

SC1834

PAPUA NEW GUINEA
[IN THE SUPREME COURT OF JUSTICE]

SCRA NO 18 OF 2017

EREMAS WARTOTO

Appellant

V

THE STATE

Respondent

Waigani: Cannings J, Yagi J, Neill J
2019: 25 June, 28 August

CRIMINAL LAW – appeals – appeal against conviction for misappropriation, Criminal Code, Section 383A(1)(a) – elements of offence – whether money paid by the State under a construction contract to a company owned and controlled by the accused had to be used for specific purpose – whether money remained property of the State until it was used for specific purpose – whether accused had dishonest intent – whether accused had honest claim of right.

The appellant appealed to the Supreme Court against his conviction on one count of misappropriation under Section 383A(1)(a) (*misappropriation of property*) of the *Criminal Code*. He was the sole shareholder and director of a company awarded a government contract for the price of K7,989,892.00 to renovate a high school. The company was paid 85% of the contract price (K6,791,408.20) up-front, and the balance of 15% (K1,198,483.80) near apparent completion of the project. The appellant was indicted on two counts of misappropriation, count 1 concerning the 85% payment, count 2 concerning the 15% payment. The State's case as to count 1 was that within five months after the 85% payment was deposited into the company's account, the funds were depleted, but only a small proportion had been applied to the school project. As to count 2 the State's case was that the 15% payment was made contrary to the contract as on the date of payment the project was not complete and a completion certificate was not issued by the project manager. The trial judge convicted the appellant on count 1, and acquitted him on count 2. The appellant appealed against his conviction, arguing that the trial judge

erred in three ways, by: (1) finding that the 85% payment (K6,791,408.20) deposited into the company's bank account remained the property of the State until it was applied to the intended purpose of the payment, the school rehabilitation project, despite the payment being transferred to the company in accordance with a commercial contract that did not specify that any of the 85% payment had to be expended on that project; (2) finding that the appellant had an evidentiary burden to overcome the State's evidence, by accounting for all the funds his company received; and (3) making a finding that the appellant acted dishonestly, without evidence and by ignoring the appellant's evidence that he held an honest claim of right over the money. The appellant asserted that his conviction was unsafe and unsatisfactory and should be quashed and a verdict of not guilty should be entered. There was no cross-appeal regarding the acquittal on count 2.

Held:

- (1) The trial judge did not err in finding that the 85% payment (K6,791,408.20) deposited into the company's bank account remained the property of the State until it was applied to the intended purpose of the payment, and concluding that when K6,445,262.69 of that money was used for purposes unconnected to the school rehabilitation project, the appellant was applying that sum, which remained the property of the State, to his own or other persons' use. The elements of the offence of misappropriation requiring proof of misapplication of property of another person (the State) were proven.
- (2) The trial judge did not err in finding that the appellant had an evidentiary burden to overcome the State's evidence, by accounting for all the funds his company received, as this was a natural consequence of the strength and level of detail of the State's evidence, and his Honour did not reverse the legal burden of proof or apply any standard of proof less than the criminal standard of beyond reasonable doubt.
- (3) The trial judge made a proper finding on the evidence and put the State to proof beyond reasonable doubt that the appellant acted dishonestly; and did not ignore the appellant's evidence and adequately considered the appellant's defence that he had an honest claim of right over the money.
- (4) All grounds of appeal were dismissed and the conviction was affirmed.

Cases cited

The following cases are cited in the judgment:

Francis Potape v The State (2015) SC1613
Havila Kavov v The State (2015) SC1450
John Beng v The State [1977] PNGLR 115
John Jaminan v The State (No 2) [1983] PNGLR 318
Lawi v The State [1987] PNGLR 183
Magr v R [1969-70] PNGLR 165
R v Hobart Magalu [1974] PNGLR 188
Sebulon Wat v Peter Kari [1975] PNGLR 325
The State v Bruno Tanfa Chilong (2009) N3578
The State v Emma Ombu Karakabo (2012) N4897
Tiden v Tokavanamur-Topaparik [1967-1968] PNGLR 231
Wartoto v The State (2015) SC1411

APPEAL

This was an appeal against conviction for misappropriation.

I Molloy & P P Yange, for the Appellant
C Sambua, for the Respondent

28th August, 2019

1. **BY THE COURT:** Eremas Wartoto was convicted by the National Court of one count of misappropriation and sentenced to ten years imprisonment. He appeals against his conviction.
2. He was the sole shareholder and director of a company, Sarakolok West Transport Ltd (SWT), awarded a government contract for the price of K7,989,892.00 to renovate Kerevat National High School. The company was paid 85% of the contract price (K6,791,408.20) up-front on 29 January 2009, and the balance of 15% (K1,198,483.80) near apparent completion of the project, on 14 October 2009.
3. He was indicted on two counts of misappropriation under Section 383A(1)(a) (*misappropriation of property*) of the *Criminal Code*, which states:

A person who dishonestly applies to his own use or to the use of another

person property belonging to another ... is guilty of the crime of misappropriation of property.

4. Count 1 concerned the 85% payment, count 2 concerned the 15% payment. The State's case on count 1 was that within five months after the 85% payment was deposited into the company's account, the funds were depleted, but only a small proportion had been applied to the school project. As to count 2 the State's case was that the 15% payment was made contrary to the contract as on the date of payment the project was not complete and a completion certificate was not issued by the project manager.

5. The trial judge, Justice Manuhu, convicted the appellant on count 1, and acquitted him on count 2. The appellant appealed against his conviction, relying on 14 grounds of appeal, which can be reduced to three central arguments, that his Honour erred in fact and in law, by:

1. finding that the 85% payment (K6,791,408.20) deposited into the company's bank account remained the property of the State until it was applied to the intended purpose of the payment, the school rehabilitation project, despite the payment being transferred to the company in accordance with a commercial contract that did not specify that any of the 85% payment had to be expended on that project (grounds of appeal 1 to 9);
2. finding that the appellant had an evidentiary burden to overcome the State's evidence, by accounting for all the funds his company received (ground of appeal 12); and
3. finding that the appellant acted dishonestly, by ignoring the appellant's evidence that he held an honest claim of right over the money (grounds of appeal 10, 11, 13 and 14).

6. The appellant asserts that his conviction is unsafe and unsatisfactory and should be quashed and a verdict of not guilty should be entered. There was no cross-appeal by the State regarding the acquittal on count 2.

ARGUMENT 1: FINDING THAT 85% PAYMENT DEPOSITED INTO THE COMPANY ACCOUNT WAS THE PROPERTY OF THE STATE

Trial judge's reasoning

7. The trial judge ruled that the 85% payment (the sum of K6,791,408.20) remained the property of the State until such time as it was applied to the intended purpose of the payment, the school rehabilitation project. His Honour made findings of fact based on the evidence of an expert forensic accounting witness, who traced the K6,791,408.20 after its deposit into the appellant's company's account, that:

- by 26 June 2009 (five months after deposit of the 85% payment) all of the money was withdrawn from the company's account;
- only K346,145.51 (5.1%) of it was applied to the school rehabilitation project;
- the balance of K6,445,262.69 (94.9%) was applied to other purposes such as purchase of motor vehicles (in excess of K2 million), repayment of loans and lease payments (in excess of K2 million) and clearance of the K154,636.96 overdraft of the account into which the 85% payment was deposited.

8. His Honour ruled that the sum of K6,445,262.69 remained the property of the State as it was not applied to its intended (or approved) purpose, so when the appellant applied it to other (unapproved) purposes, he was applying the property of the State to his or other persons' use. His Honour stated:

62. There were a number of interconnected legal issues raised. It was submitted that the State did not have an interest in the funds immediately after it was paid on 29 January 2009. On the facts of this case, this argument is shallow and simply does not make sense. Those funds were paid to SWT for a specified purpose. The State had an interest in the achievement of that specified purpose. That interest then confers upon SWT the legal obligation, which was also stipulated in the contract, to apply the funds for the specified purpose only. The State had an interest in the funds and how it was to be spent.

63. SWT was not at liberty to spend the funds on other purposes as it pleased prior to completion of the project. The accused cannot seriously claim honest claim of right for him to use the funds as he pleased. In other words, [the] State did not lose its property or ownership rights and or interest in the 85% payment after it was deposited into the SWT

account. The funds remained the property of the State until such time the project was completed.

9. His Honour proceeded to find that the appellant had acted dishonestly and convicted him of misappropriation of the sum of K6,445,262.69.

Appellant's propositions

10. The appellant argues that by taking the above approach to the elements of the offence of misappropriation (other than the element of dishonesty, which is the subject of the third principal argument), the trial judge erred in fact and law, by:

- (a) altering the State's case, which was specifically that the intended purpose of the 85% payment was 'to allow the appellant (or his company, SWT) to place orders for materials to be imported, the bulk of which will be for the water supply and sewerage system', by widening the case to be that the intended purpose of the 85% payment was 'rehabilitation work on the high school' (grounds of appeal 1 and 2);
- (b) finding that the 85% payment was made subject to a specified purpose (whether the purpose alleged by the State or the purpose characterised by the trial judge) when: (i) the contract provided for an advance payment of 85% of the contract price without restriction on how it was to be used, (ii) the standard conditions of the contract imposing restrictions on the use to be made of an advance payment were described as "Not Applicable", (iii) there was no or insufficient evidence of any communication to the appellant or SWT specifying that the 85% payment was only for the purchase of materials as alleged by the State (or for the purpose described by his Honour); and (iv) it was unreasonable and lacked business efficacy and consequently the court could not be satisfied beyond reasonable doubt that 85% of the contract price had to be applied to the sole purpose alleged by the State (or for the wider purpose described by the trial judge) (ground of appeal 3);
- (c) finding that the State retained an interest in the 85% payment after it was made to the appellant's company, such that it remained the State's property, conferring upon the appellant (and his company) the legal obligation, which was also stipulated in the contract, to apply the funds only to the specified purpose (ground of appeal 4);

- (d) finding the remarks of the Supreme Court in the civil case of *Wartoto v The State* (2015) SC1411 determinative of the issue of whether the State retained an interest in the 85% payment, describing it as “incredible that the defence raised the same issue”, when those remarks: (i) were not based on all the evidence before the National Court in the appellant’s criminal trial, (ii) were made in civil proceedings and were not findings made according to the criminal standard of proof, (iii) did not raise an issue estoppel in the criminal proceedings, and (iv) were made by reference to cases (such as *Lawi v The State* [1987] PNGLR 183) where payments were made for a specific purpose and/or in circumstances in which the payer retained an interest) (grounds of appeal 5 to 9).

Determination

(a) Alteration of State’s case

11. We do not agree that the trial judge altered the State’s case, the gist of which remained the same, from arraignment to submissions: that the intended purpose of the 85% payment was for rehabilitation work on the high school, and that the appellant applied the bulk of the money to unintended and unapproved purposes. The trial judge did not err in the way contended for.

(b) Finding that 85% payment was made subject to specified purpose

12. We do not agree that the trial judge erred in finding that the 85% payment was made subject to a specified purpose: for rehabilitation work on the high school. The aspects of the contract highlighted by the appellant (no express restrictions in the contract as to how the 85% payment was to be applied; standard conditions that potentially applied restrictions on the use to be made of an advance payment were described as “Not Applicable”; no communication to the appellant or SWT specifying that the 85% payment was only for a specific purpose and it was unreasonable and lacked business efficacy to impose such restrictions) do not persuade us that the trial judge erred in finding that the 85% payment had to be applied to the purpose of the contract: rehabilitation work on the high school.

13. This was public money, drawn from a particular fund holding monies for education infrastructure projects, allocated through a commercial contract to a public purpose: rehabilitation work on the high school. The fact that the money was allocated through a commercial contract awarded to a private company did not

detract from the inevitable, implied, continuing legal obligation imposed on all persons gaining possession and control of that money to apply it to the purpose for which it was drawn from the fund in the first place.

14. We agree with the appellant that each case must be assessed on its merits. There might be a case in which the terms of the contract between the State (or other governmental body) and a contractor (such as the appellant's company, SWT) make it expressly clear that the money is not subject to any restriction on how it is to be applied. However, the intention of the parties to the contract would need to be expressed clearly and unequivocally, so as to defeat the presumption that naturally arises whenever the State engages a private contractor for public infrastructure works, that money paid to the contractor is to be applied to the purpose of the contract: construction of particular infrastructure. This is not such a case. The aspects of the contract highlighted by the appellant do not make it clear that the appellant or his company could use the 85% payment as they saw fit. The trial judge did not err in the way contended for.

(c) Finding that the State retained an interest in the 85% payment after it was made

15. In finding that the State retained an interest in the 85% payment after it was made, such that it remained the State's property until it was applied to its intended purpose, the trial judge was applying the principle established in the leading Supreme Court case *Lawi v The State* [1987] PNGLR 183: when a sum of money is allocated to a person subject to conditions that it be applied in a certain way, it remains the property of the person who allocates the money unless and until it is applied in accordance with those conditions.

16. Amet J, as he then was, explained the principle when dealing with the argument of Mr Lawi, a member of Parliament who had been convicted of misappropriation of two sums of money totalling K16,000.00 that had been allocated to him for agricultural and road projects, but not applied to such projects. Mr Lawi argued that he became the legal owner of the money once it was allocated to him, ie property in the money passed from the State to him, so that when he applied it to particular purposes, though those purposes might not have been what was proposed by the State, the money was no longer the property of the State, so the elements of the offence as to ownership (applying 'property belonging to another person') did not exist. His Honour stated:

There cannot be any doubt that the moneys were grants for particular public purposes, with the implied conditions that they be expended on

those public purposes. The moneys were most definitely not the appellant's private property to expend on his own purposes or anybody else's as he desired. The two amounts of money were National Government grants and in my view the National Government had a legal and an equitable proprietary interest in them until they were expended on the purposes for which they were granted.

17. By finding that the State retained its interest in the 85% payment, and that the money remained the property of the State unless and until it was applied to its intended purpose, the trial judge was properly applying the *Lawi* principle. We reject the appellant's argument that the facts in *Lawi* (which involved allocation of government grants to particular infrastructure projects, to be administered by Mr Lawi) should be distinguished from the present case (allocation of public money to a particular education infrastructure project, through a commercial contract with a private company). The critical consideration is that public money is involved, which is allocated to specific public purposes. The trial judge did not err in the way contended for.

(d) Finding the Supreme Court's remarks in Wartoto v The State (2015) SC1411 determinative

18. It is correct that in determining the issue of whether the State retained an interest in the 85% payment, the trial judge regarded the Supreme Court's remarks in *Wartoto v The State* (2015) SC1411 as determinative of the issue. His Honour cited the following remarks in the joint judgment of Sakora J and Kandakasi J:

Based on the law as we have stated and discussed above, we would answer the question under consideration in the case before us in these terms. The State has all its interest or property rights in public funds paid to a private contractor for certain public works, until the purpose for which the payments are made is achieved or accomplished.

19. It is also correct that the trial judge was critical of the appellant's counsel for raising the issue of ownership of the property, as his Honour regarded it as an issue already settled by the Supreme Court. His Honour stated:

It is incredible that defence counsel has raised the issue in spite of the Supreme Court's pronouncement.

20. We agree with several of the points raised by the appellant regarding the trial

judge's approach to the Supreme Court decision in *Wartoto v The State* (2015) SC1411. We agree that those remarks (i) were not based on all the evidence before the National Court in the appellant's criminal trial, (ii) were made in civil proceedings and were not findings made according to the criminal standard of proof, and (iii) did not raise an issue estopped in the criminal proceedings. We agree, with respect, that his Honour ought not to have been as dismissive as he was of the arguments raised by the appellant. It was significant that the pronouncements of the Supreme Court were made in the context of an appeal against a National Court decision made in civil proceedings in which the appellant was seeking an injunction to restrain the Public Prosecutor from presenting an indictment against him in criminal proceedings.

21. Despite the trial judge's criticism, it is evident that his Honour dealt with the merits of the arguments of the appellant (as to the 85% payment being made to the appellant's company without specification of purpose and in such a way that property in the money passed to the appellant's company). His Honour concluded, correctly in our view, by applying the principles in *Lawi*, that the 85% payment was made by the State to the appellant's company subject to the condition that it be applied to the school rehabilitation project, and that unless and until it was applied to that project, the money entailed in the 85% payment remained the property of the State.

22. Though we consider, with respect, that the trial judge unduly criticised defence counsel, his Honour did not err in law or in fact, in the manner contended for.

Conclusion as to argument 1

23. The trial judge did not err when finding that the 85% payment (K6,791,408.20) deposited into the company's bank account remained the property of the State until it was applied to the intended purpose of the payment, the school rehabilitation project. Argument 1, encompassing grounds of appeal 1 to 9, is dismissed.

ARGUMENT 2: PLACING EVIDENTIARY BURDEN ON APPELLANT

Trial judge's reasoning

24. The trial judge commented, at paragraph 45 of his judgment, on an "evidentiary burden" imposed on the appellant. His Honour made this comment,

after noting that the appellant did not deny that the 85% payment was deposited into his company's account and that it was not all applied to the school rehabilitation project, and setting out the State's evidence as to how the 85% payment was applied. His Honour stated:

43. The accused does not deny the payment of 85% into SWT ANZ Bank Ltd account BSB 018909 account number 12621572 on 29 January 2009. He does not deny that the 85% was not used for the specific purpose. He admitted that the money was used for other purposes. Section 589 of the Code provides that an accused person may admit on the trial any fact alleged against him, and the admission is sufficient proof of fact without other evidence. In this case, the admission, with evidence, seals and confirms the prosecution's evidence on how the funds were expended as illustrated in the tables.

44. However, the accused placed reliance on the concept of "fungibility", which he understood to mean that all funds come in then they becomes one. Because of that he said it was very easy to pay out funds to work on the project. Accordingly, the Kerevat project was done through SWT's Kokopo Imprest Accounts and the groups consolidated accounts consisting of Queen Emma Lodge, Litia Ilam's account, Louisa Wartoto's Rabaul claim account, Eremas Wartoto's claim account and Kandrian Ltd's account for purchase of materials overseas mainly in China. The total Project cost for KNHS [Kerevat National High School] is K9,885,047.00 which is K1,975,000.00 more than the initial contract price because of the variation claim due to late completion caused by State failure to give vacant possession.

45. The accused may have such a unique method of managing the project funds. *The evidentiary burden is, however, on him to overcome the prosecution's evidence by accounting for all the funds he received.* It is for him to counter the prosecution's evidence and explain how the 85% funds were managed under the "fungibility" concept. It is for him to produce credible financial reports with supporting source documents to support his explanation. Unfortunately, when he gave evidence he did not produce any such detailed report accounting for the 85% fund. [Emphasis added.]

Appellant's proposition

25. The argument is that his Honour erred in law by placing the onus on the appellant to overcome the State's evidence, which amounts to a reversal of the onus of proof.

Determination

26. His Honour did not reverse the onus of proof. Nowhere in his judgment, including the passage referred to by the appellant, did his Honour give any indication that he was reversing the legal onus of proof or imposing on the State any standard of proof less than beyond reasonable doubt. His Honour's comment as to the evidentiary burden shifting from the State to the appellant was unremarkable and aptly made in view of the nature and detail of the State's evidence.

Conclusion as to argument 2

27. The trial judge did not err in finding that the appellant had an evidentiary burden to overcome the State's evidence, by accounting for all the funds his company received. Ground of appeal 12 is dismissed.

ARGUMENT 3: FINDING THAT THE APPELLANT ACTED DISHONESTLY

Trial judge's reasoning

28. The trial judge dealt with the dishonesty element of the offence of misappropriation in the following passage:

71. Dishonesty is an element of the offence of misappropriation and has to be considered. The events preceding the payment of the 85% have all been excluded for reasons the Court has given. Whether the accused was dishonest or not would be apparent from how the funds were expended. The Court has found that K6,445,262.69 was not used on the project. All of these expenditures benefited the accused and his businesses and no one else, not even any charity organization.

72. It is simple. Dishonesty is established if you used and benefited from somebody else's funds without his authority. The State did not pay 85% of the contract price for the accused to service his loans and

purchase assets for his other business operations. The accused should have waited until completion of the project. He was not entitled to use the funds as he pleased while the Kerevat project was still in progress. If this is not dishonesty, what is it?

73. The blatant misapplication of funds with little or no regard for the State and high school in his province demonstrates dishonesty that extends over and beyond the bounds of a contractual dispute. The level of dishonesty in this case warrants criminal prosecution. The accused is properly before this Court and is properly charged for misappropriation.

74. The Court is satisfied beyond reasonable doubt that the element of dishonesty has been established.

Appellant's propositions

29. The appellant argues that by taking the above approach to the element of dishonesty, the trial judge erred in fact and law, by:

- (a) not considering whether the State had established that the appellant acted dishonestly; and
- (b) not insisting that the State prove that the appellant did not have an honest claim of right to use the 85% payment as he saw fit.

Determination

(a) *Not considering element of dishonesty*

30. This argument is misconceived as it is clear from the passage of the judgment cited above that his Honour considered the dishonesty element of the offence as an element separate and distinct from the other, 'property', elements of the offence. Though his Honour did not expressly state the elements in the same way as set out, for example, by the Supreme Court in *Havila Kavo v The State* (2015) SC1450, his Honour was clearly cognisant of them and applied them in a rational and discernible manner.

31. In *Kavo* the Supreme Court stated that the offence of misappropriation under Section 383A(1) of the *Criminal Code* consists of five elements, whereby the State

must establish that the accused:

- applied;
- to his own or another person's use;
- property;
- belonging to another person;
- dishonestly.

32. As to what is required to prove the dishonesty element of the offence, we adopt the dicta of the Supreme Court in *Kavo*:

Element (v) of the offence of misappropriation, which requires the court to be satisfied that the accused applied the property "dishonestly" to his own (or another's) use, requires a determination of the state of mind of the accused at the time of application of the property. Both the appellant and the respondent agree that dishonesty is a question of fact for the trial Judge to determine, based on the facts of the case and according to the ordinary standards of reasonable and honest people (Brian Kindi Lawi v The State [1987] PNGLR 183).

A subjective test must be applied: it must be proven beyond reasonable doubt that the accused in fact knew that he was acting dishonestly. However, in applying that test, an objective standard can be taken into account: it might reasonably be inferred that the accused must in fact have known that he was acting dishonestly (James Singo v The State (2002) SC700, The State v Gabriel Ramoi [1993] PNGLR 390, The State v Francis Natuwohala Laumadava [1994] PNGLR 291, The State v Andrew Ludwig Posai (2004) N2618, The State v Graham Yotchi Wyborn (2005) N2847, The State v Francis Potape (2014) N5773).

33. We consider that the trial judge properly addressed the element of dishonesty by having regard to objective standards of behaviour – reasonably inferring that the appellant must have known that he was acting dishonestly by using the bulk of the 85% payment to service loans and lease repayments and for other business and private purposes entirely unrelated to the school rehabilitation project – when concluding that the appellant *dishonestly* applied the sum of K6,445,262.69 to his or other persons' use.

34. We are satisfied that his Honour adequately determined the dishonesty element of the offence of misappropriation.

(b) *Not insisting that the State prove that the appellant did not have an honest claim of right*

35. The appellant argues that the trial judge did not adequately deal with his defence of honest claim of right without intention to defraud, under Section 23(2) of the *Criminal Code*, which states:

A person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud.

36. Section 23(2) creates the defence of honest claim of right without intention to defraud in respect of offences relating to property, such as misappropriation. The key principles to apply when determining whether this defence operates are:

- A claim of right only has to be honest, it does not have to be reasonable (*Tiden v Tokavanamur-Topaparik* [1967-1968] PNGLR 231, *Sebulon Wat v Peter Kari* [1975] PNGLR 325).
- If the accused presents evidence of an honest claim of right the State bears the onus of disproving it. It is not for the accused to prove that he had an honest claim of right. It is the duty of the State to prove that he did not have an honest claim of right (*Magr v R* [1969-70] PNGLR 165, *Francis Potape v The State* (2015) SC1613).
- Because it is a type of excusatory defence the State must disprove (exclude) the defence beyond reasonable doubt (*John Jaminan v The State (No 2)* [1983] PNGLR 318).
- Whether an accused has an honest belief is a question of fact to be determined by the evidence in each case. It is not a matter of an accused simply saying on oath that he had an honest belief and having that assertion accepted, as such evidence might be unconvincing as it was, for example, in *R v Hobart Magalu* [1974] PNGLR 188 and *The State v Henry Gorea* [1996] PNGLR 141. Alternatively evidence of an honest claim of right might be convincing and unable to be disproven by the State, as it was, for example, in *The State v Bruno Tanfa Chilong* (2009) N3578 and *The State v Emma Ombu Karakabo* (2012) N4897.

- Once the defence operates, it is a complete defence to any offence relating to property of which fraudulent or dishonest intent is an element.

37. We note that at paragraph 63 of his judgment the trial judge observed:

The accused cannot seriously claim honest claim of right for him to use the funds as he pleased.

38. This shows that his Honour, having noted that the appellant gave evidence that he believed he had a right to use the 85% payment as he pleased, was unconvinced by that evidence. His Honour did not accept that the appellant honestly believed that he could use the money as he saw fit. Even if the appellant's evidence were regarded as sufficient to cast upon the State the onus of disproving the defence, his Honour's reasoning is sufficient to show that he was satisfied beyond reasonable doubt that the appellant did not have an honest claim of right.

39. We consider that, although the trial judge could have more fully set out his reasons for rejecting the defence of honest claim of right, along the lines of the key principles outlined above, his Honour's determination of the issue was adequate in the circumstances, given that the issue was not clearly articulated in defence counsel's submissions; and further, it was not clearly articulated in the submissions made on behalf of the appellant at the hearing before us.

Conclusion as to argument 3

40. The trial judge did not err in finding that the appellant acted dishonestly or in rejecting the defence of honest claim of right without intention to defraud. Grounds of appeal 10, 11, 13 and 14 are dismissed.

CONCLUSION

41. To succeed on an appeal against conviction an appellant must by virtue of Section 23 of the *Supreme Court Act* establish that the verdict is unsafe or unsatisfactory, the conviction entailed a wrong decision on a question of law or there was a material irregularity in the trial; and the Supreme Court must consider that a miscarriage of justice has occurred (*John Beng v The State* [1977] PNGLR 115).

42. None of the grounds of appeal has succeeded. No errors of law or fact have

been disclosed that would render the verdict unsafe or unsatisfactory or show that the decision of the National Court was based on a wrong decision of law. No miscarriage of justice occurred. The appeal must be dismissed.

ORDER

- (1) The appeal is dismissed.
- (2) The conviction for misappropriation is confirmed.

Judgment accordingly.

Islands Legal Services: *Lawyers for the Appellant*
Public Prosecutor: *Lawyer for the Respondent*