45/88

SUPREME COURT OF VICTORIA

DOSSER v CLOSE

O'Bryan J

2 June 1988

CRIMINAL LAW – THEFT – LABEL-SWITCHING IN STORE – LESSER PRICE LABEL SUBSTITUTED FOR GREATER PRICE LABEL – WHETHER APPROPRIATION: *CRIMES ACT* 1958, S74.

Where a person substitutes a price label showing a lesser price for goods for one showing a greater price, such person adversely interferes with or usurps the right of the owner and accordingly, appropriates the property within the provisions of s73(4) of the *Crimes Act* 1958.

***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; MC 5/1984, followed.**

O'BRYAN J: [1] This is the return of an order nisi granted by Acting Master Williams on 21st December 1987 to review the decision of the Magistrates' Court at Melbourne on 18th November 1987, when an information laid pursuant to s74 of the *Crimes Act* wherein the applicant was informant and the **[2]** respondent was defendant was dismissed following a "no case to answer" submission at the end of the applicant's case.

The grounds of the order nisi are:-

"A. The learned magistrate was in error in holding that on the evidence there had been no appropriation of the property by the respondent within the meaning of section 74 of the *Crimes Act* 1958.

B. If the learned magistrate was correct in holding that on the evidence the respondent had not appropriated the property in the relevant sense, then she was in error in not permitting the informant to amend the information so as to allege that the respondent had obtained the property by deception contrary to section 81 of the *Crimes Act* 1958.

C. The learned magistrate was in error in holding that there was no case for the respondent to answer and in dismissing the information."

Before the hearing commenced counsel for the respondent applied to refer the order to review for hearing and determination by the Full Court pursuant to s88(3) of the *Magistrates' Courts Act* 1971. The applicant opposed the order sought. The basis for referral to the Full Court lay in the fact that in 1984 the House of Lords considered the point of law which arises directly in the present case and determined the law contrary to the interests of the respondent. The decision *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 is concerned with the construction of s3(1) of the *Theft Act* 1968 (UK) and the meaning of "appropriation". In 1973 an amendment to the *Crimes Act* 1958 introduced into Victorian Law the *Theft Act*. Because a House of Lords decision in point should be followed in Victoria by a judge at first instance, the respondent desired referral of the order to review to a Full Court in which correctness of the decision of the House of Lords might be examined afresh **[3]** c.f. *R v Bugg* [1978] VicRp 25; (1978) VR 251; *Britten v Alpogut* [1987] VicRp 77; (1987) VR 929; (1986) 79 ALR 457; (1986) 23 A Crim R 254. The *Morris* decision has already been considered by the Full Court and followed: *R v Roffel* [1985] VicRp 51; (1985) VR 511. In my opinion, the application should be refused because the point raised in this proceeding has not produced conflicting decisions by judges at first instance. Further, I was informed that no cases of a like kind await hearing. In my opinion the discretion conferred by s88(3) should be reserved for cases in which conflicting decisions of single judges produce uncertainty in the law or when a number of cases in which the same legal point is raised are pending and it is desirable to have an authoritative decision by the highest Court in the State. The criteria required for referral to a Full Court are absent in the present case.

The information charged the respondent that "on the 10th day of August 1987 at Melbourne (he) did steal one set of Sidchrome A/F ring and open-end spanners of the value of $116 being property belonging to James McEwan and Co Pty Ltd" contrary to s74 *Crimes Act* 1958. The basic definition of theft contained in s72 of the Act reads:-

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

Section 73(4) provides:-

> "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."

[4] Section 72(1) of the Act is basically in the same terms as s1(1) of the *Theft Act* and s73(4) is in the same terms as s3(1) of the *Theft Act*. The evidence led before the Magistrates' Court shows that a security officer employed by James McEwan and Co Pty Ltd made observations of the respondent during the afternoon of 10th August 1987. The respondent was observed to handle several tool sets in display shelves on which price stickers had been placed bearing the word "McEwans" and the price of the article. The tool sets were available to be selected by a customer and taken from the shelves to a cashier for payment. The security officer said in evidence that he observed the respondent place a price label affixed to a set of 13 spanners with a price label showing a lesser price. Removal of the label and placement of a label showing a lesser price was carried out surreptitiously by the respondent. The respondent was then observed to carry the goods from the display shelf to a cashier at a check-out point where he paid the lesser price using a credit card. When the respondent was arrested he denied that he had changed the price label. Subsequently, under interrogation at a police station the respondent maintained that he did not change the label.

At the end of the case for the applicant, a submission of "no case to answer" was made on behalf of the respondent. The "no case to answer" submission was made on several bases. Firstly, it was submitted that the elements of the offence had not been proved to the requisite standard. Secondly, it was submitted that the charge of theft had not been made out as "appropriation" was not **[5]** complete. Thirdly, it was submitted that the appropriate charge was an offence against s82 of the *Crimes Act* namely, obtaining a financial advantage by deception. The submission was upheld and the information was dismissed.

It is reasonably clear from the affidavit of the respondent that the learned Magistrate dismissed the information on the ground that "the charge of theft did not cover the facts, assuming there had been a change in price tags by the respondent". The learned Magistrate also said "there was no basis to conclude that the English legislation was the same as that in Victoria". Most unfortunately neither the learned Magistrate nor the police prosecutor had available to them the authority of *R v Morris*. The learned Magistrate determined the case without reference to authority. The learned Magistrate indicated in her decision that she believed the proper charge was obtaining a financial advantage by deception. Unfortunately, the learned Magistrate's attention was not directed to a decision of Gobbo J in *Heddich v Dike* (1981) 3 ACR 139. In *Heddich's case* Gobbo J held that a total overlap exists between s72 and s81 of the *Crimes Act*, so that "every case of obtaining property by deception (except where the subject matter of the charge is land) is also a case of theft of that property".

Mrs Richards of counsel who appeared for the applicant submitted that the decision in *Morris* is on all fours with the present case and, accordingly, the learned Magistrate was obliged to find a *prima facie* case of "appropriation" of the goods by the respondent when he substituted a price label showing a lesser price on goods **[6]** for one showing a greater price and then removed the goods from the shelves. Mr Haag of counsel who appeared with Mr Vickery for the respondent submitted that the Magistrate was entitled to dismiss the information upon the basis that the applicant had not established two elements of theft, namely a dishonest appropriation of property and an intention to permanently deprive the owner of property. "The ingredients of theft are fourfold, namely, (1) a dishonest (2) appropriation of (3) property belonging to another (4) with the intention of permanently depriving the owner of it." (*Heddich* at 142).

In my opinion, each ingredient was capable of being proved in the evidence, as the evidence stood when the applicant's case closed and the learned Magistrate was entitled to be satisfied beyond reasonable doubt of all the elements of theft. The acts amounting to "appropriation" within s73(4) were, changing the labels and removal of the goods from the shelf. Lord Roskill in *Morris' case* said that the combination of these actions "evidences adverse interference with or usurpation of the right of the owner". His Lordship added: "those acts, therefore, amount to an appropriation and if they are accompanied by proof of the other three elements to which I have referred, the offence of theft is established".

The *actus reus*, or the conduct which constitutes an essential element of a completed crime, was established *prima facie* by the evidence of the store security officer who observed the conduct of the respondent. The *mens rea* is a separate matter altogether and required the learned Magistrate to draw an inference of dishonest intention from **[7]** the conduct described clearly. In my opinion a *prima facie* case involving all the elements of the offence of theft could be found in the evidence presented in the Magistrates' Court. Lord Roskill in *Morris' case*, in whose speech five Law Lords agreed said:-

> "There is a dishonest appropriation for the purposes of the *Theft* Act 1968 where by the substitution of a price label showing a lesser price on goods for one showing a greater price a defendant either by that act alone or by that act in conjunction with another act or other acts (whether done before or after the substitution of the labels) adversely interferes with or usurps the right of the owner to ensure that the goods concerned are sold and paid for at that greater price."

This statement of principle is directly in point in the present case and I am bound, I believe, to follow the decision. When a "no case to answer" submission is made the question for the court is one of law; "whether the defendant could lawfully be convicted on the evidence as it stands, – whether, that is to say, there is with respect to every element of the offence some evidence which, if accepted, could either prove the element directly or enable its existence to be inferred. That is a question to be carefully distinguished from the question of fact for ultimate decision, namely whether every element of the offence is established to the satisfaction of the tribunal of fact beyond a reasonable doubt". *Zanetti v Hill* [1962] HCA 62; (1962) 108 CLR 433 at 442; [1963] ALR 165; 36 ALJR 276.

In my opinion, the learned Magistrate was in error in holding, as she did, that if the evidence for the informant was accepted such conduct by the defendant did not amount to an "appropriation" of the spanners within **[8]** s73(4) of the Act. Accordingly, grounds A and C of the order nisi are made out and the order nisi will be made absolute. Order that the order nisi be made absolute, that the order in the Court below dismissing the information be quashed, that the information be returned to the Magistrates' Court at Melbourne to be reheard according to law. Respondent to pay the taxed costs of the informant.
