no doubt that the appellant withdrew these moneys and by 15 January 1985 the cheque account (in which the K6000 was deposited) had a credit balance of only K61.29 and the pass book account (into which the K10,000 was deposited) had a credit balance of K23.16 on 26 April 1984. He most certainly did not use these moneys he withdrew for any agricultural projects or road projects. In fact when he wrote to the Finance Department in two letters dated 28 February he said:

Re: K10,000

The above amount of money (K10,000) derived under the 1983 RTSF has been received but, it has not been utilized for the said project. As and when the funds are utilized the Finance Department will be furnished with the appropriate documentations for your official records.

In the meantime the amount of money as stated above (K10,000) is still pending.

Re: K6000

I wish to state here that the amount of money as stated above Six Thousand Kina (K6000) has been received, but still not utilized yet.

The money would be spent on the necessary project as originally envisaged. It is being made pending. As and when the details are availed I shall furnish them to your office.

So the moneys withdrawn had been spent on other things. They were not "pending" as the appellant put it in his two letters. Withdrawals from the pass book account (where the K10,000 was deposited on 19/7/83) show that K5000 was withdrawn in cash on 14/10/83, K600 in cash on 27/10/83, K300 in cash on 23/11/83, K100 in cash on 5/12/83, K140 in cash on 16/12/83, K2700 in cash on 23/2/84, K300 in cash on 24/2/84, K500 in cash on 27/2/84, K150 in cash on

6/3/85, K3130 in cash on 13/4/84 and K2200 in cash on 26/4/84. These withdrawals left the balance already mentioned of K23.16 as at 26 April 1984. None of these moneys withdrawn was spent on any road project.

As to the cheque account evidence shows that on 31/3/83 a cheque for K4980 was drawn in favour of South Pacific Brewery Ltd., another cheque for K3735 was drawn in favour of the same company on 8/4/83.

South Pacific Brewery is not an agricultural company. And these cheques from the account where K6000 was deposited help to show that moneys were used for other purposes than what they were intended for. There is one conclusion from the facts: he applied the moneys to his own use.

Even if the evidence shows that moneys belonging to the State were used by the appellant for his own use, section 383A (1)(a) requires that the State prove that he applied the moneys *dishonestly* and that it belonged to the State.

Moneys Property of the State

Mr Robert's submission in relation to this aspect of the case was that as the cheques were drawn and given to the appellant, the moneys became his. Of course there can be no doubt that when a cheque is drawn in the name of a person common sense dictates that without more the cheque and proceeds from it when it is cashed or processed belong to him. But in this case hard facts show that the moneys were given to the appellant, not for him to use on anything he fancied (including himself) but on two specific projects.

With respect to the K6000 (from the agricultural sectoral fund) the evidence shows that it came from the 1983 Primary Industry Sectoral Fund. It was paid by a cheque drawn in the name of the appellant. In his evidence in chief he said:

Q. Did you receive K6000 to be used for Agricultural purposes?
A Yes.

So he knew perfectly well that the money was for a specific purpose. It was not given to him to use on anything he wished or caught his fancy.

With respect to the K10,000, evidence clearly shows that he applied for the money and was granted the K10,000 for a particular road project. Once again there is no doubt that he knew that the money was to be used for that project and nothing else. In respect to both sums of moneys the State had a legal interest in them and could have sued him for their return. So it is without question that the appellant applied State or Government property to his own use.

Dishonesty

Was the application of the money to his own use dishonest? The learned trial judge's affirmative answer was based on the following reasons (from his judgment):

> In the case before me the accused has clearly applied the moneys for his own purposes and used them to prop up his personal account. With respect to the K6000 it clearly propped up his overdraft situation, it saved him K6000 of overdraft with its resultant savings in bank charges. With the K10,000 the money was used for purposes other than the road project, no explanation has been shown as to what the withdrawals were for so that the court can assume it was for personal reasons and also it would have a similar effect, even though in another account, of supporting his overdraft situation. In effect he has used the

K10,000 as an interest free government loan and deliberately deprived the people of the advantage of the money for some years. The people were unable to earn the benefits from the Agricultural projects for two years and have had to suffer four more years of wear and tear on the Tumun-Anglimp Road because of his failure to apply the money for the road works on that road. This delay was deliberately for the accused's own political purposes and to support his own personal overdraft situation. This is not an oversight, nor a matter of not knowing. This is blatant dishonesty. The acts of the accused come clearly within section 383A and any willingness to fulfil his obligations does not void the offence.

There is another aspect which while not really necessary for deciding the guilt of the accused could be relevant as showing the status of funds and relevant to the time factor as to when the funds should be utilized.

These funds were part of the 1983 appropriation. As anyone involved with the control and management of public moneys knows, and the accused was a Minister at one time and therefore intimately involved in appropriations, all appropriations are for the respective year the appropriation is made. As section 26 of the now repealed Public Finances (Control and Audit) Act (Ch. No. 36) states:

> Unless the contrary intention appears in any law by or under which the appropriation was made all appropriation out of the Consolidated Revenue Fund made in respect of a financial year lapse at the end of that year.

I have not been shown anything in any law or appropriation direction which shows any contrary intention in these Agricultural Project and Transport Sectoral Funds and I have not been shown anything which would place these funds in the category covered by section 27 of the Public Finances (Control and Audit) Act being payments to be made or available after the end of the financial year.

I therefore cannot see any legislation or Parliamentary statement, and I could not really envisage any such situation, which makes the Sectoral Funds or grants to members of Parliament for favoured projects to be in any way different from any other government funds. They are not moneys which the member can spend quite how he wishes for any purpose whatsoever. They are funds which must be applied, namely for specific purposes or within the parameters for which they are designated. With respect to the agricultural projects K6000 the Member would have some flexibility in relation to the exact projects. However with the K10,000 at the very least the Member can go to the people and say, look I have got some money for your road and he can get the political credit for it instead of the Department of Works. But it must be money that is to be applied in the year that is appropriated. It is not money he can put in his own bank account, borrow against, use to prop up his overdraft and deny the people the benefits of it for a few years while he awaits a politically opportune time to fulfil his obligations. Also of course any delay means that the people are going to get less value because of inflation as well as

being deprived for the period of the delay. As I have already said this must be a further example of the dishonesty in the application of the government funds. I therefore find you, Brian Kindi Lawi, guilty on two counts of misappropriation contrary to section 383A of the Criminal Code.

There are certain comments or conclusions on his Honour's judgment which have no proper basis in evidence.

(1) Although the K6000 might have "propped up" the appellant's overdraft (of up to K12,000) there was no evidence that the appellant used the K6000 to prop up his overdraft.

(2) Although the K6000 might have "propped up" the appellant's overdraft there was no evidence that the appellant thought the K6000 saved his overdraft with its resultant savings of bank charges.

(3) There was no evidence that the appellant intentionally "used the K16,000 as an interest free government loan and deliberately deprived the people of the advantage of the money for some years".

(4) There was no evidenee that people were aware that they were ". . . unable to earn the benefits from the agricultural projects for two years" and ". . . had to suffer for more years of wear and tear on the Tumun-Anglimp Road because of his (the appellant's) failure to apply the money for the road works on that road".

(5) No evidence was called by the State to show that the appellant's people or some of them (from the Western Highlands Province – appellant was and still is a Member of Parliament for that Province) were aware that he had, in 1983, been given (by the Government) K6000 for agricultural projects and K10,000 for the Tumun-Anglimp Road.

(6) Section 26 of the Public Finances (Control and Audit) Act (Ch. No. 36) had no application to the case. Both the K6,000 and the K10,000 were parts of appropriations made under the 1983 Appropriation Act. The latter was part of the appropriation for the Department of Transport and the former was part of the appropriation for the Department of Primary Industry. And as each of the Departments had utilized these moneys by handing them over to the appellant they had used these moneys. Under section 26 only moneys unused lapse at the end of the financial year.

It is (or should be) apparent from my comments on the trial judge's judgment that I consider his Honour based his finding of "dishonesty" on wrong and/or improper premises. "Dishonestly" (or "Dishonest") is not a term of art (legally speaking that is). As far as I know the term has not achieved the distinction of being considered a technical one. In the United Kingdom, home of the English language, the same view prevails and I quote from the case of *R.* v. *Feely* [1973] Q.B. 530; [1973] 2 W.L.R. 201 [1973] 1 All E.R. 341; 57 Cr. App. R. 312, where Lawton L.J. delivering the judgment of the English Court of Appeal (Criminal Division), said at p. 537 (Q.B.); p. 205 (W.L.R.); pp 344-345 (All E.R.); p. 317 (Cr. App. R.):

> In s. 1(10) of the *Theft Act 1968 (U.K.) the word "dishonestly" can only relate to the state of mind of the person who does the act which amounts to appropriation. Whether an accused person has a particular state of mind is a question of fact which has to be decided by the jury when there is a trial on indictment and by justices when there are summary proceedings.* The Crown did not dispute this

proposition, but it was submitted that in some cases (and this, it was said, was such a one) it was necessary for the trial judge to define "dishonestly" and when the facts fell within the definition he had a duty to tell the jury that if there had been an appropriation it must have been dishonestly done. *We do not agree that judges should define what "dishonestly" means.* (My emphasis).

In this jurisdiction where section 383A is to be applied, it is for the trial judge to consider, on the facts of the case before him or her, whether the application of the property was dishonest.

The facts in this case are such that it was open for one judge to conclude there was dishonesty involved.

I would dismiss the appeal against the conviction. As to the appeal against sentence I concur with my brother Cory J.

AMET J.

The facts in this appeal are sufficiently set out in the judgments of the learned Chief Justice and Cory J.

The appellant was convicted of two counts of misappropriation of property pursuant to section 383A of the Criminal Code (Ch. No. 262). He has appealed against both the convictions and the sentences. I set out the relevant parts of section 383A as I shall be making reference to them.

(1) A person who dishonestly applies to his own use or to the use of another person –
   (a) property belonging to another; or
   (b) property belonging to him, which is in his possession or control (either solely or conjointly with another person) subject to a trust, direction or condition or on account of any other person,

   is guilty of the crime of misappropriation of property.

(3) . . . For the purposes of this section –
   (a) property includes money and all other property real or personal, legal or equitable, including things in action and other intangible property;
   (b) a person's application of property may be dishonest even although he is willing to pay for the property or he intends to restore the property afterwards or to make restitution thereof to the person to whom it belongs or to fulfil his obligations afterwards in respect of the property;
   (c) . . .
   (d) persons to whom property belongs include the owner, any part owner, any person having a legal or equitable interest in or claim to the property and any person who, immediately before the offender's application of the property, had control of it.

Property belonging to another

The appellant was specifically charged and convicted under section 383A (1)(a) with dishonestly applying to his own use the amounts of K6000 and K10,000, property belonging to another, being the Government of Papua New Guinea.

The general thrust of the appellant's submissions was that there was no element of criminality of his conduct. The first argument advanced was that the properties in the two cheques and the proceeds thereof belonged to the appellant and not to the

Government of Papua New Guinea. It was submitted that at the moment of the two cheques being handed to the appellant, the properties in them passed to him. The two cheques in the amounts of K6000 and K10,000 were from the National Government. The K6000 cheques was from the Primary Industry Sectoral Fund. It was made out in the name of the appellant. He deposited it with the Mt. Hagen Branch of the Bank of South Pacific in a cheque account styled "Mrs Cathy and Brian Kindi Lawi". The appellant was the sole signatory to the account. The K6000 was to be applied to agricultural projects sponsored by the appellant in his electorate. The cheque for K10,000 was from the 1983 Rural Transport Sectoral Fund for the improvement of Tumun-Anglimp Road, also made payable to the appellant. This was deposited into a passbook savings account styled "Lawi, Brian Kindi – T/F Western Highlands Transport Fund A/C". Again the appellant was the sole signatory.

There cannot be any doubt that the moneys were grants for particular public purposes, with the implied conditions that they be expended on those public purposes. The moneys were most definitely not the appellant's private property to expend on his own purposes or anybody else's as he desired. The two amounts of money were National Government grants and in my view the National Government had a legal and an equitable proprietary interest in them until they were expended on the purposes for which they were granted. Indeed, it is this very argument that this section was enacted to overcome, following the case of *John Kasaipwalova* v. *The State* [1977] P.N.G.L.R. 257. This is specifically provided for in subsection (3)(d):

> (d) persons to whom property belongs include the owner, any part owner, any person having a legal or equitable interest in or claim to the property and any person who, immediately before the offender's application of the property had control of it.

This argument therefore fails, the property in the moneys belonged to the National Government.

Dishonest application

The second ground argued was that there was no evidence that the appellant dishonestly applied the moneys, either to his own use or to the use of any other person or purpose. First, the appellant has not denied that he had withdrawn the moneys from the respective accounts during the period alleged in the indictment. Secondly, he has not denied that no money was expended on road improvements or agricultural projects, that is on any of the purposes for which the grants were made. Thirdly, there is no evidence at all, either from the prosecution or the accused, as to where and how the two amounts of money were expended. In relation to the K6000 deposited in the cheque account, it is possible for the State to produce all the cheques negotiated during the period to suggest or show where the moneys were expended. In relation to the K10,000 deposited in the passbook savings account only the appellant could disclose where and for what purposes he withdrew and expended the money.

The appellant had elected not to explain where and how he had spent the moneys or indeed, if he still had it available, and if so where.

In these circumstances, the appellant has argued that because there is no evidence

as to how he applied the moneys, it cannot be the only conclusion that he therefore applied the moneys to his own use or to the use of any other purpose or person. Furthermore it cannot be the only conclusion that he dishonestly so applied the moneys.

Subsection 3(b) provides a partial answer to this proposition; that:

> a person's application of property may be dishonest even although he is willing to pay for the property or he intends to restore the property afterwards or to make restitution thereof to the person to whom it belongs or to fulfil his obligations afterwards in respect of the property.

The appellant had paid over the K6000 to the Mt. Giluwe Investment Corporation Ltd. after the period in issue. This does not exculpate him.

As I had earlier stated, it is not disputed that the appellant had withdrawn the two sums of money from the respective accounts. The appellant had chosen not to give any evidence as to whether the equivalent of these two amounts were in fact available in another source or account or investment and readily available at a moment's notice to be applied for the purposes for which they were granted.

In the absence of such evidence, which in my view only the appellant could have provided, then a rational and safe inference open to the tribunal of fact was that the two sums of money were applied by the appellant "to his own use or to the use of another person". I do not accept that it is an answer to say, well the State did not ask the appellant. The appellant did not see fit to volunteer any rational explanation. This does not shift the evidentiary onus from the State.

The appellant has argued further that, whichever way he might have used the money, though there is no evidence of any application, because there is no such evidence, he cannot be said to have been dishonest in so dealing with the money, within the meaning of the section.

This submission raises squarely the issue, which hithertofore has not been seriously raised and considered, as to what is meant by the term "dishonestly". As I have suggested already, subsection 3(b) does suggest that the subjective intentions of the person applying the property, that he is willing to pay for the property or intends to restore the property afterwards or to make restitution or to fulfil his obligations afterwards in respect of the property, will not necessarily exculpate him. The application of the property may still be dishonest.

In *R.* v. *Feely* [1973] 1 Q.B. 530, 537-538; [1973] 2 W.L.R. 201, 205; [1973] 1 All E.R. 341, 344-345; 57 Cr. App. R. 312, 317, the Court of Appeal held that:

> ["dishonestly"] in section 1(1) of the [Theft Act 1968] related only to the state of mind of the person who did the act amounting to appropriation, whether an accused person has a particular state of mind is a question of fact which has to be decided by the jury . . . Jurors, when deciding whether an appropriation was dishonest can be reasonably expected to, and should, apply the current standards of ordinary decent people. In their own lives they have to decide what is and what is not dishonest.

Section 1(1) of the Theft Act 1968 (U.K.) is in the following terms:

> A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; . . .

Two Victorian authorities of the Full Court of the Supreme Court have chosen not to follow *R.* v. *Feely,* in relation to the similar provision in the Crimes Act 1958 (Vic.), section 81(1), which provides that:

> A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of a felony . . .

In *R.* v. *Salvo* [1980] V.R. 401, it was held that the

> word "dishonestly" imports, as an element in the offence which the Crown must prove, that the accused person obtained the "property" being property "belonging" to another person, *without any belief that he had in all the circumstances a legal right to deprive the other person of the property.* (My emphasis.)

In *R.* v. *Bonollo* [1981] V.R. 633, it was held that:

> The word "dishonestly" is used not in its ordinary meaning but in a special sense in section 81(1), importing the element that the accused must obtain the property *without any belief that he has a legal right to obtain the property.* A belief by the accused that he had some moral right to obtain the property, or deprive another person of it, will not exculpate him. (My emphasis.)

In *R.* v. *Landy* [1981] 1 W.L.R. 355; [1981] 1 All E.R. 1172; 72 Cr. App. R. 237, the Court of Appeal explained and enlarged upon *R.* v. *Feely* in these terms, at p. 365 (W.L.R.); p. 1181 (All E.R.); p. 247 (Cr. App. R.):

> The dishonesty to be proved must be in the minds and intentions of the defendants. It is to their states of mind that the jury must direct their attention. What the reasonable man or the jurors themselves would have believed or intended in the circumstances in which the defendants found themselves is not what the jury have to decide; but what a reasonable man or they themselves would have believed or intended in similar circumstances may help them to decide what in fact individual defendants believed or intended. An assertion by a defendant that throughout a transaction he acted honestly does not have to be accepted but has to be weighted like any other piece of evidence. If that was the defendant's state of mind, or may have been, he is entitled to be acquitted. But if the jury, applying their own notions of what is honest and what is not, conclude that he could not have believed that he was acting honestly, then the element of dishonesty will have been established. What a jury must not do is to say to themselves: "If we had been in his place we would have known we were acting dishonestly so he must have known he was." *What they can say is:*
>
> > *"We are sure he was acting dishonestly because we can see no reason why a man of his intelligence and experience would not have appreciated, as right minded people would have done, that what he was doing was dishonest."*
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> In our judgment this is the way *R.* v. *Feely* [1973] 1 Q.B. 530 should be applied in cases where the issue of dishonestly arises. (My emphasis).

In the later case of *R.* v. *Ghosh* [1982] Q.B. 1053; [1982] 3 W.L.R. 110; [1982] 2 All E.R. 689; 75 Cr. App. R. 154, the Court of Appeal embarked upon a thorough

examination of the authorities, as at the time there appeared to be two conflicting lines of authority. On the one hand there were cases which decided that the test of dishonesty for the purposes of the Theft Act 1968 (U.K.) was "subjective" – that is to say the jury should be directed to look into the mind of the defendant and determine whether he knew he was acting dishonestly: *R.* v. *Landy.*

On the other hand there were cases which decided that the test of dishonesty is objective. The court after examining the lines of authorities said, at p. 1061 (Q.B.); p. 116 (W.L.R.); p. 694 (All E.R.); p. 160 (Cr. App. R.):

> We feel, with the greatest respect, that in seeking to reconcile the two lines of authority in the way we have mentioned, the Court of Appeal in *R.* v. *McIvor* [1982] 1 W.L.R. 409 was seeking to reconcile the irreconcilable. It therefore falls to us now either to chose between the two lines of authority or to propose some other solution.

The Court in *R.* v. *Ghosh* then examined the following cases which adopted a "subjective" approach: *R.* v. *Waterfall* [1970] 1 Q.B. 148; [1969] 3 W.L.R. 947; [1969] 3 All E.R. 1048; 53 Cr. App. R. 596 with Lord Parker C.J. giving the judgment of the Court; *R.v. Royle* [1971] 1 W.L.R. 1764; [1971] 3 All E.R. 1359; 56 Cr. App R. 131, with Edmund David L.J. giving the judgment of the Court and following *R.* v. *Waterfall, R.* v. *Gilks* [1972] 1 W.L.R. 1341; [1972] 3 All E.R. 280; 56 Cr. App. R. 734, Cairns L.J. giving the judgment of the Court of Appeal upheld the direction of the trial judge in subjective terms. Then *R.* v. *Feely* [1973] 1 Q.B. 530; [1973] 2 W.L.R. 201; [1973] 1 All E.R. 341; 57 Cr. App. R. 312, which was usually cited as having laid down an objective test, but in fact a subjective test, was discussed.

The Court said, at pp. 1063-1064 (Q.B.); 118 (W.L.R.); 696 (All E.R.); 162 (Cr. App. R.):

> This brings us to the heart of the problem. Is "dishonesty" in section 1 of the Theft Act 1968 intended to characterise a course of conduct? Or is it intended to describe a state of mind? If the former, then we can well understand that it could be established independently of the knowledge or belief of the accused. But if, as we think, it is the latter, then the knowledge and belief of the accused are at the root of the problem.
>
> Take for example a man who comes from where public transport is free. On his first day here he travels on a bus. He gets off without paying. He never had any intention of paying. His mind is clearly honest; but his conduct, judged objectively by what he has done, is dishonest. It seems to us that in using the word "dishonestly" in the Theft Act 1968, Parliament cannot have intended to catch dishonest conduct in that sense, that is to say conduct to which no moral obloquy could possibly attach . . . A man's belief and his willingness to pay are things which can only be established subjectively.
>
> So we would reject the simple uncomplicated approach that the test is purely objective, however attractive from the practical point of view that solution may be.

The Court continued, at p. 1064 (Q.B.); p. 118 (W.L.R.); p. 696 (All E.R.); pp. 162-163 (Cr. App. R.):

> In determining whether the prosecution has proved that the defendant was

acting dishonestly, *a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest.* If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.

If it was dishonest by those standards, *then the jury must consider whether the defendant himself must have realized that what he was doing was by those standards dishonest.* In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. *It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest,* even if he asserts or genuinely believes *that he is morally justified in acting as he did.* (My emphasis).

It is true that the English line of authorities have examined all relate to the Theft Act 1968 (U.K.), but I do consider that the discussions on the expression "dishonestly" are highly relevant and indeed quite appropriate and applicable to the same expression in section 383A(1). I consider the principles not inappropriate nor inapplicable to the circumstances of Papua New Guinea and so I would apply them to the consideration of whether in the circumstances earlier described, the appellant can be said to have been "dishonest" in the application of the money.

I consider that according to the ordinary standards of reasonable and honest people from the Western Highlands or indeed Papua New Guineans generally, what the appellant did was dishonest. I consider further that the appellant must have realised that what he was doing was by this standard dishonest. He knew or ought to have known that ordinary people would consider the way he acted to be dishonest. To act in that way knowing that ordinary people would consider it dishonest is dishonest. In the terms of *R.* v. *Landy* (at p. 365), which I adopt,

> I am sure he was acting dishonestly because I can see no reason why a man of his intelligence and experience would not have appreciated, as right minded people would have done, that what he was doing was dishonest.

This ground of appeal is therefore rejected. The appeal against conviction therefore is rejected.

Appeal against sentence

It was submitted that the learned trial judge had erred in taking into account matters upon which there was no evidence and in applying wrong sentencing principles and had thereby imposed sentences which were manifestly excessive. I quote passages of the trial judge's remarks with which issue is taken:

> Instead of applying these funds when they were appropriated to you, *you used them to save yourself bank overdraft charges to prop up your own expensive life style while you were going to make the people wait a few more years for the benefits of the money.* Quite aside from the erosion of the value of the money by inflation the people were deprived from [sic] the ability to earn more from Agricultural projects for two years and have *had to suffer the burden and wear and tear costs for four years longer of a worse road. And there is no doubt about it, these wear and tear costs would be quite considerable over a period of time.* You have therefore effectively stolen from the people and yet you stand up as

their leader and representative. (Emphasis added.)

With respect, I do think the learned trial judge did extend himself into areas on which there was no evidence. There was no evidence as to what purpose the K6000 agricultural grant would be applied. It could not fairly be said that "the people were deprived from [sic] the ability to earn more from agricultural projects". There was no evidence that people "have had to suffer the burden and wear and tear costs for four years longer of a worse road".

The second aspect with which issue is taken is said to be the over emphasis on the fact that the appellant was a Member of Parliament. Again I refer to parts of those remarks emphasizing the view the trial judge took:

> You are a Member of Parliament and therefore as such you direct and expect the country's authorities to do their job. *Yet when they do their duty or try to you do your best to hinder them.* You are a Member of Parliament and as such you expect the Department of Finance of this country and the Police of this country to do their job. *Yet when they try to investigate these moneys for which they are answerable to Parliament you deliberately refused to help them.* Is this good character? Definitely not ... *But no, you ignore your sworn responsibilities to Parliament and refused to co-operate.* Oh yes, you can exercise your Constitutional rights and you don't have to answer any queries from the Police in their investigation. *But what about your declaration of loyalty to the Parliament?* As a Member of Parliament, when you first entered Parliament *you stood up and made a declaration of loyalty in the form in section 6 of the Constitution which includes your promise that you would uphold the Constitution and the laws of Papua New Guinea.* These are not just empty words, they are words with great meaning and import and at a time like this when I am considering your character and anything in mitigation of penalty I must have regard to this declaration by you. *Therefore why should I show you any leniency if you deliberately fail to live up to that sworn declaration made to the people of this country.*

Again, with respect, I consider the learned trial judge has erred in holding against the appellant as it were, the fact that he had exercised his constitutional right not to answer questions put to him by police investigators in an interview. I consider it quite wrong to say that by so declining to answer questions asked in an interview that "you do your best to hinder them", or that "you deliberately refused to help them". Then, I think the learned trial judge fell into further error by confusing the appellant's parliamentary responsibility and obligations with his constitutional rights. The trial judge is in effect saying, "why should I show you any leniency because you chose to exercise your constitutional right". It is wrong to attempt to equate one with the other. It is wrong to make any adverse remarks on sentence because a prisoner or accused has exercised a constitutional right in a particular way. Most unfortunately, the tenor of the remarks I have quoted would appear to convey the impression that, if an accused exercises his or her constitutional right not to answer any questions at all because he or she has not been charged with any offence, then he or she cannot expect to be shown any leniency in relation to punishment. With respect, any remark conveying such an impression has no justification whatsoever. The freedom to exercise this constitutional right cannot be fettered in this way.

In the end result, I consider that the learned trial judge erred in principle and

took into account factors which he ought not to have. The sentences imposed thus manifested the over emphasis placed upon irrelevant factors I have referred to and so should be varied. In relation to the sentence of two years for the first count of misappropriating K6000 I vary and reduce it to a sentence of eighteen months in hard labour, given the fact that the amount has since been paid towards the purpose for which it had been granted. In relation to the sentence of five years for the second count of misappropriating K10,000, I also vary and reduce it to a sentence of three years in hard labour, but I would suspend eighteen months of the three years on condition that the appellant enter into a recognizance in the sum of K300 to be of good behaviour for a period of five years and that he repay to the State K10,000 within seven days. The sentences to be served concurrently.

CORY J.

In this case the appellant appeals against both his conviction and sentence by the National Court on 10 February 1987 upon two charges of misappropriation under section 383A of the Criminal Code (Ch. No. 262), for which he was sentenced to two years' imprisonment on the first and five years' imprisonment on the second count.

The indictment contained two counts:

(1) That between 31 March 1983 and 15 January 1985 at Mt. Hagen the accused dishonestly applied to his own use the sum of K6000 in cash the property of the government of Papua New Guinea.

(2) That between 14 October 1983 and 6 April 1984 at Mt. Hagen the accused dishonestly applied to his own use the sum of K10,000 in cash the property of the government of Papua New Guinea.

The relevant sections of the Criminal Code are as follows:

383A. Misappropriation of property.

(1) A person who dishonestly applies to his own or to the use of another person-
   (a) property belonging to another:
   is guilty of the crime of misappropriation of property.

(3) For the purpose of this Section –
   (a) property includes money and all other property real or personal, legal or equitable, including things in action and other intangible property; and
   (b) a person's application of property may be dishonest even though he is willing to pay for the property or he intends to restore the property afterwards or to make restitution to the person to whom it belongs or to fulfil his obligations afterwards in respect of the property; and
   (c) persons to whom property belongs include the owner, any part owner, any person having a legal or equitable interest in or claim to the property and any person who, immediately before the offender's application of the property, had control of it.

Statement of the facts

Count 1

The Department of Primary Industry's Sectoral Fund released to the B.M.S. Manager, Mt. Hagen K6000 for agricultural projects sponsored by the accused. The

B.M.S. delivered the cheque for K6000 made payable to the accused and the accused deposited the cheque on 31 March 1983 in a bank account with the Bank of South Pacific, Mt. Hagen branch in an account "Cathy and Brian Kindi Lawi". Prior to the deposit of this cheque, this account on 18 March 1983 was in credit to the extent of K1694.19. From 31 March 1983 until 15 January 1985 (the period of the charge) the accused made numerous withdrawals on his account until by 15 January 1985 the account was then only in credit K61.29. There was no evidence what the withdrawals were for, with the exception of an application for a bank cheque for K4990 for the South Pacific Brewery on 31 March 1983 and a cheque for K3735 for the South Pacific Brewery on 8 April 1983. On 5 November 1984 and again on 11 December 1984 the Department of Finance wrote to the accused requesting him to account for the K6000. On 28 February 1985 the accused replied stating "that the K6000 has been received, but still have not utilized it." On 5 November 1985 the accused, from funds outside of the above bank account, paid cash of K6000 to the Mt Giluwa Investment Corporation Ltd. for the purchase of a tractor.

Count 2

The Department of Transport Rural Sectoral Fund in 1983 instructed the B.M.S, Mt Hagen to release K10,000 to the accused for the purpose of the Tuman-Anglimp road project. The accused received the cheque for K10,000 made payable to the Tuman-Anglimp road project and on 14 October 1983 deposited the cheque in a savings account with the Bank of South Pacific, Mt. Hagen entitled "Mr Lawi Brian Kindi t/f Western Highlands Transport Fund Account". Between 14 October 1983 and 26 April 1984 (the period of the charge) the accused made some thirteen withdrawals on his account reducing the credit balance on 26 April 1984 from K12,223 to K23.16. On 1 November 1984 the Department of Finance wrote to the accused requesting him to account for the K10,000. On 28 February 1985 the accused replied to the Department of Finance advising that the K10,000 had not been utilized. The K10,000 was not utilized for the proposed road or any other project up until the date of the trial in February 1987. At the trial the accused admitted that after withdrawing the money he had used it. A few days before trial K10,000 was deposited in the trust account of the appellant's solicitor.

On conviction the appellant argued three grounds of appeal

(1) It was submitted that as the appellant had been charged under section 383A:
   (a) "property belonging to another", that there was no proof that the K6000 and K10,000 was the "property of the Government of Papua New Guinea" within the meaning of the section. The ground does not appear as one of the amended grounds of appeal and no application was made at the hearing to amend the grounds of appeal, but in any event it is covered by subsection (3)(d), the Government of Papua New Guinea would be "a person having a legal interest in or claim to the property, and was also "the person who, immediately before the offender's application of the property had control of it".

(2) The appellant's second ground of appeal is contained in grounds 3(g) and (h), which are as follows:
   (g) at the time of the appropriation to the appellant there was no dishonesty;

(h) there was no deception, deceit, misrepresentation, lack of lawful capacity or dishonest intent at the time of the appropriation or receipt of funds.

The relevant point in time for section 383A(1), is not the time of the receipt of funds by the appellant, but the time that it is alleged he "dishonestly applied [the funds] to his own use". As stated by Glanville Williams *Textbook of Criminal Law* (1st ed. 1978) at p. 374 referring to the English Theft Act 1968, "if he receives the property in good faith, the theft is committed at the first subsequent dishonest and wrongful appropriation", quoted with approval by Southwell J. in *R.* v. *Baruday* [1984] V.R. 685, 691.

(3) The main thrust of the appellant's appeal is contained in ground 1 –

(1) There was no evidence of any dishonest application of funds and further that the learned Judge misdirected himself and took into account the irrelevant considerations or ignored relevant matters.

The remaining grounds amount to an allegation by the appellant that there was no satisfactory evidence that he "dishonestly" applied the funds to his own use. It is proposed to deal with these grounds together.

In relation to the principles which this Court should take on an appeal from a trial judge, I adopt the view stated by Amet J. in *Nambuga Mara* v. *The State* (unreported, S.C. 320 at p. 11): "The principles relevant to the approach which this Court should take in the re-examination of the conclusions of the trial judge upon facts proven before him, or rather inferences of facts from other specific findings or conclusions of facts." [sic] The relevant English and Australian authorities are succinctly summarized by Pratt J. in *Karo Gamoga* v. *The State* [1981] P.N.G.L.R. 443, 454, approving the judgment of Lord Reid in *Benmax* v. *Austin Motor Co. Ltd.* [1955] A.C. 370, 376 [1955] 2 W.L.R. 418, 422; [1955] 1 All E.R. 326, 329:

> But in cases where these is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task though it ought, of course, to give weight to his opinion.

On each count there were two questions to be decided by the trial judge:

(1) Did the appellant apply the money to his own use?
(2) Was the application of the money in the circumstances "dishonest"?

These were questions of fact to be determined by the trial judge. As was stated by Lawton J. in *R.* v. *Feely* [1973] Q.B. 530, 537; [1973] 2 W.L.R. 201, 205; [1973] 1 All E.R. 341, 344-345; 57 Cr. App. R. 312, 317 in dealing with the definition of theft under the Theft Act (U.K.):

(1) a person is guilty of theft if he dishonestly appropriates property belonging to another . . .

In section 1(1) of the Theft Act 1968 the word "dishonestly" can only relate to the state of mind of the person who does the act which amount to appropriation. *Whether an accused person has a particular state of mind is a question of fact which has to be decided by the jury when* there is a trial on

> indictment . . . we do not agree that judges should define what "dishonestly" means.

Although it is apparent from the presiding judge's judgment that he decided each of the above questions in the affirmative and although there was ample evidence in support of those findings, he has not clearly set out what those facts were.

In relation to the first question:

(1) Did the appellant apply the money to his own use?

In each case there were the withdrawals of the money from the bank accounts by the accused reducing the credit balance in each account almost to zero. In the case of the K6000, two of the withdrawals were for large payments to the South Pacific Brewery for an amount in excess of K7800; no explanation was offered by the accused as to what the rest of the withdrawals were used for, from which it was reasonable to infer that, as in the case of the payments to the South Pacific Brewery, the appellant applied the money to his own use. In the case of the K10,000 the appellant admitted that he had used the money from the withdrawals and again in the absence of any explanation by the appellant, it was reasonable to infer that he had applied the money to his own use.

In relation to the second question:

(2) Was the application of the money in the circumstances "dishonest"?

In the case of K6000, the appellant had been given the money to use for agricultural projects in his electorate and in the case of K10,000 for the Tuman-Anglimp road project. In each case the money had not been used for those purposes but had been applied by the appellant to his own use. In each case, when the Department of Finance wrote asking the appellant to account for the money, he falsely replied that the money had not been utilized when he knew in fact that at that point of time it had been utilized for his own purpose. On these facts the appellant's application of the money was clearly "dishonest".

The fact that the appellant may have intended to repay the money later or fulfil his obligation in relation to the money at a later point of time, does not alter the finding of dishonesty, see subsection (3)(b). These findings of fact were sufficient in themselves to support the conviction under section 383A. But the trial judge in his judgment then went on to deal with another "aspect" which he said

> while not really necessary for deciding the guilt of the accused, could be relevant as showing the status of funds and relevant to the time factor as to when the funds should be utilized.

The other "aspect" which the trial judge referred to was that under the Public Finances (Control and Audit) Act, money must be applied in the year that it is appropriated. There was no evidence on this aspect and his Honour was in error in having applied his personal knowledge of the workings of the Finance Department and in treating that as a "further example of the dishonesty in the application of the Government Funds." However, as he had already said that, this was not really necessary for deciding the guilt of the accused.

I would therefore dismiss the appeal against conviction.

[The discussion of the appeal against sentence is omitted; see the judgment of Amet J., *l.* 600.]

Reported by: L.K.