

IN THE PROVINCIAL COURT OF NOVA SCOTIA  
**Citation:** *R. v. Roach*, 2003 NSPC 57

**Date:** 20031205  
**Case No.(s):** 1101837  
1101838  
1101839  
**Registry:** Halifax

**Between:**

**R.**

v.

**Donna Georgina Roach**

**Judge:** The Honourable Judge C. H. F. Williams, JPC

**Heard:** Decision rendered orally on December 5, 2003  
in Halifax Nova Scotia

**Counsel:** Eric R. Woodburn, for the Crown  
Lonny J. Queripel, for the Defence

## BY THE COURT

### Introduction and Summary of Facts

- [1] The accused, Donna Roach, was the building superintendent for certain tenements owned by Garden Crest Developments, that were situate in the Halifax Regional Municipality. In addition with her other assignments she was authorized to lease any vacant apartments and to collect the rents. Sometimes the tenants would pay her cash that she would promptly remit to the owners. Several tenements were however in states of disrepair and the buildings were scheduled for demolition. The accused, however, on her own initiative, but with what she understood to be a general mandate from the owners, leased some of the units but did not report these occupancies to the owners. Additionally, she felt, which was disputed by the owners, that she needed more assistance in managing the units together with an increase of wages.
- [2] When the accused was on vacations the owners did an inspection of the premises and discovered that some units, unknown to them, were rented and that the tenants had paid rents to the accused. Conducting a financial audit, they uncovered that not only had the tenants paid rents to the accused but also that the accused did not deliver those rental payments to them. As a result, they confronted the accused with these allegations. Initially, she denied any wrong doing but eventually admitted that she had some money for them. Moreover, she requested a friend to deliver this money but it was without any detailed accounting or explanations.
- [3] Nonetheless, the owners determined that she still did not account for sums of money that she had received from tenants. The accused admitted that she did receive sums of money from tenants but, at trial, essentially offered the explanation that she was diligent in the performance of her duties and that any errors or omissions were unintentional and honest. This case therefore is a consideration of whether the accused had the requisite *mens rea* to commit the offences of fraud and theft.

### Relevant Legislation

- [4] The **Criminal Code** s. 322 states:
- (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything whether animate or inanimate, with intent,

- (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;

(3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.

**[5]** Additionally, the *Criminal Code* s. 380 states:

380. (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 or any service.

- (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 the value of the subject-matter of the offence exceeds five thousand dollars; or

- (b) is guilty

- (i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or

- (ii) of an offence punishable on summary conviction,

where the value of the subject-matter of the offence does not exceed five thousand dollars.

## **Findings of Facts and Analysis**

**[6]** Essentially, the accused has submitted that she lacked the required *mens rea* to constitute the crimes of theft and fraud. In the *Bank of New South Wales v. Piper* [1897] A.C. 383, Sir Richard Couch propounded that:

The absence of mens rea really consists in an honest and reasonable belief entertained by the accused of the existence of facts, if true, would make the act charged against [her] innocent.

**[7]** Further, it would appear that in situations where the accused consciously took or did something honestly believing that she had a right, however mistaken, to do what she did, “the test for the determination of the presence of an honest belief is a subjective rather than an

objective one.” See: *R. v. Howson*, [1966] 2 O.R. 63, per Laskin J.A.

- [8] Here, the defence submitted for the accused was that even though she did borrow rent money from a tenant and did not submit it to the owners but used it for her own purposes, she intended to correct the shortfall from her own income and would have done so but for the fact that she was fired. Additionally, she made honest accounting errors in two other clear instances where monies were not submitted.
- [9] On the other hand, the Crown submitted that she was not credible as it was clear from the evidence that she took rent money from a tenant, used it for her own purposes without permission, and attempted to conceal this fact by obfuscation. Further, she knowingly rented units, collected the rent, but neither advised the owners of this fact nor submitted the rent monies for those units. Moreover, her evasive testimony, inconsistencies and experience belied any honest intentions.
- [10] However, from my observations of the witnesses as they testified and my assessment of their testimonies with the total evidence, I conclude and find that the accused was indeed the superintendent of rental units owned by Garden Crest Developments, that were situate in the Halifax Regional Municipality. Further, I conclude and find that included in her responsibilities as superintendent, she was authorized to rent the units and to collect and receive the rents from the tenants for remittance to the owners. I also conclude and find that she did rent some units and collected and received rental payments from the tenants.
- [11] From the evidence, I do not doubt and find that the accused was involved in three clear episodes of indiscretion. The first was in October 2000. I accept and find that she borrowed the rent money of \$960.00 from the tenant, Patricia Polley. Then, I accept and find that she discussed with the tenant that she was short on cash and that if the owners enquired as to late payment of rent to advise them that the tenant’s student’s loan was late. Further, I accept and find that she gave the tenant a receipt for this payment but instead of remitting the money to the owners, used it to go on vacations. Second, in the case of the tenant, Fabian Frye, I accept and find that the accused leased an apartment unit to him, collected the rent money but never notified the owners that the unit was occupied and they had no record of its occupancy. Also, I accept and find that she did not give the collected rent money to the owners. The third occurrence was in the case of the tenant, Leckus Bell. I find that the accused also rented a unit to him and collected the appropriate rents without notifying the owners of the occupancy or remitting the rental monies to them.
- [12] The question, however, is whether the accused conduct, in the circumstances, amounted to criminal behaviour. On the evidence, she is not claiming a colour of right in the monies to justify her conduct. Rather, she presents as her defence, her lack of intention to steal or to defraud the owners. Thus, it seems to me that in these set of circumstances, as presented, the test to decide the honesty of her belief would be whether such a belief was based upon bona fide reasonable grounds. Consequently, the critical question is: What would a reasonable

person, in the position of the accused, who honestly believed that She had not stolen any money but is accused of doing so, have done?

- [13]** It seems to me that a reasonable person who honestly believed in a set of facts, as did the accused, and where there was a difference of opinion, would have, if possible, adopted a conciliatory course of action, cooperate with the owners and take reasonable steps to rectify what she claimed to be honest mistakes or error in judgement. There can be no doubt that the accused knew that she had leased the units and received the monies. Additionally, there can be no doubt that the accused, by her own admission, was aware that she had borrowed the rental money without authorization. However, when the owners confronted her concerning the shortfalls she denied any improprieties and the possession of any of their monies. In my view, when she did admit that she had some money her submission of a sum of money without any details or explanations was a deliberate attempt to lend uncertainty to the issue
- [14]** Consequently, in my opinion, the course of action that she took was demonstrative of her true state of mind. First, she denied having any rent money and that she had remitted all that she had received. This suggested her knowledge that there now existed a dishonest imputation concerning her management of the rental units. Thus, I think that her first reaction established her knowledge that the owners were aware that tenants had given her monies that she had not remitted. Further, I think that her reaction also suggested that, given the now inhospitable environment as evidenced by Exhibit 9, she felt that it was impossible for her to compromise.
- [15]** Accordingly, it seems to me, that as a reasonable and prudent person, whose honesty and integrity are impugned and, given her position of trust, dispelling any suspicions or misunderstanding by simply detailing the amount eventually remitted would have been very easy. However, she wilfully closed her mind to that possibility as she felt that the owners owed her and any adjustments, without any discussions to that effect, should have been made in her final wages. Thus, I think that from the standard of a reasonable person, it would be difficult to conclude that she was continuously under any innocent misapprehension of the facts.
- [16]** In my view when she gave no explanation or accounting for the monies that she received but not remitted, I can reasonably infer that she was asserting an exclusive possessory or proprietary claim constituting a colour of right in the property that she retained. However, given her knowledge that she had received the money on behalf of the owners she also would know that her retaining that property would be morally and legally wrong. Thus, even if she had an honest belief that the monies were properly accounted for and detailed, she had eroded the reasonableness of that belief by her determination and refusal, in light of her assertion of innocence and the possibility of an honest mistake, not to confirm or to discuss with the owners the details of the amount of money that was eventually remitted to them after the confrontation. By this action, in my opinion, she had seriously undermined

whatever reasonable grounds she might have had to support her assertion of honest belief going toward buttressing her defence of lack of dishonest intent.

- [17] She has admitted that she received the monies on behalf of the owners in her capacity as building superintendent. Therefore, the rental monies were not legally hers to retain but, she was not prepared to resolve the dispute or to admit a wrong. Thus, in my opinion, her action was not only morally wrong it was also insincere and, in the circumstances, unreasonable. Accordingly, I can reasonably interpret it to be that she fraudulently and without colour of right intended to deprive the owners, temporarily or absolutely, of their property, the rental monies. See, for example: *R. v. Howson* [1966] 3 C.C.C. 348, 2 O.R. 63 (C.A.), *R. v. McAuslane* [1968] 1 O.R. 209 (C.A.).
- [18] Consequently, it seems to me that the accused had knowledge of the ownership of the money that she received from the tenant, Patricia Polley. Further, I find that she was not acting under a colour of right when she obtained that money. However, it is apparent that she might have been acting on the basis of a moral right as she believed that the tenant owed her money and as she was short on cash before going on vacations she could replace it at a later time. However, a moral right cannot of itself establish a colour of right. See: *R. v. Cinq-Mars* (1989), 51 C.C.C. (3d) 248 (Que. C.A.), *R. v. Lilly*, [1983] 1 S.C.R. 794, *R. v. Hammerly* (1976), 3 C.C.C.(2d) 141 (Ont. C.A.). Therefore, in my view, the taking of this money, with the unequivocal knowledge that it belonged to the owners and with no authorization from them to deal with it other than to remit it and, using it for personal purposes, constituted a theft by conversion, as it deprived the owners of their property temporarily and absolutely. I also find that the sum of money involved did not exceed five thousand dollars.
- [19] I do not doubt that the owners were entitled to the rents from all the units when occupied. Additionally, I accept and find that the accused did receive rental monies from all the units that she rented. Thus, I accept and find that when the accused rented units to Bell and Frye without notifying the owners and collected rental money for those units without remitting it to the owners, she had in effect prejudiced their economic interests, deprived them of what was lawfully their property and had acted to their detriment as their building superintendent. By her actions, she had concealed from the owners fundamental and essential information that led them to believe that the units were vacant and that no rents were generated from those units. In my view, this was a dishonest act in that she had a duty to inform and wilfully omitted to do so. Further, I think that it was the wrongful use of property in which the owners had an interest and that her actions put their pecuniary interest at risk which was extinguished when they did not receive the rents generated. I therefore think that it was conduct that a reasonable decent person would consider being dishonest and unscrupulous. See: *R. v. Zlatic*, [1993] 2 S.C.R. 29, 79 C.C.C.(3d) 466, *R. v. Theroux*, [1993] 2 S.C.R. 5, 79 C.C.C.(3d) 449.
- [20] Consequently, I conclude that the owners were deprived of their property, the rental monies, as a result of the accused dishonest acts. Put another way, I find and conclude, on the

evidence that I accept, that the accused did by deceit, falsehood or other fraudulent means defraud Garden Crest Developments of sums of money. I, however, have determined that the amount involved does not exceed five thousand dollars and find accordingly.

- [21] Although there were strong suggestions that the accused was also dishonest concerning tenants other than the three whom I have identified, I am not certain, from the evidence, that it would be safe to find guilt on those assertions. Having heard the accused and applying the principles mandated in *R. v. W.(D)*, [1991] 1 S.C.R. 742, I am left in some doubts on those suggestions but have no doubts on the issues on which I have found.

### **Conclusions**

- [22] Accordingly, on my assessment of the total evidence and on the analysis that I have made, I am not satisfied, on the evidence that I accept, that the accused conduct, as found, supported the proposition that she had an honest and reasonable belief in acting as she did. In my opinion, her testimony was not only inconsistent but it was also inconsistent with that of the other witnesses. Her conduct, when carefully considered constructed a picture of the accused entertaining a dishonest intention to take the property of the owners temporarily or absolutely and to deprive them of something to which they were entitled.
- [23] In the result, I am satisfied that the Crown has proved beyond a reasonable doubt all the essential elements of the offences and I find the accused guilty of the offences of theft not exceeding five thousand dollars and of fraud not exceeding five thousand dollars. Convictions entered accordingly. Further, I will enter a conditional stay on the charge of possession over five thousand dollars.