21/81

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v BROW

Young CJ, Crockett and Tadgell JJ

3 December 1980 — [1981] VicRp 75; [1981] VR 783

CRIMINAL LAW – THEFT BY DECEPTION – ELEMENTS OF OFFENCE – "DISHONESTY" – INTENT NECESSARY TO BE PROVED BY THE PROSECUTION: *CRIMES ACT* 1958, SS74, 81.

Appeal against conviction and sentence of applicant arising from his business as a dealer in second-hand motor vehicles.

If it is proved that a person purports to sell for consideration goods which are the property of another or are encumbered in favour of another knowing:

(a) that the owner or encumbrancee has no knowledge of the sale and would not consent to it if he had; and

(b) that the purchaser has no knowledge of the true ownership or of the encumbrance and would not proceed with the transaction if he had —

then there is evidence that the consideration is obtained by deception and that the obtaining is dishonest in terms of s81 of the *Crimes Act* 1958. The consideration is regarded as none the less dishonestly obtained in those circumstances simply because the vendor at the time of the sale hoped or expected or even intended to deal with the true owner or encumbrancer of the goods with the view ultimately to satisfying his claim as true owner or encumbrancer and thus saving the purchaser from loss.

***R v Salvo* [1980] VicRp 39; (1980) VR 401; (1979) 5 A Crim R 1, considered.**

THE COURT: His Honour directed the jury that property is dishonestly obtained if the person obtaining it knows or believes that he has no legal right to obtain it. He said:

> "Therefore the accused can be convicted only if the Crown has satisfied you beyond reasonable doubt that the accused did not in fact believe he had in the circumstances a legal right to obtain the property in question. If the Crown has not so satisfied you, then the accused should be acquitted."

In so instructing the jury His Honour was avowedly applying the reasoning of the majority of the members constituting this Court in the recent decision of *R v Salvo* [1980] VicRp 39; (1980) VR 401; (1979) 5 A Crim R 1. The passage from the charge which we have quoted, and the charge as a whole, may fairly be read as meaning not only that it was incumbent on the Crown to prove that the applicant obtained the relevant property without believing he had a legal right to obtain it but that, if the Crown did prove that, then the property was necessarily dishonestly obtained for the purposes of s81. In other words, His Honour treated the majority judgments in *R v Salvo* as providing an exclusive definition of "dishonestly obtains".

Counsel for the applicant submitted that the trial Judge erred in confining the meaning of the word "dishonestly"' in that way and submitted further that the reasoning of the majority in *R v Salvo* did not require it. In *R v Salvo* the sole defence was that the accused did believe he had a legal claim of right to obtain the property there in question. In the present case, on the other hand (so it was argued), the defence did not depend upon any belief by the applicant that he had a legal claim of right as such to obtain the relevant property: his defence to the allegation of dishonesty was that he had no dishonest intent because he had no intention when obtaining the property to cause loss to those from whom he obtained it. The argument therefore was that *R v Salvo* does not apply to a case as this, in which the question of dishonesty was, to use counsel's words, "at large".

The submission for the applicant was that *R v Salvo* was distinguishable; that in the circumstances of this case the trial judge should have directed the jury as a matter of law that it

was not necessarily sufficient, in order to prove that the property was dishonestly obtained, that the Crown negate any belief by the accused of a legal claim of right to obtain the property; and that the jury should have been positively directed that it was open to them not to be satisfied that the applicant obtained the property dishonestly notwithstanding that they were satisfied that he had no such belief.

The submission contained overtones of the reasoning of the Court of Appeal in *R v Feely* (1973) QB 530 (which was rejected by the majority of the Court in *R v Salvo*) that honesty is to be regarded as an amorphous concept a transgression beyond the confines of which will be recognised by a properly instructed jury when they see it. Indeed it was inherent in counsel's argument that the reasoning of the majority in *R v Salvo* was inconsistent with the reasoning in *R v Feely* only in a case where, unlike this case, the only possible defence to an allegation that property was dishonestly obtained in a *bona fide* belief in a claim of right. In our opinion these submissions cannot be sustained. If it is proved that a person purports to sell for consideration goods which are the property of another or are encumbered in favour of another knowing:

> (a) that the owner or encumbrancee has no knowledge of the sale and would not consent to it if he had; and
>
> (b) that the purchaser has no knowledge of the true ownership or of the encumbrance and would not proceed with the transaction if he had —

then in our opinion there is evidence that the consideration is obtained by deception and that the obtaining is dishonest in terms of s81. We would regard the consideration as none the less dishonestly obtained in those circumstances simply because the vendor at the time of the sale hopes or expects or even intends to deal with the true owner or encumbrancer of the goods with the view ultimately to satisfying his claim as true owner or encumbrancer and thus saving the purchaser from loss.

This is so because the obtaining of property being the consideration for a sale can only be honestly justified by reference to the supposed contractual transaction on which the sale depends. The right of the vendor to obtain the consideration does not depend on an intention that the purchaser should not suffer loss or on any other basis than that afforded by the supposed contract. The right depends upon the vendor's claim that he can satisfy the legal obligations which he believes the contract requires of him. In the circumstances supposed the vendor's obligations must include a right or power on his part to sell unless he believes that the contract absolves him from having that right or power. It follows that unless the vendor believes he can claim the right or power to sell or a contractual absolution from it he cannot point to an honest justification for obtaining the consideration from the purchaser.

The case is therefore quite different from one in which an employee, without his employer's actual consent, "borrows" money from the till intending that he will replace it after successfully investing it with a bookmaker and that his employer will therefore be caused no loss. cf. *R v Williams* (1953) 1 QB 660; [1953] 1 All ER 1068; (1953) 37 Cr App R 71; [1953] 2 WLR; *R v Cockburn* [1968] 1 All ER 466; [1968] 1 WLR 281; (1968) 52 Cr App R 134. It is also quite different from cases where money which has been obtained by deception might be intended to be subsequently restored: cf. *R v McCall* (1970) 55 Cr App R 175; *Halstead v Patel* [1972] 2 All ER 147; (1972) 1 WLR 661. It has been suggested by some learned writers that the reasoning in *R v Feely* (*supra*) should be capable of being applied in such cases to allow a finding of fact inconsistent with dishonesty in circumstances where no intention to cause ultimate loss to the victim can be made out by the Crown. Arguments in favour of that view are to be found in an article by Mr CR Williams in (1980) 54 *Law Institute Journal* (Vic) 567, and in Weinberg & Williams, *The Australian Law of Theft* (1977) 134-138; Smith, *The Law of Theft* (1972) 46-48.

R v Salvo might or might not leave room for those or similar cases to be regarded on their particular facts as not involving dishonest appropriation or obtaining, as the case may be. It is unnecessary, however, to decide that point here because it does not arise. If there are cases in which a person who by deception obtains property without any *bona fide* belief of a legal claim of right but who nevertheless does not obtain the property dishonestly in terms of s81 this is not one of them. This is a case in which the circumstances of the deception proved in relation to counts, 2, 4, 6, 14 and 15 are inconsistent with an absence of dishonesty in the obtaining of the

property unless the accused believed the circumstances entitled him to claim the property from the various purchasers in the way he did that they were consenting to his obtaining it.

We have now to consider the Judge's charge as to dishonesty so far as it affected the remaining count laid under s81, count 5. That count differed from the other five counts laid under s81 of which the applicant was convicted in that it was not concerned with the contract for the sale of goods for which the property the subject of the charge of obtaining was the consideration. The essence of the charge was that the applicant obtained a Holden vehicle from Dwyer by way of a trade-in on another vehicle (the Toyota) on the footing that he (the applicant) would forthwith discharge the hire-purchase agreement to which the Holden was subject. The trial Judge reviewed for the jury the evidence relating to count 5, including the opposing accounts given by the applicant and Dwyer as to what was represented to Dwyer.

His Honour indicated that if the arrangement was that the accused should pay out the finance company forthwith, that meant that he should do so within a reasonable time having regard to all the circumstances. Taken as a whole we think the gist of the direction to the jury as to count 5 was that, before convicting the applicant, they had to be satisfied beyond reasonable doubt that the applicant induced Dwyer to trade in his Holden vehicle by representing that he intended to discharge the hire-purchase obligation in respect of it within a reasonable time, whereas he had no such intention.

In accepting Dwyer's evidence of the representation and of its falsity and of the inducement (as they must be assumed to have done, the last being in effect not a live issue) the jury were in our opinion entitled to conclude that the Holden was obtained by the applicant dishonestly. It was not necessary that the Judge should have said more about dishonesty in the context of count 5 than we have indicated he did. The facts proved produced, we think, a typical case where, as Murphy J said in *R v Salvo* [1980] VicRp 39; [1980] VR 401, 422; (1979) 5 A Crim R 1. "The very deception practised may, in all the circumstances, demonstrate the accused's dishonesty ..." Once the jury had drawn their conclusions as to the fact of the representation and as to its falsity and the inducement there was in truth no basis for concluding that the Holden had not been obtained by the applicant dishonestly. The false representation which amounted to the deception was that the applicant intended reasonably promptly to discharge the hire-purchase obligation after obtaining the vehicle. He cannot therefore now be heard to say that his receipt of it was not dishonest because he always intended to discharge the obligation by instalments or at a future undetermined time when the car was sold. The obtaining was made dishonest because it depended upon the false basis of the deception.

The resolution of the two counts of theft also depended, so far as the question of dishonesty was concerned, very largely upon questions of fact. Two cheques which were made out to the applicant, and which were received by him on account of the purchase price of Susak's vehicle which the applicant had sold on consignment, were deposited by the applicant to the credit of his overdrawn general account and the proceeds were dissipated. The crown case was, in effect, that the cheques should have been paid to the credit of a trust account by virtue of the provisions of s33 of the *Motor Car Traders Act* and the proceeds applied in favour of Susak, The Crown also relied upon s73(9) of the *Crimes Act*, which provides:

> "Where a person receives property from or on account of another, and is under an obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds shall be regarded (as against him) as belonging to the other."

The applicant's evidence was to the effect that he did not know that the *Motor Car Traders Act* required him to hold the proceeds of consignment sales on trust, that the cheques were made payable to him and that that was why he put them into his trading account. The applicant also said that, at the time he received the cheques, he intended to pay Susak either by buying him another motor car or by cash. He had no intention to steal from Susak. The Judge's direction to the jury in relation to the adverb "dishonestly" as a component of the definition of theft was not an elaborate one. His Honour had, however, at an earlier stage of his charge spent considerable time in dealing with "dishonestly" in the context of s81. Having dealt with appropriation as an element of theft, he said:

> "The second element is that the accused appropriated the property dishonestly – we come back to

> this concept of dishonesty. Now to act dishonestly is for the accused to obtain property knowing or believing he has no legal right to do so. So that is fairly clear as regards these theft charges. The law says, for instance, that if a person appropriates property in the belief that he would have the other's consent if the other knew of the appropriation, and the circumstances of it, then it is not to be regarded as dishonest. So that is the second element – dishonesty."

So far as we can find, no more was said to the jury in His Honour's charge about "dishonestly" in the context of theft. In particular, His Honour did not refer to the concept when dealing with the facts relating to charges 8 and 9, although he did then deal with the concept of an intention permanently to deprive. He also referred to s73(9) of the *Crimes Act* and said further:

> "You will appreciate that these monies, that is the $1,800 and the $1,617,50, were not Mr Brow's monies at all. They were the proceeds of the car or from part of the proceeds from the sale of Mr Susak's car. The car was not Mr Brow's. You will recall that under the *Motor Car Traders Act* there were requirements for a licensed motor car trader to keep a trust account and that is where that money should have finally ended up. The fact Mr Brow did not have a trust account is a matter for you to consider as to why that was so."

One must assume an acceptance by the jury of the facts deposed to by the Crown witnesses to the effect that the cheques should have been paid to the credit of a trust account and their rejection of the applicant's professed ignorance of that requirement. Those findings of fact left no room for any reasonable doubt that the appropriation of the two cheques by the applicant occurred in circumstances in which dishonesty might properly be inferred. This is another instance in which evidence of the circumstances of the appropriation was, if believed, sufficient to demonstrate dishonesty. Sufficient was in our opinion said to the jury to require them to consider whether a defence was available under s73(2)(a) and (b) of the *Crimes Act*. There were no other defences reasonably open. That being so, we are prepared to conclude that the charge did not involve any misdirection in relation to the element of dishonesty in the crime of theft.

The final substantial criticism of the Judge's charge in relation to his treatment of the adverb "dishonestly" was that it confused the issue of dishonesty with that of deception in the counts laid under s81. The vice of that, it was submitted, was that the jury might have assumed dishonesty because of the deception or might have failed to consider dishonesty as a separate element of each of the charges laid under s81. The possibility of such confusion was, of course, central to opinions of the majority of the Court in *R v Salvo* (*supra*).

The language used by the Judge in his direction to the jury in this case was certainly sufficient, in our view, to indicate that the matter of dishonesty was a discrete element of the charges laid under s81 which the Crown had to prove. That being so, it cannot be supposed that any finding by the jury of dishonesty resulted from a failure to consider it as a separate ingredient of the offences. Furthermore, it follows from what we have already said that the jury was entitled to infer dishonesty from the deception practised in the circumstances proved in relation to each of the counts on which the applicant was convicted under s81. For these reasons we are of opinion that the second ground of the application for leave to appeal against conviction should fail.

The third ground argued was in these terms:

> "The learned trial judge failed properly to charge the jury in relation to the law on intent necessary to be proved by the Crown and/or properly to relate the evidence to such law."

The intent referred to is the intention permanently to deprive a victim of property which must be proved by the Crown as an ingredient of an offence under s74 and s81. In directing the jury on this question for the purposes of s81 His Honour said:

> "The Crown has to satisfy you beyond reasonable doubt that at the time when the accused obtained the property of another by deception he did so with the intention of permanently depriving that other of it. It seems clear and this is only a comment on my part – it seems clear from the evidence, and as I say, it is a matter for you, that the accused did not intend to return any of the moneys or cheques or motor cars he received with respect to the purchase of motor vehicles then in his yard. And if you are satisfied about that, then there is fairly clear evidence from which it is open to you to find that the Crown has satisfied you beyond reasonable doubt that there was an intention of permanently depriving the other person of the cheque, money or motor car, as the case may be".

In directing the jury upon intent for the purposes of s74 His Honour did not enlarge upon the concept but he did indicate that the accused must be proved to have had the necessary intention at the time of the appropriation; and he stated the effect of s73(12) – that a person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights.

Insofar as the argument attributes to the learned trial Judge a failure to indicate to the jury that the Crown must prove an intention of the applicant that the persons whose property he obtained or appropriated should be permanently deprived of it, we do not consider the criticism to be made out. In truth the inescapable conclusion from the evidence was that the applicant intended that the persons dealing with him should not have their property back once he obtained it; indeed in the case of the charges laid under s81 the very nature of the transactions was such that they did not expect to receive it back. They did expect a *quid pro quo*, however, and it was that which they did not receive.

The fourth ground argued was this:

> "The learned trial judge was in error when he instructed the jury that it was a matter for the jury to decide whether the prisoner had to have legal title to a car when he sold it."

This cryptically expressed ground is intended, apparently, to refer to the way in which the judge dealt with some evidence given by the applicant upon the custom of the used motor car trade. Referring to the applicant, His Honour said:

> "He told you, during cross-examination, that frequently one does not have the legal title to a car when you sell 'but eventually it comes'. That will be a question for you. Clearly, it is very hard to pay out the finance company you might think, and that is a comment on my part, before you receive the money. You may think that that might be strictly so, that there might be a period of time when in fact legal title to the car is not there ... So it becomes a question of degree for you to decide – it is up to you what view you take of it as to whether you think that there ought to be a leeway of a short period for the whole thing to be dealt with. So that when Mr Brow says, you see, that frequently one did not have a legal title to a car when you sold it, but eventually it came, that you may consider that relates to doing something immediately after you get the money; with a hire-purchase company, or you may consider it means taking even a longer time. That is a matter for you, for your opinion and for your judgment as to what you think in all the circumstances is proper."

That part of His Honour's charge, as we understand it, left it to the jury to decide as a question of fact whether the applicant's capability to deliver an unencumbered vehicle in all the circumstances was consistent with such representations as he might expressly or impliedly have made that he was capable of delivering such a vehicle. In our opinion no misdirection was involved and there is nothing in this ground.

The fifth ground argued was that:

> "The learned trial judge failed to put or to put adequately the defence of the applicant."

The argument revealed that the ground contained no point that had not already been covered by the second and third grounds and it is unnecessary to say more about it. We consider that the application for leave to appeal against conviction should be refused.

We turn to consider the application for leave to appeal against sentence. The learned trial Judge regarded some of the offences committed by the applicant as deserving a greater punishment than others. He imposed sentences of eighteen months' imprisonment in respect of each of counts 2, 4, 5 and 6, each to be served concurrently, and sentences of two years' imprisonment in respect of each of counts 8, 9, 14 and 15 each to be served concurrently. The total effective sentence was therefore three and a half years' imprisonment and His Honour directed that the applicant serve a minimum of two years before becoming eligible for release on parole.

His Honour's expressed basis for differentiating between the offences as to sentence was that those which were committed earlier than April 1979, were, as he thought, committed at a time

when the applicant had or might have had a basis for a belief that he could meet his commitments. On the other hand the offences which were committed in and after April 1979, occurred at a time when the financial circumstances of the applicant indicated or should have indicated plainly to him that he had no prospect of meeting his commitments. His Honour accordingly regarded the latter group of offences as involving a greater culpability than the former group and imposed sentences which were designed to reflect that view.

We have had some difficulty in concluding that His Honour was justified in drawing the distinction he did between offences committed before, and those committed after April 1979. A study of the evidence as a whole, and especially of the applicant's evidence in explanation of his conduct, suggests that his operation was calculated from the outset to fail. His belief that he could succeed in what he was doing with an initial capital of only $800 was founded on an ineluctable but unjustified optimism which seemed not to desert him even at the trial and upon his plea following conviction. We do not think that, even shortly before he filed his own bankruptcy petition, the applicant was any more conscious of the futility of his enterprise than he had been when he began.

The realisation that he could never operate profitably by using hire-purchase and like financial accommodation of others as a substitute for his own capital seems never to have occurred to him. Insofar as the scheme provided him with a privately-held belief of justification for his conduct, it did so throughout the life of his business. Of course the scheme provided no justification in point of law or common sense of the way in which the applicant treated those who dealt with him. All the offences arose out of the business of the applicant and in our opinion all were unjustified to more or less the same extent and for basically the same reasons.

Notwithstanding what we have said, we have felt unable to conclude that the view which commended itself to the Judge was not one which it was open to him to take, and we do not think that this Court would be justified in interfering with the sentences on the footing that the Judge differentiated between them. There is, however, another matter on which we are of opinion that His Honour's sentencing discretion did miscarry. In our opinion there was no justification in the circumstances why the four sentences of eighteen months' imprisonment should have been made concurrent only with each other and the four sentences of two years' imprisonment should have been made concurrent only with each other. All eight offences arose out of the applicant's continuing business operation.

Since there was, as we think, no significant difference between the offences as to what induced the applicant to act as he did, we think there was insufficient reason to direct that there should be no measure of concurrency between the group of sentences of eighteen months' imprisonment and the group of sentences of two years' imprisonment. There being in our opinion an identifiable error in the reasoning which led the trial Judge to impose the sentences he did, it becomes the function of this Court to impose the sentences it considers proper. We shall not interfere with any of the individual sentences imposed or with the concurrency orders which His Honour made in respect of each of the two groups of sentences. We shall, however, order that one year of the concurrent sentences of two years' imprisonment should be served concurrently with the concurrent sentences of eighteen months. That will produce a total effective sentence of two and a half years. We shall further order that the applicant serve a period of eighteen months' imprisonment before becoming eligible for release on parole.
