

BARBADOS:

[Unreported]

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL**

Criminal Appeal No 1 of 1997

BETWEEN:

ERROL EUCLIGN NILES

**(Appellant)
AND**

THE QUEEN

(Respondent)

Before: The Honourable Sir Denys Williams, Chief Justice, The Honourable Mr. Justice Colin Williams and The Honourable Madame Justice Marie MacCormack (ag.), Justices of Appeal.

2001: September, 21st.

Dr. R.L. Cheltenham in association with Mr. Alrick Scott for Appellant.

Mr. D. Saddler for Respondent.

DECISION

The appellant, Errol Niles, an attorney-at-law, was charged with the fraudulent conversion of property contrary to section 64(1)(a) of the Larceny Act Chapter 139. The charge was that sometime between the 3rd day of November, 1993 and the 8th day of February, 1994 he fraudulently converted to his own use and benefit \$40,346.16 Barbados currency being the proceeds of Barclays Bank plc cheque No. 60389 entrusted solely to him by Patterson Cheltenham in order that he, Niles, would pay the sum to Cynthia Waldron.

He was convicted and sentenced to 9 months imprisonment.

He has appealed on the grounds that (1) the verdict was unreasonable and unsafe having regard to the evidence and that (2) the learned trial judge erred in law in failing to direct the jury on the question of intent to defraud, in referring the case to the jury and in allowing an amendment after a no case submission, thereby causing injustice to the appellant.

The evidence makes it clear that the appellant received a cheque for Barbados \$40,346.16 from Mr. Patterson Cheltenham, another attorney-at-law, for payment to Cynthia Waldron as damages for injuries sustained in a motor accident. Receipt of the cheque is admitted by the appellant in his unsworn statement. But he says that he never received the proceeds of the cheque. After he received the cheque he did not deal with it personally but instructed his staff to take care of "what had to be done in respect of that matter." Very soon afterwards, he says, he was ordered to hand over all documents, files, records, cheques to the Bar Association. Nothing further could have been done in respect of this matter and nothing was in fact done. In December 1995 he heard of the situation with Mrs. Waldron and felt that he had a duty as a senior partner of Niles & Co to make good any loss. He understood that Mr. Peter Williams was her attorney-at-law, got in touch with him and voluntarily made an arrangement (denied by Mr. Williams) which he understood was agreed by Mrs. Waldron.

The evidence of Cynthia Waldron is that she never "signed for" the cheque nor did she authorize anyone to sign on her behalf. She did not receive, or know anything about, any cheque in relation to the matter.

There is an endorsement on the cheque "Cynthia Waldron. Pay to Niles and Co." and Waldron's evidence is that she did not make that endorsement.

The case against the appellant is that

(1) having received the cheque from Mr. Cheltenham, he endorsed it "Cynthia Waldron, Pay to Niles and Co.";

(2) he then paid it into the account of Niles & Co at Barclays Bank and misappropriated the proceeds;

(3) this was a fraudulent misuse of the funds.

As stated earlier the defence is that the appellant received the cheque from Mr. Cheltenham and instructed his office to take care of what had to be done. Two vital questions arise for answer. First, who endorsed the cheque "Cynthia Waldron, Pay to Niles and Co.?" Secondly, what ultimately became of the funds?

The answer to those two questions would enable the Court to determine the issues raised by this appeal. As to the first question, Cynthia Waldron testified that she did not endorse the cheque and the appellant made a like denial. But unfortunately no expert in handwriting was called to assist the Court in resolving the issue.

Sergeant Bynoe testified:-

"I know a lot about fraud. The endorsement on the back of the cheque is fraudulent because it was purported to be signed by Cynthia Waldron

I am not a handwriting expert. I took a specimen of Cynthia Waldron's signature. It was not examined by a handwriting expert as far as I am aware. I can't tell this Court positively that that's not Cynthia Waldron's signature on the back of the cheque".

Station Sergeant Boyce's evidence was:-

"I can't say to the jury that it is not Cynthia Waldron's handwriting at the back of the cheque. I know of a firm called Niles and Company. Errol Niles and Mr. Basil Scott were partners in the company. There was more than one partner in the company according to the Business Registration Certificate. After I spoke to Mr. Niles he did not at any time tell me that he endorsed the cheque. My investigations did not reveal that Mr. Niles did anything to that cheque. From my knowledge there was no evidence as to who uttered this cheque."

As to the second question, Diana Clarke, an employee of CIBC and the Assistant Administrative Officer in charge of the Ledger Department, testified that no one other than the appellant could have withdrawn money from the Niles & Co. account because he was the sole signatory to that account. However that evidence does not seem to be consistent with other evidence in the case. The appellant in his unsworn statement said that there were two signatories to the account – and no evidence was led to challenge this - and Station Sergeant Boyce testified that there were more than one partner in Niles and Co. according to the Business Registration Certificate. It is of no little surprise to this Court that no evidence was elicited from Diana Clarke as to what became of the funds after they had been deposited in the account of Niles & Co.

In the light of the above, no inference can be drawn from the appellant's partnership in Niles and Co.

In our opinion the appeal must be allowed and the appellant's conviction is quashed and the sentence set aside.

Chief Justice

Justice of Appeal Justice of Appeal.