22/87

SUPREME COURT OF QUEENSLAND

R v EVENETT

Campbell CJ, Williams and Moynihan JJ

3 April 1987 — (1987) 2 Qd R 753; (1987) 24 A Crim R 330

CRIMINAL LAW – STEALING – OBTAINING MONEY FROM AUTOMATIC TELLER MACHINE BY CUSTOMER OF BANK – ACCOUNT OVERDRAWN WHEN MACHINE "OFF-LINE" – NO AUTHORITY FROM BANK TO OVERDRAW – WHETHER THEFT.

E. was a customer of the National Australia Bank Limited ('N.A.B.') and was issued with a flexi-card to enable withdrawals of funds from his account by way of an automatic teller machine. E. had no prior arrangement for credit or overdraft and was entitled to withdraw funds only to the extent of his credit balance in his account. On an occasion when the machine malfunctioned, E. withdrew funds in excess of his credit balance. Subsequently, he was charged with stealing the money; however, the trial judge directed the jury to acquit E. On appeal—

HELD: Appeal allowed. Jury misdirected.
(1) Where funds are obtained from an automatic teller machine during a malfunction, the question is whether the bank authorized the withdrawal.
***Kennison v Daire* (1985) 38 SASR 404; 16 A Crim R 338, affirmed by High Court [1986] HCA 4; (1986) 160 CLR 129; 64 ALR 17; (1986) 60 ALJR 249, applied.**

(2) A person who has an account with a bank but has no prior arrangement for credit or overdraft, may be guilty of theft if he withdraws funds in excess of the credit balance in the account.

CAMPBELL CJ: *[After setting out the nature of the charges and the facts, His Honour continued]*: … **[2]** The learned trial judge ruled that there was no evidence to show a fraudulent taking of N.A.B's money by the accused Evenett. His Honour was referred by counsel to *Kennison v Daire* (1985) 38 SASR 404; 16 A Crim R 338. In the facts of that case a customer of a bank closed his account but retained the automatic teller card which had been issued to him. At a time when the teller machine was "off-line", so that it could not access the appropriate computer and thus information relating to the state of the account, the card holder used the card to withdraw money. He was convicted of larceny which conviction was upheld in the Full Court of South Australia. An appeal to the High Court from that decision was dismissed. (See *Kennison v Daire* [1986] HCA 4; (1986) 160 CLR 129; 64 ALR 17; (1986) 60 ALJR 249.)

The learned trial judge held that *Kennison v Daire* was distinguishable in that the card holder in that case had no account with the appropriate bank and the High Court had held it to be unnecessary to consider what the position might have been if the account had remained current but had insufficient funds to its credit. The learned trial judge therefore found that to the extent that the Full Court of South Australia dealt with the situation where an account continued with insufficient funds, statements were *obiter dictum*. His Honour further went on to say that a person cannot fraudulently take something in circumstances in which the owner of it, who is aware of the circumstances, willingly parts with it and that as King CJ said in *Kennison v Daire* (see at p403) the critical question is the intention of the bank.

His Honour relied on evidence called on behalf of the prosecution to the effect that the flexi-teller system was programmed to react to different failures; that while normally an account holder, such as the accused, could withdraw only to the extent of his credit balance, when certain malfunctions occurred the flexi-teller was programmed to pay up to $500.00 per day without Regard to an account balance. His Honour went on to say:-

> "In those circumstances, it seems to me that the accused simply did what he was permitted by the bank to do. He had use of the card, asked for money and got it, going into overdraft in so doing. He was able to do so, because each time he operated the machine there was a malfunction in or to Melbourne. While the evidence is that the bank would not normally give him credit or overdraft,

> because the computer paid out only to the limit of his account on these occasions, different rules apply. Irrespective of his account balance, the system was that he could withdraw $500.00. That, on the evidence, was the intention of the bank. Whether the entire consequences of that intention were expected or intended by the bank is, in my opinion, beside the point. I am of the view that the Crown has not established a fraudulent taking of any of the money charged in the indictment. No reasonable jury, properly directed, could be satisfied of that element to the requisite standard. I propose to instruct the jury accordingly."

For reasons which I shall state I am of the opinion that His Honour has made one or two fundamental errors here, some of fact and some of law. In the first place it seems to me that where the bank establishes a system whereby, in the event of malfunction which resulted in a flexi-teller machine being "off-line" with the host computer, account holders are enabled to withdraw up to $500.00 per day, this cannot be said to be a manifestation of an intention by the bank that people without credit who are card holders will have credit extended to them. With no further arrangement it cannot be said to amount to any more than the setting of a limit of $500.00 so that people in credit might at least withdraw some money limited to $500.00 per day notwithstanding that they might have significantly larger amounts standing to their credit. There is no reasonable basis for an assumption that the bank intends to do more than enable a machine to deliver up to $500.00 to an entitled person who seeks to receive money from the bank. If the system enables a person bent upon acting fraudulently to take from the bank money to which he is not entitled that is simply a risk which the bank runs.

In *Kennison v Daire* King CJ in the South Australian Full Court (see *supra*) at p407 said:

> "I begin with the proposition that if the taking was with the consent of the bank there was no larceny. If it was the intention of the bank, actual or imputed, that the property in or possession of the money should pass to the appellant, he is not guilty of larceny. In *R v Potisk* (1973) 6 SASR 389, Bray CJ (with whom Mitchell J agreed) cited with approval the remarks of Brett J in *R v Middleton* (1873) LR 2 CCR 38, at p53:
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> > 'Consent or non-consent is an action of the mind. These propositions, therefore, are treating of a question of intention. If it be said that a man intends to part with the property in a thing which he delivers to another, the meaning of the words is that he intends that the other should take the thing and keep it as his own; and it seems a contradiction in sense to say that the thing so delivered is taken from him without his consent.'
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> "If the owner intended the property to pass or intended to give possession, though he would not so have intended had he known the real facts, that is sufficient to prevent the offence of obtaining another's property from amounting to larceny: *R v Prince* (1863) LR 1 CCR 150, per Blackburn J at p155. Even if based upon a mistake as to the attributes of the recipient, where there is an intention to pass the property in or possession of chattels there can be no larceny of those chattels: see *R v Prince* (1868) LR 1 CCR 150 at pp154-155 per Channel J, p155 per Blackburn J; *R v Potisk* (1973) 6 SASR 389, at p401 per Bray CJ."

King CJ further pointed out that there was a contention by counsel in the case that in its off-line programming of the Automated Teller Machine the bank manifested an intention to pass property in money withdrawn by anyone, Regardless of authority, who placed a card into the machine and selected the correct personal identification number. He pointed out that the risk of abuse involved was said to be accepted for the sake of customer convenience. I do not know that the evidence went precisely to that effect in this particular case, but in my view the inference is plainly available. One need have only the most cursory dealings with bankers to know that *prima facie* a banker does not agree to customers' receiving money which in effect they have not owned unless there is some special arrangement for overdraft which almost invariably involves provision of some security. As King CJ pointed out there was no evidence in that case that any person in authority in the bank directed his attention to whether property in money would pass to a person obtaining money from an automatic teller machine by unauthorised use of a card. In the case under consideration here there does not appear to have been any suggestion by Evenett that he had been authorised to extract money from the flexi-teller machine without corresponding credit in his account. As was pointed out in *Kennison v Daire* (*supra*) the critical question was not the belief of the card holder but the intention of the bank.

Relevant to this is a statement made in the joint judgment of the High Court (see 60 ALJR at p249) when the matter went on appeal, that the fact that the bank programmed the machine

in a way that facilitated the commission of a fraud by a person holding a card, did not mean that the bank consented to the withdrawal of money by a person who had no account with the bank and it was pointed out that it had not been suggested that any person having the authority of the bank to consent to the particular transaction did so; that the machine could not give the bank's consent in fact and there is no principle of law that requires it to be treated as though it were a person with authority to decide and consent. In my view, this reasoning is equally apposite in a case where a person who has an account with a bank, nevertheless has not the benefit of any arrangement with it for drawing from an account with no funds or insufficient in it.

The statement by the learned trial judge here that a person does not take something fraudulently in circumstances in which the owner who is aware of the circumstances willingly parts with it is not to the point here, on the facts as properly understood. There is no evidence here that the bank willingly parted with money to a person not entitled to withdraw it. It simply made it possible for honest persons to make withdrawals in a way which gave dishonest persons an equal facility. That is not to authorise withdrawals by dishonest persons. His Honour, in my view, was mistaken when he said that Evenett simply did what he was permitted by the bank to do. All that happened was that a system was in operation which enabled Evenett to make a withdrawal to which he was not entitled. This is in no sense a permission of it. It was not intended by the bank that such a withdrawal should take place. As His honour pointed out there was evidence that the bank would not normally give Evenett "credit or overdraft".

Counsel for Evenett drew our attention to cases such as *R v Prince* (1868) 1 CCR 150, *Chambers v Miller* [1862] EngR 1080; 13 CBNS 125; 143 ER 50; (1862) 32 LJCP 30, *R v Turvey* 46 2 All ER 60 and others concerned with larceny and principally with the question of asportation, but the question of asportation is not raised by the reference. Statements in the cases which relate to situations when an owner of property actually either directly, or indirectly by arrangement, delivers or consents to delivery of property in or possession of chattels to an alleged thief, touch upon the intention of the owner which clearly becomes relevant, but they are really concerned with intention at the time of the delivery of the relevant chattels. It was submitted to us that the word "takes" connotes the common law requirement of an authorised asportation and that the word "conversion" connotes a dealing with goods in a manner inconsistent with the rights of the true owner.

The discussion on the meaning of the words "taking" and "conversion" in s391 of the *Criminal Code* included a submission that a mere dishonest receipt of property did not amount to larceny at common law. I stress that this relates to the situation where there was a receipt of property with the knowledge and intention of the owner rather than a taking of it where some act of the owner enabled the taking to occur. In my view there is in this case finally no real distinction between it and a case where the owner of property leaves it on a post in his front fence in which case it could be said that he has enabled an alleged thief to take it but not that he had consented to the taking or that he had intended to pass the property to the alleged thief.

The argument of behalf of Evenett came down to a submission that a person who acquires possession of property with or without incidental proprietary rights, by virtue of the authority of the owner, could not properly be convicted of stealing because neither the original taking nor subsequent conversion of the property was inconsistent with the owner's rights. However, as I have said, no such authority was given in this case. The question asked of us was as follows:-

> "In view of the matters referred to by the learned trial judge was it correct that there was, in law, no case to be left to the jury?" I would answer the question - "no". Since preparing my reasons I have had an opportunity of considering some observations made by my brother Williams. While I am satisfied that there was sufficient evidence to support the prosecution case in the matter under review I join with him in commencing the wisdom of calling direct evidence as to conditions of use of money from automatic teller machines or flexi machines however entitled.

WILLIAMS J delivered separate reasons and also answered the question "No."

MOYNIHAN J concurred.

[Judgment supplied courtesy of the CSM Queensland.]