PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Grant*, 2014 NSPC 96

Date: 2014-12-09
Docket: 2665576
Registry: Pictou

Between:

Her Majesty the Queen

v.

Patricia Anne Grant

VERDICT
CORRECTED DECISION REPLACING PARA. 26 AND RENUMBERING ONE PARAGRAPH THEREAFTER

Revised Decision: This corrected decision is being issued on January 6, 2015 and replaces the previously released decision.

Judge: The Honourable Judge Del W. Atwood

Heard: 4, 11 September; 20 October; 3 November 2014, in Pictou, Nova Scotia

Charge: Para. 334a of the Criminal Code of Canada

Counsel: William Gorman, for the Nova Scotia Public Prosecution Service
Douglas Lloy Q.C., for Patricia Anne Grant

By the Court:

[1] Patricia Anne Grant worked for a number of years at a small personal-lines general insurance agency in New Glasgow as a receptionist. Her duties included receiving premium payments from customers at the counter, doing up related paperwork, then delivering receipts to the bank at the end of the day and depositing them. She was dismissed by her employer after it was discovered that she had taken a couple of deposit bags home instead of to the bank. Her employer felt that this had been going on for a number of weeks. Police charged Ms. Grant with theft in excess of five thousand dollars, which is governed by an indictable process; she elected trial in this court, and I heard evidence from a number of prosecution witnesses over the course of several days. Ms. Grant did not call evidence. It is now time for the court to render its verdict.

[2] I find Ms. Grant not guilty of the offence of theft. These are my reasons.

[3] The facts of this case are not overly complex. Ms. Grant started as a receptionist at a small, local insurance agency that got acquired by another one based in Cape Breton; because of her experience, she was kept on after the takeover, and continued her duties at the front counter, but at a new office site. As with most small agencies, staff knew each other well, and trusted each other

implicitly. Yes, there were best practices in place regarding the handling, processing and posting of premium payments, as well as the depositing of each-day's receipts. However, it seemed to have been accepted by most of the staff and their supervisors—both on site and at head office in Cape Breton—that a certain degree of leeway was allowed in departing occasionally from established policies when circumstances warranted it. For instance, the receptionist was tasked with bagging up receipts at the end of each business day and taking them directly to the bank chute; however, given that this was a small agency with premium payments being made irregularly by customers, it was acknowledged that a bank deposit need not be made daily if the receipts for the day wound being only a very few payments at the counter.

[4] Theft is defined in the *Criminal Code* in these terms:

> 322. (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
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> (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;
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> (b) to pledge it or deposit it as security;
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> (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
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> (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.

> (2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.
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> (3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.
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> (4) For the purposes of this Act, the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material.

[5] Applying this definition, I find with total certainty that Ms. Grant took home cheques and cash belonging to her employer, instead of depositing them in the bank as she ought to have done; she did this without her employer's consent. Accordingly, the *actus reus* of theft has been proven beyond a reasonable doubt.

[6] I turn now to the mental element. In this case, it is not necessary to consider the issue of color-of-right, as it was not raised by defence counsel. Indeed, there is no evidence to support it.[1] However, this does not foreclose a defence based on reasonable doubt regarding *mens rea*. To be sure, a person acting with a color of right can be said not to have acted fraudulently; however, the lack of a color of right does not lead to an automatic finding of fraudulent intent.

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[1] See *R. v. Foidart* 2005 MBCA 104 for a succinct but informative discussion on evidence relevant to a color-of-right defence.

[7] The mental element of theft encompassed by the adverb "fraudulently" has attracted considerable judicial discussion over the years. One case in Nova Scotia stands out. In *R. v. Dalzell*,[2] two appellate-review courts dealt with a rather singular set of facts. Ms. Dalzell was a master's-degree student who was working on an alternative-measures justice project; she had hoped to be able to demonstrate to retail merchants the ineffectiveness of traditional-loss prevention measures in order to prove to them the need for proactive, rather than reactive policies to deter shoplifting. In order to demonstrate this concretely, she went into a retail grocery store, took merchandise off the shelves, and then left the store without paying for what she had taken. She planned to return later, hand over the goods to the store manager and point out to the manager the weakness in the store's anti-theft system. Success required that she slip past the mall cop. It didn't work. Ms. Dalzell was arrested and charged with theft. But what failed in the field worked in halls of justice. In very succinct reasons, the trial judge acquitted as he found he had a reasonable doubt regarding Ms. Dalzell's intent. A summary-conviction appeal by the prosecution was dismissed by O'Hearn CCJ; at the very end of his *tour de force* on the law of fraud, he laid out the mental-element issue very clearly:

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[2] [1982] N.S.J. No. 160 (Co. Ct.); *aff'd.,* [1983] N.S.J. No. 382 (A.D.).

> In sum, the cases in authorities discussed support the conclusion that 'fraudulently' in s. 283 means a dishonest state of mind, leading to a dishonest intention to 'appropriate' the property taken, i.e., to act with respect to it as if the taker were the owner, although perhaps only the temporary owner. It follows that the trial judge, on the basis of the defendant's evidence was entitled to acquit her if he had a reasonable doubt as to her fraudulent intent. He could, of course, on the evidence have convicted her instead, but to the extent that I am able to do so -- not having heard the witnesses or observed them -- I agree with his conclusion.[3]

[8] This encapsulates the mental element of theft completely, and was referred to with approval by the two judges of the Appeal Division who formed the majority in the appeal brought by the prosecution from the decision of the County Court.[4] Theft, then, is a specific intent offence: it requires a dishonest state of mind, leading to a dishonest intent to take or deprive, even if only temporarily. This describes the fraudulent intent required by sub-s. 322(1) of the *Code*. It is not enough that an accused intentionally took the property of another knowing that there was no consent; there must be more, as the intentional taking must be shown to have been fraudulent.[5]

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[3] [1982] N.S.J. No. 160 at para. 54. I do not intend to waste paper by abstracting a long, drawn-out quote from the judgment of O'Hearn CCJ. To do so would fail to do justice to that great jurist. His whole opinion should be read, as it is the gold standard on the law of theft.

[4] [1983] N.S.J. No. 382 at paras. 15 and 28.

[5] The *Dalzell* approach is not without its critics. It has been suggested that the outcome in the case resulted from sympathetic courts elevating the absence of an ulterior wrongful intent to the level of a general defence, despite the rule that ignorance of the law is no excuse. See Bruce P. Archibald, "Rehabilitating the Criminal Code: Rational and Constitutional Construction of the Elements of Offences" in Josiah Wood and Richard Peck, eds., *100 Years of the Criminal Code in Canada* (Ottawa: Canadian Bar Association, 1993) at 325.

[9] Proof of intent will generally come from an assessment of all of the relevant surrounding circumstances. The common law recites quite often the proposition that a trier of fact is entitled to infer that a sane and sober person intends the natural and probable consequences of his or her actions. But that does not relieve the court from looking at the background facts.

[10] In considering those facts, I am mindful of the theories advanced by the prosecution and by the defence.

[11] The prosecution asserts that this was a revolving theft; essentially, a fraudulent line of credit via employee defalcation. What is alleged is that there was an initial theft of cash by Ms. Grant. She covered it up by delaying that-day's deposit until she had taken in sufficient cash at the counter on the following business day to replace what she had stolen initially. However, in doing so, she created another shortage on that second business day. Thereafter, each successive day resulted in an unaccountable shortage that required, indeed, successive thefts. To maintain the appearance of normalcy, Ms. Grant went through the motions of doing up deposit bags at the end of each day. She then took the bags home to avoid detection in moving money from one deposit bag to the next; she also held on to cash for her own use.

[12] There is evidence to support this theory, which was presented most skilfully by the prosecution

- As the receptionist, she handled most of the premium payments made by customers at the counter; yes, she was relieved by other staff during her lunch hour; however, it was Ms. Grant who was on duty most of the day.
- She was the employee solely in charge of preparing the day's deposit at the bank.
- While it is true that others had access to the cash drawer and the safe, not just Ms. Grant, it is true also that it was she, and she alone, who was found to have taken money from the business and stashed it away at her home.
- The bank used by the agency was the Bank of Montreal on Provost Street; it would be about a 5-minute walk from the agency's offices at the top of town.
- Ms. Grant lived on MacLean Street; whether walking or driving home, she would have been halfway along the very short route to the bank upon turning up to MacLean off Archimedes Street.

- There had never been depositing irregularities prior to July and August of 2013, which would suggest strongly that, regardless of her level of training, Ms. Grant understood well her duties to get the deposits to the bank every day.

- When returned by Ms. Grant to the agency, one of the deposit bags that she had taken home was discovered to have been torn open. Assuming the truth of Ms. Grant's declaration that she was merely "irresponsible", why would she need to tear open a sealed deposit bag, other than to lay her hands on the contents. And if the deposit was in order—cash and cheques along with the deposit slip all sealed safely within—why would she need to fiddle around with what was inside?

[13] The defence theory was somewhat less unified. While there is nothing wrong with pleading defences in the alternative, the problem is that, when one conflicts with the other, the theories are less easily grasped. The defence asserts that, as everyone in the agency had access to the unlocked cash drawer, it cannot be excluded that someone else was responsible for the missing money. In the alternative, were the court to find that it was Ms. Grant who had taken it, her actions were due to inadequate training, rather than an intent to steal.

[14] Ms. Grant did not testify. While I am permitted to take her decision not to do so into account,[6] I find that I am unable to draw any sort of an adverse inference from it. Furthermore, she admitted, through her counsel, the voluntariness of the statement made to her supervisor that she had acted irresponsibly, so that this is not a case of her not offering any account whatsoever.

[15] This first defence theory—essentially one of unknown-third-party liability—does not seem to have very much going for it. After all, it was Ms. Grant—and no one else—who was found out with deposit bags, cash and cheques at her home. Contrary to the old saw, anything is *not* possible, and I find the proposition that someone else started dipping into the till around the same time as Ms. Grant started taking deposit bags home to be unsupportable. I might as well believe that the money was being confiscated by a North Korean cabal.

[16] But the issue of intent is different. I find that I am left in a reasonable doubt on that point because of what I see as being a very significant gap in the evidence.

[17] This was not a private prosecution. Ms. Grant was charged by a public policing agency. I find myself asking what is, at this point at least, the rhetorical question of what sort of police investigation was carried out here? I know that a

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[6] *R. v. Corbett*, [1975] 2 S.C.R. 275, at pp. 280-81; *R. v. Wills*, 2014 ONCA 178 at para. 44, *aff'd*., 2014 SCC 73.

complaint was made to police. I understand that some witness statements were taken, and some papers gathered up and put in exhibit envelopes. But police are tasked with more than just taking dictation or being couriers for documents. Or being agents for private interests. More principally, what is the value-added component of a police investigation? It must be more than merely collecting up what is handed over, and then banging out a Crown sheet and an information—in effect, tying a metaphorical bow around and already wrapped-up package.

[18] Rather, the purpose of an investigation is to ask questions, challenge assumptions, consider innocent explanations, dig, and dig, and then dig some more. In fairness to the policing service that carried out this investigation, it may well be that a high-level investigation was done here. But if it was, I did not hear about it. There was no video-recorded walk-through of the agency which might have shown the court the layout of the workspace, the ease of access to the cash drawer, the location of the safe, the proximity of other workstations to the reception desk, and the like. Particularly troubling is that there was no evidence put before the court of Ms. Grant's home being searched. Surely, there was more than sufficient probable cause to get one; after all, this lady had two bags of money from her employer she admitted to having taken home. What might a search have

turned up? More bags? More money (and I ask this mindful of the fact that there were unrecovered funds)? Or nothing. One will never know now.

[19] Did anyone think about going after a production order to check Ms. Grant's banking records. Was she heavily indebted? Had she incurred significant expenses? Was she overdrawn? Was she experiencing personal crises? Or health issues?

[20] And what have I been told about Ms. Grant? Her household? Her family? Her support obligations? Her lifestyle?

[21] Really, not very much.

[22] The term "forensic audit" tends to cause fear to erupt in the management offices of policing services. It is connotative of vast forensic-services expenses. Small businesses loathe the thought of having their day-to-day operations brought to a halt by having their accounting records tied up in endless inspections and checks. But the fact is that this is all a paper tiger. Most forensic audits of small businesses in low-level cases of suspected defalcation can be done by any investigator who knows how to balance a cheque book, and this with little impact on business operations—particularly in this era of easily replicated digital record

keeping. But the extra work must be done, because it fills in the informational gaps that are glaring in this case.

[23] I find myself left with more questions than answers. Why would this lady, with years of diligent service, in a position involving a high level of trust with her employer's money, want or need to start stealing? Motive is not an element of the offence of theft; however, proof of a motive may afford strong circumstantial evidence of intent.[7] I do not see a clear motive here, other than the nebulous and vacuous motive of greed, one which can be argued in any case of theft or fraud—although it is really a fallacy because it begs a pretty big question.

[24] I couple this with the fact that Ms. Grant did not try very hard to conceal what she was doing. There is no evidence that she hid or destroyed agency copies of the receipts that she had issued to customers; payments still got posted and credited to customers' accounts, or so it seems. This allowed the agency to do the account reconciliation which confirmed that money was missing. I recognize well that a theft can be carried out without concealment; sub-s. 322(2) of the *Code* underscores that. However, that provision does not render lack of concealment as a neutral or negligible fact; it means merely that stealth is not an element of the

[7] *See, e.g., R. v. Griffin*, 2009 SCC 28 at para. 65; *R. v. Lewis*, [1979] S.C.J. No. 73 *passim.*

offence. But it is still a circumstance for me to consider in assessing the element of intent.

[25] As I mentioned a little bit earlier, the existence of a specific intent will usually have to be inferred from circumstantial evidence. Accordingly, this is, in part, a circumstantial case. Is fraudulent intent the only rational inference to be drawn in this case?[8] I simply do not believe so. I consider the fact that Ms. Grant did have the authority of her employer to take money off site in order to deposit it at the bank. This likely would not have included a permission to take it home. However, Ms. Grant's residence on MacLean Street was close to the bank and agency where she worked; taking a deposit bag there was bad judgment, to say the least. But this not a wrongful dismissal case based on carelessness; rather, it is a criminal trial requiring proof of a high level of intent.

[26] In closing argument, counsel for the prosecution placed reliance on *R. v. Kowlyk*.[9] In this decision, the Supreme Court of Canada affirmed the doctrine of recent possession. Upon proof of the unexplained possession of recently stolen property, the trier of fact may -- but not must -- draw an inference of guilt of theft or of incidental offences. This inference can be drawn even if there is no other

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[8] *R. v. Griffin*, 2009 SCC 28 at para. 33 spells out the appropriate test.
[9] [1988] S.C.J. No. 66.

evidence connecting the accused to the originating offence. Thus, unexplained possession of property may serve to identify the possessor as the thief—or, if the property was taken in a robbery or a break and enter, as the robber or break-and-enter artist. The doctrine addresses the question of identity, or the "whodunit". That is a question not in issue here. The court knows that Ms. Grant took money from her employer and carried it to her home. The live issue in this case, rather than identity, is proof of specific intent. The doctrine of recent possession offers little assistance on that point.

[27] In spite of the very complete martialling of the limited evidence the prosecutor was handed, I find myself left in a state of reasonable doubt as to the issue of specific intent, and I find Ms. Grant not guilty.

JPC