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Court : House of Lords

Decided On : Mar-01-1951

Judge : Lord Chancellor, Lord Porter, Lord Normand, Lord Oaksey, Lord Radcliffe

Appeal No. : No.

Appellant : Reading

Respondent : Attorney-general (on Behalf of His Majesty)

Judgement :

Lord Porter

MY LORDS,

The Lord Chancellor, who is unable to be present today, asks me to say that he concurs in the opinion I am about to deliver.

Lord Porter

MY LORDS,

This is an Appeal from an Order of the Court of Appeal dated the 19th May, 1949, affirming the judgment of the Honourable Mr. Justice Denning (as he then was), and ordering that the Suppliant's Appeal from the said judgment be dismissed with costs to be paid by the Suppliant to the Crown or its Solicitor, such costs to be taxed by a Taxing Master.

In 1944 and 1945 certain sums, all in Egyptian currency, amounting in all to E18,842.105, equivalent to 19,325 4s. 8d. in sterling, and held by or on behalf of the Suppliant, were seized and taken into possession on behalf of His Majesty.

By Petition of Right presented on the 1st November, 1946, the Suppliant sought to recover these sums or their sterling equivalent (allowance being made for sums released to him), as money had and received by His Majesty to his use.

The Respondent admitted that these sums had been seized and taken into possession on behalf of His Majesty but alleged that they represented part of the proceeds of bribery and that the Suppliant was accountable therefor to His Majesty and received and held them in trust for His Majesty. Alternatively he claimed that the Respondent was entitled to set them off against the Suppliant's Claim.

The facts proved or agreed in the Action are not in dispute and may succinctly be stated substantially in the form adopted by the Appellant in his case and are as follows: -

(A) In 1943 and 1944 the Appellant was a Sergeant in the Royal Army Medical Corps and receiving pay at the rate appropriate to his Rank. He was employed as a Sergeant in charge of medical stores at No. 63 General Hospital, Cairo.

(B) On the 14th March, 1944, he dictated and signed a statement to Lieutenant Brooks of the Special Investigation Branch, Middle East, that he had received in all some 20,000 from a man named Manole in the following circumstances:

Some time about the beginning of 1943, when having coffee at Alexandria whilst on leave, he was asked by a man, who apparently knew him but whom he did not know, whether he would assist by selling cases of whisky and brandy to agents in Cairo for which he would get a few pounds. The Appellant expressed his willingness and was told that someone would get into contact with him outside the hospital gates at Helmeih and tell him what he had to do. About a month later Manole met him there, told him a lorry was coming at a specified time to a place which was pointed out to him. When it arrived he was to board it and take it to another spot which again he was shown. At the specified time and place a lorry

duly arrived, the Appellant then boarded it and conducted it through Cairo to the appointed spot, where the contents were transferred to another lorry but he was unable to see of what they consisted. He then went home, but by arrangement met Manole later on the same day at a restaurant in Cairo and received from him an envelope which on examination was found to contain 2,000. This process was repeated on a number of occasions on which, as in the first, a lorry arrived with cases the contents of which were undisclosed, and after each journey he was given sums varying from 1,000 to 4,000.

(C) On the 20th March, 1944, his statement was shown to the Suppliant by Sergeant-Major Jones of the Special Investigation Branch, and the Suppliant acknowledged that it was his statement and that it was true. He also told Sergeant-Major Jones that he had been dressed on each occasion in uniform, and on a later occasion showed Corporal Read of the Special Investigation Branch a number of different places in Cairo as points at which he had met or left the lorries which he had accompanied from time to time.

The Appellant's Case also alleges that at all material times it was obligatory for all service personnel in Cairo to wear uniform, except when engaged in sport or other specially excepted activity. I can find no evidence to this effect but regard the allegation as immaterial to the decision which your Lordships are asked to reach.

In these circumstances Denning, J., held that the Crown was entitled to the money in question. It was, in his view, immaterial to consider whether the method of seizure was justified or not. Even if it was not, the Crown had a valid counterclaim and, avoiding a circuitry of action, could thus defeat the Appellant's claim. "It is", he says, " a claim for restitution of moneys " which, in justice, ought to be paid over." It was suggested in argument that the learned judge founded his decision solely upon the doctrine of unjust enrichment and that that doctrine was not recognised by the law of England. My Lords, the exact status of the law of unjust enrichment is not yet assured. It holds a predominant place in the law of Scotland and, I think, of the United States, but I am content for the purposes of this case to accept the view that it forms no part of the law of England and that a right to restitution so described would be too widely stated. But, indeed, this doctrine is not of the

essence of Denning, J.'s, judgment. His reasoning is to be found in the passage which succeeds that quoted. He says: " In my judgment, it is " a principle of law that if a servant takes advantage of his service by " violating his duty of honesty and good faith, to make a prom for himself, " in this sense, that the assets of which he has control, or the facilities which " he enjoys, or the position which he occupies, are the real cause of his " obtaining the money, as distinct from being the mere opportunity for getting " it, that is to say, if they play the predominant part in his obtaining the " money, then he is accountable for it to the master. It matters not that the master has not lost any profit, nor suffered any damage. Nor does it matter that the master could not have done the act himself. It is a case "where the servant has unjustly enriched himself by virtue of his service without his master's sanction. It is money which the servant ought not to be allowed to keep, and the law says it shall be taken from him and given to his master, because he got it solely by reason of the position which he occupied as a servant of his master. And again, The uniform of the Crown, and the position of the man as a servant of the Crown were the sole reasons why he was able to get this money, and that is sufficient to make him liable to hand it over to the Crown. The learned judge however also says: There was not, in this case, a fiduciary relationship; and this man Reading was not acting in the course of his employment. If this means, as I think it does, that the Appellant was neither a trustee nor inpossession of some profit-earning chattel and that it was contrary to his duty to escort unwarranted traffic or possibly any traffic through the streets of Cairo, it is true, but, in my view, irrelevant. He nevertheless was using his position as a Sergeant in His Majesty's Army and the uniform to which his rank entitled him to obtain the money which he received. In my opinion any official position, whether marked by a uniform or not, which enables the holder to earn money by its use gives his master a right to receive the money so earned even though it was earned by a criminal act.

You have earned ", the master can say, money by the use of your position as my servant. It is not for you, who have gained this advantage, to set up your own wrong as a defence to my claim.

Asquith, L.J., in the Court of Appeal, points out that there is a well-established class of cases in which a master can recover whether or not he has suffered any

detriment in fact, e.g., those in which a servant or agent has realised a secret profit, commission or bribe in the course of his employment, and that the sum recoverable is the amount of such profit. It is perhaps sufficient to refer in this connection to *Boston Deep Sea Fishing and Ice Co. v. Ansell*, 39 Ch.D. 339, and to quote the words of Bowen, L.J.. at page 367: " It is true, as Mr. Justice Kekewich says, that the money which is sought to be recovered must be money had and received by the agent for the principal's use; but the use which arises in such a case. and the reception to the use of the principal which arises in such a case, does not depend on any privity between the principal and the opposite party with whom the agent is employed to conduct business-it is not that the money ought to have gone into the principal's hands in the first instance; the use arises from the relation between the principal and the agent himself. It is because it is contrary to equity that the agent or the servant should retain money so received without the knowledge of his master. Then the law implies a use, that is to say, there is an implied contract, if you put it as a legal proposition-there is an equitable right, if you treat it as a matter of equity-as between the principal and agent that the agent should pay it over, which renders the agent liable to be sued for money had and received, and there is an equitable right in the master to receive it, and to take it out of the hands of the agent, which gives the principal a right to relief in equity.

But it is said that this right to recover is subject to two qualifications (1) the sum obtained must have been obtained in the course of the servant's employment, and (2) there must exist in the matter in question a fiduciary relationship between employer and employee.

It is often convenient to speak of money obtained as received in the course of the servant's employment, but strictly speaking I do not think that expression accurately describes the position where a servant receives money by reason of his employment but in dereliction of his duty. In *Attorney-General v. Goddard* (1929) 98 L.J. (ns) K.B. 743 the bribes given to Sergeant Goddard were received by reason of his employment but not in the course of it, except in the sense that his employment afforded the opportunity by which the gain was made. Just as in the often-quoted instance of a servant letting out his own services and the use of his

master's horses for private gain, he is not acting in the course of his employment, he is taking advantage of the position which his employment gives him and for reward so gained he is answerable to his master none the less, as Attorney-General . Goddard (sup.) shows, though the obtaining of the money is a criminal act. It is true that the right of the master to demand payment of the money is often imputed to a promise implied from his relationship to the servant. I doubt whether it is necessary to raise such an implication in order to show that the money has been received to the master's use. but even if it were it may well be contended that there is no illegality in a servant promising to hand over to his master any sums he gains by use of his position. Nor would the master be affirming any criminal act committed by the servant in earning the sum claimed; he would only be saying that as between himself and the servant the servant could not set up his own wrong as a defence. Any third party's claim to the money would not be affected.

In this aspect the making of the promise need not and should not in my view be referred to a point of time after the receipt of the bribe: it may well be ascribed to the time when the contract of employment was entered into.

As to the assertion that there must be a fiduciary relationship, the existence of such a connection is, in my opinion, not an additional necessity in order to substantiate the claim ; but another ground for succeeding where a claim for money had and received would fail.

In any case, I agree with Asquith, L.J., in thinking that the words "fiduciary" relationship " in this setting are used in a wide and loose sense and include, inter alios, a case where the servant gains from his employment a position of authority which enables him to obtain the sum which he receives.

My Lords, the fact that the Crown in this case, or that any master, has lost no profits or suffered no damage is, of course, immaterial and the principle so well known that it is unnecessary to cite the cases illustrating and supporting it. It is the receipt and possession of the money that matters, not the loss or prejudice to the master.

In general I find myself in complete agreement with the views of the Court of Appeal as delivered by Asquith, L.J. I differ only as to the time to which the making of the implied contract is to be imputed. I should indeed have thought it unnecessary to add any observations of my own, had it not been for the interesting and closely argued contentions of Mr. Salmon for the Appellant. As it is, I would nevertheless dismiss the Appeal.

Lord Normand

MY LORDS,

I agree with the Court of Appeal with the single reservation that I have not found a necessary to consider whether the Respondent would have been entitled to succeed in an action at law for money had and received. On that question I would have desired to hear further argument had it been necessary to decide it.

Though the relation of a member of His Majesty's forces to the Crown is not accurately described as that of a servant under a contract of service or as that of an agent under a contract of agency, the Court of Appeal has held that he owes to the Crown a duty as fully fiduciary as the duty of a servant to his master or of an agent to his principal, and in consequence that all profits and advantages gained by the use or abuse of his military status are to be for the benefit of the Crown. I respectfully think that these are unassailable propositions, and further that the Appellant cannot be allowed to propone as a defence to the Crown's claim his own criminal conduct either in accepting a bribe in breach of military discipline or in participating in an offence against the municipal law of Egypt.

Lord Oaksey

My Lords.

I agree with the judgment of the Court of Appeal except on one point. I do not think there is any difficulty in imputing to a servant an implied promise that he will account to his master for any moneys he may receive in the course of his master's business or by the use of his master's property or by the use of his position as his master's servant. There is nothing illegal in such a promise ; on the contrary, in

substance it is the basis for the equitable principle that an agent is accountable for profits made in the course of his agency without the knowledge and consent of his principal, and no less accountable if the profits arise out of corrupt transactions; an agent is bound to know the law and therefore when he enters into a contract of agency he impliedly undertakes to be accountable for any such profits.

It was further argued on behalf of the appellant that the Crown would not be entitled to property stolen in what is called a smash and grab raid in which a servant of the Crown had shared some of the stolen property, and this is no doubt true, but the reason is that the Crown could not assert a right to receive stolen property knowing it to have been stolen.

It was also argued that because a master is not liable for damages caused by a servant's use of the master's property when not engaged on the master's business it follows that the master cannot claim the profits. This argument appears to me to confuse the obligations of a servant or agent to his master with the principal's or master's obligations to third parties.

It may be that there are cases in which a servant may use his master's property in the servant's hours of leisure and earn profits for which he is not accountable to the master. It would depend upon the facts and on the degree of user of the master's property, and the rule de minimis might apply in many cases.

But the appellant, who was a soldier on active service in time of war, was not an ordinary servant and his use of his uniform and his real rank and position was, as Mr. Justice Denning (as he then was) and the Court of Appeal pointed out, the real cause of his obtaining the money in question.

The question-When is a soldier on active service and in uniform not on duty?-is one which will depend upon the facts of the case. Whether he is in uniform or not he is always bound to act so as not to prejudice order and good discipline, and in my opinion he is never entitled to appear in public in uniform in order to earn money without the knowledge and consent of the Crown.

Lord Radcliffe

MY LORDS,

I agree that this appeal should be dismissed, for I see no answer to what has been said in the judgment of the Court of Appeal.

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