

1954

# State of Utah v. C. Jean Shonka : Brief of Respondent

Utah Supreme Court

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In the  
Supreme Court of the State of Utah

STATE OF UTAH,

vs.

C. JEAN SHONKA,

*Respondent,*

*Appellant.*

Case No.  
8205

BRIEF OF RESPONDENT

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In the  
Supreme Court of the State of Utah

STATE OF UTAH,	<i>Respondent,</i>	}	Case No. 8205
vs.			
C. JEAN SHONKA,	<i>Appellant.</i>		

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Appellant was convicted of Grand Larceny. The charge was, in substance, that she stole a check belonging to Box Elder High School at Brigham City, Utah, cashed the check, and kept the money.

Counsel for appellant states his version of the facts and after a brief resume of the activities of the defendant, Miss C. Jean Shonka, as to her handling of a certain check in the amount of \$300.55, declares "upon all of this there is no dispute \* \* \*." Respondent reads the record otherwise.

Miss Shonka was an employee of the Board of Education of Box Elder County from September, 1945, until December 23, 1952, upon which later date she, by request, resigned. Miss Shonka had been employed as a secretary and office employee of the Box Elder High School and as her years of employment passed, certain other duties were assigned to her which eventually included that of handling the funds of the school, keeping the books, making deposits and joining with the high school principal as a co-signer of checks drawn on school funds.

For reasons not fully disclosed by the record, Miss Shonka was relieved of the responsibility of receipting for and depositing school funds on or about January 2, 1952 (R. 211), and she had been theretofore relieved of her responsibility for opening the school mail (R. 35-36). The principal of the school, Mr. Freeman, assumed the responsibility for opening the mail and a Mr. Austin Larson, member of the faculty, assumed the obligation of receipting for, handling and banking the school funds (R. 35). It would appear that, subsequent to the date of these changes, the extent of Miss Shonka's authority to handle funds was limited to a so-called "petty cash" fund in the amount of \$25.00 which, when depleted, would be reimbursed by means of a check drawn against the school funds, signed by Miss Shonka and countersigned by Mr. Freeman.

In preparing for the registration of students to be conducted on the 25th, 26th and 27th of August, 1952, Miss Shonka performed certain duties for the accomplishment thereof. She states that knowing money would be necessary for registering the students, she went to the file draw-

ers in the vault room to obtain change for that purpose (R. 212) but, as says appellant's counsel, "the cupboard was bare." However, it was in fact only bare of silver and currency, for Miss Shonka says she therein found a check (R. 212). This check represented a reimbursement to the Box Elder High School for funds they had expended in their participation in the State High School Basketball Tournament of 1952 and the check bore the date of March 28, 1952. Miss Shonka had been, as heretofore related, relieved of her responsibility to handle the funds of the school as of January 2, 1952, but she nevertheless found it expeditious to take this said check in the amount of \$300.55 to the bank on the 21st day of August, 1952, and there cash it. Having admittedly done so, Miss Shonka informed the court and jury that she placed the funds received, ten \$20 bills, four \$10 bills, ten \$5 bills, together with \$10.55 in silver, in a bag which she had taken with her to the bank (R. 213), and that she then returned to the high school and placed the bag in the third drawer of a steel filing cabinet where it was left until a Monday morning, August 25th (R. 214). On that Monday morning, according to Miss Shonka, she removed from the bag two \$10 bills, four \$5 bills and \$10 in silver (R. 215) for the purpose of making up a "change box" for the registration activities (R. 214). Thereafter, apparently on the morning of the third day of registration, Miss Shonka contends that she took \$50 from the "change box", of which she put \$20 back in the money bag in the vault and put the remaining \$30 into another cash box for registration purposes on that day (R. 222). Then on the morning of August 28th, Miss Shonka says, she took \$30 from the second change box which she deposited back in

the money bag which was still in the third drawer in the filing case in the vault (R. 224). Thereafter, she never saw it again (R. 226).

Miss Shonka says, as to her further conduct, that she never mentioned her finding of this \$300.55 check to anyone (R. 268); that she knew it was from the Utah High School Activities Association (R. 273); that she knew Mr. Larson was supposed to receipt for it (R. 274); that she knew she should have had a receipt for it (R. 274); that she knew it was Mr. Larson's duty to deposit it in the bank (R. 274); that she knew she had not entered it upon the school books (R. 274); that she knew the school books would not balance if she did not make the entry (R. 274, 275); that she had never prior to this hearing ever mentioned to any school official that she had cashed the check for change for registration or any other purpose (R. 275). Miss Shonka further stated that there was no record of an entry or notation concerning the item of \$300.55 in any of her books or records (R. 279). From the 28th day of August, 1952, until the time of the termination of her employment, December 23, 1952, Miss Shonka claimed no concern for this sizeable amount of money. This irrespective of the fact that on prior occasions her desk had been pilfered (R. 267, 269) and the police had been called in (R. 268). The record further shows that Miss Shonka had been called upon for a personal accounting in the forepart of October, 1952 (R. 263); that she did not reply to such a request (R. 264); and that she was given an ultimatum that she account by December 19 or be dismissed (R. 278); nor did she meet the terms of this ultimatum but, “\* \* \*

I dropped the matter because I figured I was complying with one or the other of their requests by resigning.”

*From the testimony of Miss Shonka alone, the jury could only find that her accounts and books were not in order and that she declined to account therefore.*

Thus, even though the jury had accepted as true the full testimony of Miss Shonka, they could not help but entertain a reasonable doubt as to her culpability.

There was further evidence adduced not consistent with Miss Shonka's testimony. Norman Jeppsen, a teacher at Box Elder High School, testified that he received *no* funds from Miss Shonka for the purpose of making change (R. 324) ; so testified Delmont Beecher, also a teacher (R. 354) ; nor did Helen Smith Pierce recall that when she commenced her duty registering students, she received any change (R. 368) ; Norwood Hyer, also a teacher, registered students and was furnished *no* change for such purpose (R. 370) ; nor was L. D. Wilde furnished any moneys for the purpose of making change (R. 381). These are the employees of the Box Elder High School who conducted the registration of the students of that school on the 25th, 26th and 27th of August, 1952. They say not what Miss Shonka says.

Too, there was testimony to the effect that a certified public accountant, doing an independent audit, was unable to find any trace of the check or the proceeds of the check to the school's credit (R. 164-165). And, also, the school's treasurer, Mr. Larson, to whom had been delegated the function of receiving all moneys which came into the school, never received either the check or the proceeds (R. 119).

We deem the facts sufficient to sustain the verdict. It was the judgment and sentence of the court that the defendant be incarcerated in the State Prison for not less than one nor more than ten years.

## STATEMENT OF POINTS

### POINT I

THE CASE PRESENTED AND THE EVIDENCE ADDUCED BY THE STATE SUSTAINS THE CHARGE OF GRAND LARCENY AND THE CAUSE WAS PROPERLY SUBMITTED TO THE JURY.

### POINT II

THE GIVING OF INSTRUCTION NO. 8 WAS WITHOUT ERROR.

## ARGUMENT

### POINT I

THE CASE PRESENTED AND THE EVIDENCE ADDUCED BY THE STATE SUSTAINS THE CHARGE OF GRAND LARCENY AND THE CAUSE WAS PROPERLY SUBMITTED TO THE JURY.

Larceny is the *felonious* stealing, taking, carrying, leading or driving away the personal property of another. Section 76-38-1, U. C. A. 1953.

*Appellant's contention here is, as we construe the brief of appellant on this Point I, that the evidence presented in this cause was insufficient to show a felonious taking as a matter of law and therefore not a question of fact for the jury.*

Appellant claims:

“Upon the evidence of the state, without considering that of the defendant, herself, we contended and do contend that there were not sufficient facts or inference from facts to warrant a finding that the defendant had a felonious intent in cashing the check, or that she had a felonious intent in carrying the money out of the bank. \* \* \*”

“The check was, in full daylight, cashed on August 21, 1952. \* \* \*”

“There was not the slightest element of concealment by the defendant. \* \* \*”

“It has been held by this Honorable Court in several cases and throughout the time of the Court, that it is the duty of the judge, upon a trial for grand larceny to take the case from the jury when the evidence is insufficient to show a felonious taking.”

The State concedes and this Court has held, *People v. Miller*, 4 Utah 410, 11 P. 514; *State v. Allen*, 56 Utah 37, 189 P. 84; that there must be an intent to steal at the time of the taking and that intent is a necessary element of the crime of larceny. However,

“\* \* \* intent is not always disclosed by what one says, but also is determined by what one says

and does, or fails to say or do in [a] given situation, together with other facts and circumstances surrounding [the] transaction.”

*Loper v. U. S.*, 160 Fed. 2d 293.

So, Miss Shonka’s having gone openly to the bank to exchange the check for cash is not sufficient to disprove a felonious intent in the face of her further unsatisfactory explanation of the disposition of the funds she thus obtained.

As the State reads appellant’s authorities: *State v. Nelson*, 39 Utah 238, 117 P. 71; *State v. Morrell*, 39 Utah 498, 118 P. 215; *State v. Allen*, *supra*; *Akins v. State*, 12 Okla. Cr. 269, 154 P. 1007; *State v. Morris*, 70 Utah 570, 262 P. 107; all of these cases concern themselves with *the sufficiency of the evidence to sustain the verdict* and to prove a felonious taking. Despite the syllabus to which appellant refers in the case of *State v. Morris*, *supra*, this is the question in that case that the court ask of itself, “Was the evidence sufficient to sustain a *verdict* of conviction?” (70 Utah at 576.) There can be no doubt that the rule announced in the cases referred to is correct as applied to the facts of those cases. These cases *are not*, however, authority for the proposition “that it is the duty of the judge, upon a trial for grand larceny, to take the case from the jury when the evidence is insufficient to show a felonious taking,” for which appellant contends. We would be the first to concede that *in the absence of any question of fact*, there would be no function for the jury to perform. Such is not here the case.

Appellant further contends, that:

“By the verdict of not guilty of embezzlement, the jury determined, and so said, that they were not satisfied beyond a reasonable doubt that the defendant converted the money, \$300.55 received by her upon the check, to her own use; and furthermore, the jury were not satisfied, and so said by their verdict, that she had a felonious intent to appropriate it to her own use, and to deprive the owner of it.”

Such a contention will not bear investigation for the very reason that there is a distinction, which we thing appellant overlooks, between *possession* and *custody* of property; which makes for a distinction between “larceny” and “embezzlement”.

“Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted.”

Section 76-17-1, U. C. A. 1953.

On and after January 2, 1952, Miss Shonka ceased to act in a fiduciary capacity as recipient of funds for the school. When she, on the 21st day of August, 1952, took, endorsed and cashed the check, she took into her possession funds that *had not been intrusted* to her. We suggest that the jury found her not guilty of embezzlement because of the fact that she did not come into possession of the check under any color of right to possession thereof whatsoever and that she could not have “fraudulently appropriated” as a person to whom it had been intrusted. This finding was not a bar to the further finding that she took something that did not belong to her; that her act in taking the

check was larcenous so that she was guilty of feloniously "stealing" from her employer. For a general treatment of the distinction between possession and custody of property consult 32 Am. Jur. 958, Larceny, Section 56, wherein it is said:

"The rule was laid down that where one having only the bare charge or custody of property for the owner converts it *animo furandi*, he commits a trespass and is guilty of larceny, the possession, in judgment of law, remaining in the owner until the conversion. This is the rule at common law and under statutes declaratory of the common law."

It was said in *Commonwealth v. Hays*, (1859) 14 Gray (Mass.) 62, 74 Am. Dec. 662:

"The statutes relating to embezzlement, both in this country and in England, had their origin in a design to supply a defect which was found to exist in the criminal law. By reason of nice and subtle distinctions, which the courts of law had recognized and sanctioned, it was difficult to reach and punish the fraudulent taking and appropriation of money and chattels by persons exercising certain trades and occupations, by virtue of which they held a relation of confidence or trust towards their employers or principals, and thereby became possessed of their property. In such cases the moral guilt was the same as if the offender had been guilty of an actual felonious taking; but in many cases he could not be convicted of larceny, because the property which had been fraudulently converted was lawfully in his possession by virtue of his employment, and there was not that technical taking or asportation which is essential to the proof of the crime of larceny. . . . *The statutes relating to embezzlement were intended to embrace this class of offenses and*

*it may be said generally that they do not apply to cases where the element of a breach of trust or confidence in the fraudulent conversion of money or chattels is not shown to exist.” (Emphasis added.)*

The jury correctly ruled out embezzlement and just as correctly decided by its verdict that larceny had been committed.

For a comprehensive annotation on the distinction between larceny and embezzlement, see 146 A. L. R. 532 and the authorities there cited.

Miss Shonka was not guilty of a breach of trust, for she had no trust imposed upon her at the time of the taking; but, Miss Shonka was guilty of the theft of the check and the jury did and well could find that at the time of the taking there was a felonious intent.

## POINT II

### THE GIVING OF INSTRUCTION NO. 8 WAS WITHOUT ERROR.

The court instructed the jury:

“Every person who finds lost property under circumstances which give him knowledge of a means of inquiry as to the true owner, and who appropriates such property to his own use \* \* \*, without first making reasonable and just efforts to find the owner and restore the property to him, is guilty of larceny.”

These are, along with the deletion, the words of the statute, Section 76-38-2, U. C. A. 1953.

Appellant claims for objection to this instruction that:

“\* \* \* The entire account and all of the evidence as to where the check was and where the money went comes from the mouth of the defendant.

“This testimony is undisputed. The check was found in a filing cabinet of the high school, cashed by the bank, and the money, and all of it, placed and left by the hand of the defendant where the check was, namely, in the possession of the true owner, as she, probably as well as anyone, knew.”

The jury was at liberty to believe or disbelieve that which “comes from the mouth of the defendant;” and they were so instructed. (Instruction No. 15.) The court also instructed the jury:

“\* \* \* If an instruction applies only to a state of facts which you find does not exist, you will disregard the instruction. \* \* \*” (Instruction No. 17.)

Instruction No. 8 does not stand alone, unexplained and unqualified. The jury *may* have believed Miss Shonka when she said she found the check on the “west side of the third drawer of the steel file in the vault room.” *If so*, Miss Shonka was a finder of lost property, and the instruction was proper. *If not*, and the jury found such not to be the fact, then they would *disregard the instruction* as the court informed them to do by that part of Instruction No. 17 set forth above.

It could be no more than mere conjecture to say that this jury did not find the defendant guilty of larceny under Instruction No. 7, wherein the elements necessary to con-

stitute the offense of larceny were fully explained to them. The jury viewed the witness, Shonka, and they may well have *believed nothing that came from the mouth of the defendant.*

What has been said by both appellant and respondent on this Point II is merely argumentive; however, unless it is clear that the jury misunderstood the law or entirely ignored evidence upon a material issue, its unanimous verdict, constitutionally required in criminal cases (Art. I, Sec. 10, Constitution of Utah), is not to be set aside or interfered with for trivial or insufficient reasons. Instruction No. 8, as given, was applicable to the facts for which defendant contended.

## CONCLUSION

The jury found C. Jean Shonka guilty of larceny as charged. Appellant makes much of the fact that the check stolen by Miss Shonka was taken openly to the bank where it was cashed. We suggest that an attempt to cash the check at any other place or under any other circumstances would have been difficult if not impossible; that the check was negotiated in a manner calculated to arouse the least suspicion; that C. Jean Shonka intended to have the money for herself, otherwise she would not have concealed from her employers (a) that she had the check in her possession, (b) that she obtained cash for the check, and (c) what became of the money.

The verdict should be sustained.

Respectfully submitted,

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