Neutral Citation: [2015] IEHC 239

THE HIGH COURT

[2014 No. 1311 SS]

IN THE MATTER OF SECTION 52 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA THOMAS MURRAY)

PROSECUTOR

AND

DEREK COONEY

DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered the 16th day of April, 2015

Background

1. This matter comes before the Court by way of consultative case stated from the District Court.

2. On the 20th of May, 2014, the defendant appeared before Dublin Metropolitan District Court charged with the following offence:

> "An offence contrary to s. 18 of the Criminal Justice (Theft and Fraud Offences) Act 2001 in that at Finglas Road, Finglas, Dublin 11 in the said District Court area of Dublin Metropolitan district, did without lawful authority or excuse possess stolen property to wit a black "carrera" gent's mountain bicycle knowing that the property was stolen or were reckless as to whether it was stolen on the 27th of January, 2014."

3. The prosecuting Garda gave evidence that on the 27th of January, 2014, he stopped the defendant's vehicle and noticed a gent's bicycle in the rear of the van. The defendant stated firstly that it was his friend's bicycle and subsequently that he had bought the bicycle from an unknown youth for €30. On examination of the bicycle, Garda Murray found that the chassis number had been filed away. On questioning, the defendant admitted that he had reservations as to whether or not the bicycle was stolen and signed Garda Murray's notebook to this effect. This concluded the prosecution case.

4. At the close of the prosecution case, counsel for the defendant sought a direction on the basis that there was no evidence from an injured party and therefore the prosecution had not proved that the bicycle was stolen. The matter was adjourned for further legal argument to the 3rd of June, 2014. Following further legal submissions, the court referred the following questions to this court for determination:

> (i) In the prosecution of an offence contrary to s. 18 of the Criminal Justice (Theft and Fraud Offences) Act 2001, can the court convict in the absence of irrefutable evidence that the property was taken without the consent of its owner at the time of the alleged offence?
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> (ii) Can the court take into account the admissions of the defendant as to his state of mind at the time of purchasing the property/circumstances surrounding the purchase of the property in question in determining whether or not the property was in fact stolen or does this evidence solely go towards proving the mental element of the offence?

Legislation

5. Section 18 of the Criminal Justice (Theft and Fraud Offences) Act 2001 provides as follows:

> "18.—(1) A person who, without lawful authority or excuse, possesses stolen property (otherwise than in the course of the stealing), knowing that the property was stolen or being reckless as to whether it was stolen, is guilty of an offence.
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> (2) Where a person has in his or her possession stolen property in such circumstances (including purchase of the property at a price below its market value) that it is reasonable to conclude that the person either knew that the property was stolen or was reckless as to whether it was stolen, he or she shall be taken for the purposes of this section to have so known or to have been so reckless, unless the court or the jury, as the case may be, is satisfied having regard to all the evidence that there is a reasonable doubt as to whether he or she so knew or was so reckless.
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> (3) A person to whom this section applies may be tried and convicted whether the principal offender has or has not been previously convicted or is or is not amenable to justice.
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> (4) A person guilty of an offence under this section is liable on conviction on indictment to a fine or imprisonment for a term not exceeding 5 years or both, but is not liable to a higher fine or longer term of imprisonment than that which applies to the principal offence."

6. The interpretation section of the Act, s. 2(1) defines "stolen property" in the following terms:

> "stolen property" includes property which has been unlawfully obtained otherwise than by stealing, and cognate words shall be construed accordingly;"

Relevant Cases

7. In *R. v. Sbarra* (1919) 13 Cr. App. R. 118, the appellant was convicted of receiving goods knowing them to have been stolen. On appeal to the Court of Criminal Appeal, he contended that there was no evidence that the goods were in fact stolen. The judgment of the court was delivered by Darling J., who noted that there was the gravest suspicion surrounding the circumstances in which the appellant had received the goods surreptitiously in the middle of the night. On this issue, the view of the court was as follows (on page 2):

> "Argument of a philosophical character has been addressed to us whether knowledge that the goods were stolen goods is enough to prove that the goods were in fact stolen, and at what point belief merges into knowledge. The court desires to express the law in the following terms. The circumstances in which a defendant receives goods may of themselves prove that the goods were stolen, and further may prove that he knew it at the time when he received them. It is not a rule of law that there must be other evidence of the theft. We have come to the conclusion that the circumstances here were enough to prove that the goods had been stolen."

8. In another judgment of the English Court of Criminal Appeal *in R. v. Fuschillo* [1940] 2 All E.R. 489, the appellant was convicted of receiving sugar knowing it to have been stolen. The prosecution tendered no evidence as to who owned the sugar or that it was in fact stolen. The appellant however made a number of inculpatory statements and the court held that the surrounding circumstances provided sufficient evidence to justify the conviction.

9. In *Noon v. Smith* [1964] 3 All E.R. 895, the appellant was stopped by a police constable who noted him to be carrying a raincoat wrapped around a cushion. When asked where he got the raincoat, he replied "it's my mother's" and when it was pointed out to him that it was a man's raincoat he said "so what, why can't my mother wear a man's raincoat?". He also said that the cushion belonged to his mother. Whilst this conversation was taking place, two tea towels, one of which still bore a price tag, fell to the ground from under the appellant's coat and when the Constable asked him where they had come from he replied "you've just found them on the floor." This encounter took place at half past midnight.

10. At the conclusion of that evidence, it was submitted on behalf of the appellant that there was no case for him to answer as the burden of proof lay on the prosecution and the prosecution had not proved that the goods mentioned in the charge were stolen or that the appellant stole them. The appellant did not call any evidence and was duly convicted of stealing a raincoat, a cushion and two tea towels, the property of some person or persons unknown.

11. The Magistrate stated a case for the opinion of the Queen's Bench Division of the High Court, which considered that there was ample evidence which would justify the conclusion reached by the Magistrate. In delivering the judgment of the court, Ashworth J. said (at p. 897):

> "Another way of stating the matter which counsel for the appellant readily accepted was that larceny can be established by evidence tendered directly proving the offence or by evidence of facts from which any reasonable person could draw the inference that a theft had taken place. That concession was, in my view at any rate, right to be made, and so it reduces the matter to the simple question whether on the facts which I have outlined, the learned magistrate, acting reasonably, was entitled to come to the conclusion that the appellant had stolen the articles referred to in the charge.
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> For my part I have not the slightest doubt that there was ample material before the magistrate which would justify that conclusion."

12. The law in the United Kingdom is usefully summarised in Smyth's Law of Theft (Ninth Ed.), where the author comments at para. 13.18:

> "It is a misdirection to tell the jury that they are entitled to take such an admission into account, except as evidence of *mens rea*. D's admission of facts which he himself perceived is, however, direct evidence of those facts which might amount to evidence from which a jury could infer that the goods were stolen. Thus D's admission that he bought goods in a public house at ridiculously low price is evidence that the goods were stolen. Similarly, where a television set is bought in a betting shop or where a publican buys cases of whiskey from a lorry driver. The conduct of a person who offers a bag of jewellery to a stranger for £2,000 and then accepts £100 for it suggests strongly, as a matter of common sense, that the jewellery is stolen."

13. The point was considered in this jurisdiction in *The People (DPP) v. O'Hanlon* (Unreported, Court of Criminal Appeal, 1st February, 1993). In that case, the appellant was convicted of receiving a quantity of video recorders knowing them to have been stolen. The appellant challenged his conviction on the following basis set out in the judgment of O'Flaherty J. (at page 4):

> "Mr White's essential submission, nonetheless, is to say that the State should have gone a stage further and brought to court the distributors to say that there was no way that these video recorders could have got into the possession of the particular firm than the way they did. In the court's judgment this is to seek to lay down a rule that proof that the goods were stolen would have to be proved to a mathematical certainty and the law does not require that. Indeed it is probably likely that it is not an essential proof at all to establish that the goods were the property of any particular person or firm; the essential proof is that they have to be shown to have been stolen goods…the court would wish to say that the proof that goods are stolen may be proved by circumstantial evidence and on occasion there may be no direct evidence such as from the actual owner or the thief but each case must depend on its particular circumstances…"

14. The issue was again considered by the Court of Criminal Appeal in *The People (DPP) v. McHugh* [2002] 1 I.R. 352. The accused was convicted by a jury in the Circuit Criminal Court on a charge of handling money, the proceeds of drug trafficking and he appealed his conviction on the grounds that the criminal origin of the money must be proved by evidence of the same quality and character as any other fact and that admissions made in an inculpatory statement which were based on opinion or hearsay evidence were no more proof than if given in evidence by any witness for the prosecution. The prosecution submitted that it was only necessary to prove that the accused handled money believing it to be or to represent the proceeds of drug trafficking, without any proof of its actual provenance. The court agreed with the appellant's submissions holding that the prosecution must prove, as a fact, the criminal origin of the property as well as the knowledge or belief of the accused in its criminal origin, both being essential ingredients of the offence. In delivering the court's judgment, Fennelly J. pointed to the anomalous situation that would arise in the absence of any evidence that the property allegedly handled was obtained through criminal activity (at p. 357):

> "The handling of property innocently acquired without any taint of criminality would be a crime merely because a person believed, even wrongly, that it had a tainted provenance in the sense of the section. The anomaly of the proposed interpretation is brought into sharp focus by the impossibility of "knowing" an untruth. It follows from the perfectly correct concession of the Director of Public Prosecutions on this point that the offence of "knowingly" handling criminally acquired property can only be committed if the property is actually such. Yet a person handling it while merely "believing" it to have such character, which would be somewhat less deliberate and thus less blameworthy, may be convicted without any proof of this element. The court is of the opinion that section 31(3) is not open, read on its own, to the interpretation urged by the Director of Public Prosecutions."

15. In commenting on some of the English authorities, Fennelly J. expressed the following view (at p. 360):

> "In several cases before the Crown Court in England, it was held that, where an accused person admitted to the police that he thought property he had handled had been stolen, but there was no other evidence before the court, evidence of the defendant's belief was not evidence of the fact that the good were stolen…
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> These authorities are summed up in the following passage in Archbold on *Criminal Pleading Evidence and Practice* (1997) (at para. 21.295):
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> > 'Where an accused, upon being questioned by the police about certain goods, admits that he purchased them and that at the same time he believed them to have been stolen, such an admission, in the absence of any other evidence, is not sufficient to permit an inference by the jury that the goods were stolen goods: *R v. Porter* [1976] Crim. L.R. 58, *R v. Marshall* [1977] Crim. L.R. 106…
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> > The general evidential principle upon which these decisions are based is that an accused person's admissions are only evidence against him where it appears that he had personal knowledge of the facts admitted: *Surujpaul v. R*, 42 Cr. App. R. 266 P.C.; *Comptroller of Customs v. Western Electric Ltd* [1996] AC 367, P.C.' "

16. The issue of proof of ownership as an essential ingredient in the offence of larceny was considered by the High Court in *Valentine v. DPP* [2007] IEHC 267, where Birmingham J. said (at page 6):

> "So far as the obligation to prove the property was owned and that the appropriation was without the owner's consent it is the case of course that from time to time there may be difficulties in establishing an owner, the pickpocket in the crowded street being an obvious example and there the jury or judge will have to consider whether the evidence is such that the property in question is proved to be owned by the person unknown and that an absence of consent can be inferred."

Discussion and Conclusion

17. Turning to the facts of the instant case, in order to sustain a conviction under s. 18 of the 2001 Act, the prosecution must establish four essential ingredients of the offence. It must establish first that the accused was in possession of property, second that the property was stolen, third that he or she had no lawful authority or excuse for possessing the property and fourth that he or she knew that the property was stolen or was reckless as to whether it was stolen. As the authorities discussed above demonstrate, it is clearly insufficient to establish the fourth element only in the absence of the second. Thus, as Fennelly J. pointed out in *McHugh*, the accused's erroneous belief that the property is stolen cannot constitute an offence.

18. In the present case, if the only evidence against the defendant was that he had reservations as to whether or not the bicycle was stolen, that would not be a sound basis for sustaining a conviction. Without more, it would not amount to satisfactory proof beyond a reasonable doubt that the bicycle was stolen.

19. However, it seems to me that the evidence in this case goes significantly further. When challenged, the defendant gave mutually contradictory accounts of his possession of the bicycle, the latter of which was clearly highly suspicious i.e. that he had purchased the bicycle from an unknown youth for €30. In addition to that, there was objective evidence that the bicycle was highly likely to have been stolen at some point having regard to the fact that the identification markings on it had been deliberately obliterated.

20. In my view, there was more than ample evidence of a circumstantial nature before the District Court which could justify any reasonable person in coming to the conclusion that the property in question was in fact stolen. To borrow the words of O'Flaherty J., that fact does not have to be proved to a mathematical certainty and therefore there is no requirement for "irrefutable" evidence as suggested by the first question. The standard of proof is beyond a reasonable doubt, not beyond a shadow of a doubt.

21. Accordingly, I propose to answer the questions posed by the District Court as follows:

> 1. Yes, but the court must be satisfied beyond a reasonable doubt that the property in question was taken without the consent of its owner.
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> 2. Yes.