

09/12; [2012] VSC 128

SUPREME COURT OF VICTORIA

KOELEMAN v NOLAN

Almond J

22 February, 4 April 2012

CRIMINAL LAW — SENTENCING — RESTITUTION ORDER — VEHICLE STOLEN BUT NOT RECOVERED — RESTITUTION ORDER MADE REQUIRING OFFENDER TO TRANSFER HIS OWN MOTOR VEHICLE — GOODS THAT DIRECTLY OR INDIRECTLY REPRESENT THE STOLEN GOODS — APPEAL ALLOWED AND ORDER SET ASIDE: *SENTENCING ACT* 1991 S84(1)(b).

K. was driven to a football game in his Ford sedan which he had acquired several years ago. Whilst at the game, K. stole a Toyota Prado which was not insured and has not been recovered. K. was subsequently charged with the theft and found guilty. At the sentencing hearing, the prosecution filed an application for an order that K. deliver or transfer the Ford sedan to the Toyota owner by way of restitution. The magistrate granted the application and made the order for transfer. Upon appeal—

HELD: Appeal allowed. Magistrate's order set aside.

1. Section 84(1) of the *Sentencing Act* 1991 contemplates the making of court orders to restore stolen goods to the person entitled to them; to deliver or transfer goods that directly or indirectly represent the stolen goods; and to require that a sum be paid to another person out of money taken from an offender's possession on his or her arrest.

2. An order for delivery or transfer of goods made pursuant to s84(1)(b) of the *Sentencing Act* 1991 can only be made with respect to "goods that directly or indirectly represent the stolen goods".

3. The section properly construed is confined to dealing with goods that are the proceeds of the disposal or realisation of the whole or part of the stolen goods or (goods that are the proceeds of the disposal or realisation) of goods representing the stolen goods. On this construction, there is no confusion, no question of redundancy and no grammatical issues arise.

4. In the circumstances, unless it could be demonstrated that the goods (Ford sedan) in this case were the proceeds of disposal or realisation of the whole or part of the Toyota Prado, or (were the proceeds of the disposal or realisation) of goods representing the Toyota Prado, then the section could not engage.

5. It is clear that Parliament intended to enable orders for the delivery or transfer of goods to be made where those goods were traceable either as the proceeds of disposal or realisation of the stolen goods or of goods representing the stolen goods. The discretion under s84(1) is intended to be exercised in straightforward cases, otherwise a more appropriate remedy can be sought in the civil courts.

6. In this case, it was common ground that K. acquired the Ford sedan several years prior to the date of the commission of the offence. It could not be concluded on any basis that the Ford sedan comprised goods that directly or indirectly represented the goods later stolen.

7. Further, there was no relevant nexus or connection between the stolen goods and the Ford sedan arising from the fact that K. travelled to the football ground in the Ford sedan. There was no evidence to suggest that K. had formed any intention to commit an offence or the offence prior to wandering off on foot from the oval to the staff car park at the rear of the venue. The theft of the vehicle seemed to have occurred impulsively when K. failed to resist the temptation to drive away in a vehicle which had keys in the ignition.

8. Accordingly, the Magistrate made an error of law because he had no power under the section to make the order.

ALMOND J:

1. On 4 April 2009, Mr Freddie Koeleman and his family went to the St Albans Sports Club at Gillespie Road, St Albans to watch Mr Koeleman's son play football. Ms Tracey Kiefer, Mr

Koeleman's former wife, had driven Mr Koeleman and her children, including Mr Koeleman's son, to the football ground in a Ford sedan. For a while, Mr Koeleman watched the game being played on the oval. However, at some point during the game he walked away from the oval to a staff car park at the rear of the venue. He tried the doors of various vehicles, including a white Toyota Prado four wheel drive. The vehicle was unlocked and had keys in the ignition. Mr Koeleman stole this vehicle.^[1] The stolen vehicle, owned by Mr Adam Barnard, was uninsured and has not been recovered.

2. On 21 June 2010 at the Sunshine Magistrates' Court, Mr Koeleman pleaded guilty to various charges including one count of theft of the motor vehicle. On 29 October 2010, the prosecution filed an application for an order under s84(1)(b) of the *Sentencing Act* 1991 that Mr Koeleman deliver or transfer the Ford sedan to Mr Barnard by way of restitution.

3. The application was heard by Magistrate Jones on 12 April 2011 and on 31 May 2011, the learned Magistrate delivered judgment. His Honour ordered:

That Freddie Koeleman do all steps necessary to transfer the silver Ford sedan registration number WPP-934 into the name of Adam Barnard.

4. On 27 July 2011, Associate Justice Mukhtar granted leave to appeal on the following questions of law:

As to the interpretation of s84(1)(b) of the *Sentencing Act* 1991 (Vic) and its application to this case:

(a) what is the proper construction of the phrase "goods" that directly or indirectly represent the stolen goods;

(b) in what circumstances can the provisions in s84(1)(b) be used to require restitution of property other than goods stolen from another person;

(c) can s84(1)(b) operate so as to effectively require restitution of property in substitution of the goods stolen from another person;

(d) how, if at all, could the Ford Falcon registration WPP-934 be said to directly and indirectly represent the stolen goods in this application.

5. Section 84(1) of the *Sentencing Act* 1991 contemplates the making of court orders to restore stolen goods to the person entitled to them; to deliver or transfer goods that directly or indirectly represent the stolen goods; and to require that a sum be paid to another person out of money taken from an offender's possession on his or her arrest.

6. Section 84(1)(b) of the *Sentencing Act* 1991 provides:

(1) If goods have been stolen and a person is found guilty or convicted of an offence connected with the theft (whether or not stealing is the gist of the offence), the court may make—

...

(b) an order that the offender deliver or transfer to another person **goods that directly or indirectly represent the stolen goods (that is, goods that are the proceeds of any disposal or realisation of the whole or part of the stolen goods or of goods so representing them)**;^[2]

7. The question for determination in this appeal may be summarised as follows:

Does the Ford sedan constitute goods that directly or indirectly represent the stolen goods for the purposes of s84(1)(b) of the *Sentencing Act* 1991?

In my opinion, the answer to this question is no for the reasons which follow.

8. An order for delivery or transfer of goods made pursuant to s84(1)(b) of the *Sentencing Act* 1991 can only be made with respect to "goods that directly or indirectly represent the stolen goods".

9. The appellant submits that s84(1)(b) of the *Sentencing Act* 1991 is intended to be restricted in its application to goods which are the proceeds of the disposal or realisation of the whole or part of the stolen goods and not to any goods in the hands of an offender and that the expression "goods that directly or indirectly represent the stolen goods" requires that there be a clear connection between the stolen goods and the goods that are to be the subject of an order. It was submitted that this is highlighted by the clarifying words found in parentheses in s84(1)(b).

10. The respondent does not agree that an order made under s84(1)(b) is intended to be restricted to goods which are the proceeds of disposal or realisation of the stolen goods but does

agree that the expression “goods that directly or indirectly represent the stolen goods” requires that there be a nexus between the stolen goods and the goods that are to be the subject of an order.

11. Counsel for the respondent submitted that the words in parentheses explain or elaborate upon the phrase “directly or indirectly represent the stolen goods”; that the first “limb” of those explanatory words (namely “goods that are the proceeds of any disposal or realisation of the whole or part of the stolen goods”) operates only with respect to goods that directly represent the stolen goods; and that the second “limb” of the explanatory words (namely “of goods so representing them”) operates only with respect to goods that indirectly represent the stolen goods. It follows, so the respondent submitted, that goods which indirectly represent the stolen goods need not be goods which have been derived from the proceeds of the stolen goods; that provided that they represent the stolen goods in some fashion that would suffice.

12. Applying this construction to the present facts, the respondent contends that the Ford sedan which was the subject of the Magistrate’s order indirectly represents the stolen goods because the Ford sedan is of a similar type and of comparable value to the stolen Toyota Prado. Further, the respondent contends that there was a relevant and sufficient nexus as the Ford sedan was used by the offender to take him to the location where the offence occurred.

13. I accept the respondent’s submission that the words in parentheses in s84(1)(b) are a legislative attempt to explain or elaborate upon the phrase “directly or indirectly represent”. But I do not accept the respondent’s submissions as to the proper construction of s84(1)(b).

14. In my opinion, the explanatory words operate coextensively to qualify the whole of the expression “directly or indirectly represent the stolen goods”. Had the parliamentary drafter intended that some of the explanatory words would refer only to goods which directly represent the stolen goods whilst the remaining explanatory words would refer only to goods which indirectly represent the stolen goods, then it would have been simple for the legislation to have been drafted in this way merely by identifying which explanatory words apply to goods which directly represent the stolen goods and which explanatory words apply to goods which indirectly represent the stolen goods. As this was not done, it suggests to me that it was not intended.

15. Further, the construction for which the respondent contends leads to an agrammatical outcome. If the phrase “goods that... indirectly represent the stolen goods” is qualified by the “second limb” of the explanatory words it reads as follows: “goods that... indirectly represent the stolen goods (that is ... of goods so representing them)”. Self-evidently, this does not make sense. Furthermore on this construction the explanatory words create confusion and may well be redundant.

16. In my view, the section properly construed is confined to dealing with goods that are the proceeds of the disposal or realisation of the whole or part of the stolen goods or (goods that are the proceeds of the disposal or realisation) of goods representing the stolen goods.^[3] On this construction, there is no confusion, no question of redundancy and no grammatical issues arise.

17. In the circumstances, unless it can be demonstrated that the goods (Ford sedan) in this case are the proceeds of disposal or realisation of the whole or part of the Toyota Prado, or (are the proceeds of the disposal or realisation) of goods representing the Toyota Prado, then the section cannot engage.

18. In addition, the construction for which the respondent contends would allow interference with any vested proprietary interests in the vehicle held by Mr Koeleman and any third party. As a general rule, statutes are not to be construed as interfering with vested interests unless that intention is made clear in the statute.^[4] In my view, that intention is not evident in the present statute. Furthermore, where a statute is capable of more than one construction, a construction which interferes least with private property rights will be preferred.^[5]

19. In my opinion, it is clear that Parliament intended to enable orders for the delivery or transfer of goods to be made where those goods are traceable either as the proceeds of disposal or realisation of the stolen goods or of goods representing the stolen goods. The discretion under

s84(1) is intended to be exercised in straight forward cases, otherwise a more appropriate remedy can be sought in the civil courts.^[6]

20. In this case, it is common ground that Mr Koeleman acquired the Ford sedan several years prior to the date of the commission of the offence. In my opinion, it could not be concluded on any basis that the Ford sedan comprises goods that directly or indirectly represent the goods later stolen.

21. Further, I note in passing, in my view there was no relevant nexus or connection between the stolen goods and the Ford sedan arising from the fact that Mr Koeleman travelled to the football ground in the Ford sedan. There was no evidence to suggest that Mr Koeleman had formed any intention to commit an offence or the offence prior to wandering off on foot from the oval to the staff car park at the rear of the venue. The theft of the vehicle seems to have occurred impulsively when Mr Koeleman failed to resist the temptation to drive away in a vehicle which had keys in the ignition.

22. I note that no authority was cited by the respondent which would support the respondent's construction of the section, and no extrinsic material was produced by the respondent which would support the respondent's construction of the section. In my opinion, the learned Magistrate made an error of law because he had no power under the section to make the order.

23. The appeal therefore must be allowed. In the circumstances, the order of Magistrate Jones dated 31 May 2011 must be set aside.

^[1] Affidavit of Clayton Terence Nolan sworn on 9 December 2011 [2] and Exhibit CN2 thereto (Transcript of Proceedings at Sunshine Magistrates' Court, 20 May 2011) at [51]-[52].

^[2] *Sentencing Act* 1991 (Vic) s84(1)(b) (emphasis added).

^[3] (my interpolation in parenthesis.)

^[4] *Clissold v Perry* [1904] HCA 12; (1904) 1 CLR 363, 373.

^[5] *R & R Fazzolari v Parramatta City Council* [2009] HCA 12; (2009) 237 CLR 603, 619-620.

^[6] *R v Nouis* [2004] VSCA 107; (2004) 8 VR 381, 384 [12].

APPEARANCES: For the applicant Koeleman: Ms A Burchill, counsel. Spicer Lawyers. For the respondent Nolan: Mr K McDonald, counsel. Victorian Government Solicitor's Office.
