

ST. KITTS

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 2 of 1986

BETWEEN:

EUGENE WALWYN - Appellant
 and
 THE QUEEN - Respondent

Before: The Honourable Mr. Justice Robotham - Chief Justice
 The Honourable Mr. Justice Bishop
 The Honourable Mr. Justice Moe

Appearances: Lee Moore and Dr. Henry Browne for Appellant
 Carl Hudson Phillips, Q.C. along with N. Butler and
 H. Rawlins for the State.

1986: Oct. 6th, 10th.

JUDGMENT

BISHOP, J.A., delivered the Judgment of the Court

This is an appeal by Eugene Walwyn, who was convicted at the Criminal Assizes in February 1986 for that he "on the 25th day of November 1982 at Basseterre in the parish of Saint George in the island of Saint Christopher in Saint Christopher and Nevis, with intent to defraud obtained from Delfin Rodriguez Favale a valuable security to wit a cheque in the sum of \$55,000.00 United States currency, on account of the Bank of Commerce, by falsely representing to the said Delfin Rodriguez Favale that a Certificate of Deposit numbered 3054, with a face value of \$587,500.00 United States currency, was a valid certificate."

The main facts relied upon in proof of the offence were as follows:

Sometime in 1982, Gustavo Freyere and Delfin Rodriguez Favale discussed the sale by the former to the latter, of a Single Maturity Certificate of Deposit issued from the Bank of Commerce St. Kitts and Nevis in Trust and Savings Association Ltd., on the 6th July 1982. That certificate was numbered 3054, it indicated maturity date as July 7, 1983 and the total amount to be paid as \$587,500.00 United States currency. Delfin Rodriguez Favale was advised that there was a loan of \$55,000.00 United States currency guaranteed on the strength of that certificate. In anticipation of the completion of the sale, Delfin Favale obtained a number of cheques to a total amount of \$305,000.00 United States currency, the agreed purchase price, from a bank in Puerto Rico. One of these cheques, dated 24th November 1982, and numbered 000109, was
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on drawn/Caynas Federal Savings and Loan Association, for the sum of \$U.S. 55,000.00, payable to the Bank of Commerce, St. Kitts. The sale was not completed in Puerto Rico because Delfin Favale wanted to be satisfied that the amount stated thereon would be paid on the date stated. So he went - accompanied by Gustavo Freyere - to the said Bank of Commerce in St. Kitts, on the 25th November 1982. There, they met and spoke with Eugene Walwyn in his capacity as President of the Bank.

It was the Crown's case that Eugene Walwyn was shown Certificate of Deposit, numbered 3054, and asked if it was valid or not. He assured Favale that it was a valid document and that the amount stated therein would be paid on the date of maturity mentioned, in the currency of the United States of America and wherever it was requested to be paid. Eugene Walwyn confirmed what Freyere had told Favale in Puerto Rico, namely, that a loan of \$U.S.55,000.00 was guaranteed by the Certificate of Deposit. He also advised that if the amount of the loan were paid to the Bank by the person interested in the certificate, then he would accept the transaction. It was upon Eugene Walwyn's assurances that Favale subsequently took steps to complete his purchase of the Certificate of Deposit numbered 3054 for the agreed price, which included the amount of the loan. He handed over to the President of the Bank who accepted on behalf of the Bank, the cheque numbered 000169 for \$U.S.55,000.00 payable to the Bank of Commerce - to pay off the loan alleged. The other cheques were handed to Freyere, who in turn delivered to Favale the Certificate of Deposit. Favale asked Eugene Walwyn to indicate the name of the owner of the certificate by adding his (Favale's) name on the back; and he went a step further by asking that the names of his wife and daughter be added, so that in the event that he was unable to collect the money when the time came to do so, then either of them would collect it. The names were typewritten on the back and Favale asked Walwyn to sign his own name under those which were typewritten, to authenticate what was added. Walwyn signed and the seal of the Bank (which was used to lend validity to documents) was affixed to the certificate. Walwyn indicated to Favale that the Bank of Commerce would wish to have on record the signatures of his wife and daughter and he gave Favale cards on which to obtain such signatures. Favale and Freyere left St. Kitts the same day. Favale took with him the Certificate of Deposit numbered 3054 and the cards for signatures. Walwyn, as President of the Bank of Commerce, had the cheque numbered 000169.

On the 14th June 1983, Delfin Rodriguez Favale wrote and registered a letter to Mr. Walwyn at the Bank of Commerce in which he reminded of the maturity date of his Certificate of Deposit numbered 3054 and advised that he intended to collect the entire sum personally. He ended that letter,

/"thanking you....."

"thanking you in advance for arrangement payment of said Certificate of Deposit on mature day when I expect to see you again." There was no reply.

Another registered letter was transmitted on the 16th July 1983; and among other things he recalled that he had made numerous telephone calls requesting payment of the money due on his Certificate of Deposit since 7th July 1983, without results. He ended the letter: "Now I demand from authorised bank officer to answer my last and this letter, categorically, when the bank will honour this obligation, making full payment of same. The letter was copied to the Treasury Department. Again there was no response from Eugene Walwyn.

Delfin Favale and Gustavo Freyere went to St. Kitts on 11th August 1983. Eugene Walwyn was expecting Favale at the Bank.

It was the Crown's case that Favale presented his Certificate of Deposit and asked for payment. Walwyn examined the certificate and said that he was not paying, that it was an invalid certificate, it was not issued by the Bank of Commerce, it was not a form used by that Bank, and as he wished to remove it from circulation, he would keep it. In the course of discussion the events on their earlier visit were recalled by Favale and Freyere; and Favale asked Walwyn whether the signature on the back was his signature, authorising the names which were above it. Walwyn looked at it, paused, and then said that the Bank would pay the sum stated. However, he confessed that the Bank of Commerce did not have enough money at that moment to do so. He advised that the Bank would sell some of its valuable real estate and within 30 days it would honour the obligation. In addition Walwyn advised that he would retain certificate numbered 3054 and issue a proper certificate on the form used by the Bank, in its place. The President of the Bank then drafted, in manuscript, a Multiple Maturity Certificate of Deposit and gave instructions to the assistant cashier to check it and have a typewritten certificate prepared from the draft. Shortly after, Walwyn signed and handed to Favale a typewritten Certificate of Deposit, numbered 143, dated 11th August 1983 and maturing 30 days later. Favale left for Puerto Rico with that certificate. Walwyn kept certificate numbered 3054 (which was later - in November 1983 - found in a vault at the Bank)

Four days later Walwyn wrote Favale a letter in which he stated among other things, that Favale had sought collection on the 11th August on a fraudulent Certificate of Deposit and that the matter had been put in the hands of "the Proper Authorities". He also advised that the Multiple Certificate of Deposit issued to him on 11th August 1983 was

/"void and....

"void and of no effect" but was issued "to hold on to the fraudulent certificate" that he had been dealing with for the past months. Walwyn also wrote: "You were relying on the fraudulent certificate to induce the issue of the one on August 11, 1983". Favale consulted his lawyers before replying on 25th August 1983, alleging that if the Certificate of Deposit were fraudulent then he (Walwyn) alone made it so. The penultimate paragraph informed that in the near future his lawyers would visit St. Kitts "top authorities" with evidence and witnesses to take legal action against Walwyn.

In November 1983 Favale and lawyers visited the Bank of Commerce. The Certificate of Deposit numbered 143 was presented for payment. There was no payment; and Favale made a report to the police.

It was also the case for the Crown that the cheque which was given to the President of the Bank was endorsed by the accountant or officer in charge of the Bank (Carl Richardson), lodged to the Bank's account at the Saint Kitts-Nevis National Bank on the 26th November 1982, and that some time later, the money was received by the Bank of Commerce.

It was never claimed that Eugene Walwyn gained any personal benefit whatever.

The prosecution also adduced evidence which remained unchallenged and uncontradicted, to show that Delfin Rodriguez Favale did not have an account - either individually or jointly with his wife and/or daughter - at the Bank of Commerce, St. Kitts.

On the above and other facts Eugene Walwyn was convicted and ordered to pay \$70,000.00 in two weeks with two sureties, in default to serve a period of 18 months imprisonment with hard labour.

To appreciate fully the issues that arose at the trial, reference must be made to the case for Eugene Walwyn, which was contained in the cross-examination of the Crown's witnesses, and in his unsworn statement from the dock, which contained not only allegations that were not clearly put to the appropriate witnesses under cross-examination, but also assertions of fact which remained unsupported by any sworn testimony.

It was Walwyn's case that on the 25th November 1982 he was shown Certificate of Deposit numbered 3054 and he told Favale, in the presence of Freyere, that it was not a valid certificate and that the Bank of Commerce would not pay on it. Further, when Favale gave him the cheque-
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numbered 000169 and dated 24th November 1982, it was for the express purpose of opening a joint account in his name and the names of his wife and daughter; and that it was for this reason that he requested that the Bank should have the signatures of Favale's wife and daughter.

It is significant, in our view, that the evidence of Gustavo Freyere concerning what took place when he and Favale visited the Bank of Commerce in St. Kitts on the 25th November 1982 and 11th August 1983 remained largely unchallenged by cross-examination.

In his statement from the dock Eugene Walwyn explained that on the 25th November 1982 he was told by Mr. Richardson, executive manager of the Bank of Commerce, that a man from Puerto Rico wanted to open a foreign account whereby he could take money out of Puerto Rico in United States currency and have it transferred anywhere. That man was Favale, and he handed a United States cheque drawn on Banco de San Juan to Mr. Richardson to open the account in his (Favale's) name, his wife's name and his daughter's name. Mr. Richardson got the appropriate cards and handed them to Favale. Then Favale showed him "what purported to be a bearer certificate of deposit supposedly issued by Bank of Commerce St. Kitts Nevis and Savings Trust Association Limited." Eugene Walwyn explained that he enquired of Favale where he had got that certificate from as it was not one of the Bank's, and he was told that Favale got it from Freyere. Favale asked him to put a note on the certificate to indicate that it was Favale's certificate as well as that of his wife and his daughter. A typist was called, Favale dictated what he wished to go on the certificate, and then he asked Walwyn to sign it. In Walwyn's words, "it was not an endorsement in my opinion and I signed it."

The statement contained facts about what occurred at the Bank of Commerce towards the end of May 1982 but for the purposes of this appeal such facts are unhelpful.

Eugene Walwyn also stated that the cheque which was left by Favale to open the account at the Bank "went backwards and forwards from the Bank of Commerce to National Bank and elsewhere." As far as he could say, up to late January 1983, the Bank of Commerce was advised that that cheque was worthless. He could not say what happened with it; he did not negotiate the cheque nor did he receive any benefit from it. As far as the certificate of Deposit that Favale had at the Bank, was concerned, Bank of Commerce never received any money on it.

Five grounds of appeal were set out in the Notice of Appeal dated 28th February, 1986; but before us learned Counsel for the appellant argued only the following two grounds:

/"(1) The learned.....

"(1) The learned trial Judge erred in law in his direction to the Jury with regard to the legal meaning of the word "obtained" appearing in section 25(a) of Cap. 41 under which the accused was charged.

(2) The learned trial Judge erred in law in failing to give the Jury any or any proper direction with regard to the meaning of "with intent to defraud".

The first ground of appeal.

Learned Counsel for the appellant submitted that the direction of the learned trial Judge with regard to "obtaining", in the charge under consideration, was a misdirection such as would have affected the minds of the Jury and leave them without a proper appreciation of the nature of what was required to be proved under the allegation of "obtained". Mr. Moore contended that it was not whether or not the cheque was obtained but rather whether the property in the cheque - the complete right of ownership in the cheque - had been proved to have passed to the appellant. In Counsel's view there was no obtaining by the appellant as alleged in the indictment, for if the word "obtained" meant (as was stated in *R v LURIE* (1951) 2 All E.R. 704) "obtained the property and not merely the possession", Favale never had the property in the cheque; and since he had no title to it he could not pass a title to anyone. Nor did he have the power to negotiate the cheque. Counsel submitted that the charge brought against the appellant could not be sustained on the evidence adduced, since, until negotiated by the Bank of Commerce, no intermediary between the 'drawer' and the 'payee' could obtain title or ownership of or property in the cheque; and at all material times, the property in the cheque vested in the Bank of Commerce.

The second ground of appeal.

Learned Counsel referred to two passages and submitted that the direction of the learned trial Judge in these passages was quite inadequate and was such as to confuse the Jury and leave them without a clear understanding of the intent.

When it was pointed out to Mr. Moore that the summing up ought to be looked at as a whole, insofar as this element of the offence was concerned, and when other passages of the summing up and the law as stated in the 3rd edition of Halsburys Laws of England (Volume 10). were brought to the attention of learned Counsel, it is but fair to observe

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that he did not pursue this ground very seriously.

This Court called upon learned Counsel for the respondent to reply to submissions and arguments put forward in support of the first ground of appeal only.

Mr. Hudson-Phillips contended that there was a basic weakness in the submissions, namely, that the property passed immediately to the Bank of Commerce upon the purchase of the cheque from the Bank in Puerto Rico. He referred the Court to evidence which was not in dispute, that Delfin Rodriguez Favale went to the bank in Puerto Rico and purchased the cheque for \$U.S.55,000.00 in the name of the Bank of Commerce and that he paid for it with his own money. Learned Counsel submitted that although the name of the Bank of Commerce was on the cheque, nevertheless Favale was in the position where he could have controlled whether or not it went to the Bank of Commerce. Mr. Hudson-Phillips stressed that Favale need not have handed it to the Bank of Commerce; he could have kept it or destroyed it if he cared to do so. Counsel also contended that it was not correct to say, and normal commercial practice would not dictate, that the mere act of writing a cheque transferred property in that cheque. In Counsel's view the appellant had the authority conferred upon him from Favale, the owner of the cheque or valuable security, to pass the property in it to the Bank. The cheque was handed to the appellant, as President of the Bank of Commerce for and on behalf of the Bank of Commerce, and he had the authority to receive it as agent of that Bank.

In reply Mr. Moore agreed with the submission of Counsel for the respondent in respect of the concept of agency, but he contended strongly that there was not one iota of evidence to show that the appellant was agent of anyone or was acting as agent of anyone, for any purpose, limited or otherwise.

The material facts revealed by the evidence have already been set out but by way of emphasis it may be re-stated that there was evidence to the effect that Delfin Favale bought a number of cheques including that payable to the Bank of Commerce. He went to St. Kitts with it and it was as a result of assurances given him, by the appellant, that certificate of Deposit numbered 3054 was a valid certificate on which the Bank of Commerce would pay the amount stated therein on the date mentioned, that he handed over his cheque to pay off a loan that the appellant said had been guaranteed on the strength of that certificate. The amount of the loan comprised a part of the purchase price of the Certificate of Deposit. Had he not been given such assurances, Favale would not have given the appellant the cheque. At that time the appellant was President
/of the....

of the Bank of Commerce. He was dealing with Favale in that capacity and Favale knew that that was so.

We are satisfied that, in the circumstances, Favale bought the cheque in the name of the Bank of Commerce and that he could have kept it or destroyed it. However, he was induced to part with it as a result of what the appellant told him. He dealt with the appellant when the appellant was acting for and on behalf of the Bank of Commerce. He handed over the cheque and it reached its proper and intended destination following the assurances given by the President, acting on behalf of the Bank. On delivery of the cheque the President (appellant) obtained the property in the cheque on account of the Bank.

Strictly speaking, learned Counsel for the appellant did not argue the ground of appeal as it was set out in the Notice of Appeal. Rather, he attacked the indictment and contended that on the basis of the evidence the offence charged was wrong. Be that as it may, we are satisfied that (1) the essential ingredients of the charge as laid were clearly available from the evidence and (2) the direction of the trial Judge was not such as would have affected the minds of the Jury or leave them without a proper appreciation of what was required to be proved. The facts of the case were simple and the Jury must have fully appreciated the issues which they had to determine.

It is for these reasons that this appeal is dismissed.

E.H.A. BISHOP,
Justice of Appeal

G.C.R. MOE,
Justice of Appeal

L.L. ROBOTHAM,
Chief Justice