**48/84**

## SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

# *R v BARUDAY*

**Crockett, Murray and Southwell JJ**

**12-14 June, 27 July 1984 — [1984] VicRp 59; [1984] VR 685; (1984) 13 A Crim R 190**

**CRIMINAL LAW – FALSE ACCOUNTING AND THEFT – INSURANCE BROKER - WORKERS COMPENSATION PREMIUMS – CREDIT OF RETURN PREMIUMS TO BROKER – FAILURE BY BROKER TO CREDIT INSURED – WHETHER CREDIT A CHOSE IN ACTION – WHETHER "PROPERTY" "APPROPRIATION": *CRIMES ACT* 1958, SS71, 72, 73.**

B. was charged with several counts of false accounting and theft arising out of his alleged manipulation of Workers Compensation insurance policy premiums as an insurance broker for the City of Knox in relation to policies with Palmdale Insurance Ltd. In calculating the total premiums, B. used a certain discount which he provided for Palmdale Insurance Ltd, but used a lesser discount in calculating the premiums payable by the City of Knox. B. received the benefit of that difference, either by appropriating moneys which he represented to the City of Knox as being part of the total premiums or failing to give the City of Knox the corresponding credit of total return premiums. B. gained about $11,500 from these manipulations. On presentment for trial, B. was convicted on all counts and sentenced to a total of 2½ years' imprisonment with a minimum of 18 months. On appeal—

**HELD: Appeal against conviction and sentence dismissed.**
**(1) Moneys paid to or credited to B.'s account (other than by way of agreed commission) were paid as agent of the City of Knox.**

**(2) Creation of such credit involved the creation of a "thing in action" and was therefore capable of appropriation.**

**(3) B.'s failure to credit the return premiums to the City of Knox operated as a denial of the owner's title and accordingly, amounted to an appropriation.**
***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,**
***R v Lawrence* [1971] UKHL 2; [1972] AC 626; and**
***Heddich v Dike* [1981] 3 A Crim R 139; MC 19/1981, applied.**

**SOUTHWELL J:** (with whom Crockett and Murray JJ agreed) *[after setting out the facts, and certain grounds of appeal, continued]:* ... **[16]** Counts 3, 6 and 10 relate to alleged thefts of return premiums, the circumstances being that upon renewal of the policies, and following the receipt of the wages return in respect of the previous period of indemnity, the applicant (and possibly Palmdale) calculated that a return premium was payable. Palmdale accordingly credited the applicant's account. The applicant failed to pass on that credit to the City of Knox, but brought into being documents which disguised the fact that return premiums were payable and had been paid.

The Crown case was that while the applicant was entitled to have his account credited with the amount of the return premium, he was bound to account for the equivalent sum within a reasonable time. It was said that once he kept that for himself beyond a reasonable time there was an appropriation and the sending out of an account to the City of Knox giving no such credit serves as adequate proof not only that he had appropriated the property but that he intended to keep it permanently.

It was said that the applicant held the chose in action – that is, the debt due by Palmdale to the City of Knox – upon trust to pay the sum involved to the City of Knox or at least credit its account. It was said that the credit of the return premium constituted a "thing in action" which is included in the definition of "property" in s71 of the *Crimes Act*, the definition of which is -

> "Property' includes money and all other property real or personal including things in action and other intangible property."

Mr Weinberg who with Mr Hollis Bee appeared for the respondent, submitted that it was

clear from that definition and from the terms of s71(2) that the concept of stealing **[17]** something intangible from someone having merely an equitable interest is encompassed. Mr Weinberg then relied upon s73(9) as providing proof that the chose in action was property "belonging to another" within the meaning of s72. Section 73(9) reads:

> "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."

It was submitted that the chose in action was the right in the City of Knox to sue Palmdale for the amount of the return premium. That indebtedness, it was said, arose not only from the law of contract, but from the *Workers Compensation Regulations* 310 and 311 which so far as is relevant read:

> "310(1) Where the premium is based on gross earnings the premium paid in respect of each period of indemnity shall be adjusted in accordance with the gross earnings of all persons in each class included in the indemnity during such period ...
>
> 311(3) Any return of premium due to the employer after adjustment in accordance with Regulation 310 of these Regulations shall be refunded by the Commissioner or the approved insurer or allowed as a reduction of the employer's premium for the next ensuing period."

As to the latter submission Mr Sharp submitted that there was no evidence that the premiums were "adjusted in accordance with Regulation 310". In my opinion, there was uncontradicted evidence that the premiums were adjusted in accordance with Regulation 310. Furthermore, although this matter was not argued in the Court below or on this application, I would have thought that the evidence was all one way that the agreement between City of Knox and Palmdale included a **[18]** term that return premiums would be credited or paid to the City of Knox. The whole scheme of insurance, commencing as it did with a deposit premium to be re-calculated upon the wages return at the end of the indemnity period, necessarily involved an agreement either that the City of Knox would pay any extra premium, or that Palmdale would pay back any premium paid in excess of that found upon re-calculation to be due.

**[19]** Mr Sharp had earlier submitted that the discounts were given pursuant to the agreement between the City of Knox and the applicant, that the latter would provide insurance with a minimum discount of 30% and a maximum of 65%. No insurance company was specified and no rate of premium was prescribed. It was the applicant's obligation under its contract with the City of Knox to find an insurer and this he did, selecting Palmdale, the allowable discounts then being 10%, 15% and 30% (Claims Experience Discount).

Mr Sharp pointed out that Palmdale tended to call all refunds "return premiums" but it did not distinguish whether these were calculated on the wages return or were allowable discounts. Palmdale kept a running monthly account with the applicant who was constantly in debit. On three occasions (counts 3, 6 and 10) Palmdale credited that account with return premiums.

After referring to the definitions of property and theft in ss71 and 72 of the *Crimes Act* 1958, Mr Sharp submitted that if it be assumed that there was a debt due from Palmdale to the City of Knox in respect of that return premium and conceding for the purposes of the argument that it amounted to a chose in action, nevertheless when the credit was given by Palmdale to the broker, that chose in action has not been transferred or assigned (and as I understand him, it has therefore not been appropriated) but it has in fact disappeared. He referred to *R v Kohn* [1979] 69 Cr App R 395, a case in which a director of a company wrongfully drew cheques on the company account in three circumstances:

1. When the account was in credit.

**[20]** 2. When the account was in overdraft but within the agreed limit.

3. When the overdraft was beyond the limit.

The Court of Appeal held that the trial judge was correct in ruling that the theft of a chose in action might include theft of a debt owed by a bank to one of its customers, that is, the chose

in action amounted to "property" within the meaning of the *Theft Act* 1968, which for present purposes is in similar terms to the Victorian legislation; it was further held that theft had been committed in respect of the first two groups but not in respect of the third, because the customer had no personal right of property in respect of any amounts beyond the overdraft limit, there was never any relationship of debtor or creditor and accordingly no chose in action.

For my part I am unable to see how that decision assists the applicant in the present case. It is not authority for the proposition that when the applicant received a credit the chose of action created by the debt disappeared.

Mr Sharp went on to submit that the applicant was authorized to credit his account with Palmdale with return premiums. Mr Sharp's submissions were based upon the primary proposition that the broker was not in the circumstances an agent either for the City of Knox or Palmdale but he was a principal. It was said that when his account was credited the "property" became the applicant's property albeit that he might in turn become liable as a matter of contract to pay to the City of Knox some or all of the moneys so credited.

**[21]** Mr Sharp further submitted that the insurance company created no chose in action, it merely waived part of the debt that was owing to it. It was said that no property was appropriated when the return premium was credited and this could be tested by examining the position had the City of Knox sued Palmdale for the amount of the return premium. Mr Sharp submitted that it would be no answer for Palmdale to say: "Your broker's account has been credited".

I have earlier expressed the opinion that there is no evidence to show that any special relationship existed between the City of Knox and the applicant, and accordingly, the applicant was in law the agent of the City of Knox. On the whole of the evidence, the jury could have come to no conclusion but that moneys paid by the broker to Palmdale were paid as the agent of the City of Knox, and moneys paid to or credited to the account of the applicant (other than by way of agreed commission) were paid to the applicant as the agent of the City of Knox.

It follows that it would, indeed, have been a good defence had Palmdale been sued by the City of Knox for Palmdale to show that the applicant had been credited with the return premiums. In turn it must follow that the creation of the credit involved the creation of a "thing in action" within the meaning of s71 of the *Crimes Act*. It was therefore "property" which was capable of appropriation.

In my opinion, when the credit was given by Palmdale to the applicant, the applicant came into possession of property belonging to the City of Knox. His determination **[22]** to retain that property, evidenced by later sending an account to the City of Knox in which the existence of that credit is impliedly denied, amounted to an assumption by the applicant of the rights of the City of Knox and accordingly amounts to an appropriation within the meaning of s73(4) of the *Crimes Act*. Glanville Williams' *Textbook of Criminal Law* [1978] p 734 says:

> "... if he receives the property in good faith the theft is committed at the first subsequent dishonest and wrongful appropriation. An example ... would be denying the owner's title."

In my opinion, the sending of an account to the City of Knox, in which account no credit was given for the return premiums received by the applicant operated as a denial of the owner's title. There being no contention that the jury was not entitled to achieve satisfaction that the other elements of theft had been proved, it follows that the convictions on counts 3, 6 and 10 have not been shown to be wrong in law. Accordingly, grounds 5 and 6 have not been made out.

Ground 7 reads:

> "That with respect of all counts of theft the learned trial judge was in error in ruling that acts which had been authorized or consented to such as were shown by ..."

Mr Sharp submitted that with respect to the return premiums the City of Knox had impliedly authorized Palmdale to make payments to the broker. He submitted that the receipt of money from the City in respect to extra premiums (counts 2 and 5) involved authorization from the City to the applicant to pay it into the latter's account. It was submitted that since the City

was authorizing the applicant to pay that money into his account, the payment into it could not amount to **[23]** appropriation. It became his property and was therefore not the property of another of which there must be appropriation to amount to theft. He further submitted that the applicant was under no obligation to pay that money to Palmdale because the applicant was acting as a principal and no element of trust was involved in the receipt of that money from the City of Knox.

He submitted that one way of testing the matter was to ask if the broker went bankrupt, would the moneys in his account be held for the creditors of the broker and not for the client who paid? He submitted it was clear that the moneys would be held for the creditors of the broker. It was said that authority for the proposition that there can be no appropriation where there is authority to receive is to be found 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. Mr Sharp conceded that if this Court upheld that submission it would be necessary to overrule the decision of Gobbo J in *Heddich v Dike* [1981] 3 ACR 139. It will be necessary to examine those cases hereafter.

For the Crown, Mr Weinberg in dealing with counts 2 and 5 submitted that the applicant appropriated the cheques for extra premiums when he received them and paid them into his account. He submitted that *R v Morris* was not authority for the proposition that there can be no appropriation where possession is gained by consent. He further submitted that there was no inconsistency between *Heddich v Dike* and *R v Morris*. He submitted that in *R v Lawrence* [1971] UKHL 2; [1972] AC 626 there was an element of deception which vitiated the consent to the taking and that in the present case fraud **[24]** vitiates the consent to the taking. He submitted that Gobbo J so decided in *Heddich v Dike* and that the decision was correct. It was said that the defence submission involved that there may be deception but nevertheless a true consent and this was unsound in law. He went on to submit that if there was deception there was appropriation because there was no consent.

In *R v Lawrence* a Mr Occhi, and Italian who spoke little English, arrived at Victoria Station on his first visit to England. He approached the appellant taxi driver, and showed him a piece of paper on which an address was written: the appellant said that it was very far and very expensive, whereupon Mr Occhi took £1 out of his wallet and gave it to the appellant who then, the wallet being still open, took a further £6 out of it. The lawful fare for the journey was about 10/6d. The appellant was convicted of theft of the £6. The main contention of the appellant was that since Mr Occhi had consented to the taking of the £6 there could be no theft because there could be no appropriation where there was consent to the taking.

In his speech, Viscount Dilhorne (with whom the other members of the House agreed) said that the passage of the *Theft Act* 1968 :

> "has relieved the prosecution of the burden of establishing that the taking was without the owner's consent. That is no longer an ingredient of the offence."

After observing that a person is not to be regarded as acting dishonestly if he appropriates another's property believing that with full knowledge of the circumstances that other **[25]** person has in fact agreed to the appropriation, His Lordship said:

> "Belief or the absence of belief that the owner had with such knowledge consented to the appropriation is relevant to the issue of dishonesty, not to the question whether or not there has been an appropriation."

His Lordship went on summarily to dismiss the submission that the £6 was not property "belonging to another".

In *Heddich v Dike* the defendant was charged with stealing some offset printing plates which he obtained from an employee of their owner by falsely representing that he was doing so with the authority of the owner. It was submitted that since the plates were handed over by the employee, if any offence was committed it was no more than obtaining property by deception.

Gobbo J, correctly in my view, in the circumstances, considered that he ought to follow the decision of the House of Lords in *Lawrence's case*. His Honour went on to adopt the view of the Court of Appeal in *Lawrence's case* that there is such an overlap between the offences in ss72

and 81 of the *Crimes Act* 1958 and that every case of obtaining property by deception – save when the subject matter is land – contains the offence of theft.

In *R v Morris* two cases were before the House of Lords. In the first case the defendant removed a price label from a joint of pork in a supermarket and attached it to a second more expensive joint. His action was detected at the checkout point before he had paid for the joint. He was convicted of theft. In the second case the defendant took goods from the shelves of a supermarket and replaced the price **[26]** labels attached to them with labels showing lesser prices. At the checkout point he was asked for and paid the lesser prices. He was charged with theft and with obtaining property by deception. He was convicted of theft but the jury was not asked to return a verdict on the second count. In dismissing the appeals the House of Lords held that to establish an appropriation it was sufficient to prove that the defendant assumed any of the rights of ownership but not necessarily all of them, and the concept of appropriation involved adverse interference with or usurpation of some right of the owner. It was held that the defendants by removing the goods in question from the shelves and switching the labels had adversely interfered with or usurped the rights of the owners of the goods to ensure that they were sold and paid for at the proper prices, and that their acts had constituted an appropriation. It was further held that in the second case the count of obtaining property by deception was not an alternative to the count of theft and that strictly speaking there was no reason why a conviction should not have been recorded on both counts.

Mr Sharp sought to derive some comfort from the speech of Lord Roskill in *R v Morris*. And, as I noted his submission, sought to show that the House in some way distinguished its earlier decision in *R v Lawrence*. The headnotes of the report of *Morris* in the WLR and in [1983] 2 All ER 448 both refer to *R v Lawrence* as having been applied. I can discern nothing in the speech of Lord Roskill (with whom the other members of the House agreed) to suggest that any doubt was entertained as to the correctness **[27]** of the decision in *R v Lawrence*. At (WLR) p703 his Lordship said that –

> "when an honest customer takes goods from a shelf that customer is acting with the implied authority of the supermarket owner to do so."

Lord Roskill was there dealing with the question whether in the English equivalent to s73(4) of the *Crimes Act* the concept of appropriation involved an act expressly or impliedly authorized by the owner or an act by way of adverse interference with the owner's rights. Lord Roskill held that s73(4) involved the latter. In that case it was a combination of the removal of the goods from the shelf and the switching of the labels which amounted to an appropriation. It is to be implied from the judgment that any consent of the supermarket owner would have to be consent with knowledge of the facts – the deception in switching the labels would vitiate that consent.

In the present case the applicant obtained cheques from the City of Knox in respect to counts 2 and 5 by falsely representing that those sums were due and payable as additional premiums. The authority or consent of the City of Knox to the payment by the applicant of those cheques into his own account was an authority or consent obtained by fraud. Mr Sharp has submitted that a valid distinction is to be drawn between the case of a cheque obtained by deception and goods which were obtained from a supermarket by deception. For my part, I do not see the validity of that distinction. The words of Lord Roskill in *R v Morris* at p705 should be borne steadily in mind:

> **[28]** "These shoplifting cases by switching labels are essentially simple in their facts and their factual simplicity should not he allowed to be obscured by ingenious legal arguments upon the *Theft Act* which for some time have bedevilled this branch of the criminal law without noticeably contributing to the efficient administration of justice – rather the reverse. The law to be applied in simple cases ... should if possible be equally simple."

I do not suggest that the present case is "simple" in the sense there referred to; nevertheless, the cry for simplicity should not be confined only to simple cases. The preparation of a false account calculated to extract a cheque from the victim is doubtless not so simple as the switching of labels of goods in a supermarket, an act calculated to facilitate the removal of goods for a lower than correct price. Nevertheless, I cannot see that the factual difference necessitates the application of a different principle of law. In my opinion, when the applicant paid the cheques for extra premiums into his account be appropriated them. It is clear that the other elements of the

offence of theft were made out to the satisfaction of the jury, and accordingly, the applicant was rightly convicted on counts 2 and 5. Ground 7 has not been made out ...

Solicitors for the applicant: Henty, Jepson and Kelly. Solicitor for the Crown: D. Yeaman, Crown Solicitor.

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