

IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS

R v LIVENIE ELLIS

- (i) Forgery
- (ii) Uttering Forged Documents

BEFORE THE CHIEF JUSTICE, THE HON. MS JUSTICE RAMSAY-HALE

Ms. Jillian Williams, Director of Public Prosecutions for the Crown
Mr. Kwame Smith for the Defendant
Heard on the 14th August 2018



DECISION

1. The Defendant Livenie Ellis submits that there is insufficient evidence to commit her for trial in the Supreme Court with respect to allegations of forgery and uttering that have been made against her.
2. Mr. Smith who appears for the Defendant makes, in addition, several observations about the drafting of the charges which are cogent and have been accepted by the DPP as correct. I set them out in full to highlight the errors made in the drafting which are all too common and all too frequent as has been pointed out by this Court time and again. I use this opportunity to remind all members of the ODPP that it is their duty to review Informations, which I believe are drawn up by the police in the first instance, BEFORE presenting them to the Court at the Sufficiency Hearing. They should ensure that the appropriate offence is charged and that the particulars are concisely and accurately stated.
3. In the instant case, the Information under the heading **Particulars of the Offence** with respect to the count of forgery contrary to section 6 of 4 Victoria Chapter 31 of the Law of the Bahamas, states:

"That you sometime between the 1st March 2016 and the 30th April 2016 at Providenciales, Turks and Caicos Islands did forged (sic) certain documents namely British Overseas Territory passport applications of ... bearing a signature of Carol Skippings, Justice of the Peace which was suspected of being forged."
4. The allegation made in the witness statements is that the Defendant did **forge** several documents namely British Passport application **forms** of several persons **by signing them as** Carol Skippings. The documents do not in fact bear the signature of Carol Skippings as set out in the Particulars.

5. In addition to the miscellaneous errors and omissions highlighted above, the **Particulars** fail to state one of the elements the Crown must prove which is that the Defendant forged the documents **with intent to defraud**. Instead, the **Particulars** recite that the documents “was (sic) **suspected** of being forged” which is not an element of any offence known to law.
6. The **Particulars of Offence** for the offence of uttering the forged documents recites,

“That you sometime between the 1st March 2016 and the 30th April 2016 at Providenciales, Turks and Caicos Islands did utter certain forged documents namely British Overseas Territory passport applications of ... bearing a signature (sic) of Carol Skippings, Justice of the Peace which was suspected of being forged.”
7. As Mr. Smith points out, the requisite element of the offence which must be proved is that the person uttered the document “**knowing it was forged...**” and that the allegation that the Defendant uttered any document **suspecting** it of being forged did not charge an offence known to the law.
8. Mr. Smith’s further submissions were concerned with the insufficiency of the evidence. The first limb of his submission is that a passport application form is not a “writing” within the meaning of section 6. He submits that “writing” must be read *ejusdem generis* the other words in the section, namely “deed, bond, or writing, obligatory, or any acquittance or receipt, ...”
9. In support of his submission, Mr. Smith relies on the definition of *ejusdem generis* and the illustration of the rule set out in the Osbourne Concise Law Dictionary as follows:

“[Of the same kind] A rule of interpretation that where particular words are followed by general words, the general words are limited to the same kind as the particular words. Thus where the Sunday Observance Act 1677 s 1 provided that “no tradesman, artificer, workman, labourer or other person whatsoever shall do or exercise any worldly labour, business or work of their ordinary calling upon the Lord’s Day (works of necessity and charity only excepted),” the words “or other persons whatsoever” were to be construed *ejusdem generis* with those which preceded them so that the business of an estate agent was not within the section (Gregory v Fern [1953] 1 WLR 974).”
10. The learned DPP in response submits that the Act was amended “for the more effectual punishment of forgery” and the word “writing” should be given its ordinary meaning and be construed as a reference to **any** writing. She includes in her bundle of authorities an extract of Blackstone Dictionary where the authors state *inter alia* that “writing” in its most general sense denotes a document whether printed or manuscript.
11. The essence of a forgery offence is the alteration of a writing in the ordinary sense of that word. It’s the very definition of the common law offence. The word ‘writing’ in the section cannot, for that reason, bear the general meaning for which the learned DPP contends.

12. What the Act does is to create specific offences in respect of the forging of divers documents, or writings. In section 6, it makes it an offence to forge, *inter alia*, “*deed, bond or writing, obligatory.*” There is no definition of “obligatory” (as a noun) to be found in any dictionary. In the extract from Blackstone on which the learned DPP relies, the authors define “*writing obligatory*” - which would be the expression under consideration but for the comma separating the two words - as the technical name by which a bond is described in pleading.
13. Looking at section 6 in the round, I am driven to conclude that the comma is misplaced and say that what was intended was a reference to a “*writing obligatory*” i.e. an agreement under seal, consistent with the words “*deed*” and “*bond*” which precede it which also describe agreements under seal. This interpretation would be consistent with the conjunctive use of the following two words - “*acquittance or receipt*” - which both bear the same meaning. Read as a whole the section appears to me to be concerned with documents which are relied on in business or commercial transactions as giving rise to debts or property rights.
14. Further support for this construction is to be found in the law in England in 1841, the **Forgery Act** of 1830 passed to consolidate earlier forgery statutes, which created at section 10 the offence of forging any “*deed, bond or writing obligatory*” which can also be found in the later **Forgery Act** Of 1861¹ The words “*writing obligatory*” can also be found in other colonial legislation including Hong Kong’s **Forgery Ordinance** of 1865.² Forging a “writing obligatory” is also an offence in many the forgery statutes of divers American States.³
15. For these reasons I hold that section 6 does not capture the particular allegations made against the Defendant of forgery as a passport application form is not any of the documents identified therein.
16. I note that section 5 makes it an offence to forge the name or handwriting of any person attesting to a power of attorney or other authority to transfer property. The provision demonstrates that the legislature was capable of creating a statutory offence of forging of the name or handwriting of a person attesting any document, as here, but chose to limit the scope of that offence to powers of attorney and like documents.
17. The question which then arises for consideration is whether the Defendant is liable to be committed to trial for the common law offence of forgery because at common law the forging of any writing, and the altering of any writing, with intent to defraud, would still be an offence. It

¹ Which provides as section 20 “*Whosoever, with Intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any Deed, or any Bond or Writing Obligatory, or any Assignment at Law or in Equity of any such Bond or Writing Obligatory, or shall forge any Name, Handwriting, or Signature purporting to be the Name, Handwriting, or Signature of a Witness attesting the Execution of any Deed, Bond, or Writing Obligatory, or shall offer, utter, dispose of, or put off any Deed, Bond, or Writing obligatory*”

²“*Forgery of deeds, wills, bills of exchange, etc.*”

22. Every person who, with intent to defraud,-

(1) forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, **any deed, or any bond or writing obligatory, or any assignment at law or in equity of any such bond or writing obligatory...**”

³ Maine, Florida, Idaho and Vermont, for example

was suggested that the Court of Appeal decided in a matter of *R v Wilkie Arthur* that the Crown, in cases of forgery, was obliged to charge one of the statutory offences in 4 Victoria Chapter 31 but no written judgment to that effect exists so far as I am aware and the Court's comment to any such effect might have been made on the particular facts of the case it was considering.

18. The common law of England was extended to the Turks and Caicos Islands: see preamble to **40 George III** Chapter 2,⁴ "*save where altered by any laws in force*". 4 Victoria Chapter 31 does not, in my view, repeal the common law offence of forgery. By "*altered*" I take the legislature to mean that the new law is inconsistent with the common law which 4 Victoria Chapter 31 is not. It repealed the provisions of 40 George III c 2 declaring the Statute of Frauds and 2 George II chapter 25 to be in force in these Islands and created new statutory offences.
19. I am fortified in this conclusion by the similar view taken by the U.K. Law Commission in its Report on the law of forgery (as it was under **Forgery Act of 1913**) that, although the Act created a number of different offences, it did not repeal the common law⁵:

*"6. The Act does not do away with forgery at common law, although in practice forgery no longer depends upon the common law save that it may be necessary to consider it to determine what is a document or when a document is false, for these terms are not exhaustively defined in the Act. The distinction between the intent required by different sections based upon the two phrases "intent to defraud" and "intent to deceive" is a narrow one and one which can give rise to difficulty in practice".*⁶
20. I accept that forgery at common law would not be properly charged where the particulars of any alleged offence fell within any of the statutory provisions but there is no warrant to hold that the common law was repealed merely because certain offences are created by the statute. The allegations against this defendant do not fall within any of the specific offences created by the statute but are sufficient to found an offence under the common law of forgery for forging a writing, to wit, the signature of Carol Skippings.
21. With respect to the second limb of the challenge to the Informations, the meaning to be ascribed to the words "*intent to defraud*," the learned DPP submits that an intention to defraud means "to deprive a person dishonestly by deceit" and that the meaning of defraud was wide enough to encompass the facts of this case. She does not say what 'to deprive'⁷ means in that formulation but relies on the decision of the House of Lords in *Wai Yu-Tsang v R* [1992] AC (PC) 269 in support of her contention that an intention to injure someone's economic or proprietary interests is not a necessary element of the offence.

⁴ Reproduced at Tab I of the Crown's Bundle

⁵ The common law offence was abolished with the passing of the Forgery and Counterfeiting Act 1981(UK).

⁶ Law Commission 1968, Item XVZZZ of the Second Programme *Criminal Law Report On Forgery And Counterfeit Currency*

⁷ Paragraph 3 of Skeleton argument filed on behalf of the Crown

22. In the judgment, their Lordships reviewed a number of authorities including *Welham v DPP* [1961] AC 103 in which the House of Lords held that an intent to defraud could exist where there was no other intention than to deceive a person responsible for a public duty into doing something or failing to do something which he would not have done, or failed to have done, but for the deceit. In his judgment in *Welham's* case, Lord Radcliffe referred to a special line of cases where the person deceived is a public authority or a person holding public office and there is no intention on the part of the deceiver to inflict on him any pecuniary or economic harm, showing that such an intention is not necessary to convict a man of an intention to defraud.

23. The House of Lords referred to an earlier decision of the House in *Reg v Scott* [1975] AC 819 in which Viscount Dilhorne cited the judgment of Lord Radcliffe in *Welham* with approval stating at page 839,

"In Welham v Director of Public Prosecutions [1961] AC 103,124, Lord Radcliffe referred to a special line of cases where the person deceived is a person holding public office or a public authority and where the person deceived was not caused any pecuniary loss. Forgery whereby the deceit has been accomplished, had, he pointed out, been in a number of cases treated as having been done with intent to defraud despite the absence of pecuniary or economic loss..."

24. In the circumstances, I am satisfied that a jury properly directed could find the Defendant acted with the requisite intent to defraud.

ORDER

25. The Defendant is committed to stand and take her trial for the offences of forgery and uttering at common law and leave to amend the Information in terms is hereby granted.

DATED THE 16TH DAY OF OCTOBER, 2018

Alec C

CHIEF JUSTICE

