

63/77

## SUPREME COURT OF VICTORIA

*POLICE v CHARLTON*

McGarvie J

23 August 1977

**CRIMINAL LAW – DEFENDANT OBTAINED CREDIT UNDER ANOTHER NAME – IF THE PREVIOUS NAME HAD BEEN GIVEN THE CREDIT SUPPLIER MIGHT HAVE REJECTED THE APPLICATION – DISHONESTLY OBTAINING A FINANCIAL ADVANTAGE (CREDIT) – "DISHONEST" CONSIDERED – FINDING BY MAGISTRATE THAT CHARGE PROVED – WHETHER MAGISTRATE IN ERROR: CRIMES ACT 1958, S73.**

The defendant was charged that by deception, namely by giving a different name, did dishonestly obtain from Myer a financial advantage namely credit. It was not contested that, the defendant had obtained a financial advantage by deception, but it was submitted that she had not done so dishonestly; nor was there sufficient evidence Myers was deceived.

The defendant's name was Teresa Charlton at all material times. She with her husband on 24 November 1974 opened a joint credit account with Myers. A court order was obtained against both for non-payment. Prior to seeking to establish a second account, the defendant had separated from her husband and adopted the surname of Linton (the surname of her mother who had remarried, and adopted the given name of "Terrie").

On 16 June 1976 she applied to Myers under her adopted name to open a credit account. It was Myers practice to decline to grant a credit account to a person they considered a bad risk. If it had been known the person applying for credit was Teresa Charlton serious consideration would have been given to the question of granting her credit.

The defendant purchased articles under the more recent credit account. At the time of applying, for this account she intended to pay the amounts which became due under it, as she had an expectation of satisfactory employment. She later made some payments to the account. The defendant was found guilty of the charge. Upon Order Nisi to review—

**HELD: Order nisi discharged.**

1. It was necessary for the Magistrate to be satisfied beyond reasonable doubt that the defendant obtained the credit by dishonest deception. This required a finding as to the actual state of the defendant's mind. In deciding whether the defendant's state of mind amounted to one of dishonesty, it was necessary for the Magistrate to apply the current standards of ordinary decent people. In deciding whether the defendant acted dishonestly, it was relevant to consider whether or not she had, at the time, an intention to pay for what she obtained. But the existence of an intention to pay was not necessarily inconsistent with acting dishonestly.

2. It was a fair inference from the material that in finding the charge proved the magistrate proceeded on the basis that it was not essential for the prosecution to prove that at the time of obtaining the credit by deception, the defendant did not intend to pay for what she obtained.

3. The material did not establish that the magistrate did not take into account together with the other evidence the evidence which the defendant had given as to her intention to pay for what she obtained. The inference is not drawn that the magistrate did not separately consider the aspect of deception and the aspect of dishonesty.

4. Accordingly, the magistrate was correct in law. There was no reason to doubt that in deciding whether the defendant's state of mind amounted to one of dishonesty, the magistrate applied the correct standard.

**McGARVIE J:** Dealing first with the subsidiary argument which is relied on in this application and leaving aside for the moment the element of dishonesty involved in the charge I consider that the magistrate was entitled upon the evidence to be satisfied beyond reasonable doubt as to all the other elements of the charge.

The main question is whether in the absence of it being established that the defendant did not intend to pay amounts which became due under the account, he could be satisfied beyond

reasonable doubt as to the element of dishonesty. On this question it is important to bear in mind that the defendant was charged with having by deception dishonestly obtained credit. She was not charged with having obtained goods or services which may have been purchased pursuant to the credit account agreement.

For present purposes it is enough to describe credit as the right to defer payment of a debt or the right to incur debt and defer its payment. In this case Mr Scott agreed the defendant under the credit account had obtained a right to incur debt and defer its payment.

In a commercial transaction by a retailer, such as Myer's the amounts payable pursuant to the credit account agreement consist of the price of goods or services purchased and of a credit charge paid for the credit. This case is to be approached on the assumption that when she applied for the account she intended to make all such payments as became due under the credit account agreement. The question is whether the existence of this intention or more strictly, the lack of proof that this was not her intention, would as a matter of law have disentitled the magistrate from being satisfied that the deception by which the defendant obtained the credit was done dishonestly. Another way of putting it is that the state of mind of the defendant when obtaining credit by deception was a state of mind amounting to dishonesty.

I have been referred by Mr Scott to a number of authorities and text books, including *R v Feely* [1973] QB 530; [1973] 1 All ER 341; (1973) 57 Cr App R 312; [1973] 2 WLR 201; *R v Greenstein* [1976] 1 All ER 1; (1975) 1 WLR 1353; Howard *Criminal Law*, 3rd Edn 255 to 266; Smith, *The Law of Theft*, 3rd Edn, pp85-89.

I consider that the following principles apply to this case. It was necessary for the Magistrate to be satisfied beyond reasonable doubt that the defendant obtained the credit by dishonest deception. This required a finding as to the actual state of the defendant's mind. In deciding whether the defendant's state of mind amounted to one of dishonesty, it was necessary for the Magistrate to apply the current standards of ordinary decent people. In deciding whether the defendant acted dishonestly, it was relevant to consider whether or not she had, at the time, an intention to pay for what she obtained. But the existence of an intention to pay was not necessarily inconsistent with acting dishonestly.

The principles which I have mentioned receive support from the authorities mentioned above and the textbooks mentioned and the authorities referred to in those textbooks. I consider that they also receive support from the publication *An Introduction to the Crimes (Theft) Act 1973* published by the Victorian Law Department in 1974 based on the writings of Professor Brett and Mr CR Williams. (see pp20-23).

No case has been cited to me which holds or suggests that in circumstances such as those of this case it is an essential part of the informant's case that the defendant, when obtaining credit by deception, did not intend to pay for it. That could be the position only if, as a matter of law, the defendant could not have a dishonest state of mind unless she did not intend to pay for what she obtained. That approach in my view, would be inconsistent with the decisions.

I consider that the material before me shows no *prima facie* error or mistake of law on the part of the Magistrate as to the element of dishonesty. The defendant gave evidence, including evidence that when she opened the account she intended to pay amounts which became due under it and had grounds for expecting to be able to do so.

There is nothing to suggest that the Magistrate excluded this evidence from his consideration in coming to his decision that the charge was proved. Of course, the function of the Magistrate in ruling on the submission of no case to answer was different in nature from his function in making the final decision. (See *Mudge v O'Grady* [1965] VicRp 8; [1965] VR 65 at 66-67).

In this case, as the material does not indicate that the Magistrate gave any reasons for his conclusion that the charge was proved, it is fair to infer that in making that decision he applied the view of the law which he had expressed in ruling upon the application based on the submission that there was no case to answer. I do not regard the material as showing that the Magistrate in deciding whether the charge was proved, acted on the basis that evidence that the defendant had

intended, at the relevant time, to pay for what she obtained was not evidence to be considered by him along with the other evidence.

It has been put to me that at one stage during the proceedings the Magistrate regarded the relevant issue as being the issue whether the defendant had deceived or intended to deceive rather than the issue which, it was submitted, was also an issue whether she had acted dishonestly.

The material indicates that Mr Scott read to the magistrate passages from Howard's *Criminal Law*, to which I have referred, and quoted a number of passages to him. While there may have been a stage of the proceedings when the magistrate in the course of argument had advanced the view that deception was the important enquiry and it was not necessary to enquire as to dishonesty, I consider it unlikely that he retained that view after hearing the passages which I have no doubt included all relevant passages cited to him by Mr Scott from Professor Howard's book. I consider that it is a fair inference from the material before me that in finding the charge proved the magistrate proceeded on the basis that it was not essential for the prosecution to prove that at the time of obtaining the credit by deception, the defendant did not intend to pay for what she obtained.

I do not take the view that the material establishes that the magistrate did not take into account together with the other evidence the evidence which the defendant had given as to her intention to pay for what she obtained. I do not draw the inference from the material before me that the magistrate did not separately consider the aspect of deception and the aspect of dishonesty.

The result is that I consider that on the material before me the magistrate was correct in law. I see no reason to doubt that in deciding whether the defendant's state of mind amounted to one of dishonesty, the magistrate applied the correct standard.

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