

COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SOUTHWARK
His Honour Judge Hardy

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/03/2010

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES

MR JUSTICE PENRY-DAVEY

and

MR JUSTICE IRWIN

Between :

R

- v -

W

Mr N Saunders for the Appellant

Mr D Miller for the Crown

Hearing date : 4th February 2009

Judgment

The Lord Chief Justice of England and Wales:

1. This is an appeal by W against his conviction on 24 July 2009 in the Crown Court at Southwark before His Honour Judge Hardy of misconduct in a public office. It raises an interesting question about the state of mind required before this common law offence whose origins can be traced back to the thirteenth century can be established. (See Pollock and Maitland, *The History of English Law* 2nd edition (1898) Vol 2 p 520/521)).
2. Between 1999 and 2008 the appellant was a serving police officer in the Metropolitan Police. It was alleged that in that capacity between 1 July 2006 and 5 October 2007 he wilfully misconducted himself by improperly using an American Express (AMEX) credit card to the extent that he incurred expenditure of approximately £12,500 for personal use funded from public monies. Save to the extent that it arose from his employment as a police officer the misconduct did not take the form of a breach of or failure to perform his duties as a police officer.
3. The evidence to support the misuse of the AMEX card was clear. At the material time the appellant was heavily in debt. He admitted that, contrary to Force Instructions, he used the AMEX card for personal expenditure as well as official expenses but said that he did so believing that he was entitled to use it in this way provided he intended to refund the cost attributable to personal expenditure. This practice was widely followed by very large numbers of his colleagues. Therefore although he had wilfully used the card in the way alleged, he denied that he was guilty of deliberate misconduct or dishonesty. For completeness, we should record that the Crown did not accept the exculpatory elements of the appellant's case.
4. At the earlier stages of the trial process, it was expressly alleged that the appellant had acted dishonestly but that allegation was not made either when the case was opened, nor indeed in the Crown's closing submissions to the jury. However when the appellant gave evidence, although the allegation of dishonesty was not put directly to him, he was cross examined on the basis that he had acted dishonestly. Comparisons were made between the conduct of the appellant and shoplifting, reference was made to the fact that he had in effect given himself a "whopping pay rise", promoted himself to a higher rank with "quite a hike in pay", and treated the card as "some sort of cash cow", or as a "bank, really". The theme of his answers to these questions was that he honestly thought that he could use the card for his personal use provided he intended to repay the sums in due course and that he did so intend. He was reflecting the "culture in the office at the time" and he "knew that officers more senior to him were doing it to". He honestly believed that he was doing nothing wrong "...so long as I paid it back I did not see that it was wrong".
5. Before the summing up it was submitted to the judge that the ingredients of the offence of misconduct in a public office required specific focus on the defendant's subjective state of mind. The only authority to which he was referred was *Attorney General's Reference (No 3 of 2003)* [2005] QB 73. One of the questions for the opinion of the court was: "What are the ingredients of the common law offence of misconduct in a public office?". Following the death of an apparently healthy man detained in a police station, a number of police officers were charged with gross negligence manslaughter and, alternatively, misconduct in a public office because they failed in their duty properly to care for the man. It was held that:

“There must be an awareness of the duty to act or a subjective recklessness as to the existence of the duties. The recklessness test will apply to the question whether in particular circumstances a duty arises at all as well as to the conduct of the defendant if it does. The subjective test applies both to reckless indifference to the legality of the act or omission and in relation to the consequences of the act or omission”.

In short, even in the context of misconduct said to arise from failure to perform a police duty, it was necessary for the Crown to establish some subjective mental element.

6. The Crown submitted that no such ingredient was required. It was therefore not open to the appellant to advance a defence on the basis that he was not dishonest. That argument may well be unanswerable in the context of police disciplinary proceedings, but its application to the trial in a criminal court of misconduct which involves a police officer misappropriating public funds for his own use seems surprising.
7. The judge concluded that the *Attorney General Reference (No 3 of 2003)* was not a case “on all fours” with the present case, and that it “may be in that case there were elements of recklessness that the jury had to be directed about”. They did not apply to the present case. He was determined to give directions to the jury which would make the law “as uncomplicated as possible”. In short, the judge rejected the appellant’s contention in relation to the defendant’s subjective state of mind at the time of his actions: accordingly no such direction was given. Its absence provides the basis for the present appeal. The jury was directed that the prosecution had to prove that the appellant “wilfully – that means to say, deliberately – misconducted himself to such a degree as to amount to an abuse of the public’s trust in that office holder, without reasonable excuse or justification. ...the prosecution must prove misconduct of a high degree. We are not talking here about a mere bending of the rules or cutting corners...to amount to abuse of public trust a mistake, even a serious one, will not suffice either. The prosecution must prove that the office holder has fallen way below, or far below, the standards expected of him as, in this case, a police officer”. He effectively repeated this direction shortly before the jury retired.
8. The offence of misconduct in a public office may arise from acts or omissions by holders of that office, and depending on the acts and omissions alleged, the mental element of the offence will vary. The Law Commission Consultation Paper on Corruption, Legislating the Criminal Code, 1997, in a passage addressing the offence of misconduct in a public office records, perhaps unsurprisingly in view of the antiquity of the offence, that it is not “easily defined”. It refers to the Salmon Report which observed that the offence “embraces a wide variety of misconduct including acts done with a dishonest, oppressive or corrupt motive”. It also highlights a paper by PD Finn, entitled “Official Misconduct” [1978] 2 Crim LJ 308, in which the difficulty of attempting a definition of the offence is acknowledged but its principal applications are said to include: (a) frauds and deceptions (fraud in office); (b) wilful neglect of duty (nonfeasance); (c) “malicious” exercises of official authority (misfeasance); (d) wilful excesses of official authority (malfeasance); and (e) the intentional infliction of bodily harm, imprisonment, or other injury upon a person (oppression). Accordingly the nature of the conduct falling within the ambit of the offence is very wide, and logically it would follow that any necessary element relating

to the defendant's subjective state of mind cannot be identical for each and every one of its different manifestations.

9. The Committee on Standards in Public Life also issued a consultation paper on the offence of Misuse of Public Office in 1997. It recommended the creation of a new offence.

“18. The unifying factor of the common law cases appears to be the existence of some improper, dishonest or oppressive motive in the exercise or refusal to exercise some public function, rather than a mere abuse of power. There are few prosecutions, suggesting that action is taken only when the conduct is particularly gross. The advantage of creating a statutory offence of misuse of public office would be that some clearer indication could be given in the statute of the circumstances in which an offence might occur. The limits should not have to be drawn by the jury unguided.

19. We consider that the new offence might ...identify the two situations in which an offence might occur as unlawfully incurring expenditure, or incurring expenditure as a result of wilful misconduct”.

10. Both consultation papers reflect a careful analysis of the existing authorities. The breadth of the offence is underlined by two contrasting, relatively recent decisions of this court. In *R v Llewellyn-Jones* [1968] 1 QB 429 a County Court Registrar exercised his judicial responsibility in such a way that he gained an “improper” financial advantage for himself. His appeal was directed at the absence of any express allegation of dishonesty, but was dismissed on the basis that dishonesty or fraud were inherent in the offence. In this case, the court was focussing on the nature of the misconduct alleged, which took the form of deceit and fraud. On the other hand in *R v Dytham* [1979] 2 QB 722 a police officer deliberately neglected to intervene to prevent what turned out to be a homicidal attack. He failed to respond to what he knew to be his duty. He was plainly not dishonest. In the context of the misconduct alleged, the court observed that the offence was “not restricted to dishonesty”, an observation which carries the clear implication that dishonesty would be a necessary ingredient of some manifestations of the offence.
11. Like *Attorney General (No 3 of 2003)* these decisions are entirely consistent with many earlier authorities which underlined that what we shall describe as a criminal state of mind is required. Thus, nearly 200 years ago, in *R v Borron* [1820] 3B and Ald 432, in the context of misconduct by a magistrate, Abbott CJ said:

“...the question has *always* been, not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive, or corrupt motive, under which description fear and favour may generally be included, or from mistake or error. In the former case, alone, they have become the objects of punishment.” (Our emphasis)

12. In argument before us Mr Miller for the Crown submitted that the ingredients of the offence were (a) an intentional act by the defendant and (b) that the defendant “must know what he was doing was wrong” and (c) that the act must be “serious” or “have serious consequences”. In the course of the argument (b) was amplified to “it must be wrong and he must know it was wrong”. When invited to explain what “wrong” meant in this context, he suggested “misuse or abuse of the card”. If however the appellant deliberately misused the card (whose only purpose was to cover expenses) in circumstances which he knew were wrong, it is very hard to see how his state of mind does not require to be addressed as dishonesty.
13. We have been unable to discover any authority which suggests that the observations in *R v Borron* are no longer apposite to a case like the present, and indeed, *R v Llewellyn Jones* confirms their continuing applicability. *Attorney General Reference (No3 of 2003)* reinforces the requirement for some subjective mental element, appropriate to whatever form of misconduct is alleged. It would be wrong in principle to extend the ambit of an ancient common law offence by narrowing the requirements relating to the defendant’s state of mind (*R v Rimmington* [2006] 1 AC 459). Consistently with principle, and addressing the realities, it is in any event difficult to see how the defendant can have fallen so far below the standards required of him as a police officer that, in the context of the misuse of a card issued to him by his superiors for “expenses”, his conduct is properly to be stigmatised as criminal, unless he was dishonest.
14. In our judgment it is clearly established that when the crime of misconduct in a public office is committed in circumstances which involve the acquisition of property by theft or fraud, and in particular when the holder of a public office is alleged to have made improper claims for public funds in circumstances which are said to be criminal, an essential ingredient of the offence is proof that the defendant was dishonest.
15. The directions to the jury omitted this ingredient. Accordingly it is conceivable that the jury may have concluded that the act was “wrong” because the defendant flagrantly broke the rules governing the use of the card without being sure that he was dishonest: alternatively, they may have convicted him because in their view he plainly was dishonest, but without receiving any direction from the judge about how to approach the dishonesty issue. Although the evidence appears to have been powerful, the question whether the appellant was acting dishonestly, or not, is pre-eminently one for the jury after a correct direction from the judge. The conviction will be quashed. Although the penalty in court was relatively modest, the ramifications of the case are important. We shall order a new trial.