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Evidence – admissibility of illegally obtained evidence – information relating to bank accounts obtained in breach of section 79 of the Banking and Financial Institution Act 1989 – Admissibility of information in proceedings not governed by statute – whether information admissible if relevant – (Malaysia)

L was indebted to the plaintiff bank. The bank obtained judgement in Singapore and registered it in Malaysia under the Reciprocal Enforcement of Judgements Act 1958. The bank also sought a Mareva injunction against L's assets in Malaysia, so as to stop him from dissipating them. In order for the bank to obtain that injunction, it hired a private investigator, who discovered the existence and details of certain bank accounts, which then formed the basis of the Mareva injunction. The bank relied on the affidavits of the investigator and the bank manager during the ex parte application. Upon the application being heard inter parties, L applied to cross-examine the investigator and the bank manager. L argued that he needed to establish that in obtaining the information relating to the bank accounts there had been a breach of s. 97 of the Banking and Financial Institutions Act 1989. L contended that the cross-examination was relevant because if there had been a breach of s. 97, the information in the affidavit was inadmissible and consequently the bank accounts should not have been the subject of the injunction. Secondly, the cross-examination would elicit the full circumstances under which the information was obtained by the investigator in contravention of s. 97, and thereby show that the bank had not come to seek equity with clean hands. The Bank's application would therefore fail.

➔ Held:

1. Parliament's intention in passing s. 97 was to protect the secrecy of the affairs and accounts of customers of financial institutions. But in giving effect to that intention, it had only gone to the extent of creating offences with respect to prohibited disclosures. Parliament did not deal with the question of admissibility or otherwise in criminal or civil proceedings of any information or document disclosed in contravention of s.97. It was a matter of the law of evidence which states that illegally obtained evidence is nonetheless admissible if it is relevant.

2. L had not shown that the court could not apply the general law to admit evidence in contravention of s. 97 of the Act, of

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information or documents relating to the affairs or accounts of a customer of a financial institution. Since that was the general law, there must be an express statutory provision to render inadmissible the evidence so disclosed.

Therefore it will be irrelevant to elicit evidence to show that the information about the existence and particulars of the bank accounts were obtained in breach of s.97 and L could not be given leave to cross-examine the investigator and the manager for that purpose.

3. The bank had gone to court for a Mareva injunction with evidence that was admissible in law of the existence of certain bank accounts. This evidence was true notwithstanding the provisions of s.97 and that it may be an offence under that section to have disclosed or obtained the evidence was irrelevant.

4. It was unconscionable to bar the bank from the relief it sought on the ground of any wrongdoing in obtaining the evidence. The principle of clean hands did not prevail in the circumstances of the case.

Wako Merchant Bank (Singapore) Ltd. v. Lim Leaan Heung & Ors. [2000] 3 MLJ 401

Criminal Law - strict liability – sale of tobacco to person below the legal age limit – whether store-owner can accept forms of identification not listed in the statute – Tobacco Control Act s.3. – (Canada)

On August 13, 1997, R, went to Seaway Gas & Fuel Ltd. ("Seaway"), a small gas bar and store to buy cigarettes. R was 16 years old and thus not legally permitted to purchase cigarettes. P, the store clerk, requested identification and R produced a laminated school identification card which showed that he was 19 years old, which is the legal age for purchasing cigarettes. P sold R a package of DuMaurier King Size cigarettes. Two provincial offences officers, had been conducting surveillance on Seaway. They stopped R who provided them with his proper name and address and correct age. R explained to them that he had purchased cigarettes at Seaway and that he had produced a student card as identification which he had prepared himself using his computer.

The officers later charged P and Seaway under s. 3(1) of the Tobacco Control Act, 1994, with selling tobacco products to someone under the age of 19.

Section 3(1) of the Tobacco Control Act provides that

"No person shall sell or supply tobacco to a person who is less than 19 years old".

The trial judge dismissed the charges against both Seaway and P. Section 3(3) of the Act provides a defence to a charge under s. 3(1). It provides, in part:

"3 (3) It is a defence to a charge under subsection (1) ... that the defendant believed the person receiving the tobacco to be at least 19 years old because the person produced a prescribed form of identification showing his or her age and there was no apparent reason to doubt the authenticity of the document or that it was issued to the person producing it."

Regulation 613/94 promulgated under the Tobacco Control Act, prescribes the following forms of identification for the purposes of subsection 3(3) of the Act:

1. A driver's license issued by the Province of Ontario with a photograph of the person to whom the license is issued.
2. A Canadian passport.
3. A Canadian citizenship card with a photograph to whom the card is issued.
4. A Canadian Armed Forces identification card.
5. A photo card issued by the Liquor License Board of Ontario.

In interpreting this provision, the trial judge considered a number of factors and concluded that she was satisfied that Ontario Regulation 613/94 is a guide to be followed and that other forms of I.D. may be presented. She found that P had exercised due diligence in requesting identification, and that the identification produced seemed to be authentic as to both the person and his age.

The Crown appealed. The appeal judge dismissed the appeal, agreeing with the trial judge that the five forms of identification set out in s. 1 of the regulation was not an exhaustive list of acceptable identification.

The Crown appealed further to the Ontario Court of Appeal.

The question to be answered by the appeal court was: what is the responsibility in law of store owners and operators with respect to the sale of cigarettes to young people? Specifically, what forms of identification may a vendor accept to verify that a potential customer is legally permitted to purchase cigarettes?

legally permitted to purchase cigarettes?
The single legal issue for determination was:
“what are the acceptable forms of identification that a customer may show to a store operator who challenges his or her capacity, in terms of age, to purchase cigarettes? Or, put another way, is it a defence to a charge under s. 3(1) of the Tobacco Control Act (selling tobacco products to underage persons) for the store operator to establish that he or she reviewed a form of identification, but not one listed in s. 1 of O. Reg. 613/94?”

➔ **Held:** allowing the appeal;

The Tobacco Control Act (“the Act”) is a regulatory statute which creates strict liability offences; the offences come within the middle category of offences set out in *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299. In that case, Dickson J. described this category of offence, and its consequences for both the Crown and the accused, at p. 1326 as:

“Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability.”

Section 3(1) of the Act, which prohibits the sale of tobacco to a person who is less than 19 years old, was a strict liability offence. Thus, in Dickson J.’s words, “the doing of the prohibited act prima facie imports the offence.” There was no dispute in the present case that the store and its clerk, sold cigarettes to a person less than 19 years old. However, a strict liability offence was not an absolute liability offence. There was a balancing of factors in strict liability offences. On the one side, an absence of mens rea to commit the offence did not assist the accused. On the other side, however, the accused could “avoid liability by proving that he took all reasonable care”. This was the common law statement of the defence of due diligence.

In the present case, however, the Ontario legislature had attempted to define the contents

of the due diligence defence in respect of the offence of selling tobacco products to young people. In effect, the legislature had provided a statutory definition of what constituted ‘all reasonable care’ for this offence.

The real issue was whether the ID provided by R was an acceptable I.D. On a proper interpretation of the words ‘prescribed form of identification’ in s. 3(3) of the Act. Section 1 lists five forms of identification for the purposes of s.3(3) which in the view of the court, constituted an exhaustive list of the forms of identification that a vendor of tobacco products may examine when deciding whether a prospective customer is entitled to buy a package of cigarettes. In reaching this conclusion, the court considered that:

- 1) the dictionary definition of the word ‘prescribed’ suggests exclusivity and compulsion.
- 2) There was no inconsistency between the words ‘prescribed’ in s. 3(3) of the Act and s. 1 of the regulation and ‘acceptable’ in s. 13(5) of the regulation. When s. 1 of the regulation lists five forms of identification as ‘prescribed’, and s. 13 of the same regulation lists the same five forms of identification as ‘acceptable’, the two adjectives mean the same thing – a vendor must insist that a prospective customer produce one of them.
- 3) The word ‘may’ in s. 13(1) of the regulation means that other forms of identification may be considered by a store operator. In the context of five ‘prescribed’ forms of identification in s. 1 and five ‘acceptable’ forms of identification in s. 13(5), the word ‘may’ in s. 13(1) simply means that the customer may produce any of the five listed forms of identification, not something completely different.
- 4) The purpose of s. 3(6) is to create an offence for persons who produce a fake version of one of the five forms of prescribed identification. The section does not purport to convert other forms of identification (e.g. a student identification card) into prescribed forms of identification simply because they are authentic and have been lawfully issued to the holder by the relevant authority (e.g. a school board).
- 5) The Act is an important public health statute which attempts to regulate in a strict and careful fashion the distribution of a dangerous product. The provisions of the Act and regulations should be interpreted with a judicial eye firmly focused on the public health purposes of the legislation.

One of the most important purposes of the legislation is to make sure that minors are not able to buy cigarettes. The legislation should be strictly interpreted to help achieve that purpose.

6) It was not an accident that the government chose only five – and five quite specific – forms of identification. “The wallets of young people are filled with identification cards – school cards, sports team cards, club membership cards, retail store cards, movie rental cards etc. It would be easy for a minor to alter the information, including birth date, on some of these cards as R had done. The five forms of identification listed in s. 1 of O. Reg. 613/94 fall into a different category. They are quite formal documents issued by federal and provincial authorities. They are not easy to obtain; care is taken by the authorities in issuing them. It was fair to infer that the Ontario legislature chose these five forms of identification because it knew that the authorities are careful in scrutinizing the relevant information before they are issued.”

7) The position of Ontario merchants was one that combines privilege and responsibility. The privilege was the merchant’s opportunity to sell products to the public and to earn a profit, or even to gain a livelihood, thereby. The responsibility arose from the fact there is a direct interface or relationship between the merchant and the customer. With respect to regulated products, it was crucial that the merchant understood and respected the limits of its privilege to sell to the public.

Her Majesty the Queen v. Seaway Gas & Fuel Ltd. and Param Phambri Court of Appeal for Ontario [2000] Docket M24193 C32393

Criminal Law and Procedure – Corruption – misconduct by public officer – failure to disclose conflict of interest – whether offence too vague as to be void as against fundamental rights and freedoms – whether relevant that Government suffered no loss – Doctrine of Vagueness – Basic Law – (Hong Kong)

S was charged with four counts of misconduct in public office contrary to the Common Law. At all material times, S was Chief property Manager at the Government Property Agency of the Government of Hong Kong. He awarded contracts to Onclever Ltd. Onclever was owned

and run by his wife’s brother-in-law. He also allowed Onclever to pre-qualify for government tenders even though the company did not have the requisite qualification to be treated in this manner.

There was a Civil Service Branch Circular on conflict of interests, which set out the common areas in which a conflict of interest would arise. The Circular required the disclosure of any interest that might influence or appear to influence the judgment of civil servants in the performance of their duties.

S contended at his trial that the offences for which he was charged were no longer part of the common law in Hong Kong, as they had been repealed as inconsistent with the Hong Kong Bill of Rights Ordinance.

S was convicted and appealed to the Court of Appeal.

➔ **Held:** dismissing the appeal;

1. Vagueness of the Charges:

Citing numerous authorities, the Court stated the following principles:

“A law must be accessible, i.e., a person must be able to know the law relevant to his case, and that it must be sufficiently precise so that the person could regulate his conduct. However, the precision would vary according to the subject matter. A law might be in broad terms and be valid. It might be clarified by court decisions, and advice could be sought on the lawfulness of conduct. Laws relating to a public officer’s partiality could not be expected to be defined with absolute precision, lest excessive rigidity render such laws unable to provide for changing circumstances.”

The offence of misconduct in public office cannot be so wide and vague as to constitute an unacceptable discrimination against public officials, because for centuries the courts have applied and interpreted the offence and not found it to be so wide and vague as to infringe the common law and constitutional rights relied upon by S. The offence has elements of mens rea and actus reus, and only applies to public officials in the execution of their duties. The conduct must arise from an improper motive; it does not penalize mere errors.

Duty to disclose

Counsel for S had contended that the trial judge erred in finding that S knew his duty to disclose and its scope. The Court referred to

Commonwealth v. Steinberg 362 A 2d 379, in which the court said: "In the present case the appellant's use of his official influence to benefit a family member when his duty was to advance the city's best interest was corrupt." S's position as a senior member of the government was such that he could not be said to have been ignorant of his duty to disclose his conflict of interest. A public officer was guilty of misconduct if he did not disclose particular interests which will conflict with his duty as a public servant, irrespective of whether or not he made any personal gains from his actions. All that needed to be shown was that he acted partially in pursuit of the interests of his own including those of his relatives and friends.

Gravamen of the offence

Although the government of Hong Kong might have suffered no loss, this was irrelevant to the conduct prohibited. The gravamen of the offence lay in the fact that S was instrumental in bringing about a situation whereby there was no level playing field for all bidders for the contracts he awarded. "It was a matter calling for 'condemnation and punishment' when the actions of a senior government officer who was placed in an influential position of trust, abused that trust and acted in such a way as to give an advantage to an individual tenderer". Such conduct amounted to corruption. The receipt of a bribe or advantage was not an essential element of corruption in its broad and general sense. A deviation from fidelity in the discharge of a person's duty can amount to corruption.

HKSAR v. Shum Kwok Sher [2001] 3 HKLRD 399

Criminal Law – Arson – Refusal to grant legal aid – whether breach of fundamental right to fair hearing – Constitution of Barbados – Community Legal Services Act 1981 – (Barbados)

H was arrested and charged with setting fire to the house of his girl-friend's parents, contrary to section 4 of the Malicious Injury to Property Act (Cap 140). The evidence was that before his trial H had applied to the Community Legal Services Commission, the body responsible for administering the community legal aid scheme in Barbados, for the grant of legal assistance, but he received no answer. At trial he again applied to the judge for legal aid. According to him he

"was told by that judge that there was no legal aid for arson or words to that effect". Prosecuting counsel recollected that the Learned Trial Judge refused H's request on the ground that the case was not, and was not likely to be of such difficulty so as to require the assistance of counsel. In the course of the trial a *voir dire* was held to determine the admissibility of incriminating statements made by the appellant and there was evidence that he played some part in the trial by questioning witnesses, making a statement from the dock and addressing the jury. He was convicted and sentenced to eight years imprisonment.

H appealed to the Court of Appeal of Barbados, which rejected the appeal. He appealed further to the Privy Council, seeking declaratory relief under section 24 of the constitution of Barbados. The appeal raised two broad questions for the consideration of the Board: (1) did the denial of free legal representation to the appellant on his criminal trial breach a right guaranteed to him under the constitution? and (2) if his constitutional right was breached, was he entitled to declaratory relief under section 24 of the Constitution?

➔ Held:

1. The Board could not be sure, on the basis of the available evidence, what transpired between H and the judge. It did not however appear that the judge attempted to investigate H's understanding of the crime charged against him or his capacity to defend himself or the nature of any possible defence he might have wished to advance. It was also common ground that legal aid was not granted.

Section 18, of the Constitution of Barbados, so far as relevant, provides the following:

"(12) Nothing contained in subsection (2)(d) shall be construed as entitling a person to legal representation at public expense."

When the Constitution was adopted there was no state-funded legal aid scheme in Barbados. The Community Legal Services Act 1981 introduced such a scheme. The purpose of the Act, expressed in section 3(1), was "to provide legal services to persons in respect of civil and criminal matters where those persons are financially unable to secure legal services from their own resources".

2. As section 17 makes plain, the procedure for applying for legal aid is somewhat different,

depending on whether the applicant is charged with a scheduled or a certified offence. It is also provided in section 19 of the Act:

"19. Where any person who has not made an application for the provision of legal services appears before a magistrate charged with a scheduled offence or as a party to a scheduled matter, or where any such person is committed for trial, the magistrate shall inform the person so charged, appearing or committed of his right to make such an application."

Thus in the case of a defendant charged with a certified offence (as opposed to a scheduled offence) the Act does not provide for an application for legal aid to be made to the committing magistrate, and there is no statutory requirement that the defendant should be informed of his right to apply for legal aid. If application is made by a person charged with a certified offence to the trial judge at the outset of the trial, as was done in the present case, there is plainly a risk of delay (if the application is granted) while an attorney is instructed and reviews the case.

The appellant was not charged with a scheduled offence and so had no automatic right, on demonstrating a lack of means, to the grant of legal aid. When he made the application, the trial judge could not have acceded to the application under section 17(c) or section 20(a) but could have done so under section 17(d) had he judged that either paragraph (g) or paragraph (h) was applicable and in either event that the provision of an attorney was required for the proper determination of the case.

3. The Constitution was to be read not as an immutable historical document but as a living instrument, reflecting the values of the people of Barbados as they gradually change over time. But the courts, including the Privy Council, must give effect to its terms. Section 18(2)(d) protects the rights of a criminal defendant to defend himself before the court either in person or by a legal representative whom he has chosen. But this right is to be interpreted in the light of section 18(12): such a defendant has no entitlement to be professionally represented at the expense of the public. This subsection is not directed to the choice of representative but to the responsibility of paying for the representative chosen under section 18(2)(d). This provision was included to avoid doubt. If sections 18(1), 18(2)(a), 18(2)(b), 18(2)(c), 18(2)(e) and 18(2)(f) were compared with

articles 6.1, 6.2, 6.3(a), 6.3(b), 6.3(d) and 6.3(e) respectively of the European Convention on Human Rights, a close correspondence would be found, often extending to the use of identical language. But there was a striking contrast between section 18(2)(d) and article 6.3(c). Section 18(2)(d), provides that persons charged with criminal offences should defend themselves before a court in person or by a legal representative they chose. This had the same effect as the opening words of article 6.3(c), except that article 6.3(c) continues to add: "or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require". Barbados had adhered to this position when acceding to international human rights instruments. On its accession to the International Covenant on Civil and Political Rights on 21 December 1972 the Government of Barbados expressly reserved

"the right not to apply in full, the guarantee of free legal assistance in accordance with paragraph 3(d) of Article 14 of the Covenant, since, while accepting the principles contained in the same paragraph, the problems of implementation are such that full application cannot be guaranteed at present."

These citations highlight two important points directly applicable in Barbados. First, and most importantly, while the constitution does not entitle every indigent criminal defendant to free legal aid in every case, it does guarantee a fair hearing to every such defendant and there is nothing in section 18(2)(d) or section 18(12) which qualifies or undermines that right. It is indeed one of the fundamental human rights and freedoms to which the people of Barbados have pledged allegiance in the preamble to the constitution. There would be very many cases, in Barbados as elsewhere, which may be fairly heard without representation of the defendant. The less serious the charge, the more straightforward the facts and the more modest the potential penalty, the likelier this was to be true. But the contrary was true also: the more serious the charge, the more complex the case and the greater the potential penalty the more likely it was that legal representation of the defendant (if he wished it) would be needed if the hearing was to be fair to him. This reality was recognised by the Community Legal Services Act. It automatically provides free legal aid for indigent defendants accused of the most serious offences. "The provision of automatic legal aid to indigent minors, whatever the offence charged against them, recognises

that minors are likely, because of their immaturity, to be at a greater disadvantage in defending themselves than an adult would ordinarily be expected to be. Thus, in the case of minors the risk that a hearing may not be fair is greater, and the statute guards against that risk. In cases which are for any reason difficult, or which raise important points of law, the trial judge may (subject to the defendant's means) procure the grant of legal aid where this is judged to be necessary for the proper determination of the case, and where these conditions are met he should. The Board was of opinion that the Act, interpreted and applied in the light of section 18(1) of the constitution, enabled effect to be given to the guarantee of a fair hearing."

4. The Privy Council restated its statement in *Mohammed v The State* [1999] 2 AC 111 at 124, that

"... breach of a defendant's constitutional right to a fair trial must inevitably result in the conviction being quashed."

The Board and the House of Lords, construing the European Convention, had observed that "the overall fairness of a criminal trial cannot be compromised" and have described the right to a fair trial as "absolute": *Brown v Stott* [2001] 2 WLR 817 at 836; *R v Forbes* [2001] 1 AC, 473 at 487. This does not mean that every legal error, every irregularity, every deviation from good practice, every departure from procedural propriety in the course of a trial must deprive a defendant of a fair hearing. Most of the constituent rights comprised within article 6 of the European Convention have been held not, in themselves, to be absolute: *Brown v Stott*, at page 836. Thus questions of degree are relevant, as are the facts of a particular case and the circumstances of a particular defendant.

5. In the absence of any material relating to the appellant's criminal trial other than the judgment of the Court of Appeal and the conflicting affidavits of the appellant and prosecuting counsel, the Board could not make a reliable judgment whether the trial judge erred in denying legal aid to the appellant or whether such denial, if erroneous, deprived the appellant of his right to a fair hearing. The case against the appellant was clearly a strong one if the evidence of eye witnesses was reliable and his incriminating admissions were accepted as true. On the other hand, he contended that his admissions were made as a result of police pressure, and the possibility had been raised that

he was not fully responsible at the time of the fire. The lack of enquiry by the trial judge when refusing legal aid would suggest that he failed to take account of the appellant's personal circumstances and any difficulties he might face. The prosecution case might well have been simple and devoid of difficulty; the same was not necessarily true of the appellant's task in resisting it, and even if there was no real answer to the charge itself there may well have been points to be made in mitigation of sentence. But the Board was concerned only with H's claim that his constitutional right to a fair hearing was infringed by the denial of legal aid at trial. For purposes of that determination, account must be taken not only of the trial but of the appeal. At the hearing of his appeal the appellant was represented by counsel, through whom he had the opportunity to argue any points reasonably open to him. The ordinary processes of appeal offered the appellant an adequate opportunity to vindicate his constitutional right.

Richard Hinds v. The Attorney General and Superintendent of Glendiarly Prison, Privy Council Appeal No 28 of 2000 [2001] UKPC 56.

Criminal Law – Theft – stealing money collected on behalf of a children's charity organization – whether theft by trustee of the charity committed against the donating public or the charity – (United Kingdom)

In 1996 the *Hands of Hope Children's Cancer Fund* was registered with the Charity Commission. Its objects included the raising of funds for the relief of children suffering from leukaemia and other forms of cancer. Money was raised by street collections. M and D were trustees of the Charity. The charity had a bank account with Lloyds Bank and between 5th January 1998 and 24th December 1998 just over £15,000 was paid into it. It was the prosecution's case that there were a "large" number of collections made on behalf of the charity, which yielded "substantial sums" of money; of which a "... significant part of the total ..." did not reach the charity bank account, and the two appellants and a third person "Steve" had taken the money. The prosecution could not prove how much had been collected. The defence claimed the prosecution had in the event failed to prove its case: they were incompetent, but they did not steal, and were not dishonest.

They were charged with stealing money from persons unknown. The prosecution had first considered a conspiracy between the two appellants to defraud the public. But for fear of one of the two conspirators being acquitted, and the consequential acquittal of the other conspirator, they abandoned this course because of "practical difficulties". Then they had in mind to charge the defendants with theft from the charity. But they were concerned at the concept of the appellants stealing from themselves, as trustees. So the final form of the indictment alleged that the appellant in question "... stole monies belonging to person or persons unknown". The "... person or persons unknown" were the individual members of the public putting money into the charity's collection box. In effect, the theft was committed by the appellants through the medium of honest collectors. D, had stated in a witness statement said that he, when collecting, used to keep £3 out of every £10 collected.

The trial judge found them guilty and sentenced them to prison. Both M and D appealed.

➔ **Held:** allowing the appeal;

1. At common law and by statute when a person who collects money for a charity is subject to an obligation to account for money by reason of the donor's intention to give money to the charity, that imposes a trust, and to misappropriate that money is to take property which belongs to the beneficiaries of that trust, ie the charity. Section 5(3) of the Theft Act, 1968, so far as is relevant, reads:

"(3) Where a person receives property ... on account of another, and is under an obligation to the other to retain and deal with that property ... in a particular way, the property ... shall be regarded (as against him) as belonging to the other."

So the collector of money from the public receives that money subject to the charitable trust and shall treat the money collected as belonging to the beneficiaries of that charity. Accordingly, property in the money passes from the donor member of the public to the charity when that money is put in the collecting tin. It is then stolen by whoever acts in a way inconsistent with the charity's ownership of that money. But it is not stolen from the donor

public - it was the charity's the moment it was placed in the collecting box.

2. The importance of the form of the indictment alleging that the theft was from the donor members of the public when in fact any theft would have been from the beneficiaries of the charity was the point of principle that no-one should be convicted of an offence with which he has not been expressly or impliedly charged (see Professor John Smith [1997] CrLR, commenting at 438 - 439). No application to amend was made, and it was now too late.

3. The Court then considered whether the case was one in which section 3 of the Criminal Appeal Act, 1968 gave power to the court to substitute a conviction for an alternative offence. Section 3(1) and 3(2) read:

"(1) This section applies on an appeal against conviction, where the appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Appeal that the jury must have been satisfied of facts which proved him guilty on the other offence.

(2) The Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of the other offence, and pass such sentence in substitution for the sentence passed at the trial as may be authorised by law for the other offence, not being a sentence of greater severity."

It however held that, in considering whether the jury could have found the defendant guilty of some other offence, the leading case of *R -v- Wilson* [1984] AC 242 HL

"... does not authorise the court to step outside the ingredients of the offence in the indictment."

The Court found that it was not possible to make such a substitution. It did not also deem it proper (although it was prepared to hear submissions on the matter) that this was a case where it could order a retrial under section 7 of the Criminal Appeal Act, 1968.

R. v. Ian James Dyke and Deborah Betty Munroe, [2001] EWCA Crim 2184.