54/76

SUPREME COURT OF VICTORIA

STEIN v HENSHALL

Lush J

5 May 1976 — [1976] VicRp 62; [1976] VR 612; (Noted 1 Crim LJ 114)

CRIMINAL LAW – "APPROPRIATION" – AN ASSUMPTION OF RIGHTS OF OWNER DOES NOT EXTEND TO ESTABLISHING AN INTENTION TO EXCLUDE OTHERS – ACTING IN A MANNER IN WHICH THE OWNER WOULD HAVE A RIGHT TO ACT IS SUFFICIENT: *CRIMES ACT* 1958, S73(4).

On two occasions, the defendant used a stolen motor car for his own purposes. The vehicle had been handed over to him by the original thief. The defendant was charged with theft of the vehicle and the charge was dismissed by the Magistrate. Upon Order Nisi to Review—

HELD: Order absolute. Dismissal set aside. Matter remitted to the Magistrates' Court for hearing and determination according to law. [cf MC48/77]
1. The assumption of the rights of an owner referred to in the *Crimes Act* 1958 s73(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. In order to determine whether there was an "appropriation" by the defendant in this case, it was not necessary to consider whether the original thief 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.

2. The question was – and was only – whether the defendant acted in relation to the car in a manner in which the owner would have the right to act. On two occasions the defendant used the car for his own purposes – not for the original thief's purposes or for those of any other person but himself. To make such a use of it was one of the rights of ownership; and the defendant assumed that right.

3. It was not disputed that the other elements of theft (i.e., other than appropriation) were established by the evidence. In particular, the necessary intention was established by the Magistrate's finding of a use without consent, and with the assistance of subs(14)(a).

LUSH J: This is the return of an order nisi to review a decision of the Magistrates' Court at Moonee Ponds given on 21 July 1975. The order then made dismissed an information against the respondent for stealing a motor car.

The provisions of the *Theft Act* (Division 2 of Pt I of the *Crimes Act* 1958) which are relevant to this case are s72, s73(4), s73(14)(a). S72(1) reads:—

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

S73(4) reads:—

> "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 right to it by keeping or dealing with it as owner."

S73(14)(a) reads:—

> "Notwithstanding anything contained in subs(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: ..."

On 11 July 1975 the defendant was found near a stolen car in a street in Kensington. His companion at the time when he was first observed moved away and was not at that time, at any

rate, spoken to by the police. On being approached, the defendant said that he had been in the car, but had not been driving it. In a record of interview made on the same day, the defendant, in a series of answers, said that a boy named Graham stole the car on Tuesday 8 July and that he knew the car was stolen because Graham had told him.

The circumstances in which the car came into the defendant's control are described in the following questions and answers:--

Q: What happened after Graham picked you up? A: We went around Footscray and Sunshine.

Q: What happened then? A: We went for a drive.

Q: What happened then? A: Then we took it to this old house. Then he said I could take the car home. I said, "No". Then he conned me into it. Then we just went to the Kensington flats and went home.

Q: What was the address in Kensington that you went to? A: Only went to the flats where I left the car, then I went home.

The last answer appears, from answers that were subsequently given, to mean that the car was left at the place described as "the Kensington flats" and not that the car was taken to some other place by Graham after the defendant had got out of it.

On the following day, 9 July, the defendant went to the car and went for a drive in it, taking some friends with him. Later he returned it to approximately the same place in which it had been left previously. On Thursday 10 July, the defendant did not use the car. On Friday 11 July, the defendant drove the car and picked up various passengers with whom he was acquainted; at one time one of these, who was named in the record of interview as "Wormy" and who was apparently aged 15, took over the driving of the car. This was, of course, the day on which the defendant was apprehended, and while the identity of the person with him immediately before the police spoke to him was not the subject of any evidence, the combination of his statement to the intercepting constable that someone else had been driving the car, and his statement in the record of interview that the boy Wormy had been driving the car on the Friday, might possibly lead to the inference that the person seen with him by the police was the boy Wormy.

Shortly before the luncheon adjournment at the hearing at Moonee Ponds the Stipendiary Magistrate indicated that he doubted whether the prosecution had proved a case of theft, but suggested that the evidence rather supported a charge of handling goods.

Immediately after the adjournment, the prosecutor, a police sergeant, informed the Court that he had considered the suggestion made during the adjournment and submitted that the original thief to whom he referred as "Wormy", had in fact abandoned the car. This submission may have been doubly unfortunate. In the first place, it introduced a concept of abandonment which, as will be seen, I consider immaterial to the case; and secondly, the mistake in the naming of the original thief may be reflected in the magistrate's subsequent reasons; because the combination of the prosecutor's mistake and the magistrate's reasons may be thought to suggest that the magistrate's understanding of the facts was that the original thief had been constantly in the company of the defendant up to the time of the interception. However, it is quite clear from the record of interview that Graham, the original thief, and Wormy, the boy who was in the car and who drove it on the Friday, were different people.

Having heard the prosecutor's submission, the magistrate dealt with it in these terms:

> "There has been no abandonment, no break in possession by Wormy. Wormy did give the defendant permission to drive the car. I don't think that amounts to appropriation. The defendant was driving the car with Wormy's permission. The defendant used the car without the owner's permission. The prosecution has failed to prove appropriation by this defendant, and therefore the information can be dismissed."

From that decision the prosecutor decided to appeal and obtained an order nisi to review on two grounds, expressed in these terms:

> "(1) That on the evidence the learned Stipendiary Magistrate should have found that the defendant had stolen the Valiant Sedan the subject of the information within the meaning of s72 of the *Crimes Act* 1958 (as amended); and
>
> "(2) That on the evidence the learned Stipendiary Magistrate should have found that the defendant had appropriated the Valiant Sedan within the meaning of (a) s73(4)(b) s73(14)(a) of the *Crimes Act* 1958 (as amended)."

It may be commented that in terms s73(14)(a) does not deal with the meaning of "appropriation", but I shall indicate the relationship contended for in these proceedings between that paragraph and the definition of "appropriation".

Mr Uren, who appeared to move the order absolute, argued that the defendant had taken possession of the car from the thief and had driven and used it at will. He submitted that there was no evidence that the car was used only at the sufferance of the thief, or that the thief was going to get the car back or wanted it back, or had reserved any right to get it back. He submitted that the learned magistrate had not been entitled to find that the thief had retained possession of the car and that the driving of it had been done with his permission; but he said that even if that were so the defendant's conduct still amounted to an appropriation under s73(4) because the defendant had had control of and was using the car for his own purposes, performing his own journeys and carrying passengers of his own choice.

Mr Davey, who appeared for the defendant (the respondent in these proceedings), based his argument on the questions and answers in the record of interview which I have quoted; and submitted that those answers were consistent with there having been no more than a loan of the car by the thief to the defendant, and that, in any case, the evidence did not exclude that possibility. He submitted that if the car had merely been lent to the defendant, there could have been no appropriation of it by him. He conceded that if, on the other hand, the true understanding of the transaction was that the original thief, Graham, had given whatever rights he had in the car to the defendant, it would be difficult to argue that the defendant's conduct did not amount to an appropriation.

Mr Davey submitted other arguments; but these he introduced with the concession that their success depended on the success of his opening argument. It may, however, be noted that he argued that the concept of "appropriation" defined in s73(4) involved an assumption of the general rights of ownership and not an assumption of a partial right.

I think it may fairly describe his argument to say that it was that the assumption of the rights of an owner constituting an "appropriation" under subs(4) had to extend to a general intention to exclude others from the property in question.

Mr Uren answered this by reference to subs(14)(a), pointing out that it would be futile to direct that the limited actions which that paragraph makes evidence of an intention to permanently deprive the owner of the property, should be given that effect if, by virtue of their limited nature, they were incapable of constituting an "appropriation", which had to be established before the question of intention became relevant.

In my opinion, the assumption of the rights of an owner referred to in subs(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 subs(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. On Wednesday 9 July, and Friday 11 July, the defendant used the car for his own purposes – not for the original thief's purposes or for those of any other person but himself. To make such a use of it was one of the rights of ownership; and the defendant, in my opinion, assumed that right.

Mr Davey's argument, on this view, is not acceptable. An alternative way of explaining its rejection is to say that the rights of the owner included the day-by-day use of the car. The original thief's action in handing the car over to the defendant made it possible for the defendant to exercise that right until the original thief reclaimed the car – if, indeed, he intended to do so. Until that time, the defendant was – even if by the original thief's permission – exercising rights which were rights of the owner.

I referred at an earlier stage to the possibility of a mistake having crept into this case as a result of a confusion in the names of the original thief, Graham, and the subsequent driver, "Wormy". I reserve my opinion on the question whether, if the defendant had been using the car in the company of and with the permission of and under the direction of the original thief, the defendant could be said to have assumed the right of an owner and so appropriated the car.

This is, on a proper understanding of the facts, not such a case; and any problems that such a case gives rise to can be decided if and when they arise.

It was not disputed that the other elements of theft (i.e., other than appropriation) were established by the evidence. In particular, the necessary intention was established by the learned magistrate's finding of a use without consent, and with the assistance of subs(14)(a).

The case before the magistrate, however, reached only the end of the prosecution evidence and it would, I think, be inappropriate to send it back with a direction as to what decision is to be given.

Accordingly, my order will be as follows:

> The order nisi will be made absolute. The order of the Magistrates' Court at Moonee Ponds dismissing the information will be set aside. The information will be remitted for re-hearing by the Magistrates' Court – or if the same Stipendiary Magistrate should be available at that court, at his discretion, for further hearing. The respondent will pay the applicant's costs, including reserved costs, but fixed at $200. The respondent will have an indemnity certificate under the *Appeal Costs Fund Act*. Order absolute.

Solicitor for the appellant: John Downey, Crown Solicitor.
Solicitor for the respondent: George Madden, Public Solicitor.
