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COURT OF APPEAL (ENGLAND)

R v MORRIS

Lord Lane CJ, O'Connor LJ and Talbot J

4 February, 8 March 1983

[1983] QB 587; [1983] 2 All ER 448; [1983] Crim LR 559; (1983) 77 Cr App R 164; [1983] 2 WLR 768

CRIMINAL LAW – THEFT – OBTAINING PROPERTY BY DECEPTION – SELF-SERVICE STORE – LABEL SWITCHING BY CUSTOMER – WHETHER APPROPRIATION BY ASSUMPTION OF THE RIGHTS OF THE OWNER: *THEFT ACT* 1968 (UK).

Section 3(1) of the *Theft Act* 1968 (UK) provides that —

"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."

Section 15(1) of the *Theft Act* 1968 (UK) provides that —

"A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall.... be liable to imprisonment..."

M. took articles from shelves in a self-service store. He then attached to those articles – in place of or on top of the true price labels – labels which he had removed from cheaper articles. At the check-out he was asked for and paid the lower prices; he was then arrested and charged with 2 counts of theft. Subsequently, he was convicted and appealed to the Court of Appeal.

HELD: Appeal dismissed.
(a) Any assumption by a person of the rights of an owner is sufficient to constitute an appropriation within s3(1) of the *Theft Act* 1968.
***R v Lawrence* [1971] UKHL 2; (1972) AC 626, applied.**

(b) The taking of an article from the shelf of a self-service store with a view of transporting it to the check-out is an appropriation, as it is an assumption of one of the rights of the owner.

(c) Label-switching either before or after the removal of the article from the shelf is evidence of a dishonest appropriation.

(d) Dishonest label-switching whereby the cashier at the check-out is deceived into charging too low a price for an article is an offence under s15(1) of the *Theft Act* 1968.

LORD LANE CJ: *[In reading the judgment of the Court, His Honour set out the facts, referred to the relevant provisions of the* Theft Act *1968, to the "two schools of thought" as to the meaning of the word "appropriation", and continued]:* ... **[774]** It is to be noted that any assumption by a person of the rights of an owner is sufficient. It should also not be overlooked that the second half of section 3(1) makes any assumption of a right to the article by keeping or dealing with it as owner also an appropriation. Thus one has first of all the ordinary meaning of "appropriates," then the meaning of "any assumption of the rights of an owner," then "any keeping of the articles as owner," and finally "any dealing with the article as owner."

We approach the task of determining the meaning of "appropriates" in a number of different ways. First of all there is the dictionary meaning – the *Shorter Oxford English Dictionary* defines it as "to take for one's own or to oneself." That seems to connote some sort of claim being staked to the article. It would not cover for example, picking up an article in a supermarket simply to examine it before deciding to put it in the basket. It seems to us however that it is apt to describe the actions of the customer who takes an article from the shelf determining to buy it.

Secondly, the object of the first five sections of the *Theft Act* 1968 was to get rid of the distinctions which existed under the *Larceny Act* 1916 between simple larceny, larceny as a bailee, larceny by a trick, embezzlement and fraudulent conversion."Appropriates" was the word chosen as the key to that operation. It was plainly intended to have a wider meaning than the word "take" under the Act of 1916. Consequently the observations of Winn LJ in *Martin v Puttick* (1968) 2 QB 82 where the defendant was charged under the Act of 1916, do not affect the present decision. He said, at p89:

> "The customer does in a physical sense take the article by picking it up and putting it into a basket or shopping bag, that is not such a taking as is contemplated by... the *Larceny Act* 1916..."

[775] Next it seems to us that in taking the article from the shelf the customer is indeed assuming one of the rights of the owner – the right to move the article from its location on the shelf to carry it to the check-out. Finally and this seems to us to be the weightiest argument, is the decision of the House of Lords in *R v Lawrence (Alan)* [1971] UKHL 2; (1972) AC 626. In that case a taxi driver at Victoria Station told an Italian student that the cost of the journey to his destination would not be covered by the one pound proffered. The student opened his wallet to the taxi driver and the taxi driver look from it a further five pounds in notes. The taxi driver then drove the student to his destination. The proper fare was some 10s 6d. The taxi driver was convicted of theft under section 1(1).

The House of lords upheld the conviction as had the Court of Appeal. Viscount Dilhorne, with whose speech the remaining members of the House agreed, based his decision upon the fact that all the necessary ingredients to establish the offence of theft were present, that is to say: (1) dishonesty (2) appropriation (3) property belonging to another and (4) intention permanently to deprive the other of that property. He stated tersely in terms at p633:

> "The first question posed in the certificate was: 'Whether section 1(1) of the *Theft Act* 1968 is to be construed as though it contained the words "without having the consent of the owner" or words to that effect. In my opinion the answer is clearly No."

That being the emphatic view of their Lordships, it would, we think, he quite wrong in effect to re-import into the offence the necessity of proving what amounts to absence of consent on the part of the owner by saying that the word "appropriates" necessarily means some action contrary to the authority or interests of the owner and that that is one of the requirements which the prosecution must prove.

Consequently in our view the taking of the article from the shelf with a view to transporting it to the check-out is an appropriation, as *R v McPherson* (1973) Crim LR 191 decides. We are conscious that this casts doubt upon other decisions referred to previously in this judgment and in particular in the two supermarket cases, *Eddy v Niman* (1981) 73 Cr App R 237 and *Kaur (Dip) v Chief Constable of Hampshire* [1981] 2 All ER 430; [1981] 1 WLR 578; [1981] Crim LR 259; (1981) 72 Cr App R 359; (1981) 145 JP 313.

If we may respectfully say so, we do not think that the placing of the article in the shopper's bag rather than the basket belonging to the store is a sufficient ground for distinguishing *Reg v McPherson* (1973) Crim LR 191. Such action on the part of a customer may have some relevance to the question of dishonesty but not, for the reasons set out earlier, to the question of appropriation.

As far as *Kaur (Dip) v Chief Constable of Hampshire* [1981] 2 All ER 430; [1981] 1 WLR 578; [1981] Crim LR 259; (1981) 72 Cr App R 359; (1981) 145 JP 313 is concerned, a decision for which I was at least partly responsible on the facts as found by the justices theft was plainly made out and our decision was wrong. There was an appropriation when the shoes were taken from the shelf, dishonesty was found as a fact by the justices, the property then belonged to another and the intent to deprive was obvious. In retrospect the real answer to *Kaur* was that what the appellant did was probably not rightly categorised as dishonest.

Turning back to the facts of the instant case, when the appellant removed the articles from the shelf that was an appropriation. If the labels were switched by him prior to the removal, that was overwhelming evidence that the appropriation was dishonest, even if it was not itself an appropriation (see below). If the labels were switched by him after the removal of the articles

from the shelf, that likewise would be evidence upon which the **[776]** jury could have come to the conclusion that the initial appropriation was dishonest.

What if, however unlikely, the jury were not satisfied that at the time of the removal from the shelf the defendant's intention was dishonest? Section 3(1) comes into operation. The defendant has come by the property without stealing it. Has there been a later assumption of a right to it by keeping or dealing with it as owner?

The authorities on this point are all one way. *Anderton v Wish* (Note) (1980) 72 Cr App R 23, a Divisional Court decision, held that appropriation took place when the customer switched price labels. That decision was followed in *Orford v Peers* (1980) 72 Cr App R 19, albeit with hesitation, and in the latest case *Burnside v Anderton* (unreported) a decision of the Divisional Court on November 5, 1982.

The hesitation in *Oxford v Peers* was due to the commentary upon *Anderton v Wish* (Note) (1980) Crim LR 320, in which the commentator had this to say:

> "It is respectfully submitted that the better view of the facts in the present case was that taken by the justices, namely that the act of labelling the brush was a preparatory step towards the offence of obtaining the brush by false pretences but did not amount to theft. The Court relies on the wide definition of appropriation in section 3(1) of the *Theft Act* 1968. This states that 'any assumption by a person of the rights of an owner amounts to an appropriation,' but it does not state that 'an assumption by a person of any of the rights of an owner amounts to an appropriation,' and there is a very important difference. Certainly the defendant was assuming a right of the owner in re-pricing the brush. She was not assuming all of the owner's rights."

Having heard argument on the matter from both counsel, we have come to the conclusion that it is not necessary for the prosecution to prove that the defendant assumed all the rights of an owner. It is sufficient if he "deals with" the article as owner. Putting a label upon an article indicating the price at which the owner will be prepared to sell is plainly such a dealing. Consequently, assuming in favour of the appellant that no dishonesty is proved at the moment of taking the article from the shelf, the later dealing with it as owner was an assumption of a right to it and that in its turn was an appropriation.

On the facts of this case the recorder had of course no need to go through the analysis of events as we have felt obliged to do. This is what he said:

> "It is said that he appropriated each of these articles, and the basis of that allegation is that he took it off the shelf, or the peg, or wherever it was on display and changed the label on it. That is the conclusion that the Crown invite you to draw from the evidence. It is for you to say whether you draw it. If he did change the label to a label of much lower value, as the Crown's evidence suggests, it would be open to you to find that he had appropriated goods on that basis. That would amount to an appropriation for the purposes of the law – an appropriation of somebody else's property; an act inconsistent with the owner's rights."

That direction was in the circumstances of the case correct. **[777]** Mr Denison in his final submission to the Court urged us to tackle the whole problem anew, and to restore what he argued is a proper balance between section 1 and section 15 of the Act. Until the customer reaches the check-out point, he argues, he is acting as agent of the shopkeeper. He is doing what in a conventional shop the shopkeeper would do for himself, namely, taking the selected article from the shelf and putting it on the counter to await payment by the customer. Therefore there can be no assumption of the rights of an owner until the point where the sale takes place.

On this argument nothing done before the check-out point is reached can be theft. If that approach is adopted there are, it is said, two possibilities. Either the customer walks out without paying, in which case, providing that dishonesty and intent permanently to deprive are proved, that is theft. Alternatively, if the customer has switched price labels or carried out some similar deceit whereby he is charged too low a price, that is the offence under section 15 of obtaining by deception.

Whilst appreciating the simplicity of this approach, we think, for the reasons already set out, that the wording of the Act, coupled with the decision in *R v Lawrence* [1971] UKHL 2; (1972) AC 626, does not allow us to adopt this solution.

As we said earlier, this is a problem within a very narrow compass. There will be, one hopes, very few occasions when the suspected thief in the self-service store will be arrested before he passes the check-out point. The idea that the mere failure to use the basket or trolley provided by the store without more is evidence of dishonesty is plainly wrong. Consequently it will be seldom that in the absence of label-switching there will be evidence of dishonesty before the check-out point is passed.

Finally, we have of necessity dealt with this case on the basis of theft or no theft. It should not be overlooked that a person who is proved to have dishonestly switched price labels and as a result has succeeded in deceiving the cashier at the check-out into charging too low a price for the article of which he intends to deprive the owner permanently is also guilty of an offence under s15(1) of the Act. S15(1) and s1(1) are not mutually exclusive: see *R v Lawrence* [1971] UKHL 2; (1972) AC 626, 633 per Viscount Dilhorne. This appeal against conviction is dismissed.

NOTE: On 24 March 1983, leave to appeal was refused: however, on 6 May 1983 the Appeal Committee of the House of Lords (Lord Diplock, Lord Roskill and Lord Bridge of Harwich) allowed a petition by Morris for leave to appeal to the House of Lords: see (1983) 1 WLR 625. Ed.
