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R. v. Monk (Ont. C.A.)

Between
Her Majesty The Queen, Respondent, and
Godfrey Benning Monk and Jack Kenneth Martin, Appellants

[1988] O.J. No. 94

C.A. Nos. 1029/84, 102/85

Supreme Court of Ontario - Court of Appeal
Toronto, Ontario

Houlden, Grange and Tarnopolsky JJ.A.

Heard: October 4-6, 1987, February 1, 2, 1988
Judgment: February 3, 1988

Marc Rosenberg, for the Appellant Martin.
David J. Martin, for the Appellant Monk.
W. Brian Traffard, Q.C. and Nancy S. Kastner, for the Respondent Crown.

BY THE COURT (Endorsement):-- After a lengthy trial, the two appellants were convicted of defrauding the public. The indictment contained one count which read as follows:

> JACK KENNETH MARTIN and GODFREY BENNING MONK stand charged:
>
> 1. That they, between the 1st day of January, 1978 and the 30th day of July, 1980 at the City of Mississauga in the Judicial District of Peel and elsewhere in the Province of Ontario and in the Province of Manitoba, unlawfully did by deceit, falsehood or other fraudulent means defraud the public of a sum of money exceeding two hundred dollars ($200.00)

Sixty-six particulars were incorporated into the indictment. Fourteen of these were added during the course of the trial.

Although a number of grounds of appeal were argued, the following are the ones which we believe require consideration:

First, the trial judge failed to direct his attention to the mens rea required for fraud. The learned trial judge seems to have been of the opinion that if the acts of the appellants constituted "deprivation in furtherance of personal ends", this was sufficient for a conviction for fraud. With respect, this was wrong. "Deprivation in furtherance of personal ends" is only the actus reus for fraud.

The appellant Martin had testified that he believed he was making prudent and active investments for the M.S. Fund. The trial judge could have rejected this evidence, but because of the way he approached the finding of guilt, he never came to grips with it. For a conviction, the trial judge had to find that the appellant had been deliberately dishonest: R. v. Black & Whiteside (1983), 5 C.C.C. (3d) 313. If the trial judge accepted Martin's explanation, or if it raised a reasonable doubt in his mind, then Martin was entitled to an acquittal.

While this point has greater relevance for the appellant Martin, it also has some relevance for the appellant Monk. On the particulars with respect to Florida State in which the trial judge found that Monk had defrauded the public, he also found that Martin had defrauded the public. Hence, the failure of the trial judge to charge himself properly on mens rea may also have had an affect on the appellant Monk.

Second, the trial judge erred in holding that an honest but mistaken belief in matters of law was not a defence to a charge of fraud. In his reasons, he said:

> It must be observed that the matters in respect of which the accused Martin felt he had done nothing wrong were legal matters. While an honest belief in facts which if proved would provide an answer to a charge may be a defence, the same does not apply to belief in matters of law. A person is presumed to know the law. The fact that the accused was at all relevant times a member of The Law Society of Upper Canada and a practising solicitor is a factor to be weighed by the trier of fact as well.

In an offence requiring proof of fraudulent intent, a mistake of civil law is a defence: see R. v. Howson, [1966] 3 C.C.C. 348; R. v. De Marco (1973), 13 C.C.C. (2d) 369; R. v. Walker and Somma (1980), 51 C.C.C. (2d) 423; and Stephen, History of the Criminal Law of England, (1883), vol. III, p. 124. The appellant Martin was a lawyer, and many of the things he did could have constituted mistakes of civil law. If the trial judge found that Martin's actions were the result of an honest but mistaken belief in matters of civil law, then because of his ruling on this point, he would have rejected them as a defence.

Since, as we have pointed out, the finding that Martin had defrauded the public on Florida State is interwoven with the finding that Monk had defrauded the public on that venture, this point also has some relevance for the appellant Monk.

Third, the trial judge erred in refusing to permit cross-examination concerning efforts made by Dodge and Dodge (International) Corp., a United States company, to obtain financing for their offer to purchase Florida State. The offer was conditional upon the purchaser arranging satisfactory financing within 70 days. John Edwin Dodge, the president of Dodge and Dodge, testified that without personal guarantees no financing was available. The trial judge refused to permit counsel for the appellant Martin to cross-examine concerning the efforts of the Dodge and Dodge group to obtain financing, holding that it was irrelevant.

The Crown concedes that the trial judge erred in refusing to permit cross-examination on this issue. The error was of some importance as it bore on Martin's defence that he had an honest belief that he was entitled to use the Dodge and Dodge deposit. Since Martin gave evidence on this issue, this error in itself would not justify the granting of a new trial.

Fourth, the tendering of Martin's affidavit used in mortgage proceedings in Manitoba and his cross-examination thereon and his cross-examination on an affidavit in the Florida State matter violated the provisions of s. 13 of the Charter. The Crown conceded that the cross-examination was contrary to s. 13 of the Charter as interpreted in R. v. Mannion (1986), 28 C.C.C. (3d) 544, Dubois v. The Queen (1985), 22 C.C.C. (3d) 513, and R. v. Kuldip, an unreported decision of this court, released January 20, 1988. These cases were all decided after the trial judge had made his rulings. In light of the fact that there must be a new trial, we do not have to decide whether s. 613(1)(b)(iii) could be applied.

Fifth, the appellants contended that the Crown adduced evidence of more than one transaction and that this violated s. 510(1) of the Code.

To understand this point, it is necessary to give some background. In 1977, the appellant Martin created a pooled fund for the purpose of investing in mortgages. The fund was set up because Martin was having difficulty in placing funds for clients who wanted to invest in mortgages. The Fund was called the Mortgage Syndicate Fund. Clients who contributed to the Fund were given a brochure which stated that the Fund would be investing in prudent and active investments in mortgages, primarily in second mortgages. The Fund was unincorporated and Martin was the sole trustee. The manager of the Fund was a private company, controlled by Martin, called Marbro Limited. Shortly after the creation of the Fund, the appellant Monk was appointed general manager of Marbro Limited. Monk was also the de facto manager of the M.S. Fund.

The moneys of the M.S. Fund were invested in five ventures, namely, James Sterne, Taylor Gardens Ventures Ltd., Florida State Meat Packers Inc., Dacam Group Ltd. and James Clark. If the one count in the indictment had related to the investments made by the Fund in these five ventures, then the 66 particulars attached to the indictment could have been considered as overt acts in which

the appellants had allegedly defrauded the public by the improper and fraudulent use of the money in the Fund. However, the particulars covered not only instances in which the moneys of the Fund had allegedly been misused, but also instances in which moneys advanced directly to Martin for investment had been misused in the five ventures.

In his reasons for judgment, the trial judge dealt first with the instances in which the moneys invested in the M.S. Fund had been misused by the appellants in the five ventures. He dealt with each venture separately and made findings that the public had or had not been defrauded on each of the particulars attached to the indictment which referred to the misuse of the moneys in the Fund.

There were a number of the sixty-six particulars which dealt with individual investors who had advanced money directly to the appellant Martin for investment in Taylor Gardens and Florida State and with the misuse of the deposits made with respect to the sale of Florida State. When the trial judge had completed his review of the misuse of the moneys in the M.S. Fund on the five ventures, he turned his attention to these particulars. He found that the appellants had not defrauded the public with respect to six individual investors in Taylor Gardens and with respect to eight individual investors in Florida State. He found that they had defrauded the public with respect to eighteen individual investors in Florida State and with respect to the deposits on the Florida State sale.

Section 510(1) of the Code requires that each count in an indictment shall in general apply to a single transaction. A single transaction may include separate incidents that in and of themselves may be separate offences, if the offences are inextricably bound up with one another and the trial of them as one count causes no prejudice to the accused. Although the matter is not free from doubt, we think it would have been better, in the circumstances of this case, if the information had contained five counts, since there may have been prejudice to the appellants from the procedure followed by the Crown.

The prejudice suffered by the appellants came about in this way. By charging only one count of defrauding the public, it became unnecessary in the preliminary inquiry to deal separately with the distinctly separate features of the alleged fraud. That is, it was unnecessary for the Crown to lead evidence other than that relating to Taylor Gardens and Florida State to secure a committal. There is no question that the appellants by the time of trial had full knowledge of the incidents of the fraud alleged through the delivery of particulars and through the Crown's disclosure, but the Dacam incident was only obliquely dealt with at the preliminary inquiry and the Clark incident was not dealt with at all. It was conceded by the Crown that Sterne was not inquired into at the preliminary inquiry, because that incident had not been discovered at that time. In the result, the appellants were unable to probe the Dacam, Clark and Sterne incidents at the preliminary inquiry.

If there had been separate counts for the five incidents, the Crown would not have been able to expand the charges by delivering particulars of incidents not disclosed at the preliminary inquiry. For that reason, we think that there may have been prejudice to the appellant Martin by the procedure adopted by the Crown. The appellant Monk was found not to have defrauded the public

on Dacam, Clark and Sterne, but it is possible that the procedure adopted by the Crown may have also caused him prejudice.

When the errors we have referred to are considered cumulatively, we are of the opinion that the appeal must be allowed and a new trial ordered. Because of the way in which the trial proceeded and the way in which the trial judge made his findings, there is difficulty in defining the form of the new trial. Under the powers conferred by s. 613(8) of the Code, we think that justice requires that we restrict the scope of the new trial. The appellant Monk was found to have defrauded the public on some of the particulars relating to Florida State and not to have defrauded the public on others. At the new trial, the Crown will not be permitted to make allegations against the appellant Monk based on the particulars which the trial judge found were not proven.

The appellant Martin was found to have defrauded the public on two particulars relating to Sterne and on one particular relating to Clark. He was found not to have defrauded the public on ten particulars relating to Dacam. He was also found to have defrauded the public on some particulars relating to Florida State and Taylor Gardens and not to have defrauded the public on others. Again, the Crown will not be permitted to make allegations against the appellant Martin based on the particulars which the trial judge found were not proven.

In view of what has occurred, it might be preferable if the Crown were to prefer a new indictment.

The appeals will be allowed, the convictions quashed, and a new trial ordered in accordance with the foregoing directions. The Crown appealed against the sentences imposed on the appellants; in the circumstances, we need not, of course, deal with those appeals.

HOULDEN J.A.
GRANGE J.A.
TARNOPOLSKY J.A.