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*Mar. 13, 14
Mar. 26

FREDERICK J. COWAN .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Forgery—Forged endorsement of cheque—Intent to prejudice—Defence of authorization—Admissibility of evidence—Criminal Code, 1953-54 (Can.), c. 51, s. 309(1)(a).

The accused, a solicitor, acted for Mrs. F in an expropriation proceeding and for that purpose retained the services of O, a real estate consultant. O submitted an account of $300 to the accused who forwarded it to Mrs. F. The latter caused her daughter to deliver to the accused a cheque payable to O in that amount. The accused endorsed the name of O on the back of the cheque and cashed it. A letter from Mrs. F, dated some months later, addressed to O, in which she expressed her surprise to learn that he had not been paid by the accused, was admitted in evidence. Subsequent to this letter the accused sent his cheque to O, but it was not honoured. Mrs. F testified, in cross-examination, that her daughter had reported to her some two weeks after the delivery of the cheque that she had told the accused at that time that he was free to do as he wished with the cheque.

The defence was that the accused was authorized to endorse the cheque and that O was eventually paid at a later date. The accused was convicted of forgery, and his appeal was dismissed. He was granted leave to appeal to this Court.

Held (Cartwright and Ritchie JJ. dissenting): The appeal should be dismissed.

Per Taschereau, Fauteux and Judson JJ.: There was no admissible evidence in the record to support the defence of authorization and the facts indicated that that defence was ill-founded and was an afterthought. Even if the hearsay evidence given by Mrs. F concerning the authorization to deal with the cheque was properly before the jury, it provided no answer to the charge. Nothing that went on between the accused and Mrs. F's daughter could authorize the accused to sign O's name on the back of the cheque. When the accused signed O's name as endorser, he did so to the prejudice of O and the offence was proved. The accused made a false document knowing it to be false with the intent that it should be acted upon as genuine to the prejudice of O. It made no difference that O was eventually paid and that if things had been done another way the accused might have had a defence. Nor did it matter that when this cheque was in the accused's hands with instructions for delivery countermanded, if they were, O could not have successfully sued for its delivery.

Per Taschereau and Fauteux JJ.: The only material in the record to support the defence of authorization was that conversation between Mrs. F and her daughter and that evidence was inadmissible as hearsay evidence. The fact that there was no objection to it was entirely immaterial, because the absence of objection did not give it any probative value. There was consequently no evidence whatever in the record to support this alleged defence. It could not be said that the accused, in the circumstances of this case, could honestly have thought that the admission of that hearsay evidence made it unnecessary for him to testify or to call Mrs. F's daughter to give evidence. As to the letter by Mrs. F to O, it was inadmissible. However, it became immaterial as it could not be held to contradict a fact which was not proved.

Per Cartwright and Ritchie JJ., dissenting: The trial judge improperly admitted in evidence the letter from Mrs. F to O and this resulted in a substantial wrong or miscarriage of justice.

This appeal should be dealt with on the basis that the hearsay evidence given by Mrs. F concerning the accused's authority to deal with the cheque was properly before the jury. That evidence was put in without objection and was treated by the trial judge and by both counsel at the trial as being properly before the jury. Had it not been so treated it was possible that the daughter would have been called as a witness and that the accused would have given evidence. It was open to the jury on that evidence to find that Mrs. F had in fact given the accused authority to cash the cheque or to deal with it as he saw fit, and that on that view it was open to them to find that an intent to prejudice O had not been established; and that was the real defence which the trial judge failed to put to the jury. But the inadmissible letter of Mrs. F, which was objected to by defence counsel, would almost certainly prevent the jury from taking that view of the evidence.

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APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming the conviction of the accused on a charge of forgery. Appeal dismissed, Cartwright and Ritchie JJ. dissenting.

E. P. Hartt, for the appellant.

John J. Freeman, for the respondent.

The judgment of Taschereau and Fauteux JJ. was delivered by

FAUTEUX J.:—I agree with my brother Judson and only wish to express my views as to one particular aspect which, with deference, is fatal to this appeal.

The defence raised by the appellant is that Mrs. Finlay expressly authorized him to deal as he saw fit with the cheque made by her to the order of Outram. The only material in the record that can possibly be referred to, in an attempt to support the fact that such authority was ever given to or received by appellant, is that part of Mrs. Finlay's testimony where, in cross-examination by counsel for the accused, she relates a conversation she had with her daughter Mary some two weeks after remittance of this cheque by the latter to the appellant:

> Q. Would you tell his honour and the gentlemen of the jury what that conversation was.
>
> A. She came home and she said that Fred needed money, and she said: "Mother, I told him to go ahead and cash the cheque. Is that all right?", and I said: "I guess it is" because we owed him money too.

Admittedly such evidence is inadmissible as hearsay evidence. The fact that there was no objection to it is entirely immaterial: *Schmidt v. The King*[2]. The absence of objection does not give this hearsay evidence any probative value. This part of Mrs. Finlay's testimony is no evidence of the truth of what her daughter told her and *a fortiori* of what her daughter reported as having been told by appellant. There is consequently no evidence whatever in the record to support this alleged defence advanced on behalf of appellant.

It is said, however, that this inadmissible evidence having been admitted and dealt with at trial as if it were admissible, the accused, for that reason, may well have honestly

[1] (1962), 131 C.C.C. 305, 36 C.R. 313.
[2] [1948] S.C.R. 333, 92 C.C.C. 53, 6 C.R. 317, 4 D.L.R. 217.

considered that there was no need for him to testify or call Mrs. Finlay's daughter to give evidence supporting this alleged defence of authorization. Assuming that such an argument could be put forward in a proper case, in my opinion, it cannot be said that the accused could honestly have thought that the admission of that hearsay evidence made it unnecessary for him to testify or to call Mrs. Finlay's daughter to give evidence. For, at the close of the case for the prosecution, the record contained evidence elicited by cross-examination of Mrs. Finlay by his own counsel, which clearly indicated that she never gave such an authorization. The evidence shows that after several attempts to obtain payment of his account, Outram received this letter dated July 13, 1959, from the appellant:

Suite 33-34
74 Sparks St.
Ottawa 4, Ontario

Office: CE2-2341
CE2-2350

FREDERICK JAMES COWAN
Barrister Solicitor Notary Public
Supreme Court and Parliamentary Agent

July 13, 1959.

Mr. A. A. Outram,
175 Rumsey Road,
Toronto, Ontario.

Re: *Cora Finlay Expropriation*

Dear Sir:

I enclose herewith my cheque in the amount of $300.00 in payment for your services in regard to the above matter.

I apologize for the delay in this matter and I was under the impression that you had been paid.

Perhaps the mix-up was due to my change in offices as I am unable to find the above client's file. In any event I apologize for any embarrassment that may have been caused to you in the above entanglement.

Sincerely yours,

ss/fc

Frederick J. Cowan

Attached to this letter was a cheque for $300 dated July 10, 1959, drawn on the Toronto-Dominion Bank in Ottawa-South, payable to the order of A. A. Outram and signed Ronco Auto Parts Reg'd, per: Frederick Cowan. On this cheque appeared the notation: "Re: Finlay". Having been endorsed and deposited by Outram, it was returned marked

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"Not sufficient funds". When cross-examined on this matter by counsel for the accused, Outram gave the following evidence:

Q. Did you telephone Mrs. Finlay and advise her of that fact—that is, Mrs. Cora Finlay?

A. Yes, I advised her after the cheque was returned N.S.F.

Q. In that telephone conversation you had with her do you recollect whether or not you told her that she was dealing with crooks, and you were going to retain your own lawyer when he came back from his holidays?

A. I don't remember the first part because I think perhaps she knew it and told me, because she started telling me immediately: "Well, I have paid him long enough ago the money to give you", but as nearly as I can remember I said: "I am . . ."—yes: "If I am not paid very soon I will take it up with my lawyer", who was Mr. John Arnup of Mason, Foulds, Arnup, Walter and Weir, and I think I said I would take it up with the Bar Association if I did not get it in due course.

Q. Your recollection is that you intimated to her that you were going to take it up with your own solicitor?

A. Yes.

Q. But you have no recollection of saying she was dealing with crooks?

A. No, I think she brought that point out instead of me when she said she had given him the money long ago.

Subsequent to this testimony and again in cross-examination by counsel for the appellant, Mrs. Finlay was referred to this telephone conversation related by Outram and gave the following testimony:

Q. Mrs. Finlay, Mr. Outram, a prior witness, has testified that he made a telephone call to you after a certain cheque forwarded to him was returned N.S.F. In that telephone call did you refer to anybody as a crook?

A. Oh, no, I don't think so.

This answer is a clear admission that she had that telephone conversation with Outram and that the only part thereof which remained open to question was whether she had referred to anybody as a crook, to which she answered she did not think so. This telephone conversation is evidence that Mrs. Finlay never gave the authorization contended for and, with deference, it cannot be contended that the accused could sincerely and honestly have thought that there was no need for him to give or call evidence to show that he had received from Mrs. Finlay the alleged authorization.

With respect to the letter written on the 7th of July 1959 by Mrs. Finlay to Outram, wherein the former expressed to the latter her surprise to learn that he had not been paid by Cowan, I agree that it was inadmissible. However, holding the view that there was no evidence at all to establish that appellant had received authority to deal with this cheque as he saw fit, this letter became immaterial as it could not be held to contradict a fact which was not proved.

For the reasons of my brother Judson and those here given, I would say that there is no substance in this appeal from the unanimous judgment of the Court of Appeal for Ontario and that it should be dismissed.

The judgment of Taschereau and Judson JJ. was delivered by

JUDSON J.:—The appellant was convicted of forgery under s. 309(1)(*a*) of the *Criminal Code* and his conviction was affirmed on appeal. The precise form of the count in the indictment on which he was convicted was that he did

> forge an endorsement on a certain document, to wit, a cheque drawn on the Royal Bank of Canada, Perth Ontario Branch, dated Perth, January 23rd, 1959, to the order of A. A. Outram, for $300.00, with intent that the same should be used or acted upon as genuine, to the prejudice of the said A. A. Outram, contrary to Section 310(1) of the Criminal Code.

The defence was that the Crown failed to prove that the accused had the necessary intent required by s. 309(1)(*a*) of the Code, which reads:

> 309. (1) Every one commits forgery who makes a false document, knowing it to be false, with intent
>
> (*a*) that it should in any way be used or acted upon as genuine, to the prejudice of any one whether within Canada or not.

Cowan was a solicitor practising in the City of Ottawa. He acted for Mrs. Finlay in an expropriation proceeding and for that purpose retained the services of one Outram as an expert witness. On completion of his work, Outram sent to Cowan his account for $300. Mrs. Finlay then drew a cheque payable to Outram for $300 for payment of this account. She had her daughter take the cheque to Cowan's office. Cowan signed Outram's name on the back of the cheque and obtained cash from the Plaza Hotel. The hotel endorsed the cheque and it was duly paid by the bank on which it was drawn.

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The defence is founded on the fact that Mrs. Finlay was in some doubt between Outram and Cowan as the proper payee of the cheque; that her daughter had reported to her, some time after the delivery of the cheque to Cowan, that she had told Cowan, at the time of delivery, that he was free to do as he wished with it. Mrs. Finlay acquiesced in what her daughter had done because she owed Cowan money for his account, not yet rendered, in the expropriation proceedings.

This evidence came out in a very peculiar way. Neither Cowan nor the daughter gave evidence and therefore there was no admissible evidence that any such conversation ever took place between the daughter and Cowan. The trial judge might well have ruled out this evidence of the mother. It is indeed very doubtful whether any such authority was given to Cowan, for many months later when Mrs. Finlay received a letter from Outram stating that his bill still remained unpaid, she replied that she thought it had already been paid and that she had sent a cheque to Mr. Cowan a long time ago. This indicates that the defence of an authorization was ill-founded and was an afterthought. Why would Mrs. Finlay say that she had sent a cheque to Cowan to pay this bill if she had authorized Cowan to use the cheque for his own purposes? But this letter from Mrs. Finlay to Outram was also inadmissible.

I would, however, deal with this appeal on the basis that the hearsay evidence given by Mrs. Finlay concerning Cowan's authority to deal with the cheque was properly before the jury. In my opinion it provides no answer to the charge. There was an existing indebtedness between Mrs. Finlay and Outram and the cheque, in the first place, was given to pay that indebtedness. As it was issued this cheque could only be negotiated by Outram and it was not so negotiated. Nothing that went on between Cowan and Mrs. Finlay's daughter could authorize Cowan to sign Outram's name on the back of the cheque. If the cheque was to be used at all in the form in which it was drawn, there could be only one endorser, namely, Outram. When Cowan signed Outram's name as endorser, he did it to the prejudice of Outram and the offence is proved. Cowan made a false document knowing it to be false with the intent that it should be acted upon as genuine to the prejudice of Outram. If there was error in the direction of the learned trial judge to

the jury on this point, it was error in favour of Cowan when he told the jury that if Cowan had reasonable grounds to believe that he was authorized to act as he did, then they must acquit. The proper instruction would have been that there was no evidence before the jury that Cowan had any ground for belief that he was authorized to deal with the cheque as he actually did, that this authority could not come from Mrs. Finlay, and that it was quite clear that it did not come from Outram.

It makes no difference that Outram was eventually paid and that if things had been done another way Cowan might have had a defence. If, in fact, Mrs. Finlay's instructions to deliver the cheque to Outram were countermanded and Cowan was authorized to deal with the cheque as he chose, he might have inserted his own name as payee and crossed out Outram's name or he might have made the cheque payable to bearer or he might have destroyed it.

Nor does it matter that when this cheque was in Cowan's hands with instructions for delivery countermanded, if they ever were, Outram could not have successfully sued for delivery of the cheque. This cheque was an unconditional order in writing drawn by Mrs. Finlay and addressed to the bank to pay to the order of Outram, who was her creditor. It was not made payable to a fictitious or non-existing person. In the form in which it was drawn it could only be endorsed by Outram. Outram's signature was endorsed by Cowan and this act, as the Court of Appeal has held, was to the prejudice of Outram.

The appeal should be dismissed.

The judgment of Cartwright and Ritchie JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—The facts out of which this appeal arises are stated in the reasons of my brother Judson which I have had the advantage of reading. I think it desirable, however, to set out the words in which Mrs. Finlay related the circumstances surrounding the drawing of the cheque and its delivery to the appellant.

Mrs. Finlay was called by the Crown. In her examination in chief, she stated that her daughter Mary was present when she drew and signed the cheque, that she had not

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received a bill from Cowan for his services but understood his charges would be in the neighbourhood of $500. Her evidence in chief continues as follows:

The WITNESS: I didn't really owe Mr. Outram money. It was Mr. Cowan. Mr. Outram never really billed me, but we owed him money, and I had a little discussion with my daughter as to who I should make the cheque out to, and she said: "Mother, we owe both of them money", and she said: "Make it out to Mr. Outram, and if Fred wants it he can have it". He had a power of attorney.

* * *

Q. Coming back to the cheque in question, Mrs. Finlay, the name "A. A. Outram" is written very legibly on this cheque. When you made it out to whom did you make it out at that time on January 23, 1959?

A. I made it out to that name; Mr. Outram.

Q. Then what did you do with the cheque?

A. I gave it to my daughter and she brought it into Ottawa.

Q. Did you give her certain instructions when you gave it to her?

A. I said: "Give that to Mr. Cowan, and he will do with it as he sees fit".

Q. As he sees fit?

A. Yes.

* * *

In cross-examination, Mrs. Finlay gave the following evidence:

Q. And to make it abundantly clear, Mrs. Finlay, in the first instance you would have had no objection at all to making the cheque for $300, Exhibit No. 5, payable to Mr. Cowan, or to Mr. Cowan using it?

A. No; how could I have?

Q. Because you owed him money?

A. Yes, because I owed him money.

Q. And in the second instance, even though you made the cheque payable to A. A. Outram, and it was given to Mary to give to Mr. Cowan, you had no objection, and still have no objection, to Mr. Cowan's having negotiated it by putting down Mr. Outram's name?

A. No, neither has Mr. Outram.

Q. You were not done out of it, and Mr. Outram has been paid?

A. That is right. I cannot see the point of it.

* * *

Q. You told us that about two weeks later Mary came back to Perth?

A. Yes.

Q. Did you have a conversation with her over this cheque, Exhibit No. 5?

A. Yes.

Q. Would you tell his honour and the gentlemen of the jury what that conversation was?

A. She came home and she said that Fred needed the money, and she said: "Mother, I told him to go ahead and cash the cheque. Is that all right"?, and I said: "I guess it is" because we owed him money too.

Q. That was the conversation?

A. Yes.

Q. So two or three weeks after you gave the cheque to Mary you knew Mr. Cowan had gone ahead and cashed the cheque?

A. That is correct.

Q. Did Mary look after most of your business interests in Ottawa?

A. Yes, she did.

Q. And did she have general authority to look after your business interests in Ottawa?

A. Yes.

Q. And as far as you were concerned did Mary have the authority to authorize Mr. Cowan to negotiate the cheque?

A. Well, as I told her so I guess she had.

While some of this evidence may have been admissible to prove the extent of the authority which Mrs. Finlay had given to her daughter, Mary, it was not admissible to prove the conversation between Mary and Cowan alleged to have taken place at the time the cheque was delivered to him. However, in the peculiar circumstances of this case, I think that we should deal with this appeal on the basis, set out in the reasons of my brother Judson, that the hearsay evidence given by Mrs. Finlay concerning Cowan's authority to deal with the cheque was properly before the jury.

I reach this conclusion for the following reasons. Mrs. Finlay's evidence quoted above was put in without objection and was treated by the learned trial judge and by both counsel at the trial as being properly before the jury. Had it not been so treated it is possible that the defence would have called Mary as a witness and that the appellant would have given evidence. It would be contrary to the manner in which the trials of criminal cases are conducted to tacitly treat evidence favourable to an accused as being properly before the court and later to reject it after the opportunity to supply admissible evidence of the same facts has passed.

On the other hand, the admission of the letter dated July 7, 1959, written by Mrs. Finlay to Outram was objected to by defence counsel and, after some discussion in the absence of the jury, was admitted notwithstanding his objection.

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In my view, it was open to the jury on the evidence quoted above to find that when, through the agency of her daughter, Mrs. Finlay handed the cheque to Cowan she, through the same agency, not only refrained from instructing him to deliver it to Outram but expressly authorized him to cash it or deal with it in such other manner as he saw fit.

Of course such an authorization given by the drawer of the cheque would not have given Cowan the right to sign the name of Outram as endorser but it would have given him the right to make the cheque payable to bearer and to cash it, or the right to destroy it or to return it to Mrs. Finlay and ask her to send him another cheque payable to himself. On the suggested view of the facts, which it was open to the jury to take, Outram had no property interest in the cheque and no right to require Cowan to deliver it to him. He was no more delayed or prejudiced in fact by Cowan having endorsed his name than he would have been if Cowan had adopted any of the other permissible courses suggested above.

With the greatest respect, it appears to me that the learned trial judge failed to put the real theory of the defence adequately to the jury. The case was put to them as if the main question was whether Cowan believed on reasonable grounds that he had the right to endorse Outram's name on the cheque, whereas the theory of the defence was that although Cowan, of course, had no right to sign Outram's name and did in fact sign it, he did so without any intent to prejudice Outram.

I have already expressed my opinion that it was open to the jury on the evidence to find that Mrs. Finlay had in fact given Cowan authority to cash the cheque or to deal with it as he saw fit and that on that view it was open to them to find that an intent to prejudice Outram had not been established; but the inadmissible letter of Mrs. Finlay of July 7, 1959, would almost certainly prevent the jury taking the view of the evidence which I have just suggested.

The Court of Appeal rightly held that the letter was clearly inadmissible but concluded that its admission did not result in any substantial wrong or miscarriage of justice. With respect, I cannot share that view. The letter would tend to make the jury reject the only view of the evidence upon which the appellant might have been acquitted.

I do not intend to suggest that the jury should have drawn from the evidence the view of the facts favourable to the appellant which I have outlined above but it was open to them to do so, and they may have regarded the inadmissible letter as decisive against this view.

I find it necessary to base my judgment on only one of the grounds on which leave to appeal was granted, that is ground number 5 which reads:

> That the Learned Trial Judge erred in directing the Jury that they were entitled to rely on the truth of the contents of Exhibit 10 (the letter of July 7, 1959) when in fact it was not properly in evidence at the trial for that or any other purpose.

For the above reasons, I would allow the appeal and quash the conviction. As it is the view of the majority of the Court that the appeal fails nothing would be gained by considering what further order should have been made had the appeal succeeded.

Appeal dismissed, CARTWRIGHT *and* RITCHIE JJ. *dissenting.*

Solicitor for the appellant: E. Patrick Hartt, Toronto.

Solicitor for the respondent: John J. Freeman, Toronto.