

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S.; Hart and Chipman, JJ.A.

Cite as: R. v. LaChance, 1993 NSCA 36

BETWEEN:

PATRICK MICHAEL LACHANCE)	Patrick J. Duncan
)	for the Appellant
Appellant)	
- and -)	
)	John C. Pearson
)	for the Respondent
HER MAJESTY THE QUEEN)	
)	Appeal Heard:
Respondent)	February 11, 1993
)	
)	Judgment Delivered:
)	February 11, 1993
)	

THE COURT: Appeal dismissed from conviction for an offence contrary to **s. 380(1)(a)** of the **Criminal Code** per oral reasons for judgment of Clarke, C.J.N.S.; Hart and Chipman, JJ.A. concurring

The reasons for judgment of the Court were delivered orally by:
CLARKE, C.J.N.S.

The appellant was charged that between December 3, 1987 and January 30, 1991, by deceit, falsehood or other fraudulent means, he defrauded the Department of Community Services of the Province of Nova Scotia and Family and Children's Services of Queens County of money, for an amount exceeding \$1,000.00, contrary to s. 380(1)(a) of the **Criminal Code**. He was convicted following his trial by a judge and jury.

Section 380(1)(a) of the **Criminal Code** provides:

(1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security,

- (a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding ten years, where the subject-matter of the offence is a testamentary instrument or where the value of the subject-matter of the offence exceeds one thousand dollars;

The appellant appeals from his conviction by alleging that the trial judge made errors of law, mainly arising from his charge to the jury. It was agreed in a statement of facts, entered at trial, that between the dates described in the charge the appellant over-claimed \$2,893.64 in the expense claims which he completed, signed and filed with his employers. He also admitted that he received the payment of this money to which he was not entitled.

The first ground of appeal alleges that the trial judge failed to adequately instruct the jury concerning the element of dishonesty in the offence of fraud and as to the mens rea necessary in the offence of fraud.

After telling the jury the main issue in the case related to the intention of the appellant, meaning whether he intended to defraud his employer, the trial judge told them there were five ingredients the Crown must prove beyond a reasonable doubt. It is the third and fifth of these five that bear upon the first ground of appeal.

Mr. Justice Davison said the third ground "is that Mr. LaChance used deceit, falsehood or other fraudulent means" and the fifth "that Mr. LaChance intended to defraud the alleged victims".

On these issues the trial judge instructed the jury as follows:

" I will be going into the various essential elements and ingredients of the charge. There are five of them. Each must be proved beyond a reasonable doubt. But the main issue in the case, relates to the intention of the accused. The accused doesn't dispute the fact that travel expenses exceeded that to which he was entitled. The question that's going to be foremost for you is, did he intend to defraud his employer? Even though that is the main issue, I will give you my advices on the other ingredients, because regardless of my views, or indeed, the views of others, it is up to you to make certain that you are convinced that the Crown has proved each of the ingredients, beyond a reasonable doubt. And it is also helpful for you to understand the charge, if I review the essential ingredients of the charge. Now the first ingredient is the identity of Patrick Michael LaChance, as the offender, if there is an offence. The second ingredient is the time and place set forth in the Indictment. The third ingredient, is that Mr. LaChance used deceit, falsehood, or other fraudulent means. The fourth ingredient is that the means used defrauded the alleged victims. And the fifth ingredient, is that Mr. LaChance intended to defraud the alleged victims. The Crown must prove all five ingredients, beyond a reasonable doubt. Now I suggest that you'll have no difficulty with the first, the second, or the fourth ingredients. The Defendant admits that there are over-claims, and admits that he filed the claims. The times; the evidence seemed to coincide with the times as set forth in the Indictment. And the fact that the Agency was deprived of money, would establish the deprivation, or the fourth ingredient. So we turn our attention to the third and the fifth ingredients. And I repeat, the third ingredient is proof that Mr. LaChance used deceit, falsehood, or other fraudulent means. The fifth ingredient is proof Mr. LaChance intended to defraud the Agency or the Province. To be convicted of most crimes, there must be a physical element and a mental element. With fraud, you will see it's difficult to separate the two, as I discuss these two ingredients in greater detail. For the third ingredient, the Crown must prove, beyond a reasonable doubt, that Mr. LaChance used deceit, falsehood, or other fraudulent means. Falsehood is a deliberate lie. Deceit is inducing a person to believe something, where the deceiver knows it to be false, and therefore covers conduct that might not be a deliberate lie. The phrase "other fraudulent means," is used to cover all other means, apart from deceit and falsehood, that can be objectively considered dishonest. In a general way, dishonest conduct refers to conduct that ordinary, decent people would feel is discreditable, because it is a variance with straight-forward or honourable dealings. Would the conduct of Mr. LaChance be characterized as dishonest, by an average, reasonable person? Both deceit and other

fraudulent means, often involve some positive act by a person, but they can arise by omission, by failing to disclose information. The fifth ingredient that the Crown must prove beyond a reasonable doubt, is that Mr. LaChance intended to defraud the Agency. And this is at the heart of the Defense. To prove an intention to defraud, the Crown must prove that Mr. LaChance intentionally -- that is, deliberately -- filed excess expense claims, with the knowledge, or the recklessness, or with wilful blindness, of the facts and circumstances that make such conduct dishonest, in the eyes of reasonable people. Secondly, filed the excess expense claims, with knowledge, or with recklessness, or with wilful blindness, that such conduct would create prejudice, or risk of prejudice, to the economic interest of other persons. And thirdly, that Mr. LaChance filed excess expense claims with the knowledge, or with recklessness, or with wilful blindness, to the fact that his conduct would be seen as dishonest, in the eyes of reasonable persons, even though he may not have personally believed his conduct was dishonest. Those are the three tests, to determine intention."

In response to a question asked by the jurors during their deliberations the trial judge clarified his remarks concerning wilful blindness by telling them,

"It is the position of the Defense, that there was no criminal intent, that over-payments came about by mere error or negligence. Negligence does not mean intention. The term I used earlier was wilful blindness, which arises when a person has become aware of the need to make an inquiry, and refuses to do so, because he does not wish to know the truth. On reflection, there is no evidence of wilful blindness, and the issue before you can be simply stated, did the Crown prove, beyond a reasonable doubt, that Mr. LaChance intended to defraud the Province or the Agency?..."

Taking the general instruction and the reinstruction together, we find no reversible error was made by the trial judge. The appellant was not prejudiced by the trial judge's instruction that the Crown must prove beyond a reasonable doubt that the appellant's conduct was dishonest and that he intended to act dishonestly. Against that the trial judge explained to the jury the appellant's evidence that he had not acted dishonestly, that while he committed errors he never had the intent to be dishonest and that at no time did he deliberately do any act with criminal intent. The trial judge also repeated the explanations of the appellant for his mistakes including overwork, inadequate systems and lack of deliberate intent.

In our opinion the charge was fair to the appellant and the factual situation was uncomplicated. We dismiss the first ground.

The second ground of appeal is that the trial judge erred in failing to charge the jury that it could return a verdict of the lesser but included offence of fraud under \$1,000.00 contrary to section 308(1)(b)(i) of the **Criminal Code**.

This is based on the fact that many of the individual over-claims were less than \$1,000.00 and it was open to the jury to find that some of them were made fraudulently while others were not.

As earlier noted, in the agreed statement of facts the appellant admitted his over payments amounted to \$2,983.64. In his evidence at trial, the appellant asserted he did not deliberately submit any false claims within the meaning of section 380 of the **Code**. Accordingly, there was no basis in the evidence upon which the trial judge could distinguish one or more claims as falling within the scope of the lesser offence. For these reasons the second ground is also dismissed.

As to the whole of the appeal against conviction, while leave to appeal is granted, the appeal is dismissed.

C.J.N.S.

Concurred in:

Hart, J.A.

Chipman, J.A.