Toritelia v. The Queen

Court of Appeal
Sir John White P., Kapi and Connolly JJ.A.
30 March 1987

Criminal law – fraudulent embezzlement – section 266(a)(ii) of the Penal Code – whether a servant who takes money from an employer intending to repay and having an expectation of being able to do so is guilty of fraudulent embezzlement – whether the meaning of that term is a matter of law upon which a jury ought to be instructed – Penal Code section 266(a)(ii).

Toritelia took $451 from his employer and used it for his own purposes. The magistrate at his trial accepted that Toritelia intended to repay the money from funds which he expected to receive by way of a grant to attend an overseas training course. The course, however, was cancelled and Toritelia was unable to repay. He was charged under section 266(a)(ii) of the Penal Code with fraudulent embezzlement of the funds. At trial he was acquitted on the basis that a person who intends to repay and has an expectation of being able to do so does not fraudulently embezzle. The Director of Public Prosecutions appealed. The High Court reversed and entered a conviction on the ground that it was no defence in law that one intended to repay money which one knew one had no right to take. Toritelia appealed against the conviction, arguing that the magistrate's findings of fact (as to his intention to repay and expectation of being able to do so) amounted to a finding that he had not acted fraudulently. The Director of Public Prosecutions argued that the proper meaning of "fraudulently" was a matter of law upon which the magistrate had erred, and that on the proper interpretation of that term a conviction was justified on the facts as found, and was rightly entered on appeal.

HELD:

(1) (Sir John White P. and Connolly J.A.) Since the term "fraudulently embezzles" in section 226(a)(ii) of the Penal Code had been consciously adopted from an equivalent provision in the Larceny Act 1916 (U.K.), cases that were authorities on the meaning of that term under that Act ought to be followed in the Solomon Islands, notwithstanding the repeal of that Act in the United Kingdom and its replacement by the Theft Act 1968 (U.K.): *ll.* 400 and 1020. *R.* v. *Feely* [1973] Q.B. 530; [1973] 2 W.L.R. 201; [1973] 1 All E.R. 341; (1973) 57 Cr. App. R. 312 followed.

(2) (Sir John White P.) The term "fraudulently" requires consideration of the state of mind of the accused at the time of the alleged offence. This is a question of fact but one which must be determined having regard to the proper meaning of "fraudulently" which is a question of law: *l.* 460.

(3) The term "fraudulently" means that the accused must have prejudiced or taken the risk of prejudicing the right of another, knowing that he had no

right to do so. This state of knowledge is commonly described as "dishonesty": *l.* 470.
R. v. *Feely* (supra), *R.* v *Ghosh* [1982] Q.B. 1053; [1982] 3 W.L.R. 110; [1982] 2 All E.R. 689; 75 Cr. App. R. 154, *R.* v. *Salvo* [1980] V.R. 401, considered.

(4) On the facts as found by the magistrate, the appellant knew he had no right to take the money, and had only a hope or an expectation that he would be able to repay it. Accordingly he knowingly prejudiced the rights of another. He ought therefore to have been convicted if the proper meaning in law of "fraudulently embezzles" had been applied: *l.* 670.

(5) (Kapi J.A.) The Penal Code is a complete code and all defences to criminal charges intended by the legislature must be based on its provisions: *l.* 810.

(6) On a proper interpretation of section 266 (a)(ii) an intention to repay cannot amount to a defence. The offence is complete upon the accused's depriving the owner of the property. Any defence based upon an intention to repay could only be advanced under section 8 of the Penal Code which provides defences for property offences where the act was done in the exercise of an honest claim of right and without an intention to defraud. Even if the appellant here could make out the second of these requirements, he could not make out the first as he had no honest claim of right to the funds he took. Accordingly he was properly convicted *l.* 920.
R. v. *Pollard* (1962) Q.W.N. 13 followed.

(7) (Connolly J.A.) The term "fraudulently" itself imports the notion of mens rea or a guilty mind. An embezzlement will not be fraudulent within the meaning of section 266(a)(ii) where it is done under an honest claim of right or an honest and reasonable belief that the taking is not against the will of the owner. Neither of these elements was made out by the appellant: *l.* 1070.
R. v. *Williams* [1953] 1 Q.B. 660; [1953] 2 W.L.R. 937; [1953] 1 All E.R. 1068; 37 Cr. App. R. 71 considered.

(8) An honest intention to repay coupled with an ability to do so can constitute a defence since it is inconsistent with an intention to permanently deprive the owner of his property. Here, however, the appellant had only a hope or an expectation of being able to repay, and this fell short of an ability to repay since hopes or expectations are of their nature liable to be defeated: *l.* 1140.
R. v. *Williams* (supra), *R.* v. *Cockburn* [1968] 1 W.L.R. 281; [1968] 1 All E.R. 466; (1968) 52 Cr. App. R. 134 (C.A.) considered.

OBSERVATION: (Connolly J.A.) An honest claim of right or an honest belief in the employer's consent would both negate fraud for the purposes of section 266(a)(ii) (see *l.* 1150). The instant case can be read together with *Lawi* v. *The State,* decided by the Supreme Court of Justice of Papua New Guinea, reported in these pages at 187.

Other cases mentioned in judgment:
Balcombe v. *de Simoni* (1972) 126 C.L.R. 576
Brutus v. *Cozens* [1973] A.C. 854; [1972] 3 W.L.R. 521; [1972] 2 All E.R. 1297; 56 Cr. App R 799 (H.L. (E.))
R. v. *Bonollo* [1981] V.R. 633
R. v. *Brow* [1981] V.R. 783

R. v. *Coombridge* [1976] 2 N.Z.L.R. 381
R. v. *Cooper* (1914) 14 S.R. (N.S.W) 426
R. v. *Glenister* [1980] 2 N.S.W.L.R. 597
R. v. *Hobart Magalu* [1974] P.N.G.L.R. 188
R. v. *Johnson* (1867) 6 S.C.R. (N.S.W) 201
R. v. *Martini* [1941] N.Z.L.R. 361
R. v. *Medland* (1851) 5 Cox C.C. 292
R. v. *Nelson* [1902] A.C. 250
R. v. *Phetheon* (1840) 9 C. & P. 552; 173 E.R. 952
R. v. *Smart* [1983] V.R. 265
R. v. *Trebilcock* (1858) D.& B. 453; (1858) 7 Cox C.C. 408; 169 E.R. 179
R. v. *Williams* [1985] 1 N.Z.L.R. 294
R. v. *Wright* (1828) 9.C. & P. 553; 173 E.R. 953n
In Re Hyams [1979] 2 N.S.W.L.R. 834
Rose v. *Matt* [1951] 1 K.B. 810; (1951) 1 T.L.R. 474; [1951] 1 All E.R. 361; (1951) 35 Cr. App. R. 1
Scott v. *Metropolitan Police Commissioner* [1975] A.C. 819; [1974] 3 W.L.R. 741; [1974] 3 All E.R. 1032; (1974) Cr. App. R. 124
Tiden v. *Tokavananui-Topaparik* [1967-8] P.N.G.L.R. 231
Treacy v. *D.P.P.* [1971] A.C. 537; [1971] 2 W.L.R. 112; [1971] 1 All E.R. 110; 55 Cr. App. R. 113
Welham v. *D.P.P.* [1961] A.C. 103; [1960] 2 W.L.R. 669; [1960] 1 All E.R. 805; (1960) 44 Cr. App. R. 124, (H.L.).

Legislation referred to in judgment:
Constitution of Solomon Islands, Schedule 3
Court of Appeal Act 1978, sections 21 and 36
Crimes Act 1961, section 222 (N.Z.)
Criminal Procedure Code, section 282
Larceny Act 1916 (U.K.)
Penal Code, sections 8, 23, 35, 251 and 266
Queensland Criminal Code, section 22
Solomon Islands Independence Order 1978
Theft Act 1968 (U.K.)

Other sources referred to in judgment:
Griew, E. "Dishonesty: The Objections to *Feely* and *Ghosh*", [1985] Crim. L.R. 341
Glanville Williams, *Textbook of Criminal Law* (2nd ed. 1983).
Weinberg & Williams, *The Australian Law of Theft* (1977)

Appeal against conviction

The appellant appealed the conviction entered against him in the High Court on the Director of Public Prosecution's successful appeal against his acquittal at the trial before a magistrate. The High Court stated a case for the determination of the Court of Appeal but the Court of Appeal dealt with the matter as a conviction appeal only.

A. Radclyffe for the appellant
F. Mwanesalua, Director of Public Prosecutions, for the respondent.

SIR JOHN WHITE P.

Judgment:

This case came before the Court as a case stated by the learned Chief Justice pursuant to section 36 of the Court of Appeal Act 1978 and the appellant filed a notice of appeal. There is no dispute as to the issues and the Court agreed that the matter would be dealt with as an appeal from the judgment of the High Court.

The facts from which the question arises can be stated briefly.

The appellant was employed as supervisor of the fish market at Yandina. The funds in an imprest account provided by the Provincial Treasurer and the proceeds of the operation of the market were under the control of the appellant. In a letter to the Provincial Treasurer dated 14 February 1984 the appellant reported that he had taken and used some of the funds under his control for his own purposes. In explaining his actions in his letter he said his intention at the time of taking the money was to "recover the whole sum ($451.60) with my advances for an overseas course."

The charge against the appellant was laid under section 266(a)(ii) of the Penal Code which reads as follows:

> Any person who:
> (a) being a clerk or servant or person employed in the capacity of a clerk or servant –
> (ii) fraudulently embezzles the whole or any part of any chattel, money or valuable security delivered to or received or taken into possession by him for or in the name or on the account of his master or employer;
> is guilty of a felony, and shall be liable to imprisonment for fourteen years.

The language of the section is in the language of the Larceny Act 1916 (U.K.) which was entitled "An Act to consolidate and simplify the law relating to larceny triable on indictment and kindred offences". In the United Kingdom the Theft Act 1968 replaced the Larceny Act 1916 but the Solomon Islands provisions have remained unaltered.

The learned Magistrate who heard the case came to the conclusion that the appellant "would not have used the money unless he had a genuine intention of repaying it", and that, "certainly he had the prospect of repaying the money", arrangements being in train for an overseas course for the appellant entitling him to a payment in advance. In fact that course was cancelled and the amount the appellant was able to repay over a period was $300.

While holding that the "borrowing" was of a kind which may be fraudulent "even with an intent to repay" the learned Magistrate found that in the circumstances the appellant was not fraudulent and he was accordingly acquitted. In reaching the conclusion the learned Magistrate relied on a decision of the United Kingdom Court of Appeal *R.* v. *Feely* [1973] Q.B. 530; [1973] 2 W.L.R. 201; [1973] 1 All E.R. 341; (1973) 57 Cr. App. R. 312.

The Director of Public Prosecutions appealed to the High Court.

As the learned Chief Justice states in the case stated, he held in a judgment dated

10 February 1986 "that the law applicable to Solomon Islands in cases of stealing was that it is no defence in law in the case of money for a person to say that although he took or used the money taken he afterwards intended to repay it to the owner". The view of the learned Chief Justice was that he was bound to follow the English judgments on the point under the Larceny Act 1916, namely *R.* v. *Williams* [1953] 1 Q.B. 660; [1953] 2 W.L.R. 937; [1953] 1 All E.R. 1068 (1953) 37 Cr. App. R. 71 and *R.* v. *Cockburn* [1968] 1 W.L.R. 281; [1968] 1 All E.R. 466; (1968) 52 Cr. App. R. 134, and not *R.* v. *Feely* [1973] Q.B. 530; [1973] 2 W.L.R. 201; [1973] 1 All E.R. 341; (1973) 57 Cr. App. R. 312 decided under the Theft Act 1968. He accordingly allowed the appeal.

We have had the advantage of hearing comprehensive arguments from counsel which have shown that the questions at issue have been much discussed in recent years in the courts of the Commonwealth and that there is considerable disagreement.

While there are differences in the relevant statutory provisions in other jurisdictions, the cases which have arisen and, in particular, the decision of the United Kingdom Court of Appeal in *Feely,* have reviewed the principles applied in earlier cases determined prior to the passing of the Theft Act 1968. There are important questions therefore for determination by this Court as to the interpretation to be given to the relevant provisions of the Penal Code of Solomon Islands.

Mr Radclyffe's submission was that where fraud is an element of an offence involving taking without authority the money of an employer where the person concerned has the intention to repay and a realistic prospect of being able to do so, it is a question for the jury, or the judge or magistrate sitting alone, to determine as a question of fact whether an accused acted fraudulently. Mr Radclyffe had no difficulty in providing examples of cases in the Solomon Islands setting where a person might use funds collected in the course of his employment for his own purposes without authority but with the intention and with the prospect of repaying the amount used and claiming that he had not acted fraudulently.

Relying on *R.* v. *Feely* (supra) Mr Radclyffe submitted that in such circumstances the word "fraudulently" means "dishonestly". Mr Radclyffe submitted that cases determined in England under the Theft Act could be invoked in this jurisdiction as persuasive authority. He referred to the recommendations of the Criminal Law Review Committee submitting that "dishonestly" was intended to replace "fraudulently", for the reason that "fraudulently" was difficult to understand, and not with the intention of changing the law.

Mr Mwanesalua submitted that the word "fraudulently" had acquired a special meaning at common law as was to be seen in decisions of the English courts giving effect to the common law. It was submitted that the Penal Code of Solomon Islands must be presumed to have intended that "fraudulently" has the same meaning as it had under the United Kingdom Larceny Act 1916. He contended that when the Theft Act 1968 substituted the word "dishonestly" for "fraudulently" a change in the law must have been intended.

The effect of his submission was that in order to prove that an accused acted "fraudulently" under section 266 of the Penal Code the prosecution must establish a deliberate and intentional misapplication of property belonging to another. The onus on the prosecution was to prove beyond reasonable doubt there was no mistake on

the part of the accused and that he knew the thing converted belonged to another.

It was contended that as the United Kingdom Court of Appeal in *Feely* was interpreting the Theft Act statements in the judgment relied on by the appellant in the present case were *obiter.*

R. v. *Feely* was decided by a court of five, the judgment of the Court being delivered by Lawton L.J. It was clear on the evidence that a branch manager of a firm of bookmakers had borrowed from the till for his own purposes contrary to instructions. In a statement to the police he said he intended to repay the amount and that in fact his employers owed him more than the amount borrowed. Lawton L.J. said [at pp. 534-535 (Q.B.); pp. 202-203 (W.L.R.); p. 342 (All E.R.); p. 314 (Cr. App. R.)]:

> The appeal raises an important point of law, namely, can it be a defence *in law* for a man charged with theft and proved to have taken money to say that when he took the money he intended to repay it and had reasonable grounds for believing and did believe that he would be able to do so?

The trial judge had directed that such a defence was not available. If the law recognized such a defence the question arose, as Lawton L.J. put it, "whether the decisions in *R.* v. *Cockburn* ; [1968] 1 W.L.R. 281; [1968] 1 All E.R. 466; (1968) 52 Cr. App. R. 134 and of its predecessor, *R.* v. *Williams* [1953] 1 Q.B. 660; [1953] 2 W.L.R. 937; [1953] 1 All E.R. 1068; 37 Cr. App. R. 71 are applicable to a charge of theft under section 1 of the Theft Act 1968, and if they are, whether they were correctly decided." The judgment stressed that the Court was concerned with whether there was a defence *in law,* the experience of the Court being that "persons who take money from tills, safes or other receptacles, knowing full well that they have no right to do so, are usually and rightly convicted of theft." It was also stressed that "had the jury ... been left to decide whether the defendant had dishonestly taken the money, their task would have been an easy one.... "As it was the trial judge had directed that "the essential matter" to decide was whether the accused took the money and at no stage of his summing-up had he left it to the jury to decide whether the prosecution had proved that the defendant had taken the money dishonestly. The judgment proceeded [at p.537 (Q.B.); p. 204 (W.L.R.); p. 344 (All E.R.); p. 316 (Cr. App. R.)]:

> This was because he seems to have thought that he had to decide as a matter of law what amounted to dishonesty.

Lawton L.J. then asked the question, "Should the jury have been left to decide whether the defendant had acted dishonestly?" "The search for an answer", he said, "must start with the Theft Act 1968". He pointed out that the definition of theft in the Act refers to "dishonestly appropriates" and that "dishonestly" can only relate to a state of mind of the person who does the act, that that "is a question of fact which has to be decided by the jury". The judgment then recorded that the Crown had not disputed that proposition but had contended that in some cases (*Feely* being such a case) it was necessary for the trial judge to define "dishonestly" and when the facts fall within the definition he had a duty to tell the jury that if there had been an appropriation it must have been dishonestly done. The next words of the judgment at p. 537 (Q.B.); p. 205 (W.L.R.); p. 345 (All E.R.); p. 317 (Cr. App. R.), are significant in considering the present case:

> We do not agree that judges should define what "dishonestly" means. This word is in common use whereas the word "fraudulently" which was used in section 1(1) of the Larceny Act 1916 had acquired as a result of case law a special meaning.

A distinction drawn was between the two words, "dishonestly" being described as "an ordinary word of the English language which "is not a question of law". Accordingly it was held in *Feely* that the jury should have been left to decide; without any definition of "dishonestly" whether the alleged taking of money had been dishonest.

The judgment then stated that conclusion would have sufficed for the appeal but for the decisions in *Williams* and *Cockburn.*

Of the first case Lawton L. J. said, at p. 538 (Q.B.); p. 206 (W.L.R.); p. 345 (All E.R.); p. 319 (Cr. App. R.), "the main ground of appeal was that the jury had been misdirected as to the word "fraudulently" in section 1(1) of the Larceny Act 1916."

Lord Goddard C.J. said "that the word "fraudulently" does add, and is intended to add, something to the words "claim of right" and that it means (though I am not saying that the words I am about to use will fit every case, but they will certainly fit this case) that the taking must be intentional and deliberate, that is to say without mistake.

The judgment in *Feely* then proceeds at p. 539 (Q.B.); p. 207 (W.L.R.); p. 346 (All E.R.); p. 319 (Cr. App. R.):

> In so far as Lord Goddard C.J. adjudged that a meaning had to be given to the word "fraudulent" he was clearly right; and on the facts of the case with which he was dealing the rest of what he said was right; but if and in so far as he sought to lay down principles applicable to *all* cases we feel bound to say that we do not agree with him. For example, he said, at 668: "They knew that they had no right to take the money which they knew was not their money. The fact that they may have had a hope or expectation in the future of repaying the money is a matter which at most can go to mitigation and does not amount to a defence.

Because of differences in the law reports recording the judgment delivered in *Williams* there are some doubts as to what was said, but the judgment of the Court in *Feely* concludes that Lord Goddard C.J. "seems to have envisaged when delivering his judgment the possibility of an unauthorized taking which might not be fraudulent". The passage is to be found in the All England Law Reports ([1953] 1 All E.R. 1068, at 1070 D-E). The judgment then continues at p. 540 C-D (Q.B.); p. 207 (W.L.R.); p. 347 (All E.R.); p. 321 (Cr. App. R.):

> Once the possibility exists it must be for the jury to decide whether the facts proved are within it.

After disagreeing with the decision of the Court in *Cockburn,* because no reference was made in the judgment to the factor of fraud "which distinguishes a taking without consent from stealing", the judgment of the Court in *Feely* concluded at p. 541 (Q.B.); p. 209 (W.L.R.); p. 348 (All E.R.); p. 323 (Cr. App. R.):

> People who take money from tills and the like without permission are usually thieves; but if they do not admit that they are by pleading guilty, it is for the

jury, not the judge, to decide whether they have acted dishonestly.

It was not held that *Williams* had been wrongly decided. What was said in *Feely* was that "if the law drifted off course" through what was said in that case "because of the strong inference of fraud arising on the facts of the case, it got on the wrong track in *R.* v. *Cockburn*". The debate has continued in the courts as to the correct direction to be given to a jury regarding "dishonestly" and "fraudulently" but as far as "fraudulently" under the Larceny Act is concerned the Court in *Feely* accepted that it needed to be explained to the jury. A clear distinction was drawn between the words "dishonestly" in the Theft Act 1968 and "fraudulently" in the Larceny Act 1916. As far as the latter was concerned the Court in *Feely* agreed that a meaning had to be given to the word and that what Lord Goddard had said regarding the facts of the case with which he was dealing "was also right". In fact the words used by the learned Lord Chief Justice quoted in the judgment of the Court in *Feely,* show that he expressly stated those words were not intended to fit every case. His words were directed to explaining the meaning of "fraudulently" in the particular case. A case in which Lord Goddard refers to "dishonestly" in relation to "fraudulently" is *Rose* v. *Matt* (1951) 35 Cr. App. R. 1, 7, where he said – "It is quite clear that an owner of goods who has entrusted them to another in such circumstances that other person has a special property in the goods is guilty of larceny if he fraudulently takes them away from that person. There is no question here that the defendant was acting fraudulently; he was acting dishonestly, and so the justices have found."

Since *Feely* a number of other cases have been decided in England and differing views have been expressed in the Court of Appeal. In the recent cases of *R.* v. *Ghosh* [1982] Q.B. 1053; [1982] 3 W.L.R. 110; [1982] 2 All E.R. 689; 75 Cr. App. R. 154 (Lord Lane C.J., Lloyd and Eastham JJ.), earlier judgments of the Court of Appeal were considered and *Feely* was explained. Clearly the decision in *Ghosh* was intended to be of general application where the word "dishonestly" was used in the provisions of the Theft Act. The result of the case is summarized in *Archbold*, 44 ed. at p. 1216, as follows:

> The conclusion at which the Court arrived, having reviewed the authorities, was that there were two aspects to dishonesty, the objective and the subjective, and, accordingly the tribunal of fact, in determining the issue of dishonesty, would have to go through a two stage process before it could make a finding against the defendant.

It was held that the state of mind of the defendant, not the conduct of the accused, was subjective, but the standard of honesty to be applied was that of reasonable and honest men and not the accused. Accordingly, a jury must be directed that they should first consider whether the accused had acted dishonestly by the standards of ordinary and decent people and if so the jury will then consider whether the accused himself must have realized that what he was doing was by those standards dishonest.

It cannot be said that *Ghosh* has stilled the controversy. For example; I quote Edward Griew in [1985] Crim. L.R. 341 writing concerning the objections to *Feely* and *Ghosh,* and expressing the hope that "the House of Lords will find an occasion to review the cases . . ." There can be no doubt that the substitution of "dishonestly" for "fraudulently" in the definition of theft in the Theft Act 1968 and the cases decided under that Act have resulted in considerable disagreement in the courts and among textbook writers. The learned editors of *Archbold* 42nd ed. draw attention to

this at paragraphs 17-32. See also Glanville Williams' *Textbook of Criminal Law,* 2nd ed. 1983 at p. 722. Contemplating "judicial reform" at p. 730, he suggests that a definition of dishonesty must be found that will not depend exclusively on general opinion and that it should involve a disregard for rights of property. He notes also the suggestion that "a judicial definition of dishonesty might be achieved by using Professor Elliott's formula: a person appropriates dishonestly "where he knows that it will or may be detrimental to the interests of the other in a significant practical way." (See [1982] Crim. L.R. 609.) [See D.W. Elliott "Dishonesty in Theft: A Dispensable Concept" [1982] Crim L.R. 395.]

The present doubts are illustrated in the State of Victoria, Australia, where theft legislation similar to the United Kingdom statute has been enacted. The appellate courts of the Supreme Court of Victoria, have declined to follow *Feely,* in particular as to the direction to be given to juries on the meaning of "dishonestly", namely, that judges should not define what "dishonestly" means because it is in common use, and "jurors when deciding whether an appropriation was dishonest can be reasonably expected to, and should, apply the current standards of ordinary decent people". In *R.* v. *Salvo* [1980] V.R. 401 in a majority decision of the Full Court, it was held that it was the duty of the trial judge to tell the jury what is the constituent element of the offence created by the word "dishonestly" where, as in that case "the particular element is a live issue", and that it was the duty of the judge to relate that element to the alleged facts of the case. And Fullagar J., at p. 427, in considering possible meanings of "dishonestly" suggested, as one, "something akin to "fraudulently" as being without any claim of right", "very close", as he later suggested, to the common law requirement of "intent to defraud". *Salvo* was followed in *R.* v. *Brow* [1981] V.R. 783 and these cases were applied in *R.* v. *Bonollo* [1981] V.R. 633, but not on *R.* v. *Smart* [1983] V.R. 265. Dissenting opinions of judges in these cases reflected the reasons for judgment in *Feely.* The effect of the majority opinions in Victoria in interpreting "dishonestly" (substituted for "fraudulently" by the theft legislation) was that to establish that where property was stolen or misappropriated the prosecution must prove beyond reasonable doubt that the accused did not in fact believe that he had a legal right to obtain or appropriate the property in question.

The difference in interpretation between the appellate courts in the United Kingdom and Victoria illustrate the difficulties which have arisen.

I do not propose to refer further in any detail to decisions under the Theft Acts because in Solomon Islands, and in other Commonwealth jurisdictions, the word used in provisions similar to section 266(a)(ii) of the Penal Code is "fraudulently", and I repeat that when Lawton L.J. referred to the word "dishonestly" in *Feely* as a word "in common use" he added, "whereas the word 'fraudulently' which was used in the Larceny Act 1916 had acquired as a result of case law a special meaning".

It is to the meaning of "fraudulently" considered in cases to which I now turn. In *Brutus* v. *Cozens* [1973] A.C. 854, 861; [1972] 3 W.L.R. 521, 525; [1972] 2 All E.R. 1297, 1299; 56 Cr. App. R. 799, 804, Lord Reid said:

> The proper construction of a statute is a question of law. If the content shows that a word is used in an unusual sense the Court will determine in other words what that unusual sense is.

In this Court we must determine the meaning of "fraudulently" in section 266(a)(ii) of the Penal Code which must be explained to assessors by a trial

judge and must be applied by judges and magistrates sitting alone in deciding whether on the facts established on the evidence a charge of fraudulent embezzlement has been proved beyond reasonable doubt. That is the essential question in the present case, and it is a question which has been the subject of decisions of superior courts in jurisdictions where the statutory provisions have codified the common law and retained the words "intent to defraud", and "fraudulently". That is the position in New South Wales and in New Zealand. There is also authority in earlier cases at the highest level in the United Kingdom to which it is necessary to refer in this review of authority. These cases have been reviewed by the learned editors of *Archbold* 42 ed. para. 17-26 p. 1179 under the heading "With intent to defraud" or "fraudulently". This edition was not available in Solomon Islands when this case was argued.

At the outset there is the following statement of principle: "To defraud or to act 'fraudulently' is dishonestly to prejudice or take the risk of prejudicing another's right, knowing that you have no right to do so." The learned editors note that in the above statement the word "dishonestly" is inserted in deference to opinions, mostly obiter expressed in several cases. Then the decision of the House of Lords in *Welham* v. *D.P.P.* [1961] A.C. 103; [1960] 2 W.L.R. 669; [1960] All E.R. 805; (1960) 44 Cr. App. R. 124 (H.L.) is cited as authority for the proposition, that despite the fact that it was contended in that case that it would be sufficient "in nine cases out of ten" to direct the jury that "fraudulently" or "with intent to defraud" meant "dishonestly", there is no mention of any need to tell a jury that they must be satisfied that the accused was acting dishonestly. The note proceeds – "It is submitted that the reason for this is that their Lordships considered that it was beyond argument that to take the risk of prejudicing another's right, knowing that you have no right to do so was dishonest". It was also noted that it is important to remember that an intent to risk possible injury to another's right is sufficient intent to prejudice, as the Court of Criminal Appeal had pointed out.

Another case referred to in *Archbold*, at p. 1183, is *Scott* v. *Metropolitan Police Commissioner* [1975] A.C. 819; [1974] 3 W.L.R. 741; [1974] 3 All E.R. 1032; (1974) 60 Cr. App. R. 124 (H.L.) a case in which the main point at issue was whether "fraud" required proof of deceit. It was held it did not. In this case, determined after the Theft Act 1968 was enacted, Lord Dilhorne delivered the leading speech with which the majority of the Law Lords sitting agreed. He concluded that the meaning of "defraud" was the same in the offence of "conspiracy to defraud" as in the repealed Larceny Act. He also referred to the Eighth Report of the Criminal Law Revision Committee which expressed the view that in larceny "fraudulently" meant the same thing as "dishonestly", which Parliament had endorsed in the Theft Act. He then said that if "fraudulently" means "dishonestly" then "'to defraud'" ordinarily means . . . to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled". Previously Lord Dilhorne had adopted the opinion of Lord Radcliffe in *Welham* as to the meaning of "intent to defraud" noting that Lord Radcliffe's remarks were of "general application". It seems to be clear, therefore, as the learned editors of *Archbold* suggest, that Lord Dilhorne did not think the substitution of the word "dishonestly" added anything to the definition of "intent to defraud" laid down in *Welham*.

The result of the review of these cases in the United Kingdom, and I am paraphrasing to some extent the view of the learned editors of *Archbold*, is that

while "dishonestly" has a meaning as a word of common use, the words "'with intent to defraud'" and "fraudulent" are "terms of art" which have long been used at common law to denote a state of mind required for particular offences. (This was accepted in *Feely* as already mentioned.) They are words frequently to be found in statutory offences although there is a modern tendency to use the word "dishonestly" which however does not add anything to the meaning to be given to "intent to defraud" or "fraudulently". The "state of mind" to be proved in all such cases depends on a subjective test to be applied by the jury, assessors, or trial judges and magistrates sitting alone as a question of fact in each case but having regard to the meaning of "fraudulently" which is a question of law. Accordingly, the question of fact to be determined on all the relevant evidence is whether the prosecution has proved beyond reasonable doubt that the accused did prejudice or take the risk of prejudicing another's right, knowing that he had no right to do so. Throughout the cases the requirement of proof of that knowledge is commonly described as proving the accused's "dishonesty".

In my view the learned authors correctly sum up the reasoning of the cases they review as giving no indication that if fraud as explained is proved the jury have to look for any kind of dishonesty, or that if the jury find fraud as defined proved, they have to consider in addition whether the accused was acting "dishonestly". It was after the Theft Act 1968 came into force that difficulties and disagreements arose in the courts regarding the interpretation of "dishonestly" which had been substituted for "fraudulently" in that statute.

I turn now to consider the position in New South Wales and New Zealand where legislation similar to the United Kingdom Theft Act has not been introduced.

In New South Wales the meaning of "fraudulently" was considered recently in the Court of Criminal Appeal in *R.* v. *Glenister* [1980] 2 N.S.W.L.R. 597. In this case a company director was charged with conspiracy and a number of charges that he had fraudulently applied property, namely cheques, to purposes other than the purpose of the company. It was held that this question was a question of fact to be determined in the light of all relevant circumstances and by looking at the objective state of affairs revealed by what the accused had done. The third ingredient of the offence, namely, the mens rea constituted by the term "'fraudulently' raised the question which was principally in debate . . ." stated the judgment of the Court. The judgment then traversed the way in which changes in the law in England were adopted in New South Wales. The Court concluded that in determining "the mental ingredients" of the "new" offences there was "no valid reason for assigning any different meaning to the terms "fraudulently" and "with intent to defraud", and that the course of judicial decision had "assigned to the term "fraudulent" a meaning interchangeable with "dishonestly"." The earlier decision of the Court of Appeal of New South Wales in *R.* v. *Cooper* (1914) 14 S.R. (N.S.W.) 426 was referred to and the following words of Cullen C.J. delivering the judgment of the Court were quoted:

> Now, where fraud is an ingredient of a criminal offence, it must be established by the existence of a dishonest intention at the time when the act charged was committed. The intention is synchronous with the act . . . The question they [the jury] had to decide was, did he when he appropriated the goods, act dishonestly, or did he honestly think that he had a right to act as he did?

The question in *Cooper* was whether an appropriation was fraudulent. It was held that it was not sufficient to direct that if the jury "found that as a reasonable man he must have known that the effect was to defraud then you are at liberty to say he had a fraudulent intention, and therefore the appropriation was fraudulent". The defence in the case was that the accused thought he was entitled to keep the goods in question because he believed the owner had wronged him. The learned Chief Justice said, "The real question whether he was acting honestly or not would depend on this, whether he honestly thought at the time that he had a legal right to do what he did". He went on to say that "the very thing the jury needed explanation about was what was meant by such terms as fraudulent and defraud".

In *Glenister* the decision of the High Court of Australia in *Balcombe* v. *De Simoni* (1972) 126 C.L.R. 576 was referred to. In that case the following words from a direction given in *Re Hyams* [1979] 2 N.S.W.R. 834 were approved:

> In such cases [where an act is charged as having been done "fraudulently"] the word "fraudulently" is intended to apply to the accused's state of mind and has a meaning usually equivalent to "dishonestly" in relation to the particular thing done by the accused so far as it affects or may affect the person who is the "victim" of the "fraud".

The judgment of the Court in *Glenister* concludes, on this point, as follows:

> We conclude that the mental element described as "fraudulent" in a charge under section 173 is equivalent to dishonesty. It will be sufficient if the trial judge instructs the jury that the Crown must prove that the accused acted dishonestly. It is unnecessary for him to go further and define dishonesty. It is enough if he informs the jury that, in deciding whether an application [of property] was or was not dishonest they should apply the current standards of ordinary decent people: *R.* v. *Feely,* (supra) [It should be added that since *Glenister* was decided a number of English cases including *Ghosh* have been reported.]

Three cases decided in the New Zealand Court of Appeal, two of them recent, were referred to in argument. In New Zealand charges of embezzlement are normally laid under section 222 of the Crimes Act 1961. That section deals specifically with theft by persons required to account and where a person "fraudulently converts to his own use or fraudulently omits to account for or pay the same or any part thereof, or to account for or pay such proceeds or any part thereof, which he was required to account for or pay. . . ." It will be seen that the offence is essentially the same as the offence charged in the present case under section 22(a)(ii) of the Penal Code. In neither section is there any express mention of claim or right.

In *R.* v. *Martini* [1941] N.Z.L.R. 361 the accused was a commission agent for an insurance company who had collected money, failed to account and converted moneys to his own use. The trial Judge, having recorded in his summing-up that the accused "claimed that he had always intended to repay the amount he had used for his own purposes", directed the jury that as the accused had admitted appropriating the moneys to his own purposes "that in law constituted theft". In the Court of Appeal the learned Chief Justice said that was not necessarily the position "as the appropriation is not theft unless it is fraudulent and that should have been explained

to the jury". The other members of the Court agreed, and Smith J. added that the result of the trial Judge's direction was that "the jury was not permitted to determine whether the accused appropriated the moneys dishonestly or by mistaken assumption of right or acquiescence by the company in his conduct". The omission was held to amount to a misdirection and a new trial was ordered.

In *R.* v. *Coombridge* [1976] 2 N.Z.L.R. 381 the accused was convicted on a number of charges under section 222 of the Crimes Act. There were admissions by the accused that he had failed to account for moneys which he had received from S. on terms requiring him to account. He claimed that he was owned money by S. and hearing that S. was not returning from Australia he had held the money. The trial judge had directed the jury, as a matter of law, that the requirement of fraud would be proved if the jury were satisfied as to the accused's obligation and that he had deliberately refrained from performing that duty and did something else with the money for his own purposes. Following the earlier decision of the Court of Appeal in *Martini* and in particular the reasoning of Smith J., Richmond P. delivering the judgment of the Court, in *Coombridge* said:

> In section 222 of the Crimes Act 1961 no express mention is made of colour of right and the word "fraudulently" is used on its own. We think that in order to act fraudulently an accused person must certainly, as the judge pointed out in the present case, act deliberately and with knowledge that he is acting in breach of his legal obligation. But we are of opinion that if an accused person sets up a claim that in all the circumstances he honestly believed that he was justified in departing from his strict obligations, albeit for some purpose of his own, then his defence should be left to the jury for consideration provided at least that there is evidence on which it would be open to a jury to conclude that in all the circumstances his conduct, although legally wrong, might nevertheless be regarded as honest. In other words the jury should be told that the accused cannot be convicted unless he has been shown to have acted dishonestly.

The judgment had previously stated that the Court had "derived considerable assistance" from the judgment in *Feely*.

In *R.* v. *Williams* [1985] 1 N.Z.L.R. 294 the New Zealand Court of Appeal considered a further case of misappropriation in which the trial judge's summing-up was challenged. After quoting the passage from *Coombridge* set out above the judgment of the Court continued as follows:

> That is how the test has been applied in this country for many years, and it is the test which must be applied here unless and until a Full Court decides otherwise.
>
> In cases under section 222 and section 224 of the Crimes Act 1961 where it is alleged that an accused acted fraudulently, it must be shown that he acted deliberately and with knowledge that he was acting in breach of his legal obligation. But if, that being established, the accused sets up a claim of honest belief that he was justified in departing from his strict obligations, even for some purpose of his own, then his defence must be left to the jury if there is some evidence from which the jury might conclude that his conduct, though legally wrong, might nevertheless be regarded as honest. The failure of the prosecution, in the face of that evidence, to prove that he did not have such a

belief, must result in an acquittal. In deciding whether the accused was acting dishonestly at the material time, the jury are entitled to look at all the facts and statements disclosed in the evidence from which inferences as to the honesty or otherwise of his belief may be drawn. In other words, the jury in deciding on the accused's state of mind – honest or otherwise – (a subjective state) are entitled to ask themselves whether on the evidence it was reasonably possible that he was acting honestly, however mistakenly, (a subjective test) and if this is reasonably possible they must acquit him. This we think is entirely consistent with the view taken by the law in the many situations where the state of a person's mind is relevant in criminal proceedings.

It will be seen that in *Williams* "the test" stated in *Coombridge* is to be applied in New Zealand "unless and until a Full Court decides otherwise". That was said no doubt because of the different views expressed in the Court of Appeal in England in cases determined since *Feely.* Those cases were referred to in the argument in *Williams,* including *Ghosh* and *Salvo* (the Victorian case referred to earlier).

The summing-up in *Williams* in which the learned Judge quoted the principles stated in *Ghosh,* was approved by the New Zealand Court of Appeal. The concluding sentence of the direction as to whether the defendant himself must have realized "that what he was doing was dishonest, according to ordinary standards of ordinary and reasonable people" was as follows:

> It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did.

The direction sums up the subjective test to be applied in New Zealand in a case where the issue arises after the tribunal of fact is satisfied that the defendant "acted deliberately and with knowledge that he was acting in breach of his obligations". (I am again quoting from the summing-up of *Williams*.)

As was said in *Ghosh* "in most cases where actions are obviously dishonest by ordinary standards it will also be obvious that the accused knew he was acting dishonestly by such ordinary standards." Where, however, there is a claim raising an issue of belief the question whether an accused was acting honestly is "whether he honestly thought at the time he had a legal right to do what he did" – see that judgment of the Court of Appeal of New South Wales in *Cooper,* already quoted, and *Martini* and *Coombridge* in New Zealand.

The result of the review of the case, in my opinion, is that the House of Lords and Privy Council (see *R.* v. *Nelson* [1902] A.C. 250) and the highest appellate courts in other jurisdictions have restated the accepted directions as to "intent to defraud" and "fraudulently". Accordingly, those directions should continue to be applied in Solomon Islands. The cases decided in the English Court of Appeal in interpreting the adverb "dishonestly", in particular *Feely,* have been considered in appellate courts in Australia and New Zealand, but not in any reported case in the High Court of Australia, the Supreme Court of Canada or the Privy Council. It can be seen that what may be called the *Feely* direction as to the adverb "dishonestly" was often strongly criticized and not followed, or applied only in part, in the majority of other appellate courts including the United Kingdom. Further, in *Ghosh* the judgment of the Criminal Division of the Court of Appeal, presided over by Lord Lane C.J., laid down new directions. In the Court of Appeal of New South Wales and the Court of

Appeal of New Zealand it is clear that judgments in England since the Theft Act 1968 regarding the subjective test required as to "dishonestly" have been reflected in restatements of the principles to be applied when the question of an accused's state of mind – whether honest or dishonest – has been an issue. Further, in New South Wales and New Zealand, where recent cases have been reported, directions to juries have continued to explain "fraudulently" as they have done for many years and appellate courts have emphasized the rule that the state of the accused's mind at the time of the alleged offence is an issue for the jury, for example, whether there has been a mistake, or a claim of right or claim of no intent to defraud which, if it could be true, would mean that the accused must be acquitted.

In my view it is clear that the principles which "have been applied for many years" in defining and interpreting the adverb "fraudulently" must be applied in the present case. The only reservation which needs to be made is similar to the reservation of the New Zealand Court of Appeal in *Williams* that because of the uncertainty at appellant level the tests may be reconsidered in the House of Lords or in other jurisdictions where there is a right of appeal to a higher court.

In the present case the appellant, charged with embezzlement, admitted that he knew he had no right to take and use the funds he held as supervisor of the fishmarket at Yandina. That his intention was to pay back the amount he had taken and that he had some prospects of being able to do so was accepted. But those prospects depended on an advance payment which he would have received if an overseas course had been approved. These prospects were not fulfilled and he was never in a position to repay the amount appropriated. Clearly, the appellant had acted deliberately in breach of his obligations in a manner prejudicing another's right knowing that he had no right to do so. That being the appellant's state of mind at the time of the appropriation with no more than a hope or expectation of being able to repay the amount he had taken there can be no doubt he was dishonestly prejudicing another's right knowing he had no right to do so. In the circumstances he was guilty of embezzlement and should have been convicted. On the appeal from the lower court the appellant was convicted. In my opinion, for the foregoing reasons, the appeal against conviction in the High Court should be dismissed.

KAPI J.A.

This is an appeal from a decision of the High Court under section 21 of the Court of Appeal Act 1978.

The appellant was charged with embezzlement under section 226(a)(ii) of the Penal Code and was acquitted by the Magistrate's Court. The Director of Public Prosecutions appealed against the decision to the High Court under section 282 of the Criminal Procedure Code. The High Court reversed the decision of the magistrate and found the appellant guilty of embezzlement. The appellant has appealed from this decision.

The facts are not in dispute. The appellant was employed by the Central Province as a supervisor of its fish market at Yandina. He had a fund which was authorised by the Provincial Treasurer for the operation of this fish market. He used the funds for the purposes of the fish market and moneys which were not spent were held in the name of the employer until they were deposited with the Provincial Treasury.

The appellant admitted spending $451.60 for his own purposes. The evidence is that at the time he took the money, he intended that he would pay it back at a later

date from moneys he expected to receive for a proposed overseas trip to New Zealand for training.

The question which has been the subject of appeal from the Magistrate's Court to the High Court and then to this Court, is whether the appellant "fraudulently embezzled" the amount of $451.60 in the circumstances.

The words which call for interpretation are "fraudulently embezzles" under section 266 (a)(ii) of the Penal Code.

There appear to be two lines of authority on this point. The first is that a person may be adjudged guilty of "fraudulently embezzles" if he uses, diverts, applies or disposes of any chattel, money or valuable security in breach of his legal obligation in looking after his employer's property. The fact that he intended to pay back or return the property is irrelevant. This line of authority is supported by *R.* v. *Williams* [1953] 1 Q.B. 660; [1953] 2 W.L.R. 937; [1953] 1 All E.R. 1068; (1953) 37 Cr. App. R. 71 and *R.* v. *Cockburn* [1968] 1 W.L.R. 281; [1968] 1 All E.R. 466. The High Court adopted this line of argument.

The second line of authority supports the view that a person is said to be acting fraudulently, if he deliberately acted with knowledge to use the property in breach of his legal obligation, but if he sets up a defence such as in this case, that the appellant intended to pay back the money, whether this was fraudulent was a matter to be decided on the facts of each case. This argument is supported by *R.* v. *Feely* [1973] Q.B. 530; [1973] 2 W.L.R. 201; [1973] 1 All E.R. 341; (1973) 57 Cr. App. R. 312, *R.* v. *Ghosh* [1982] Q.B. 1053; [1982] 3 W.L.R. 110; [1982] 2 All E.R. 689; 75 Cr. App. R. 154, *R.* v. *Coombridge* [1976] 2 N.Z.L.R. 381 and *R.* v. *Williams* [1985] 1 N.Z.L.R. 294. The Magistrate's Court appeared to have adopted this line of argument.

In this case, we are not concerned with the interpretation or application of principles of common law or equity under Schedule 3(2) of the Constitution. Nor are we concerned with the interpretation or application of an Act of the Parliament of the United Kingdom under Schedule 3(1) of the Constitution. The Court is here concerned with the interpretation and application of a statute which is deemed to have been made under the Constitution of Solomon Islands. See section 5(1) of the Solomon Islands Independence Order 1978.

In the absence of any Act of the Parliament and lack of practice direction given by the Chief Justice on the question of the doctrine of judicial precedent under Schedule 3(4) of the Constitution, it is proper for this Court in this case to come to its own view of the statute in question. This is the final Court of Appeal of an independent country and must interpret the statute in the way it thinks appropriate for Solomon Islands. That is not to say that the Court will not have regard to the authorities that have been referred to us from other jurisdictions with similar statutory provisions. I am grateful to the President for a detailed analysis of cases from England, Australian States and New Zealand. I have found them helpful in formulating my own views.

I have considered all the relevant authorities and I am not convinced that the line of authority following *Feely* is the correct view to be adopted in Solomon Islands. There are many unsatisfactory aspects of this view. They are carefully collected and argued by Edward Griew in an article entitled "Dishonesty: The Objections to *Feely* and *Ghosh* " [1985] Cr. Law Rev. 341. I prefer the view expressed in *R.* v. *Williams* [1985] 1 N.Z.L.R. 299; and *R.* v. *Cockburn* [1968] 1 W.L.R. 281; [1968] 1 All E.R. 466. I do not reach my conclusions on the reasoning of these cases alone but also on

a proper analysis and interpretation of the Solomon Islands Penal Code.

I now turn to the proper construction of the section. It is in the following terms:

> 266. Any person who –
> (a) being a clerk or servant or person employed in the capacity of a clerk or servant –
> (i) steals any chattel, money or valuable security belonging to or in the possession of his master or employer; or
> (ii) fraudulently embezzles the whole or any part of any chattel, money or valuable security delivered to or received or taken into possession by him for or in the name or on the account of his master or employer; or
> (b) being employed in the public service of her Majesty –
> (i) steals any chattel, money or valuable security belonging to or in the possession of Her Majesty or entrusted to or received or taken into possession by such person by virtue of his employment; or
> (ii) embezzles or in any manner fraudulently applies or disposes of for any purpose whatsoever except for the public service any chattel, money or valuable security entrusted to or received or taken into possession by him by virtue of his employment; or
> (c) being appointed to any office or service by or under a Town Council or other local government council or other public body –
> (i) fraudulently applies or disposes of any chattel, money or valuable security received by him (whilst employed in such office or service) for or on account of any Town Council or other local government council or other public body or department, for his own use or any use or purpose other than that for which the same was paid, entrusted to, or received by him; or
> (ii) fraudulently withholds, retains or keeps back the same, or any part thereof, contrary to any lawful directions or instructions which he is required to obey in relation to his office or service aforesaid,
> is guilty of a felony, and shall be liable to imprisonment for fourteen years.

The offence of embezzlement under section 266 of the Penal Code, deals with three different situations.

(a) Embezzlement of chattel, money or valuable security which are held in account or in the name of master or employer. Section 266(a)(ii).
(b) Embezzlement of chattel, money or valuable security held by a public servant for use in the public service. Section 266(b)(ii).
(c) Embezzlement of chattel, money or valuable security held by clerks employed in a town council, a local government council or other public bodies for use in those authorities. Section 266(c)(i).

The following words appear in these three subsections:

> "fraudulently embezzles" – 266(a)(ii),
> "embezzles or in any manner fraudulently applies or disposes of" – 266(b)(ii) and
> "fraudulently applies or disposes of" – 266(c)(i).

What then are the essential elements of the offence of embezzlement in these

provisions? The offence of embezzlement is essentially a statutory creature. This offence was prescribed by statute because of the deficiencies in the law of larceny at common law. The essence of embezzlement is that a clerk or servant holds property on behalf of the employer or master to be accounted to him or for authorized purposes, and he uses, diverts or disposes or applies such property for unauthorized purposes without the consent of the owner. It can be implied from this that at the time he uses, diverts, applies or disposes of property, he intends to permanently deprive the owner of that property. That is to say, he assumes ownership of the property at the time. To put it differently, "fraudulently embezzles" or "fraudulently applies or disposes of" means that the offender in applying or disposing of property intended to produce a result which is in some sense detrimental to the right or interest of the owner of the property.

What defences may be raised as a matter of law to this offence? In considering this question, it is important to bear in mind that the Penal Code is intended to be an exhaustive statement of the law. That is to say, it prescribes not only the elements of the offence necessary to find a person guilty of the offence, but also establishes any defence in law. It is not for the judiciary to prescribe these matters. Indeed, the legislature has given consideration to this issue. Section 251 of the Penal Code, which deals with the definition of theft, has specially expressed the defence of "a claim of right made in good faith". The legislature, however, has not expressed this to be a defence in the same manner with respect to embezzlement under section 266 of the Penal Code. This is a clear intention on the part of the Parliament not to import this defence in the same manner into section 266 of the Penal Code. I cannot find any words in the provision itself which would imply such a defence.

However, there is no need for this Court to be concerned with the formulation of such a defence, as the legislature has already provided for it under section 8 of the Penal Code. It is in the following terms:

> 8. A person is not criminally responsible in respect of an offence relating to property, if the act done or omitted to be done by him with respect to the property was done in the exercise of an honest claim of right and without intention to defraud.

This is to be contrasted with the defence expressed under section 251, in that there is no requirement for "intention to defraud" under section 251 of the Penal Code. A defence under section 8 of the Penal Code is successfully raised when the embezzlement of the property is done in "the exercise of an honest claim of right and without intention to defraud".

What is an honest claim of right? Section 8 of the Penal Code is similar to the wording of section 22 of the Queensland Criminal Code. Section 23 of Papua New Guinea Criminal Code is in exact terms as the Queensland provision. I would adopt the decisions from these jurisdictions on the question of the meaning and application of this defence. In particular, I adopt the words of Gibbs J. as he then was in the case of *R.v. Pollard* (1962) Q.W.N. 13:

> It is well settled that a claim of right sufficient to relieve a person of criminal responsibility need only be honest and need not be reasonable *(Clerkson* v. *Aspinall, ex parte Aspinall* [1950] St. R. Qd. 79, 89); "the fact that it is wrong headed does not matter": *R.* v. *Gilson and Cohen* ((1944) 29 Cr. App. R. 174,

180). In *R.* v. *Bernhard* ([1938] 2 K.B. 264, 270) the Court of Criminal Appeal said that a person has such a claim of right "if he is honestly asserting what he believes to be a lawful claim, even though it may be unfounded in law or in fact". At page 272 the Court said,

> However strong and however well justified may be a judge's view that there is a preponderance of evidence against the defence of a claim of right, the question whether that defence is negatived by the evidence must be left as a question of fact to the jury.

In *Pollard's* case, the following question was referred for consideration:

> Does the question of criminal responsibility under section 22 of the Criminal Code arise for consideration if, on a charge of unlawfully using a motor vehicle under section 408A of the Criminal Code the accused claims to have an honest belief that the owner would have consented to his using the motor vehicle as he did, had he, the owner, known of the circumstances appertaining at the time of the using.

On the question Gibbs J. had this to say,

> The short point that arises for consideration in the present case is whether, on the evidence that the accused knew that the owner of the vehicle had not consented to his using it, but believed that the owner would not have any objection to his using it and would have given his consent if asked, the question whether the accused took the vehicle in the exercise of an honest claim of right should have been left to the jury. An accused person acts in the exercise of an honest claim of right, if he honestly believes himself to be entitled to do what he is doing. A belief that he may acquire a right in the future is not in itself enough. If, when he took the vehicle, the accused did not believe that he was then entitled to take it, he did not act in the exercise of a claim of right, and it does not matter for the purposes of section 22 what other beliefs he may have held. On the other hand, if he honestly believed that he was entitled to take the vehicle without obtaining the owner's consent, either because he thought that the owner would not object, or because he thought that the owner would have given his consent if he had been asked for it, or for any other reason, the taking would have been in the exercise of an honest claim of right.
>
> . . . it is not to the point that the accused had no right to take the vehicle. If he had honestly believed that he was entitled to take it, or if the jury had a reasonable doubt whether he had such a belief, he should have been acquitted, however wrong his belief may have been, and however tenuous and unconvincing the grounds for it may seem to a judge.

See also *Tiden* v. *Tokavananui–Topaparik* [1967-68] P.N.G.L.R. 231, *R.* v. *Hobart Magalu* [1974] P.N.G.L.R. 188. In the present case, the appellant does not raise such a belief, that is to say, he had no belief that had the employer known of the taking and use of the money, he would have consented to it. An intention to repay the property does not constitute a claim of right within the meaning of section 8 of the Penal Code.

Can an intention to repay the property be set up as a defence to embezzlement? In my view, such a defence on its own is not open on a proper construction of

section 266 of the Penal Code. As I have indicated before, this section deals with three different circumstances.

A close analysis of this provision is necessary. Section 266(b)(ii) prohibits any public servant applying or disposing of any property for any "purpose whatsoever except for the public service". Similarly, an examination of section 266(c)(i) reveals that it prohibits a person from fraudulently applying or disposing of any property for any purpose "other than that for which the same was paid, entrusted to or received by him". These two provisions refer to authorized purposes for which the property may be used and prohibit use of property for unauthorized purposes. There is an absence of similar words in section 266(a)(ii). The only reason for the absence of such words is that sections 266(b)(ii) and 266(c)(i) deal with clerks who are given property for purposes connected with their employment, whereas section 266(a)(ii) deals with property received to be held for or in the name of or account of a master or employer. A servant or a clerk has no authority or direction to use the property for unauthorized purposes. That is an essential character of embezzlement common to all. Where money is used for unauthorizsed purposes, the fact that a person intends to pay back the money, does not in any way negative the fact that there was embezzlement, fraudulent application or disposal of property. The essence of embezzlement is that the person deprives the owner of the property or assumes ownership at the point of embezzlement. Compare *R.* v. *Johnson* (1867) 6 S.C.R. (N.S.W.) 201 and *R.* v. *Williams* [1953] 1 Q.B. 660. In my view it is not possible to raise such a defence by a construction of the whole of section 266 of the Penal Code. Had the legislature intended this to be a defence on its own, it would have said so under this provision.

Again, the legislature in the Penal Code has already provided for a defence which addresses the issue of intention to permanently deprive the owner of the property. This is to be found in section 8 of the Penal Code. As I have already pointed out, the section provides the defence where the two elements set out are satisfied. I have already dealt with the element of honest claim of right. These two elements must go together and one cannot go without the other. A person cannot successfully raise the defence by saying that he had an intention to return the property if he used the property without the consent of the owner or without an honest claim of right. Similarly, a person who has an honest claim of right cannot be successful in raising the defence under section 8 unless he has acted without intention to defraud. Compare *R.* v. *Hobart Magalu* [1974] P.N.G.L.R. 188, 200. The legislature has clearly set out these matters.

The words "intend to defraud" within the context of section 8 of the Penal Code, mean that not only must a person deal with property based on an honest claim of right, but he or she must show that there was no intention to deprive the owner of the property. This is a question of fact. The manner in which the property is dealt with is relevant. A person who intends to restore or return property and has ability to do so may successfully raise the element. But this may not always be the case. It may be shown that such a person may have failed to fulfil the intention between the date of commission of the offence and trial. This conduct may be contrary to any intention to return or pay back property. On the other hand, a person who has no ability to pay may collect enough money from relatives in the village and repay the money as he intended. As I have indicated, it is a question of fact and each case will be decided on its own facts.

In the present case, as I have indicated before, the appellant has not successfully raised the defence under section 8 of the Penal Code. He has not acted on an honest claim of right.

On the question of "intent to defraud", the appellant appeared to me to have attempted to fulfil his intention. When he realized that the proposed course was cancelled, he informed his superiors of the money he had taken and repaid $300.00 between 21 May and 12 December 1984. I believe it was the action of the appellant which led to the present charge. However, there is no need for me to express any concluded view of the facts because it would not assist the appellant as he has failed to raise the element of honest claim of right.

For these reasons, I would dismiss the appeal.

On sentence, the Chief Justice remarked:

> However as the Director has not asked me to make any order in this case and especially because of the particular facts of it I will make no order.

With respect, I have found it difficult to fit this into any of the provisions relating to punishment under the Penal Code. The closest provision which may cover what his Lordship did is section 35 of the Penal Code. I consider that having regard to the facts of this case, section 35 would be applicable. Had this provision been brought to His Lordship's attention, he would have considered its application. That is to say, he would have considered discharging the appellant without proceeding to convict him. There has been no ground of appeal on this point; the conviction for embezzlement remains on record.

CONNOLLY J.A.

The appellant was employed as supervisor of the fish market at Yandina by the Central Province. He was charged with fraudulently embezzling $451.60 contrary to section 266(a)(ii) of the Penal Code which reads:

> 266. Any person who –
>
> (a) being a clerk or servant or person employed in the capacity of a clerk or servant –
>
> (ii) fraudulently embezzles the whole or any part of any chattel, money or valuable security delivered to or received or taken into possession by him for or in the name or on the account of his master or employer:"

The amount charged was admittedly taken between 6 December 1983 and 28 February 1984. The appellant had been nominated to go to New Zealand for a course and his attendance involved his going to Honiara for a passport and making other arrangements. He was unable to obtain the necessary funds through official channels and decided to use his employer's money. In addition there was an argument that part of the $451.60 had been "borrowed" by persons under his control for whom he was, as it was found, covering up.

The charge was heard by the learned Principal Magistrate, sitting in the Magistrate's Court for the Central District. The learned Magistrate found as facts:

(a) that the "borrowing" of the money by the appellant occurred in exceptional circumstances, the appellant not being properly trained in the handling of money and being left largely to, as he described it, "muddle through" in

making his arrangements to go to New Zealand;

(b) that the appellant intended to repay the sum from an advance which he expected to be made to him in connection with the overseas course;

(c) that when the course was cancelled and there was no prospect of the advance being made to him, he informed his superiors of the situation and commenced repayment. Between 21 May and 12 December 1984 he refunded $300.00 to his employer.

It was suggested in argument that, despite government instructions to the contrary "borrowing" by public servants is common and that, in practice, if the money is repaid, no action is taken against the public servant concerned. If this is so, it may create a situation in which this type of offender may plausibly be able to set up an honest claim of right and those charged with public administration in Solomon Islands should bear this in mind.

On 25 November 1985, the appellant was acquitted of the charge, the learned Principal Magistrate holding that the "borrowing" was not fraudulent having regard to his intention to repay. This conclusion was based on the view that the decision of the Court of Appeal (Criminal Division) in *R.* v. *Feely* [1973] Q.B. 530; [1973] 2 W.L.R. 201; [1973] 1 All E.R. 341; 57 Cr. App. R. 312 has the result that the word "fraudulently" in section 266(a)(ii) means dishonestly as that word is commonly understood in the community so that this element of the offence is to be determined by a tribunal of fact without recourse to the decisions at common law and under the Larceny Act 1916 (U.K.).

The Director of Public Prosecutions appealed against the decision to the High Court under section 282(1) of the Criminal Procedure Code. The proviso to that subsection requires the sanction in writing of the Director of Public Prosecutions to an appeal against an acquittal but presumably the fact that it is the Director's appeal satisfies the proviso.

For my part, I think it appropriate to commence an examination of this problem by considering the mens rea involved in the offence charged without regard to the law as it has developed since the passing of the Theft Act 1968 (U.K.). Section 266(a)(ii) is in the language of section 17(1)(b) of the Larceny Act 1916 (U.K.). It will be noted that the mens rea is stated simply as "fraudulently". As a matter of language, the essence of fraud is deceitful or dishonest conduct with a view to unjust advantage to the offender or injury to the rights of others. See, e.g. *The Shorter Oxford English Dictionary*. Of its nature, the word connotes a conscious and deliberate act and knowledge that the act is wrong. Just as accidental fraud is inconceivable, so also is it impossible to describe as fraudulent, an act honestly done in the exercise of a claim of right. Cf *R.* v. *Coombridge* [1976] 2 N.Z.L.R. 381, 387 per Richmond P.; *R.* v. *Cooper* (1914) 14 S.R. (N.S.W.) 426, 430 per Cullen C.J.; *Nelson* v. *The King* [1902] A.C. 250, 256 per Lord Halsbury L.C. And see Glanville Williams, *Criminal Law* (2nd ed.) General Part, p. 329.

However, the word "fraudulently" received judicial consideration in *R.* v. *Williams* [1953] 1 Q.B. 660; [1953] 2 W.L.R. 937; [1953] 1 All E.R. 1068; 37 Cr. App. R. 71. *Williams* was a case of larceny and involved a consideration of section 1(1) of the Larceny Act 1916, the equivalent of which is section 251(1) of the Penal Code. That provision reads:

251. (1) A person steals who, without the consent of the owner, fraudulently

and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof.

There is a proviso which is not material for present purposes. The Court of Criminal Appeal (Lord Goddard C.J., Byrne and Parker JJ.) held that each word in this definition must be given its full meaning and that "fraudulently" must bear some
1060 meaning distinguishing it from the other ingredients of the offence. What is important for present purposes is that their Lordships go on to affirm that the same meaning must be given to the word throughout the larceny Act as also to the expression "intent to defraud". The meaning which, it was said, would meet the circumstances of *Williams,* where Larceny was charged, was that the taking was intentional with knowledge that what was taken was the property of another person. I must confess to having some difficulty in understanding how the meaning ascribed to the word "fraudulently" in *Williams* in truth adds anything to the other ingredients of the offence as defined in section 251(1) of the Penal Code.

A person who intends permanently to deprive the owner of the thing taken must
1070 surely be taking it deliberately and with knowledge that it is the property of the owner. It is I think apparent, with all respect, that there is an obvious overlap between the specific elements of theft in section 251(1) and the word "fraudulently". It was the contrary approach which made it possible to narrow the content of the word "fraudulently" in a case of larceny where the elements are defined to include the absence of a claim of right on the one hand and an intent permanently to deprive the owner on the other. With all respect, I cannot accept that it is sufficient, when the mens rea is identified by the word "fraudulently" standing alone, as in section 266(a)(ii), to prove an intentional taking with knowledge that what is taken is the property of another. Indeed, in *Williams,* Lord Goddard at p. 668 (Q.B.); p. 943
1080 (W.L.R.); p. 1071 (All E.R.); p. 81 (Cr. App. R.) encapsulates the required mental element in a sentence – "They knew that they had no right to take the money which they knew was not their money."

In my opinion, an embezzlement will not be fraudulent if it is done under an honest claim of right or an honest and reasonable belief that the taking is not against the will of the owner. Both are inconsistent with the notion of fraud although in both cases there will be a deliberate taking and the knowledge that what is taken is the property of another.

If one turns then to the facts of this case, the test propounded by Lord Goddard in *Williams* would plainly seem to be satisfied. The taking was deliberate and
1090 Toritelia knew that was he took was the property of his employer. Nonetheless, as I have indicated, I do not think that the taking should be regarded as fraudulent if Toritelia had reasonable grounds for believing that his employer was agreeable to his use of the money. The contrary, however, is the case for he had had no success in getting the money he required through official channels. Nor did he set up any claim of right. The exculpatory feature which persuaded the Magistrate to acquit him was a genuine intention to repay.

Now whether an intention to repay is a defence to a charge of larceny was considered in *Williams* (*supra*) and also in *Cockburn* [1968] 1 W.L.R. 281; [1968] 1 All E.R. 466. Both these decisions are founded on a narrow ground which is that
1100 notes and coins taken and spent pass permanently from the possession of the owner even though later replaced by others. Thus at p. 1 81 of the report of *Williams* in the

Criminal Appeal Reports it is said [p. 668 (Q.B.); p. 943 (W.L.R.); p. 1071 (All E.R.)]:

> Therefore, it seems to the court in this case that, by taking the actual coins and notes and using them for their own purposes, the appellants intended to deprive the Postmaster-General of the property in those notes and coins, and in so doing they acted without a claim of right and they acted fraudulently because they knew what they were doing. They knew they had no right to take the money which they knew was not their money. The fact that they may have had a hope or expectation in the future of repaying that money is a matter which, at most, can go to mitigation and does not amount to a defence.
> Cf. *Cockburn* at pp. 284 (W.L.R.) and 469 (All E.R.).

Whether this is a satisfactory basis for criminal responsibility, in *relation to paper money which has no intrinsic value*, is open to debate. Logically, it could lead to the conclusion that it is larceny to exchange two $5 for a $10 note without the consent of the owner. It is of interest that Weinberg and Williams, in *The Australian Law of Theft* (1977) say, at p. 54, "On principle there seems no reason why a person who takes something intending to return that very thing should not be guilty of larceny, while a person who takes a fungible such as money intending to and reasonably expecting to be able to return a precise equivalent of that which was taken should be guilty of larceny." On the other hand, the result in *Williams* at least seems with respect to be clearly right. In that case the alleged intention to repay was no more than a hope or expectation that the future profits of the business would enable full restitution to be made. Now an intention to return property taken cannot be a defence unless the person charged had reasonable grounds for believing he would be able to do so. Thus, in *R.* v. *Phetheon* [1840] 9 C. & P. 552; 173 E.R. 952 it is said:

> The rule for the jury's guidance in such a case seems to be that, if it clearly appear that the prisoner only intends to raise money upon the property for a temporary purpose, and at the time of pledging the article had a reasonable and fair expectation of being enabled shortly by the receipt of money, to take it out and restore it, he ought to be acquitted; but otherwise not.

The cases which establish this proposition are cases in which a master's property was wrongly taken and pledged. See *R.* v. *Wright* (1828) 9 C. & P. 553; 173 E.R. 953.; *R.* v. *Medland* (1851) 5 Cox C. 292; *R.* v. *Trebilcock* (1858) D. & B. 453; 169 E.R. 179. The defence was held not to be made out where the accused had only a vague possibility of redeeming the property and returning it. On the other hand, where it had already been returned, the defence was held to be made out. The principle was doubted in *R.* v. *Johnson* (1867) 6 S.C.R. (N.S.W.) (L.) 201 which was a case of money taken by a bank employee, the reasoning in which rather anticipates *Williams* and *Cockburn*. The principle as stated is, however, consistent with the leading feature of larceny and embezzlement which is an intention on the part of the offender to deprive the owner permanently of the property. Intention to restore coupled with an ability to do so is inconsistent with the intention permanently to deprive. On the other hand, an alleged intention to restore with no reasonable prospect of doing so is, in practical terms, an intention permanently to deprive the owner unless a pious hope be fulfilled.

I see no reason in principle why the same rule should not be applied to money as

to chattels although, as will appear, for the purposes of this case it is unnecessary to express a concluded opinion on the point. If that view were correct, then *Cockburn* should be regarded as wrongly decided for there was strong evidence not only of intention but of present capacity to restore and a history of similar past transactions.

The present case, however, is altogether otherwise. The "prospect" of being able to repay, to which the Magistrate referred was in truth a mere hope or expectation to use the language of *Williams* (*supra*). Hopes and expectations are of their nature always liable to be defeated and knowingly taking the money of another without his consent and with no more than a hope of being able to repay it is plainly larceny. It is fraudulent on any view for the offender, with full knowledge that he is taking money he has no right to take, is, at the highest for him, exposing the owner to the risk that he may never see it again. By the same token, if he converts the money to his own use while it is in his exclusive possession, he embezzles it and, in the circumstances to which I have just referred, he does so fraudulently.

I also incline to the view, although it is unnecessary to express a concluded opinion in this case, that an honest claim of right or an honest belief in the employer's consent would both negate fraud for the purposes of section 266(a)(ii). Neither was available to Toritelia in this situation. Indeed, such defences will rarely, if ever, be available where the embezzlement occurs over a period and the employee is able to communicate with his superiors. From what I have said, it will be apparent that, in my view, under the general law, including that part of it codified in the Larceny Act 1916 and in the Penal Code of Solomon Islands, Toritelia should have been convicted. On appeal to the High Court Wood C.J. took that view. The remaining question is whether the decisions of the Court of Appeal after the passing of the Theft Act 1968 alter this situation.

The first point to be made is that the Theft Act 1968 was intended to work fundamental changes in the law. Thus Lord Diplock in *Treacy* v. *D.P.P.* [1971] A.C. 537 is reported at p. 565 as saying that the Act "is expressed in simple language as used and understood by ordinary literate men and women. It avoids so far as possible those terms of art which have acquired a special meaning understood only by lawyers in which many of the penal enactments which it supercedes were couched."

This is also recognized by Lawton L.J. in *Feely* at p. 539 of the Law Reports where his Lordship, speaking for a specially constituted court of five judges observed that the Larceny Act 1916, *unlike the Theft Act 1968* was never intended to alter the law (emphasis supplied).

Now the Theft Act 1968 has not become part of the law of Solomon Islands which has, for relevant purposes, re-enacted the analogous provisions of the Larceny Act 1916. In doing so, the Parliament of Solomon Islands must be taken to have enacted those provisions with the special meaning which their language has acquired over the long history of the common law. Merely because the word "dishonestly" which is used to identify the mens rea called for under the Theft Act has, as a matter of language, a meaning similar to the word "fraudulently" provides no warrant for discarding the body of law which has grown up as a matter of judicial exposition in relation to the common law and its codification and substituting for that a test newly devised by the Court of Appeal in England to meet the requirements of altogether different legislation.

The appeal to the High Court succeeded, Wood C.J. holding that the decision in

Feely was inapplicable. His Lordship examined the relevant provisions of the Criminal Code of Queensland which contains a definition of the word "fraudulently" for the purposes of the law of theft. It defines the mens rea in the case of money as an intent to use it at the will of the person who takes it although he may intend to afterwards repay the amount to the owner. For the reasons I have given, I am not satisfied that this represents the common law and indeed it may be useful to say that it is not regarded as correct, in construing the Criminal Code of Queensland, to proceed on the assumption that it is intended to do no more than state the common law. It should therefore be regarded as an unsure guide. I am, however, satisfied that the conclusion to which Wood C.J. came was correct and I would dismiss this appeal.

Reported by: P.T.R.