

35/87

SUPREME COURT OF VICTORIA

W (a child) v WOODROW

Gray J

25 June, 23 July 1987 — [1988] VicRp 45; [1988] VR 358; (1987) 26 A Crim R 387**CRIMINAL LAW – THEFT OF MOTOR VEHICLE – PASSENGER – AWARE THAT VEHICLE STOLEN – WHETHER GUILTY OF THEFT OF VEHICLE – "ASSUMPTION OF THE RIGHTS OF AN OWNER": CRIMES ACT 1958, SS72, 73.**

Appropriation of a motor vehicle can occur where a person assumes any of the car owner's rights. One of the car owner's rights is to travel in the vehicle as a passenger. Accordingly, where a person travels as a passenger in another's car knowingly without the car owner's consent that person assumes the rights of the owner and is guilty of theft.

GRAY J: [1] On 20th June 1984, W (hereinafter referred to as "the appellant") appeared before the Children's Court at Box Hill on one count of theft of a motor car. He pleaded not guilty but the learned Magistrate found the charge proved. The Court did not proceed to conviction but adjourned the information until 7th April 1985 upon the appellant entering into a recognizance to be of good behaviour.

[2] The appellant appealed to the County Court against this order. The appeal came on for hearing before His Honour Judge Hewitt on 14th February 1985. His Honour adjourned the hearing *sine die* upon the parties intimating that they desired to take advantage of the procedure provided for in s83 of the *Magistrates' Courts Act 1971*. Section 83(1) is in the following terms:

"At any time after notice given of an appeal to the County Court for which the remedy is by such appeal, the parties by consent and by order of a judge of the Supreme Court may state the facts of the case in the form of a special case for the opinion of the Supreme Court, and may agree that a judgment in conformity with the decision of the Supreme Court and for such costs as the Supreme Court adjudges may be entered on motion by either party and shall be of the same effect in all respects as if it had been given by the County Court upon an appeal duly entered and continued."

In this instance the parties have agreed upon a statement of the facts of the case in the form of a special case. On 24th March 1986, Kaye J ordered that the matter be referred to the Cause List for the opinion of the Court. When the matter came on for hearing before me, Mr Berman of counsel appeared for the appellant and Mr Morgan-Payler of counsel appeared for the respondent.

The special case does not state upon what question the opinion of the Court is sought. I was told by counsel that the question to be answered is whether the Children's Court was correct in finding the charge proved and, more particularly, in finding that the appellant had appropriated the motor car the subject of the charge.

The relevant parts of the statement of facts reads as follows:

"1. The Appellant, Martin Lindsay Wilson was born on 7th April, 1967, and is currently 18 years of age.

2. In January 1984 the appellant resided at 6/11 Station Street, Blackburn.

3. On the night of Tuesday 17th January 1984 the appellant was at his said flat when a person known to him as Anthony Maslen arrived at the flat, together with several other persons.

4. The appellant was invited by one or more of his visitors to accompany them for a ride in a motor vehicle. He accepted this invitation. Shortly before midnight he left his flat and entered the rear of a Holden sedan. Before entering this vehicle he became aware that it had been stolen, and did not belong to any of the persons visiting him. He was aware also that neither he nor any of his visitors had any right to be in control or custody of that vehicle on that night.

5. The appellant was thereafter a passenger in the rear seat of the vehicle. While he remained so, the vehicle was driven by one of his visitors from his home in Blackburn to Nunawading, from Nunawading to Croydon, from Croydon to a hotel known as the Sky High, and from there to The Basin and finally back to Blackburn.

6. The appellant took no part in directing where the motor vehicle should be driven. His role was entirely passive. He simply permitted himself to be driven wherever the person in control of the motor vehicle determined to drive it.

7. The appellant made no effort to dissuade the driver or the others from continuing to drive the vehicle in which he was a passenger."

The appellant was charged with theft under s72 of the *Crimes Act* 1958. It is necessary to set out the relevant provisions of ss72 and 73:

"72.(1) A person steals if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.

73.(4) Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a [3] right to it by keeping or dealing with it as owner.

(14) Notwithstanding anything contained in sub-section (12) in any proceedings—

(a) for stealing a motor car or an aircraft proof that the person charged took or in any manner used the motor car or aircraft without the consent of the owner or person in lawful possession thereof shall be conclusive evidence that the person charged intended to permanently deprive the owner of it."

It has already been held that a person who drives a motor car knowing that he does not have the owner's consent assumes the rights of the owner within the meaning of s73(4). This is so whether or not the original thief is a passenger in the car: *Stein v Henshall* [1976] VicRp 62; (1976) VR 612; *Howard v Edwards*, unreported judgment of Fullagar J, 20th March 1984.

In the former case, Lush J said (at p615):

"In my opinion, the assumption of the rights of an owner referred to in sub-s (4) involves the taking on one's self of the right to do something which the owner has the right to do by virtue of his ownership. I do not accept the argument that the conduct required to establish an assumption of the rights of an owner extends to establishing an intention to exclude all others, and I think that Mr Uren's argument that sub-s(14)(a) illustrates this is valid. In my opinion, in order to determine whether there was an 'appropriation' by the defendant in this case, it is not necessary to consider whether the original thief, Graham, gave up all his possessory rights to the defendant or retained them, or lent the car to the defendant so that the defendant was in possession of it by gratuitous bailment. The question is – and is only – whether the defendant acted in relation to the car in a manner in which the owner would have the right to act."

These passages were relied upon by Fullagar J in *Howard v Edwards* in reaching his conclusion that the driver had assumed the rights of the owner notwithstanding the presence in the motor car of the original thief. [5] The conclusion reached in the two Victorian cases that an appropriation of the property of another is constituted by the assumption of any of the owner's rights was re-affirmed by the House of Lords in *R v Morris* [1984] UKHL 1; [1984] AC 320; [1983] 3 All ER 288; (1983) 77 Cr App R 309; [1983] Crim LR 813; [1983] 3 WLR 697.

It was submitted on behalf of the appellant that the conclusion that the car had been dishonestly appropriated cannot be reached by working back from the deemed intention to permanently deprive contained in s73(14) because it is clear that the prosecution must prove each element of the crime, although assisted in this task by the conclusive presumption contained in sub-s(14). But once it is accepted that an appropriation can be constituted by the assumption by the appellant of any of the car owner's rights, the question comes down to whether the appellant's conduct in travelling in the car as a passenger amounts to an assumption of a right of the owner.

It is clear enough in my opinion, that one of the car owner's rights is the right to travel in the car as a passenger. This is no less a right than the owner's right to drive his car. On the appellant's behalf, it was submitted that if mere use of the car was intended to amount to an appropriation, the Act would have employed the verb "use" in s73(4) as it did in s73(14). There

is no substance in this point because the concept of the assumption of the rights of the owner includes use but extends far beyond it.

It was next submitted that it could not have been intended that all forms of use of an owner's property should be regarded as an appropriation. For example, it was said that to sit upon the bonnet of a parked car could not be so treated. [6] It was contended that the line must be drawn somewhere and that mere occupancy of the car as a passive passenger lies on the innocent side of the line. Conduct such as sitting on the bonnet of another's car without his consent may well amount to a technical theft. However, upon such facts, the better view may be that there is no use of the motor car as a motor car and no sufficient adverse interference with or usurpation of the owner's rights: See *R v Morris* (*supra*) per Roskill LJ at p293 (All ER).

But, in my view, the act of travelling as a passenger in another's car knowingly without his consent amounts to a use of the car for one of its ordinary purposes and involves an assumption and usurpation of one of the owner's rights. The remaining element of the crime, namely an intention to permanently deprive the owner of the car, is conclusively presumed against the appellant by virtue of his use of the car: Section 73(14).

Accordingly, in my opinion, upon the stated facts the learned Magistrate was correct in finding the charge proved. I order that the appeal be dismissed.
