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IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 260/86

THE QUEEN

v.

KARL FEODOR SIM

Coram: Cooke P
McMullin J
Casey J

Hearing: 30 April 1987

Counsel: R.B. Squire for Crown
K.C. Bailey for Appellant

Judgment: 30 April 1987

JUDGMENT OF THE COURT DELIVERED BY COOKE P

Karl Feodor Sim, whose name we were informed from the Bar has since been changed to Goldie, was tried before a District Court Judge and jury on an indictment containing 48 counts under ss.265, 266, 266A and 266B of the Crimes Act 1961. Most of them related to alleged forgeries of the signature of C.F. Goldie, but in some there appears the name Petrus van der Velden and in some the name Rita Angus. It is sufficient to instance as samples counts 1 and 3:

> 1. The Solicitor-General charges that at Foxton or elsewhere in New Zealand on a date prior to the 27th day of May 1981, Karl Feodor Sim forged a document, namely a sketch of a Maori female, wrinkled, with moko and tiki, by signing the said document with what purported to be 'C F Goldie'.

> 3. The Solicitor-General charges that at Foxton on or about the 27th day of May 1981 Karl Feodor Sim knowing a document to be forged, namely a sketch of a Maori female, wrinkled, with moko and tiki, and signed 'C F Goldie' caused Geoffrey Robert Spencer to act upon the said document as if it were genuine.

In the event the defendant was found guilty on 20 charges of forgery relating to the signatures Goldie or Van der Velden, 18 charges of uttering, and one of altering a document with fraudulent intent. The charges covered quite a long period of years and arose in the main from the sale, in a business conducted by him at Foxton, of various works of art. It was a mixed business including wine-reselling, the conducting of auctions, and the sale of second-hand goods.

He now appeals, or applies for leave to appeal, against his convictions on two of the counts. That part of the case was referred to in argument as the general appeal. There is also a case reserved relating to most of the counts on which there were convictions.

As to the general appeal, the convictions in question were on counts 47 and 48.

> 47. The Solicitor-General charges that at Foxton or elsewhere in New Zealand on a date prior to the 18th day of June 1984 Karl Feodor Sim did with intent to defraud alter a document namely a crayon sketch of people working in a wheat field purportedly signed with the signature of 'Rita Angus'.
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> 48. The Solicitor-General charges that at Lower Hutt on or about the 18th day of June 1984 Karl Feodor Sim did with intent to defraud cause McGregor Wilson Beer to act upon a document namely a crayon sketch of people working in a wheat field and signed 'Rita Angus' knowing the same to have been altered with intent to defraud.

These counts were alternative to counts 45 and 46 - those of forging the signature of Rita Angus on the same sketch, and a corresponding charge of uttering. The defendant was found not guilty on those two charges. The alternative charges in counts 47 and 48 concerned alterations to certain particulars appearing on the back of the sketch and purporting to show the provenance of the sketch.

On the general appeal two points were in the end taken for the appellant in this Court. First, it was said that certain handwriting comparison evidence given by the Crown expert, Mr West, on counts 45 and 46 was inadmissible on those counts and that, despite the acquittal of the defendant thereon, there may have been some prejudicial effect from that evidence when the jury were considering counts 47 and 48. This point is without substance. The evidence referred to concerned the front of the sketch. Neither the Crown in prosecuting the case nor the Judge in summing up suggested that it had any bearing on counts 47 and 48. Manifestly the jury did not accept it as sufficient to enable them to convict the defendant on the counts to which it did relate, namely 45 and 46. It seems to us improbable in the extreme that it had any influence upon them when they were considering counts 47 and 48, where the Crown case turned on different evidence from Mr West. There is no basis for the speculation now put forward for the appellant.

The second point concerns the chain of reasoning whereby Mr West formed and gave in evidence an opinion indicating grounds for finding that the defendant had made alterations on the back of the sketch, as charged in count 47. The expert witness first compared certain acknowledged cursive writings of the defendant with writing consisting of calligraphy, with some ten lapses into cursive script, appearing on certain documents found in the defendant's business premises. They were exhibit 138 - an agreement - and exhibit 146 - a price list. From that comparison, he concluded that those two exhibits were written by the defendant. Then he compared the exhibits with the alterations on the back of the sketch and saw grounds for concluding that they were written by the same person, namely the defendant.

Under s.19 of the Evidence Act 1908 the Judge was satisfied beyond reasonable doubt that exhibits 138 and 146 were genuine examples of the defendant's handwriting. Mr Bailey's argument is that he should not have taken Mr West's opinion evidence into account in arriving at that satisfaction. Some degree of support, not very firm or clear, was derived by counsel for that proposition from Wigmore on Evidence, volume 7, paragraph 2020, but no English or other Commonwealth authorities or textbooks have been found by counsel to support the proposition. We see insufficient warrant for reading such a limitation into

the section. The Judge must be satisfied beyond reasonable doubt, at any rate in a criminal case: see R. v Ewing [1983] 2 All E.R. 645. As Wigmore puts it at the end of the paragraph already mentioned :

> It is even said that the proof must be 'clear' or 'positive', and this requirement, left to the discretion of the trial Judge to administer, seems all that is desirable.

In this case, both the exhibits already specified and the document referred to in counts 47 and 48 were disputed documents. While satisfying himself as regards the former on the preliminary or threshold question, the need for which satisfaction is a safeguard for the accused, the Judge rightly went on to leave out all questions of authenticity to the jury, both as to the exhibits and as to the entry on the back of the sketch. The section was thus satisfied. The application for leave to appeal must be dismissed and, in so far as the general appeal is strictly to be described as an appeal, it is also dismissed.

The case reserved states three questions:

(a) Was I correct in deciding that a signed sketch was capable of being a 'document' for the purposes of section 264(1) of the Crimes Act?

(b) Was I correct in deciding that the addition by an accused of a false signature to a sketch could constitute 'making a false document'?

(c) Was I correct in deciding that even if the sketch was made by the artist whose name an accused falsely added, the addition by the accused of a false signature to the sketch could constitute 'making a false document'?

The material provisions of the Crimes Act are s.263(1)(a), being the first part of the long definition of 'Document' in the interpretation section relating to forgery :

> 'Document' means -
>
> (a) Any paper, parchment, or other material used for writing or printing, marked with matter capable of being read; .....

A further part of s.263(1) being paragraph (a) in the long definition of 'False Document':

> 'False document' means a document -
>
> (a) Of which the whole or any material part purports to be made by any person who did not make it or authorise its making;

And s.264 (1) and (2) :

> 264. Forgery - (1) Forgery is making a false document, knowing it to be false, with the intent that it shall in any way be used or acted upon as genuine, whether within New Zealand or not, or that some person shall be induced by the belief that it is genuine to do or refrain from doing anything, whether within New Zealand or not.
>
> (2) For the purposes of this section, the expression 'making a false document' includes making any material alteration in a genuine document, whether by addition, insertion, obliteration, erasure, removal or otherwise.

It is convenient to mention that some slight degree of confusion appears to have crept into the summing up and the corresponding portion of the case stated, and to have been contributed to by the way in which the Crown case was presented; in that, on one interpretation of what he said to the jury, the Judge was referring to s.264(2) rather than to s.264(1). We are satisfied, however, that the relevant

provision was subs.(1) and that any erroneous reference to subs.(2) cannot possibly have led to any miscarriage of justice in this case, so the point is within the scope of the proviso.

The argument leading to the three questions already quoted derives basically from R v Closs, a somewhat briefly reasoned decision of the Court for Crown Cases Reserved in England in 1857, reported in various places including 7 Cox's Criminal Cases 494. The other reports are collected in Russell on Crime 12th ed. vol 2 at pp 1221 and 1222 where there is some criticism of the decision; criticism which, in our respectful opinion, may well have force. Be that as it may, Closs's case was decided at common law and does not necessarily govern the position under the provisions of the New Zealand code. So far as Closs dealt with the point now arising, Cockburn CJ delivering the judgment of the Court appears to have held that the addition of a false name on a picture to give the impression that the picture was an original painted by one J. Linnell, whereas in truth it was only a copy, was not a forgery, because to quote the relative sentence from the report in Cox :

> A forgery must be of some document or writing; but the name of Linnell in this case can only be regarded as an arbitrary mark put upon the picture by the painter to enable him to recognise his own work.

It is conceivable that there was something in the particular facts of Closs to lead the Court to that perhaps somewhat unusual conclusion. It seems to us that, in the

absence of evidence tending to show some such special purpose, the ordinary inference is that a signature upon a painting or other work of art such as a sketch is intended to be, and is taken by those who look at the work to be, an indication that it has in fact been painted by the person whose signature purports to appear before the viewer.

The words of the New Zealand s.263(1)(a) are 'any paper, parchment, or other material used for writing or printing, marked with matter capable of being read'. It is not in dispute that, if all that the paper or parchment or other material bears is a painting or drawing, it does not fall within the definition of document, because it is not yet marked with matter capable of being read. So merely to paint a picture or draw a sketch is not to make a document within the meaning of this section. Nevertheless, when there is added to the paper, parchment or other material a mark or a series of marks capable of being read, then the material so marked does become a document.

In our view that is precisely what occurred in the present case. Further, matter capable of being read, in this case a signature, may clearly be a material part of the whole; and if the message naturally conveyed is that the work as a whole was made by the person whose signature purports to appear, then that signature is a material part of the false document and fully capable of falling within s.264(1). It does not fall within s.264(2), however, because until the signature has been added the paper,

parchment or other material has not been converted into a document.

In a sustained argument, Mr Bailey urged the Court in effect to cut down the natural meaning of the definition of 'document' in s.263(1)(a) in the New Zealand Act by reference to the decision in Closs. We see insufficient reason for taking that line. It may be - we do not say it is the case, but it may be - that before the change made in the New Zealand legislation in 1973 there would have been something to be said for that interpretation. That is because until that change the New Zealand provision was in the form initially drafted by the Criminal Code Commissioners in their 1879 Report. In their draft code it was s.313, which read :

> A document means in this part any paper, parchment, or other material used for writing or printing, marked with matter capable of being read but it does not include trade marks on articles of commerce, or inscriptions on stone or metal, or other things of the same kind.

An argument would at least have been open that 'other things of the same kind' included what Cockburn CJ was reported by Cox to have spoken of as an arbitrary mark put upon the picture by the painter to enable him to recognise his own work.

We need not express any comment on the validity of such an argument, for in 1973 the section was considerably changed: in the main by lengthening it to include modern methods of reproduction, but more significantly for present

purposes by deleting from (a) the words 'but does not include trade marks on articles of commerce or inscriptions on stone or metal, or other things of the same kind'.

If anything that omission strengthens the view that (a) should be given its ordinary and natural meaning and not cut down by any process of interpretation based on Closs's case. On that view of the matter it becomes unnecessary to explore how far Closs represents the modern law of England.

The view we have just expressed leads inevitably to the answers to the questions specified in the case which, in effect, have already been given by the District Court Judge. A refinement raised by the questions is that (c) draws attention to the possibility that some at least of the sketches or paintings were genuine. It appears from the evidence that there is a decided possibility at least that such was the case with the Van der Velden works, but a much less strong possibility in the case of the purported Goldie works. For the evidence does seem to point to the latter works as being spurious. Be that as it may, at no stage did the Crown case depend on proving that the works were not works of Goldie or Van Der Velden or Rita Angus. As regards all the counts, the Crown case was based on the falsity of the signature or other added matter, not on any alleged falsity of the work itself. We agree with the District Court Judge that this can make no difference. If the signatures referred to in most of the counts and the

alterations referred to in counts 47 and 48 were false, they were material part of the documents; and clearly there was ample evidence that they were false.

For those reasons, each of the three questions is answered Yes, and the convictions of the defendant must stand. Not surprisingly, there has been no appeal against what appears to have been a lenient sentence of 200 hours community work and a fine of $1000.

RB Cooke P.

Solicitors

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