

SUPREME COURT OF SEYCHELLES

Reportable

[2019] SCSC 76

CR03/2013

THE REPUBLIC

(rep. by Ananth Subramaniam)

versus

DANIELLA SAVY

(rep. by Manella Parmantier)

(

Neutral Citation: *Republic v Daniella Savy* CR 03/ 2013] [2019] SCSC 76 (7 February 2019).

Before: Dodin J.

Summary: Three counts of stealing by servant contrary to section 260 read with section 266 of the Penal Code – Insufficiency of evidence - Accused acquitted of all counts.

Heard: [28 Sept 2017, 4 Oct, 29 Nov, 10 Dec 2018]

Delivered: [7 February 2019]

ORDER

The charges against the accused have not been proved beyond reasonable doubt. The evidence adduced did not establish that the accused had exclusive access to the monies and bank accounts in question. Accused not guilty on all counts and acquitted accordingly.

JUDGMENT

DODIN J.

[1] The accused, Daniella Savy stands charged with 3 counts of stealing by servant contrary to section 260 read with and punishable under Section 266 of the Penal Code. The offences were allegedly committed over the period of 1st January to 31st December 2007, 1st January to 31st December 2008 and 1st January to 31st 2009.

[2] According to the testimony of Marie-Anne Edmond, from the year 1995, she set up a business named St Joseph Pre-school and in 1998 she set up a second business by the

name of Bambi's Day Care Centre. Both businesses took in pre-school children who were cared for during the day for a fee. She employed several workers including the accused, Daniella Savy, Jemina Pouponneau, Linda Marie, Jenny Frederick and others whom she could not recall their names. The accused was first employed in June 1995. Mrs Edmond testified that she fell and injured her back in 2006 and for the next three years she was unable to work and left the accused in charge of the businesses. In July 2010, Habib Bank informed her that there was not enough money in her account to make payments. She returned to the businesses in August, 2010 and made enquiries by comparing the ledgers kept for the businesses against the fees that were paid for the children the businesses were taking in. She found that there were shortages as follows: 1st January to 31st December 2007 SCR33,846.90; 1st January to 31st December 2008 SCR 75,651.80 and for 1st January to 31st December 2009 SCR 53,009.50.

[3] Mrs Edmond further testified that in her absence, the accused was supposed to do the banking. The calculations were shown to the accused in whose presence they were made and the accused signed acknowledgements of debt in respect of the shortages which she agreed to pay by monthly instalments of SCR 5,000. However she paid only SCR 5,000 once in July, 2010.

[4] Fiona Lagrenade, an accounts technician working for S & N Associates testified that she did some work for two businesses by names of Synergy and Bambi's Babysitting. She compared the figures she got from the register supplied by the directors of the businesses who were Mrs Edmond and her son Selwyn Edmond to the monies banked at Mauritius Commercial Bank and Habib Bank for the two businesses respectively and made a report showing the variations.

[5] The accused made a very short dock statement maintaining that she did not personally take any money and cannot understand why she was being charged.

[6] In his final submission learned counsel for the Republic submitted that the evidence adduced by the prosecution established that the accused was an employee of the businesses owned by Mrs Edmond and her son and that during the years 2007 to 2009 there were discrepancies whilst the accused was managing the businesses. The accused

signed acknowledgements of debt in respect of the shortages in banking. The shortages in banking were because the accused was under-banking monies paid to the businesses whilst the accused was managing the business. Learned counsel submitted that the shortages which were acknowledged by the accused caused monetary loss to the businesses which the evidence show the accused to be responsible. Learned counsel concluded that the prosecution has proved its case against the accused beyond reasonable doubt and therefore moved the Court to convict the accused accordingly on all three counts.

[7] Learned counsel for the accused submitted that the evidence adduced only amounted to accusations against the accused with no substance upon which a conviction can be based. Learned counsel pointed to the discrepancies in the testimonies of the two witnesses, namely the acknowledgements of debt when compared with the actual charges which for all three years show discrepancies. Learned counsel further submitted that daily ledgers and daily bank statements to show any amount received or banked was not produced by the prosecution leaving doubt as the sums which are supposed to have been taken are determining factor in establishing the elements of the offence. Learned counsel moved the Court to find the accused not guilty of all three counts and to acquit her accordingly.

[8] Sections 260 and 266 of the Penal Code states:

“260. A person who steals anything capable of being stolen is guilty of the felony termed theft, and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for seven years.

266. If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for ten years.”

[9] The elements of the offences are that the accused must be an employee (clerk or servant) and came into possession of the thing capable of being stolen on account of the employer, and actually stole the thing that is capable of being stolen. Elements not in dispute are that the accused was indeed an employee and was entitled to collect, use and bank monies on behalf of her employers for the two businesses, Saint Joseph Pre-school and Bambi’s Day Care Centre. If she did collect any money, it was clearly not her money to take.

However, the prosecution must also bring evidence to show that she was the only one who collected or had access to the monies in question. Secondly, the thing stolen must be clearly identified and in the case of money proof must be brought as to the amount claimed to have been stolen.

[10] The prosecution's case gives the following amounts: 1st January to 31st December 2007 SCR33,846.90; 1st January to 31st December 2008 SCR 75,651.80 and for 1st January to 31st December 2009 SCR 53,009.50. In the acknowledgments of debt exhibited by the prosecution appear the following sums: 1st January to 31st December 2007 SCR42,812; 1st January to 31st December 2008 SCR 42,921.69 and for 1st January to 31st December 2009 SCR 56,931. No other evidence was adduced to clarify the discrepancies. It must be noted that according to Mrs Edmond, the monies collected were also used to purchase goods for use by the businesses in order for them to operate. There is no evidence to show how much of the monies collected were used for these purposes and how much were to be banked.

[11] Secondly, there is evidence of several employees in the employment of the businesses at the time but only the accused is being held responsible for the monies allegedly lost. The evidence of Mrs Edmond disclosed that when she was running the business she needed the assistance of the accused to do all the banking and purchases. It is not clear why she maintained that only the accused had access to the monies with the exclusion of all others even if no concrete evidence was adduced to that effect.

[12] Thirdly, the evidence showed that the directors of the businesses were Mrs Marie-Anne Edmond and Mr Selwyn Edmond. There is no evidence to show who had access to the bank accounts to remove money and that the withdrawal of monies from those accounts were properly accounted for. The evidence showed that the accused could deposit monies into these accounts but the fact that after 3 years one account had a shortage of money does not equal to the accused having under-bank monies. It must be noted that relevant bank statements were not produced to Court.

[13] The prosecution is clearly relying on circumstantial evidence to establish the case against the accused. There are clear parameters that the prosecution must meet if it has to rely on

circumstantial evidence as stated in the Kenyan case of Benson Limantees Lesimir & Ano. vs. Republic Criminal Appeal No. 102 &103 Of 2002

“In the circumstances, then the evidence tendered by the prosecution does not irresistibly point to the appellants to the exclusion of all others within the meaning of R. vs Kipkering Arap Koske & Another 16 EACA 135 where it was inter alia held that:”

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

[14] The same Court made the following pertinent observations which stands good to the current case:

“It is important to state that suspicion cannot suffice to infer guilt. The court for appeal in the case Joan Chebichii Sawe – V- Republic Crim. App. No. 2 OF 2002 had this say about suspicion in a criminal case:

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of Mary Wanjiku Gichira vs Republic (Criminal Appeal No. 17 of 1998(unreported), suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence.”

[15] From the facts as rehearsed above and my observations and findings, it is obvious that there are serious deficiencies in the evidence adduced by the prosecution in that the evidence was not sufficient to establish the charges against the accused beyond reasonable doubt. In fact I find that this is a fit case where a submission of no case would have indeed been successful.

[16] I therefore find that the charges against the accused have not been proved to the satisfaction of the Court and I acquit the accused of all counts levelled against her accordingly.

Signed, dated and delivered at Ile du Port on 7 February 2019

Dodin J.