44/77

SUPREME COURT OF VICTORIA

DEAN v FRESHMAN

Crockett J

18 October 1976

CRIMINAL LAW – THEFT BY FINDING – DISHONEST APPROPRIATION – APPROPRIATION IN THE BELIEF OWNER CANNOT BE DISCOVERED BY REASONABLE STEPS CONSIDERED – BELIEF SUBSEQUENT TO APPROPRIATION TO BE DISREGARDED – FINDING BY MAGISTRATE THAT CHARGE PROVED – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* 1958, S73(2)(c).

The defendant was charged with the theft of a watch the property of one Marsh. Both the defendant and Marsh lived at the same premises in different flats. In August 1975, both were cleaning their cars in the driveway next door; at the conclusion of the car washing the two men went to their premises. Later the defendant returned to the scene of the car washing and found a watch lying on the ground near the car-port. He kept the watch in his possession.

In November 1975, the defendant was a guest in Marsh's flat, when Marsh noticed that the watch then being worn by the defendant was his own. It appeared that Marsh had lost his watch at or about the time he was engaged in washing his car, the previous August. Marsh subsequently asked the defendant's wife to have her husband return the watch. When this was not done the police were notified.

The defence to the charge was that the defendant had found the watch and that, up to, and at the time of his appropriation of it, he had not acted dishonestly. Furthermore, that at all times, had the identity of the owner been established to his satisfaction he had been prepared to return the watch to the owner, i.e. that at all material times he had "no intention to permanently deprive the owner". The Magistrate disbelieved the defendant as to his intention and convicted the defendant. Upon Order Nisi to review—

HELD: Order Nisi discharged.

1. In a "finding" case, if at the time of appropriation of the property the finder has a belief that the person to whom the property belongs can be discovered by taking reasonable steps, then his appropriation is a dishonest appropriation. Provided, then, that at that time there was an intent permanently to deprive the owner of the property, all three elements will have been established and theft will have been proved.

2. The critical question in the present case was whether at the time the defendant found the watch he had a belief that the person to whom the watch belonged could be discovered by taking reasonable steps. If he did not, it could not be said that at the crucial moment he acted dishonestly. On the other hand, if he did possess such a belief then it appears that the charge of theft was made out against him.

3. The only conclusion open on the evidence was that the defendant did have a belief that the person to whom the property belonged could be discovered by taking reasonable steps. It was important to bear in mind that possession of such a belief subsequent to the acts of appropriation is to be disregarded. In the present case there was compelling evidence at the time of and arising from the request's being made to the applicant through his wife to return the watch, that he then knew that the owner of the watch could be discovered by taking reasonable steps.

4. The only view of the matter that any court could take on the evidence was that the steps that could have been taken to ascertain the owner, involving merely asking each of the neighbours if the watch belonged to any one of them, were such obviously reasonable steps that a belief as to the reasonableness of such steps must inevitably have been held by the finder of the watch.

CROCKETT J: ... Section 72(1) of the *Crimes Act* states that a person steals if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it. The difficulties and refinements which for a long period had bedevilled the common law in relation to when, if at all, the finding by a person of some object constitutes theft by that person of that object, have been eliminated by the provisions introduced into the *Crimes Act* and which are closely modelled upon the modern English *Theft Act*.

The old notion involving as a necessary element of theft that there must be a "taking and carrying away" has been supplanted by the concept of "appropriation". That term is defined in s73(4). However, the necessity that an accused must act feloniously has in "finding" cases been preserved in a negatively expressed exculpatory condition in relation to the honesty of the finder. That has been achieved in s73(2)(c) which may be paraphrased:

> "A person's appropriation ... is not to be regarded as dishonest ... if appropriates ... in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps".

In my view the corollary of that legislative provision is that in a "finding" case, if at the time of appropriation of the property the finder has a belief that the person to whom the property belongs can be discovered by taking reasonable steps, then his appropriation is a dishonest appropriation. Provided, then, that at that time there was an intent permanently to deprive the owner of the property, all three elements will have been established and theft will have been proved.

The applicant took the watch inside after finding it and "just forgot about it after a while". Then it appears that when his own watch ceased to function he decided to use the watch he had found. It could not be worn with the band that was then on it as that was broken, and, although he does not expressly say so, it seems clear from other evidence given by him that he either repaired the band or replaced it, and then proceeded to use it as though it was his own. In those circumstances it is quite clear, nor, I think, was it seriously contested, that when the applicant commenced to use the watch in that fashion he was assuming the rights of the owner of the watch and, accordingly, what he did amounted to an appropriation of it.

The critical question, however is whether at that time he had a belief that the person to whom the watch belonged could be discovered by taking reasonable steps. If he did not, it could not be said that at the crucial moment he acted dishonestly. On the other hand, if he did possess such a belief then it appears to me that the charge of theft was made out against him.

I am indebted to both counsel for their interesting and helpful arguments concerning this matter. I own that I was disposed for some tine to think that the evidence did not merit a finding that such a belief had been held by the applicant at the time of his appropriation of the watch. Or, at all events, that it was a question upon which different views might be held and, accordingly, the matter might have to go back for further consideration by the Magistrates' Court. However, having listened to the whole of the argument, I am persuaded that the only conclusion open on the evidence is that the applicant did have a belief that the person to whom the property belonged could be discovered by taking reasonable steps. It is important, as counsel for the applicant pointed out to me, to bear in mind that possession of such a belief subsequent to the acts of appropriation are to be disregarded. In the present case there is compelling evidence at the time of and arising from the request's being made to the applicant through his wife to return the watch, that he then knew that the owner of the watch could be discovered by taking reasonable steps.

However, as has been said, there cannot be a double appropriation. It has to be considered whether at the time of the watch's first being appropriated there was the necessary belief on the part of the applicant so as to stigmatise that appropriation as a dishonest one.

Of course, neither in his record of interview with the police, nor in his oral evidence, did the applicant state that he did have such a belief. If such a belief is to be found against him, it must, therefore, be by way of inference from proven facts. That is to say, the existence of the necessary belief must be established circumstantially by the informant. As with any other facts, the belief must, of course, be proved beyond reasonable doubt. This means that it is necessary not only that any inference drawn should be a rational inference, but that it must be the only rational inference which the circumstances enable the Court to draw. In other words, if a rational inference about a fact consistent with innocence could equally be drawn from facts found to be proved, then it would not be permissible to draw an inference that supports the applicant's guilt.

The evidence to which the respondent points as comprising the facts from which it is contended that the inference not only can be drawn but must be drawn, namely, that the applicant had a belief that the person to whom the property belonged could be discovered by taking reasonable steps, is to be found in two passages. In the first place he told the interviewing police officer that

"I picked it up expecting one of the neighbours to come around to see if I had seen a watch". Then in his oral testimony he said that he picked it up and thought that one of the neighbours would claim it.

In my opinion, those statements prove to the point of demonstration that the applicant's belief at the time he found the watch and took it into his own home was that it belonged to a neighbour or to somebody on whose behalf a neighbour could act. No other conclusion is, I think, open and it is supported by the fact that the watch was admittedly found on private property next door to where the applicant lived. An expectation that a neighbour would enquire about the watch involves the possession of a belief as to the ascertaining of the identity of the owner of the watch. If this is so, the only remaining question is whether that belief must extend to a belief that the taking of reasonable steps could lead to the discovery of the watch's owner.

In my opinion, the only view of the matter that any court could take on such evidence's being put before it is that the steps that could be taken to ascertain the owner, involving merely asking each of the neighbours if the watch belonged to any one of them, are such obviously reasonable steps that a belief as to the reasonableness of such steps must inevitably have been held by the finder of the watch.

It was urged that I ought not to reach that conclusion, as it is inconsistent with the applicant's having, three or four months after having found the watch, and whilst wearing it, attended the Marshs' home for a social function. It is true, I think, that consideration needs to be given to that fact in order to conclude whether or not the applicant did possess the necessary belief. In my view, however, the evidence given by the applicant himself so irresistibly compels the finding that he held the necessary belief that one must disregard the subsequent action on the ground either that it was an action of forgetfulness or over-confidence, or was one performed in the belief that the watch would not be seen or, if seen, would not be recognised because of a different band, or for some other reason.

At all events, bearing those considerations in mind, I remain of the view that the only reasonable conclusion to be drawn from the applicant's own evidence is that at the time he appropriated the watch – and I would so conclude on the assumption that the belief formed at the time of the finding must inevitably have continued down to the date of appropriation, whenever that was – the applicant had a belief that the person to whom the property belonged could be discovered by taking reasonable steps. It is, of course, not to the point that the belief, if put to the test, might prove to be ill-founded; nor is it to the point that the reasonable steps that might be taken were, in fact, not taken.

Both counsel agree that the reasons given by the Court below for having concluded that such a belief was at the critical time entertained by the applicant are unsustainable. However, on the best view of the evidence available to the applicant in connection with this matter, it appears to me, as I have endeavoured to explain, that any court would be driven to the conclusion that such a belief was possessed at the time of the applicant's appropriation of the watch. Accordingly, as the Court, as I have said, rejected his evidence that he did not intend permanently to deprive the owner of the watch, all the elements of theft have been made out. The conclusion of the Court to convict the applicant was, therefore, in my view, the correct conclusion.
