Windebank v Pryce [2001] NTSC 45

PARTIES:	MARK BRENTON WINDEBANK
	v
	LEONARD DAVID PRYCE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION exercising Territory jurisdiction
FILE NO:	JA60/2000 (9922797)
DELIVERED:	19 June 2001, Alice Springs
HEARING DATES:	16 and 17 May 2001
JUDGMENT OF:	THOMAS J

CATCHWORDS:

APPEAL – APPEAL AGAINST CONVICTION

Appeal from the Court of Summary Jurisdiction – appeal against conviction

R v Bailey [1956] SASR 153; *R v Leak* [1969] SASR 172; *Middleton v The Queen* [2000] WASCA 200; *Rabey v The Queen* [1980] WAR 84, referred to

Parker v The Queen (1997) 186 CLR 494; *Crofts v The Queen* (1996) 186 CLR 427; *Graham v The Queen* (1998) 195 CLR 606, cited

REPRESENTATION:

Counsel:

Appellant:	G Georgiou
Respondent:	R Noble

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Windebank v Pryce [2001] NTSC 45
No. JA60/2000 (9922797)

BETWEEN:

MARK BRENTON WINDEBANK
Appellant

AND:

LEONARD DAVID PRYCE
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 19 June 2001)

[1] This is an appeal against findings of guilt made by a stipendiary magistrate in the Court of Summary Jurisdiction at Alice Springs on 13 October 2000. The learned stipendiary magistrate found the appellant, Mark Brenton Windebank, guilty on nine counts of stealing, a total amount of $8500, between 16 September and 30 September 1999.

[2] The appellant entered a plea of not guilty to all nine charges. The hearing proceeded over three days in October 2000.

[3] The appellant was convicted and sentenced to 14 days imprisonment. The respondent to this appeal has also lodged a Notice of Appeal claiming the sentence imposed is manifestly inadequate. The hearing of that appeal

against sentence was deferred pending the outcome of Mr Windebank's appeal against conviction for these offences.

[4] The Crown case on the hearing before the Court of Summary Jurisdiction can be summarised as follows.

[5] Mr Windebanke was at the relevant time an employee of the ANZ Bank in Alice Springs. The Crown allege that between 16 September 1999 and 30 September 1999 a total of $2500 was stolen from an account in the name of Lindy Braedon and a total of $6000 stolen from an account in the name of Aputula Housing Association. The money was withdrawn from these accounts using a Night and Day card bearing a number with the last four digits 7515 (sometimes recorded as 75150). The full card number being 5602549632975150.

[6] The Crown presented documentary evidence to show that if a customer loses a credit card they will be provided with a temporary card referred to as a "Night and Day" card. This is a card with no name, unembossed and it is given to the customer who can use this card to link into their account.

[7] The particular Night and Day card used in the course of the offences was linked to two accounts, the first being Lindy Braedon, the second Aputula Housing Association.

[8] It was alleged by the Crown who had documentary evidence in support (Exhibit P8) that on 15 September an ATM at Alice Springs "swallowed"

this particular card because there were a number of tries by the person to enter the correct PIN number. It was then in the ATM machine for bank staff to retrieve. It was the Crown case that a member of the bank staff, Ms Sally Wilson (aka Fraser), retrieved an unembossed Night and Day card and other items from the ATM on 16 September 1999. The Crown allege that Mr Windebank spoke to Ms Fraser indicating he had lost his Night and Day card in the ATM and asked her to retrieve it for him. Ms Fraser handed him an unembossed Night and Day card. It is the Crown case that it is this card which was linked to the two accounts to withdraw the $8500. The Crown allege that on the same date, 16 September, the appellant went to another employee, Miriam Klute, stating that he need a PIN number on his Night and Day card and Ms Klute had obtained a PIN number through her user ID at 9.19am on 16 September 1999.

[9] The Crown produced documents to show that this card was again linked to the two accounts previously mentioned under Mr Windebank's operator number. It was also briefly linked to his own account. The Crown say the following day Mr Windebank's operator number was used to link the accounts to this card. The last withdrawal was on 30 September 1999.

[10] On 1 October 1999, Ms Lindy Braedon attended the bank and spoke to the teller, Ms Fraser. Ms Fraser looked at the account of Ms Braedon noted that card 7515 had been linked to her account. Ms Fraser also checked the account of the Aputula Housing Association because card 7515 had also been linked to that account. Ms Fraser noted the withdrawals that had been

made from the ATM on both these accounts. She also noted that card 7515 had been linked to Mr Windebank's account. Ms Fraser formed the view that Mr Windebank had withdrawn the money from these two accounts without permission.

[11] Mr Windebank was subsequently interviewed by police and denied the charges. He stated he did have a Night and Day card because his other card was not working. He told police he thought he had packed this card away as he had recently resigned and was planning to leave the Northern Territory. Police were not able to locate the card.

[12] It is relevant to note that the matter proceeded as a committal hearing on 11 and 12 October 1999. At the conclusion of the evidence and following submissions from both counsel on 12 October 2000, his Worship ruled that the Crown had established a prima facie case. The learned stipendiary magistrate then suggested to the parties that the matter could proceed by way of summary hearing rather than committal to the Supreme Court.

[13] Counsel for the Crown and for the defence after some consideration consented to this course.

[14] The Crown indicated they had no further evidence to call. Mr Georgiou submitted that in accordance with his earlier submissions relevant to a prima facie case, that there was no case for the defendant to answer. The learned stipendiary magistrate ruled the defendant had a case to answer. Counsel on

behalf of the defendant advised that the defence would not be calling any evidence.

[15] Counsel for the Crown and for the defence then made submissions as to whether the Crown case had been proved beyond reasonable doubt.

[16] The following day on 13 October 2000, the learned stipendiary magistrate delivered his reasons for decision and found the defendant guilty on the nine charges of stealing.

[17] It is these findings of guilt that are the subject of the present appeal. The grounds of appeal are as follows:

> "1. That the findings of guilt were against the evidence and the weight of the evidence in the circumstances.
>
> Particulars.
>
> 1.1. The appellant relies on the matters pleaded in the subsequent grounds of appeal.
>
> 1.2. That suspicion was attracted to the defendant only because his name was linked to the accounts from which the funds were removed, although such a linking was unnecessary to achieve the withdrawal of funds, and could have been made by any operator apart from the appellant. (page 26 Transcript).
>
> 1.3. There was insufficient evidence that the appellant ever had possession of card number 7515.
>
> 1.4. The prosecution failed to produce relevant records which may have disclosed explanations consistent with the innocence of the defendant.
>
> 1.5. The prosecution case essentially depended upon inferences it sought to draw from the uncorroborated evidence of the witness Ms Fraser who, on the prosecution case, was contradicted by evidence from Ms Over, and who became suspicious of the defendant because his name appeared in the linking of the account.

1.6. The prosecution could point to no explanation in the evidence as to any possible motive for linking the appellant's account, other than if a person other than the defendant wanted to deflect suspicion from himself or herself towards the defendant.

2. The learned Magistrate misdirected himself as to the application of the burden of proof.

Particulars

2.1. The learned Magistrate adopted a process of reasoning whereby he sought to determine who the offender was, rather than to determine whether the prosecution had provided to the required degree that it was the defendant (e.g. pages 170.1; 171.4; 173.2 and 174.1 Transcript of Reasoning for Decision).

2.2. The learned Magistrate relied upon the failure of the defendant to give evidence as precluding the court from obtaining evidence that might better have linked the defendant's night and day card that was said to have been used in the offences. (page 174.4 Transcript).

2.3. The learned Magistrate purported to resolve significant factual questions upon the basis of a mere likelihood. (e.g. page 174.8 Transcript).

2.4. The learned Magistrate relied upon the appellant's proposed departure at about the time of the alleged offences as giving rise to an inference of a consciousness of guilt in circumstances where such an inference was not argued for by the prosecution, the appellant had no opportunity to be heard in relation to such a process of reasoning and the evidence revealed a reasonable explanation consistent with innocence in relation to the defendant's anticipated departure at about that time. (page 174.8 Transcript).

2.5. The learned Magistrate erred in concluding that Ms Over was mistaken in her evidence in circumstances where such a proposition was never raised with her during her evidence, and the learned Magistrate ought to have concluded that her evidence raised a reasonable doubt about the appellant's guilt. (page 172 Transcript).

2.6. The learned Magistrate relied upon speculative inferences rather than inferences arising reasonably from the evidence.

3. That the findings of guilt were unsafe and unsatisfactory because of the failure of the police to investigate adequately

the commission of the offences. In particular, the police failed to:

(i) obtain details of three of the four changes to the 'Personal Identification Number' (P.I.N.) for 'Night and Day card 560-2549-6329-7515';

(ii) obtain further information from the appellant as to the location of his 'Night and Day' card;

(iii) obtain banking records in relation to the appellant's Night and Day card;

(iv) investigate the banking records of other employees;

(v) produce the employment records of the appellant's work hours on 16 September 1999;

(vi) investigate generally all matters which may have exculpated the appellant.

4. That the learned Magistrate erred in admitting into evidence Search Warrants that were obtained to search the appellant's residence and belongings;

5. That the learned Magistrate erred in taking into account an irrelevant consideration, namely that the appellant had resigned from his employment;

6. That the learned Magistrate erred in drawing an inference adverse to the appellant by reason of the fact that the appellant had resigned from his employment;

7. That the learned Magistrate erred in finding that the witness Miriam Over was mistaken as to the date on which she assisted in the alteration of a 'P.I.N.';

8. That the learned Magistrate erred in accepting the evidence of Sally Ann Fraser as to:

(i) dates;

(ii) the card which she handed to the appellant;

9. That the learned Magistrate erred in that he failed to give sufficient reasons for his decision in finding the defendant guilty of each of the counts.

10. That the learned Magistrate erred in failing to find that the appellant had no case to answer in relation to each of the charges, having found that 'It is possible that someone else other than the defendant could have done this'. (page 125 Transcript – Reasons for Ruling).

11. The learned Magistrate erred in failing to direct himself in accordance with the circumstantial evidence direction, namely,

that the prosecution was required to prove that upon the evidence, there was no reasonable hypothesis consistent with the innocence of the defendant.

12. The learned Magistrate failed to give any or adequate weight to the immediate denials by the appellant to the police of any wrongdoing, or to his innocent explanations for any conduct brought to his attention during the course of his interviews.

13. The learned Magistrate failed to give any weight to the evidence of the applicant's previous good character and/or lack of prior convictions. (page 110 Transcript)."

[18] Mr Georgiou commenced the hearing of this appeal with detailed submissions with respect to the particulars set out in Ground 1 of the appeal. At the conclusion of Mr Georgiou's submissions on Ground 1, Mr Noble on behalf of the Crown conceded that the Court should allow the appeal under Ground 3 of the Notice of Appeal. Accordingly, both parties have submitted this appeal should be allowed.

[19] Because of the logistical difficulties of reconvening this Court it was decided that the Court would hear the parties' submissions on the other grounds of appeal, as the Court had not had the opportunity to properly consider the evidence, and reasons for allowing the appeal under Ground 3.

[20] The parties also made submissions on whether the consequence of allowing the appeal should be to remit the matter for hearing before the Court of Summary Jurisdiction or enter a verdict of not guilty.

[21] With respect to Ground 3 of the appeal, provided the grounds are substantiated, the only issue for the Court to decide is whether the matter should be remitted to the Court of Summary Jurisdiction for rehearing as

sought by the Crown or a verdict of not guilty entered as sought by Mr Georgiou on behalf of the appellant.

[22] It is the submission of Mr Noble on behalf of the Crown that the appeal should be allowed on the basis of the matters set out in Ground 3 of the Notice of Appeal and the matter remitted to the Court of Summary Jurisdiction for rehearing.

[23] It is the submission of Mr Georgiou, counsel for the appellant, that the appeal should be allowed, the conviction be quashed and a verdict of not guilty entered.

[24] The prosecution case at hearing rested largely on the evidence of Sally Anne Fraser (nee Wilson) who in September 1999 was employed by the ANZ Bank in Alice Springs as a sales consultant. The appellant, Mark Windebank, was also employed as a sales consultant with the ANZ Bank. Ms Fraser gave evidence that they would each log on to their computers in the morning, however, the computers would be left on during the day and someone else could use that terminal. This means all transactions by any person from a particular terminal would have the same operator number. Ms Fraser had given evidence that she was at a training session on 14 and 15 September. On 16 September she was relieving in the teller area. Her duties included balancing and filling up the ATM's. Ms Fraser stated on the morning of 16 September she retrieved some cards out of the ATM. Only one of these cards was an ANZ card and it was also an unembossed card. This was called

a Night and Day card. A Night and Day card is a replacement card until a person receives an embossed card. Ms Fraser states Mr Windebank arrived in the morning and said his card had been taken in the machine the night before and asked Ms Fraser if she could retrieve it for him. When Ms Fraser found the ANZ unembossed card she states she gave it to Mr Windebank. It was not signed on the back and Ms Fraser had said to Mr Windebank "you had better sign it". She did not make any note of the card number. It is a simple matter for a staff member to obtain an unembossed card and link it to an account which enables that card to be used to access that account. The card is also allotted a PIN number. Ms Fraser gave evidence that on 1 October a woman called Lindy Braedon came with a bank statement in her name, account number 55 2253866. Ms Fraser looked the account up on the computer screen. There were transactions on the ATM for cash from that account. On 16 September 1999, $1000 was withdrawn. On 20 September 1999, $1000 was withdrawn and $500 on 28 September. Ms Fraser checked and found four cards were linked to Ms Braedon's account. Two cards were no longer active. Ms Braedon had one card. The fourth card was a Night and Day card with no name bearing a number with the last four digits 7515. Ms Fraser found that this Night and Day card had also linked to another account in the name of Aputula Housing Association. There were six withdrawals of $1000 each from this account. The bank statement of Ms Braedon was tendered Exhibit P1. Ms Fraser gave further evidence that card 7515 was also briefly linked to Mr Windebank's account on 16 September

1999. This information is contained in document titled "Linked Information Account" (Exhibit P6), tendered during the course of evidence given by the administrative officer, Ms D. Burbidge. The bank statement of Aputula Housing Association was Exhibit P2 in the hearing before the Court of Summary Jurisdiction.

[25] Under cross examination, Ms Fraser agreed that the first time she had turned her mind to the transactions involving Mr Windebank was 1 October 1999. She agreed it is not unusual for a staff person to ask her to retrieve a card from the ATM. The Crown case relied very heavily on the oral evidence of Ms Fraser. If her memory was faulty, or for some other reason Ms Fraser was in error as to the date being 16 September when she retrieved the Night and Day card, then the case for the Crown would be considerably diminished. Ms Fraser gave evidence (t/p 16) that employment records in the bank would be able to show the dates on which she was the relieving bank teller. Ms Fraser stated she did not have these records. No employment records were tendered. Ms Fraser had not worked as a relieving teller for about two months prior to 16 September 1999. She worked as a relieving teller also on 17 September 1999. On both dates she retrieved cards from the ATM. Ms Fraser agreed in cross examination that no record was made of the cards she retrieved from the ATM. These cards were placed on the sales consultant's desk where other persons within the sales consultant area had access to them. Ms Fraser gave evidence that a record is kept when cards are swallowed by the ATM where incorrect PIN numbers

have been used. Ms Fraser agreed that it would not be possible to ascertain from an inspection of bank records to identify which operators of the computers undertook a particular transaction. Ms Fraser gave evidence (t/p 32) that the bank has records of all cards that are kept in the ATM. These records were not tendered to the Court.

[26] The Crown case relies substantially on the evidence of Ms Fraser, who at the relevant time was employed by the ANZ Bank Alice Springs as a sales consultant. Pivotal to the Crown case was the acceptance of Ms Fraser's evidence that it was 16 September 1999 when she retrieved the relevant card from the ATM and gave to Mr Windebank. Ms Fraser identifies the date as being 16 September because she was relieving in the teller area while other staff attended a course.

[27] Ms Fraser made no record of the card number that she handed to Mr Windebank, neither did she make any record on 16 September of retrieving a card and giving it to Mr Windebank. Her evidence is that it was not unusual for staff to ask her to retrieve a card for them. She also stated these cards when collected are placed in the general sales consultant area where any one in that area can have access to them. The first time she gave any consideration to the date she retrieved the card for Mr Windebank was on 1 October 1999 when Ms Braedon attended the bank to query certain withdrawals from her account. Ms Fraser made a statement to police on 13 October 1999. There is no record of what cards Ms Fraser retrieved from the ATM on 16 September 1999. Ms Fraser had no knowledge as to the

number of the card that she handed to Mr Windebank. She was not able to state how many cards were in the ATM on that date or what sort of cards were there. Ms Fraser agreed that when she arrived at the conclusion that the date she retrieved the card from the ATM was 16 September was after she had reviewed the bank records and formed the view that it was Mr Windebank who withdrew the money without permission. This suspicion was formed even though on the evidence of Ms Fraser the link to Ms Braedon's account could have been made by any operator apart from the appellant. She agreed that if the request to retrieve the card had been made on 17 September, this would not fit in with her theory that Mr Windebank had withdrawn the money. Ms Fraser gave evidence a record is kept in some part of Australia when cards are swallowed up where incorrect PIN numbers have been used. These records were never produced.

[28] Ms Dianne Burbidge gave evidence that in September 1999 she was the administration assistant at the ANZ Bank in Alice Springs. At the time she was relieving branch manager. In cross examination Ms Burbidge was questioned about Exhibit P5, a document titled "Card Holder Information". This document shows card 7515 was issued on 7 September 1999. It shows the PIN number was changed on 16 September 1999. The words "NBR PIN charges 4" means that there have been four attempts to put PIN numbers on this card between 7 September and 16 September. It is accepted that there have been four dealings in relation to the PIN number. Ms Burbidge was cross examined as to what had occurred in relation to the PIN number. She

was asked whether there was a separate record which would state what had actually occurred, that is whether there were attempts at entering PIN's or whether there were four separate changes. Ms Burbidge replied that it would be necessary to call up the reports since 7 September, when that card was issued. These reports were not tendered. Ms Burbidge agreed in cross examination that sales staff would know that unissued ANZ Night and Day cards do not have a PIN number on them when they arrive at the bank. She also agreed that it would be pointless to take one of those cards to a machine and try to withdraw funds from it unless it had a PIN number.

[29] It is not in dispute that police investigations did not extend to obtaining records of the three changes to the PIN for Night and Day card 7515. From the evidence of Mr Burbidge such records are obtainable. Neither did police obtain banking records in relation to the appellant's Night and Day card or investigate the banking records of other employees. Nor did police produce employment records of the appellant's working hours on 16 September 1999. The system within the sales consultant area was described to the Court in evidence, for example, the practise of various staff to each operate from the four computer terminals rather than logging off whenever they left the computer. This meant a staff member could conduct a transaction or a review on someone else's password and ID. All staff had access to the retrieved cards from the ATM. From the evidence as to other records which were kept but not tendered in this case, a more thorough police investigation of the records could have exculpated the appellant.

[30] I agree with the submission made by both counsel for the appellant and the respondent that the appeal should be allowed under Ground 3 of the grounds of appeal that the findings of guilt were unsafe and unsatisfactory.

[31] I would also allow the appeal under Ground 11 of the grounds of appeal; that the learned stipendiary magistrate erred in failing to direct himself in accordance with the circumstantial evidence directions, namely, that the prosecution was required to prove that upon the evidence, there was no reasonable hypothesis consistent with the innocence of the defendant. Had this direction been applied then the learned stipendiary magistrate could not have been satisfied the prosecution had proved that upon the evidence, there was no reasonable hypothesis consistent with the innocence of the defendant.

[32] With respect to the issue of whether having allowed the appeal I should remit the matter to the Court of Summary Jurisdiction for rehearing or enter a plea of not guilty, I have been referred to a number of authorities. In *R v Bailey* [1956] SASR 153 Napier CJ said at 161:

> "… but the question that remains is whether there should be a new trial. The governing consideration is, of course, that justice should be administered according to law, but we are not disposed to say that the interests of justice would be served by laying down the rule that a new trial will be ordered, as a matter of course, where there was evidence upon which the jury *could* have convicted on an adequate direction. A second trial is seldom an entirely satisfactory solution, and we think that it would be inadvisable to give any encouragement to the idea that a new trial will be allowed, however the case is presented at the first trial. When justice has once miscarried we think that there is some risk that 'truth, like all other good things,

> may be loved unwisely – may be pursued too keenly – may cost too much.'"

In *R v Leak* [1969] SASR 172 at 176:

> "… We think that if there is evidence on which such a jury could reasonably convict and might not improbably convict, the interests of the administration of justice will generally demand a new trial unless in the particular circumstances that would be unjust to the accused: but that where the case is as weak as we think the present case is and a jury properly directed would probably acquit, as we think it would, then the considerations mentioned in *Bailey's Case*, and particularly the hardship on the appellant of having to bear the costs of two trials and an appeal, can assume a weight which they might not otherwise bear, and incline the court in its discretion to refuse to order a new trial."

[33] The decision of *Middleton v The Queen* [2000] WASCA 2000, canvassed many of the authorities on the issue of whether Courts of Appeal in allowing an appeal should enter a verdict of acquittal or order a retrial. Reference was made to the decision of *Rabey v The Queen* [1980] WAR 84 Wickham J at 95 – 96:

> "All the criteria for exercising the discretion to order a new trial as distinct from simply directing a judgment and verdict of acquittal, have not yet been worked out. Where the case is strong and the error is a procedural one only, there is much to be said for the proposition that the matter should be retried in a proper manner. There are, however, other considerations. A new trial ought not to be ordered as a matter of course. Once justice has miscarried it is not always easy to maintain the scales in precise equipoise on a second occasion. The public interest in securing a fair trial of an alleged wrongdoer must be weighed against public inconvenience and expense, and against the possible oppression upon a member of the public who is placed in jeopardy twice for the same offence, has already spen[t] some time in prison and has already been through one trial and on appeal. …."

[34] In the matter before this Court the appellant has not served any period of time in gaol. This error that is the basis for allowing the appeal however is not merely a procedural error. There was a very substantial inadequacy in the investigation of the Crown case. I have agreed with both counsel that on the basis of the failure by police to investigate adequately the commission of the offences the findings of guilty were unsafe and unsatisfactory.

[35] I am aware from the decision of *Middleton v The Queen* (supra) that from the later authorities canvassed by Miller J and paragraphs 20 – 24 the trend has been for Courts of Appeal when they allow an appeal to leave the discretion to the Director of Public Prosecutions whether to present the charges for a retrial (*Parker v The Queen* (1997) 186 CLR 494; *Crofts v The Queen* (1996) 186 CLR 427; *Graham v The Queen* (1998) 195 CLR 606).

[36] However, in this matter I have come to the conclusion that it would be more appropriate for this Court to enter a verdict of not guilty. The essential basis for allowing the appeal is because the findings of guilt were unsafe and unsatisfactory as a consequence of the failure by police to investigate adequately the commission of the offences. It is not a situation where new evidence has now come to light. From the evidence of Ms Fraser and Ms Burbidge, there were records relevant to these matters in existence at the time the matter was first investigated. The further investigations should have been completed and the result of such investigations and any records obtained been presented at the hearing in the Court of Summary Jurisdiction.

[37] This is not a situation where the Crown are able to state that they have fresh evidence to present at a subsequent trial. At the date of the hearing of the appeal, the further police investigations had not been carried out and it is not known whether the further evidence would assist the Crown case or exculpate the appellant.

[38] I have come to the conclusion that in these circumstances it would be oppressive to the appellant to place him in jeopardy twice for the same offence.

[39] In this matter the public inconvenience and expense and the oppression of placing the appellant in jeopardy twice for the same offence outweigh the other considerations for ordering a retrial.

[40] Accordingly, the order I make is that the appeal be allowed, the conviction quashed and a verdict of not guilty entered.

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