

JERSEY / JUDGMENT

AG v Yuksel 23-Oct-2019 [2019]

JRC 208 (23 October 2019)

[2019] JRC 208

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JUDGMENT

THE BAILIFF: 1. On 8 th October, 2019, I gave an extempore ruling to the effect that the Defendant in this case had, at the end of the Crown's evidence no case to answer. At that time I indicated that I would give fuller reasons before that decision. These are those reasons. 2. The Defendant was charged with nine counts of fraudulent conversion. She had originally been charged with an additional count of fraud but that count was withdrawn prior to the commencement of the trial and the Crown offered no evidence. Only 9 counts appeared on the billet . 3. The essence of the Crown's case with regard to each of the 9 counts on the indictment was that customers of the Defendant's companies, Parisma Limited or Logistics to Go Limited, paid substantial sums of money to those companies for used clothes, used shoes, or used handbags for onward sale in foreign countries predominantly in Africa. The sums of money paid either consisted of a substantial sum by way of deposit or the entirety of the purchase consideration. Payment of the sums in advance secured for the purchasers a significant discount. 4. It was also part of the Crown's case that the Defendant, who at the material time had exclusive control of the bank accounts of her two companies, converted that money paid into these accounts by using it to pay the debts of Parisma Limited and/or Logistics to Go and, on some occasions, for her own personal purposes. The debts of Parisma Limited included payment for wages and rent and, in the case of money used for the Defendant's own purposes, for her rent and other living expenses. 5. In some instances where the money was received by Parisma Limited, the company's bank account was in credit and in other instances it was overdrawn and the payment received from the prospective purchasers either reduced or for a time extinguished the overdraft. 6. The evidence from each of the prospective purchasers (being the complainants in each count) and from another three witnesses whose evidence was allowed in by way of similar fact and/or background evidence was that they had discovered Parisma Limited by its website, had made contact, had dealt in the most part with the Defendant, and had paid a deposit or full consideration in the way that I have set out above. Sometimes the money came from the complainants themselves, sometimes through them from companies that they owned, and sometimes it was accumulated by them in part at least by monies from other persons for whom they were buying the items in question. Sometimes it represented charitable money. 7. In each case Parisma Limited produced a pro-forma invoice summarising the transaction and describing

the full consideration and/or the amount of any deposit and discount. On each of the pro-forma invoices there was reference to Parisma Limited's terms and conditions which were said to apply to the transaction (whether the transaction was with Parisma Limited or Logistics to Go Limited) and which could be viewed online. Some of the complainants confirmed that they had read the terms and conditions but most had not although they had read those conditions that were expressly set out in the pro-forma invoices. In any event, the terms and conditions were clear that in the event of a cancellation of the order Parisma Limited would retain a substantial percentage of any monies paid and that there would be no refunds. The pro-forma invoices also stated a time which the orders that they covered would be sent out. 8. The evidence was to the effect that the companies Parisma Limited and/or Logistics to Go Limited had either failed entirely to provide the items which they had contracted to provide, or the full quantity of the items ordered or items of the correct specification as to quality. Furthermore, that with some minor exceptions, no refunds had been provided by those companies. 9. The evidence also suggested that the Defendant had personally interacted with most of the complainants in connection with their orders, had discussed discounts and the like with them, and had chased for monies to be paid. After the full monies had been paid, the Defendant then became very difficult to contact by the complainants. 10. That is a summary of what I take to be the key evidence that was before the jury at the conclusion of the Crown's case. At that point, counsel for the Defendant made a submission of no case to answer. 11. He submitted that the Crown had not proved the "actus reus" of the offence of fraudulent conversion. It was submitted that the prosecution must prove:- (i) That some property belonged to a named complainant; (ii) That the property was identified and had been entrusted for a specific and defined purpose and subject to conditions as to its use; (iii) That the Defendant, contrary to terms or which the money was entrusted to her, instead used it for her own purposes - she had in other words usurped the right of the owner named in each count. 12. The defence first advanced an argument that when one is considering the transfer of monies from one bank account (that of the complainants) to the bank account of Parisma Limited there is not as such a transfer of property. When the money left the complainants' bank account, so it was argued, what had happened was that the chose in action that the complainant held against his bankers for the payment of that sum had been extinguished and when the money was paid into, for example, the account of Parisma Limited what had been gained was a chose in action against the bank for that sum of these companies (on the assumption that it comprised a credit balance). In support of this argument, the Defendant put before me the case of *R v Preddy*

[1996] AC 815, a decision of the House of Lords concerning Section 15(1) of the Theft Act 1968.

In that case Their Lordships were considering whether or not it could, in the words of that statute, be said that the defendant had obtained "property belonging to another". I do not propose to deal with this argument further as this case deals with the interpretation of a specific statutory provision in the laws of England and Wales which is not the same as the definition of fraudulent conversion in this jurisdiction. 13. The definition of the crime of fraudulent conversion is to be found in the case of *Marriott v AG* [1987-88] JLR 285, a judgment of our Court of Appeal, in which Le Quesne JA said this:- "... Fraudulent conversion is not in Jersey a statutory offence. What has happened has been that the

provisions of the statutes which created this offence in England have been assimilated and made part of the law of Jersey and those provisions which are statutory in England here have effect as part of the common law of the Island. It is therefore necessary to see what provisions are governing the offence of fraudulent conversion in England. They are set out in S20 of the Larceny Act 1916. I say they are set out; since the passing of the Theft Act 1968 this statute is no longer in force in England, but it still operates here as a result of the process I have described as part of the common law. It reads as follows:-

- (1) Every person who - ... (iv) (a) being entrusted either solely or jointly with any other person with any property in order that he may retain in safe custody or apply, pay, or deliver for any purpose or to any person the property or any part thereof or any proceeds thereof; or
- (b) having either solely or jointly with any other person received any property for on account of any other person; fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property or any part thereof, or any proceeds thereof; shall be guilty of a misdemeanour ..." 14. In that case the Court was considering whether the defendant, who was the curator of his mother, could have fraudulently converted the property in question. 15. As part of its deliberations, the Court quoted from English case law as follows:- "We start with the case of *R v Grubb* which was decided in 1915. This was a case of a man who formed a company to carry on the business of stockbroking. Certain sums of money and certain stocks were entrusted to the company so that on behalf of the owners they might either use the money for buying stock or might sell the stock entrusted to them and use the proceeds for buying other stock. A passage from the judgment of Lord Reading CJ reads as follows (11 Cr. App. R at 157): 'The first point to be decide in this case is whether there was evidence that the appellant was 'entrusted' with the property in question or whether he received it for or on account of any other person. This Court has no doubt that if the appellant was entrusted with the property or if he received it there was evidence that he fraudulently converted it to his own use or benefit. In the opinion of this Court a person may be entrusted with property or may receive it for or on account of another person within the meaning of this section, notwithstanding that the property is not delivered to him directly by the owner and that in fact the owner does not know of his existence and has no intention of entrusting the property to him. If the accused has obtained or assumed the control of the property of another person in circumstances whereby he becomes entrusted or whereby his receipt becomes a receipt for or on account of another person and fraudulently converts it or the proceeds, then he has committed an offence within the section.'" 16. In its conclusion, the Court said:- "It appears to us that there can be no question that the appellant was within the meaning of the word entrusted with the property of his mother. He was placed by the order of the Royal Court in the position in which he had the complete control and management of his mother's property and affairs, subject to a liability to deliver proper accounts to show how he had dealt with it. And, as sections of the law which I have read show, the property was entrusted to him in order that he might manage it for certain purposes set out in the law, the maintenance of other benefit of the interdict and so on." 17. The Court then went on to quote from further English authority, *Rogers v Arnott*

[1960] 2 Q. B. 244, about which the Court said:- "This was a case before the Divisional Court of the Queen's Bench Division in which, in somewhat complicated circumstances which it is not necessary to detail, it was necessary for the court to consider whether an attempted but abortive sale could constitute a fraudulent conversion. It is sufficient to refer to a paragraph in the judgment of Donovan J, as he then was ([1960] 2 All ER at 420):- 'It would be rash, I think, to attempt a definition of the term 'converts to his own use' which would cover every possible case. A sale of the property by the bailee contrary to the terms of the bailment, and for his own benefit, is clearly such a conversion. The reason is that the bailee in such a case has usurped the rights of the owner for his, the bailee's benefit. Is the position any different in the case of an attempted sale? I think not. If I am lent property, and then determine in my own mind to sell it for my own benefit contrary to the terms of the bailment, I have determined that in relation to the property, I will no longer be a borrower but an owner, and an owner who wishes to sell. When I proceed to carry that the intention into effect by offering the property for sale, I am standing in the owner's shoes in relation to that property and exercising an owner's right. In these circumstances I have in my view already converted the property to my own use whether the attempted sale takes place or not. And if I have acted dishonestly in the matter, as the respondent here is found to have done, then the offence of larceny is committed.'" 18. Counsel for the Defendant submitted that in the circumstances the monies received by Parisma Limited and/or Logistics to Go Limited were received in the ordinary course of the business of those companies as payment, in advance, for items of a particular type or quality which the companies were in the business of selling. This was a simple payment in the normal course of business in return for which the complainants acquired a right to sue the companies under the contract of sale and subject to the terms and conditions. It could not be said, so it was argued, that the monies had any other character in the sense that they were not entrusted to the Defendant to be used for a specific purpose, i.e. the purchase of particular stock to fulfil those orders. The defence further argued that such could not be conceivably be the case where the full amount of the purchase considerations had been paid which much have contained an element of profit which the companies must have been free to use as they wished. This factor showed what the nature of the payment was - it was simply a payment for goods that were in the event not provided at all or not provided adequately. The money received was not held for the benefit of the customers. 19. The Defendant also argued that inevitably where the money was paid into an account which was overdrawn what it was doing, in effect, was reducing the overdraft of the company and not being used for any other purpose. It could not be, so it was submitted, that anyone trading with the benefit of overdraft was committing potentially the offence of fraudulent conversion if monies they received in the course of their ordinary business was paid in to the account that was overdrawn and not used specifically to acquire stock to fulfil the specific order in respect of which the money was paid. 20. The Defendant then went through the evidence tendered on each of the counts on the indictment and submitted that there was no evidence that any of the money paid by the complainants to Parisma Limited and/or Logistics to Go Limited was paid for a specific identified purpose

other than the normal consideration for the purchase of certain stock. 21. The Crown in argument said that the Court should focus on the elements of the offence and some of the defence's characterisation of those elements, particularly where it was suggested, as the defence had, that what the Crown must in some way show was an in rem claim against the monies paid was wrong. Criticism was also made of the case of *Preddy* and that in any event there could be no suggestion that the chose in action could not be property within the meaning of the definition of fraudulent conversion. 22. Primarily the Crown submitted that the jury could look at all of the circumstances including part of one of the Defendant's question and answer interview, which had been placed before the jury in which the following exchange was put to the Defendant:- "Question: See you haven't just used that money specifically to buy that order, its also for other things regarding Answer: Well there's always a contribution to the company Question: Hmm hmm Answer: But you know you've got to buy the goods ..." 23. This, it was submitted, was something that the jury could have taken into account in assessing whether or not there had been an entrustment. I cannot agree. The most that that question and answer illustrated was the fact that the Defendant accepted that the companies received money and that at some point money would need to be expended to acquire goods to fulfil the order. That does not in my judgment amount to evidence at all for an entrustment of the specific sums in question. 24. The Crown further submitted that there did not need to be a fiduciary relationship nor did, in the words of the case cited in *Marriott* above, there need to be an assumption of the rights of the owner. 25. For the reasons set out above I accepted the arguments of the Crown on the case of *Preddy* and on whether or not money in a bank account could be the subject of a charge of fraudulent conversion. In my judgment the expression " any property " is wide indeed and can encompass in ordinary parlance monies held in a bank account. 26. What is clear from *Marriott* , however, that what is required is that the Defendant has been " entrusted ". This word must have a meaning above and beyond simply receiving money in the ordinary course of business of sale and purchase. It seems to me that the word " entrusted " suggests that the money is held for a particular purpose. It does not in my judgment need to be held pursuant to a trustee type or fiduciary relationship and there may be a number of different ways in which money can be so held. However, there must in my judgment be a purpose which is beyond the simple business use of the recipient company. The holder of the property must be obliged to use it in a particular way and one can readily see that in the case law examples of, say, solicitor and client, estate agent with regard to a deposit, a factor receiving money which needs to be accounted to his principal and, as in the case of *Marriott* itself, a curator these are clear examples of money entrustment. 27. In this case, however, I do not think that simply being the recipient of money in the ordinary course of business in return for which goods to be provided can be an entrustment. An example from Archbold (36th edition), being the most recent edition of Archbold deals with the Larceny Act of 1916 at paragraph 1916 is to be found under the heading " Receipt " where the learned author states:- "On a mere contract of sale and purchase of shares and the payment of money by the purchaser to the vendor, followed by a failure on the part of the vendor to deliver the shares, there is not an

entrusting of the money to the vendor within the meaning of sub-section 1(iv)(a). But where there is no company, and therefore no shares in existence at the time of the agreement between the parties, and the recipient of the money undertakes to a lot shares in the company when formed to the persons who had paid the money, it is open to the jury to find that the money was paid in order to assist the promotion of the company, and this would be an entrusting of the money for the purposes of applying it a particular way within the meaning of the sub-section." 28. The case cited within Archbold for the above proposition is *R v Laurens* [1916] 11 Cr. App. R215, a decision of the Court of Criminal Appeal of England and Wales. I will not cite the text of that judgment which does not appear to me to go beyond the principle set out in Archbold quoted above. 29. This, it seems to me, illustrates that when dealing with a simple sale and purchase as, in my judgment, the transaction between the complainants and Parisma Limited and/or Logistics to Go Limited was, on the payment of money for the purchase of the items in question there was no entrustment. There was no evidence before the jury that the monies paid to Parisma Limited and/or Logistics to Go Limited had been paid to be used in a specific way other than as simple consideration for a contract of sale and purchase. Absent any material which a jury could reasonably infer an entrustment for a particular purpose, the Crown could not hope to establish one of the elements of the offence of fraudulent conversion. 30. For those reasons I allowed the submission of no case to answer and directed the jury to return verdicts of not guilty to each of the counts. 31. In explaining the position to the jury, I made reference to other offences such as "fraud" and "obtaining money by deception" or similar. I had done so in order to illustrate to the jury that I had to consider the elements of a particular offence, namely that of fraudulent conversion. In the media reports of what I said to the jury my expression has been taken as suggesting that the Defendant should have been charged with offences other than fraudulent conversion and the implication from that would be that she might be guilty of those offences. That was not my intention and I regret that I used the words that I did as they have given rise to the inference that I thought that the Crown had missed other opportunities for charges or that in some way the Defendant might be guilty of other offences not charged. I did not intend to express that opinion. 32. The Defendant is innocent of all charges until proven guilty and I simply would not have had enough information before me to draw any conclusion that the Defendant might be guilty of any other offences for which she had not been charged. I therefore take the opportunity to correct that assumption. I express no opinion on that issue at all. Authorities *R v Preddy*

[1996] AC 815 . Theft Act 1968. *Marriott v AG* [1987-88] JLR 285. *Rogers v Arnott* [1960] 2 Q. B. 244. Archbold Criminal Pleading, Evidence and Practice 36 th Edition. Larceny Act 1916 Page Last Updated: 24 Oct 2019 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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Prepared on 23 October 2026 · Esheria