19/86

SUPREME COURT OF VICTORIA — FULL COURT

SHARP v McCORMICK

Murray, Brooking and Nathan JJ

7 April, 13 May 1986 — [1986] VicRp 83; [1986] VR 869

CRIMINAL LAW – THEFT – PROPERTY TAKEN BY EMPLOYEE – INTENTION TO RETAIN PROPERTY IF SUITABLE FOR EMPLOYEE'S PURPOSES – IF OTHERWISE, PROPERTY TO BE RETURNED TO EMPLOYER – WHETHER THEFT – WHETHER INTENTION OF PERMANENTLY DEPRIVING – WHETHER EMPLOYEE TREATING PROPERTY "AS HIS OWN TO DISPOSE OF REGARDLESS OF THE OTHER'S RIGHTS: *CRIMES ACT* 1958, SS72, 73(12).

McC. was intercepted driving his motor car on the back seat of which was found a pair of overalls wrapped around a motor car coil. McC. admitted that the coil belonged to his employer; he had taken it without permission; he was in the process of taking it home to see whether it would fit his car; if it did, he intended to keep it: otherwise, he intended to return it to his employer. At the subsequent hearing on a charge of theft of the coil, the Magistrate agreed with a 'no case' submission that the prosecution had failed to prove that McC. intended permanently to deprive his employer of the coil and dismissed the charge. On order nisi to review—

HELD: Order absolute. Remitted for further hearing.
Per curiam: (1) The evidence established a dishonest appropriation of the coil; the only question concerned the defendant's intent at the time of the appropriation of the property.

(2) Even if the defendant lacked the intention of permanently depriving his employer of the coil, he was to be taken as having it by the operation of s73(12) of the *Crimes Act* 1958 which provides that an intention to treat property as one's own to dispose of regardless of the owner's rights is to be regarded as an intention of permanently depriving the owner of the property.
***R v Easom* (1971) 2 QB 315; (1971) 3 WLR 82; (1971) 2 All ER 945; 55 Cr App R 410, distinguished.**

(3) At the time the defendant appropriated the coil, he was clearly treating it as his own to dispose of as he saw fit and he was paying no regard to the rights of the true owner. Accordingly, the defendant had a case to answer.

MURRAY J: [1] This is the return of an order nisi to review a decision of the Stipendiary Magistrate sitting at Port Melbourne on 29th November 1984. By an order made 25th July 1985 Starke J referred the matter to the Full Court. The respondent was, by information laid on 24th November 1984, charged with the theft of a Nippondenso coil valued **[2]** at $30 the property of A.M.I. Toyota Ltd. At the conclusion of the case for the prosecution the Magistrate dismissed the information.

> The applicant obtained an order nisi to review this decision upon three grounds, namely:
> "(a) On the evidence before him the learned stipendiary magistrate should not have found that there was no case for the respondent to answer and should not have dismissed the charge against the respondent.
>
> (b) The learned stipendiary magistrate was wrong in law in the interpretation which he placed on section 72 of the *Crimes Act* 1958.
>
> (c) The learned stipendiary magistrate was wrong in law in the interpretation which he placed on section 73(12) of the *Crimes Act* 1958."

The essential facts of the case may be summarized very briefly. The respondent was employed by A.M.I. Toyota Ltd. On the afternoon of Saturday, 24th November 1984 a motor car driven by the respondent was intercepted by a police divisional van containing Senior Constable Harms and the informant in Ingles Street, Port Melbourne. On the back seat of the respondent's car was a carry bag which, on inspection, proved to contain a pair of overalls wrapped around a motor car coil. Both at the scene and later at the Port Melbourne Police Station the respondent

admitted that the coil was the property of his employer and that he had taken it without his employer's permission. A record of interview taken at the police station contained the following passage:

> "Q. 10 What were you going to do with this coil?
> A. My one on my car doesn't work so I was going to see if it fits and if it didn't I was going to put it back.
>
> Q. 11 Did you have permission to take this coil? A. No.
>
> **[3]** Q. 12 Did you believe that you had a right to take it?
> A. No.
>
> Q. 13 Did you pay for the coil? A. No.
>
> Q. 14 Did you know that it was wrong to take the coil?
> A. Yes.
>
> Q. 16 What is your reason for stealing the coil?
> A. No reason at all. Just that I needed one and if it fitted I'd use one. If it didn't fit I'd take it back."

Evidence was called to the effect that the respondent made similar admissions at an interview conducted at his place of employment on the following Monday and other evidence was called proving the ownership and value of the coil. When the case for the prosecution was closed the solicitor appearing for the respondent submitted that the prosecution had failed to prove that the respondent intended permanently to deprive his employer of the coil and that the information should be dismissed. He referred to *R v Easom* (1971) 2 QB 315; ; (1971) 3 WLR 82; (1971) 2 All ER 945; 55 Cr App R 410 and submitted that only a conditional intention had been proved. Sergeant Kelly, who conducted the prosecution, referred the Magistrate to the provisions of s73(12) *Crimes Act* 1958 but after hearing the submissions the Magistrate found that the decision in *R v Easom* (*supra*) governed the case and dismissed the information.

Section 72(1) *Crimes Act* 1958 provides:

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

Section 73(12) provides:

> "A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be **[4]** 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; and a borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal."

Before considering the application of the above provisions, which also appear in the English *Theft Act* 1968, it is desirable to consider the decision of the Court of Appeal in *Easom* (*supra*). In that case a female Sergeant of Police, sitting in the aisle seat in a picture theatre, placed her handbag on the floor beside her. The appellant, sitting behind her, picked up the handbag and examined its contents which were a purse (apparently empty), a notebook, a quantity of cosmetics and a pen. Not finding any of these items to be of value the appellant replaced the handbag with its contents intact on the floor beside the police sergeant. He was later charged with stealing "one handbag, one purse, one notebook, a quantity of tissues, a quantity of cosmetics and one pen".

In giving the judgment of the Court Edmund Davies LJ held that the evidence only disclosed what his Lordship referred to as a conditional appropriation and that this was not enough to sustain a charge of theft. At p319 his Lordship said:

> "In the respectful view of this court, the jury were misdirected. In every case of theft the appropriation must be accompanied by the intention of permanently depriving the owner of his property. What may be loosely described as a 'conditional' appropriation will not do. If the appropriator has it in mind merely to deprive the owner of such of his property as, on examination, proves worth taking and then, finding that the booty is valueless to the appropriator, leaves it ready to hand to be repossessed by the owner, the appropriator has not stolen. ... In the present case the jury were never invited to

> consider the possibility that such was the appellant's state **[5]** of mind or the legal consequences flowing therefrom. Yet the facts are strongly indicative that this was exactly how his mind was working, for he left the handbag and its contents entirely intact and to hand, once he had carried out his exploration. For this reason we hold that conviction of the full offence of theft cannot stand."

In the later part of his judgment his Lordship considered the question of whether the appellant could have been convicted of attempted theft. He pointed out, however, that no attempt had been made to amend the charge and that the case had been conducted solely upon the basis that the appellant was guilty of theft. From some of his Lordship's remarks it is possible to infer that he was of the opinion that if the appellant had been charged with the attempted theft of unspecified articles in the handbag he may well, upon proper directions to the jury, have been convicted.

The decision of *Easom* has by no means escaped discussion by academic writers. See, for example, *Three Rogues Charters* by Glanville Williams (1980) Crim LR p263; *Conditional Intention to Steal* by Laurence Koffman (1980) Crim LR 463 and *Temporary Appropriation Should Be Theft* by Glanville Williams (1981) Crim LR 129. In my opinion, however, it is not necessary for this Court to pass upon the question of whether it agrees with the decision because the decision is plainly distinguishable in a critical respect. In *Easom's case* the appellant was charged with the theft of the handbag and various specified articles. In relation to the handbag there appears to have been no evidence that the appellant at any time formed an intention to deprive the owner permanently of the handbag because the facts indicate that he took the handbag merely for the purpose of examining **[6]** its contents. Nor when he opened the handbag and inspected its contents did the evidence establish even a conditional intention of stealing them because by his actions he indicated that he had no such intention. It was these facts which, in my opinion, led Edmund Davies LJ to discuss the question of whether, if the appellant had been charged with an attempt to steal unspecified articles from the handbag such a charge may have been sustainable. In the present case, however, the appellant took the coil and was in the process of taking it home to see whether it fitted his car when he was apprehended. The question, therefore, in the present case is entirely different from the question which fell to be decided in *Easom*.

In argument before the Court counsel for the respondent conceded, as he no doubt felt obliged to do, that the evidence established a dishonest appropriation of the coil by the respondent and that the only question which arose was as to his intent. It is trite law that the intention which falls to be considered is the intention of the accused at the time of the appropriation of property. The question to be decided therefore is whether the evidence established a *prima facie* case of theft either under s72(1) alone or under s72(1) when read with s73(12) *Crimes Act*. Professor Glanville Williams in *Textbook of Criminal Law* p647 *et seq*. scathingly criticises the provisions of s6(1) English *Theft Act* 1968 which is the equivalent of s73(12) *Crimes Act* and comes to the conclusion that it is virtually of no practical importance.

With great respect to the professor I confess that I do not see all the **[7]** difficulties which he thinks are so apparent. For example, I do not quite understand why the second limb of sub-s(12) should have been placed before the first limb or for that matter why the two limbs should have been joined by "but" rather than by "and". I do, however, see considerable difficulty in the application and construction of the second limb. Professor Williams points out that in considering the facts in *Easom* (*supra*) the test whether *Easom* intended to keep the articles unless he later decided to give them back might be expressed in a different way, namely, that he intended to give them back unless he later decided to keep them and that differently expressed tests may lead to different legal answers.

It appears to me, however, that if the facts in the present case establish that the defendant intended to keep the coil unless he later decided to return it then his intention at the time of the appropriation is sufficient to establish theft under s72(1). If the question is posed the other way, namely, that the defendant intended to return the coil unless he later decided to keep it, then it appears to me that the appropriation would fall within the first limb of sub-s(12). His reservation of the probability or possibility of keeping it would amount to an intention to treat the coil as his own to dispose of regardless of the owner's rights. It must be remembered that the operation of sub-s(12) depends upon the absence of an actual intent permanently to deprive the owner of the property in question at the time of the appropriation. It follows that what must be examined is the

intention of the respondent at the moment he appropriated the **[8]** coil. The evidence establishes that his intention at that time was to take the coil to see whether it fitted his motor car in which case to retain it and otherwise to return it to his employer. To say that his intention to return it to his employer if it did not fit his motor car was an intention to have regard to the rights of his employer is in my opinion little short of an abuse of language. When the respondent took the coil he was quite clearly treating the coil as his own to dispose of as he saw fit and he was paying no regard to the rights of the true owner. His stated intention of returning it if it did not fit his car was simply a matter of choice on his part which he may or may not have carried out when the time came. The rights of his employer in regard to the property were completely ignored at the time of the appropriation. Despite the criticism of the use of the word "dispose" (see 1977 Crim LR 653) I do not understand why that word would not be appropriate to a disposition of the coil by the respondent either by way of using it in his car or returning it to the factory.

It follows that in my opinion the Magistrate was in error in upholding the submission made to him at the close of the case for the prosecution that there was no case for the respondent to answer. Counsel for the respondent requested the Court to remit the matter to the Magistrate for further hearing if the Court were minded to make the order nisi absolute. Counsel indicated that there may be other defences which his client desired to raise. Accordingly, in my opinion the order nisi **[9]** should be made absolute and the matter remitted to the Magistrate for further hearing in accordance with the law as stated in the judgment of the Court.

BROOKING J: [1] In the end, Mr Cummins chose to argue only one question in this case, that of the intention necessary for theft. The Stipendiary Magistrate made certain findings of fact for the purposes of the no case submission. Whether he was right in proceeding in this way is raised by the order nisi, but Mr Cummins was content to put this to one side and have the point in the law of theft determined on the footing that the facts were that the respondent removed the coil from his place of employment with the intention of trying it out on his car to see if it fitted, intending to keep it if it fitted and to return it to his employer if it did not. This is the most favourable finding from the respondent's point of view and the case should be considered accordingly.

So considered, it is a clear case of theft, since if it does not fall within s72(1) of the *Crimes Act* 1958 as unaffected by s73(12) it falls within s73(12). Why should we decide whether on the facts stated the respondent had in the ordinary sense the intention of permanently depriving his employer of the coil? For if he lacked that intention in the ordinary sense he was to be taken as having it by force of **[2]** s73(12). What did he do? He dishonestly appropriated the coil – this is indisputable and indeed conceded – saying to himself, "If it fits, I will keep it; otherwise I will give it back". That is as clear a case as one could imagine of intention to treat the thing as his own to dispose of regardless of the owner's rights. How does it differ in principle from an intention to keep the car part if it fits, and otherwise to throw it away, or destroy it, or give it to a friend, or endeavour to sell it; or a bare intention to keep the part if it fits, with no decision as to its fate if it does not? In all these cases the person appropriating intends to behave as if he were the owner.

The fact that in the case now under consideration the intention is to return the coil to the employer if it does not fit does not mean that the taker is having regard to the employer's rights. If the coil is in fact returned to its owner, this will be, not because the taker recognises that the rights of the owner put him under a duty to return it, but because the taker has decided that if it suits him to do so, in other words if the coil is of the wrong kind for his car, he will take it back. What brings him within sub-s(12) is his intention to keep the coil if it fits his car. This is an intention to treat the thing as his own to dispose of regardless of the other's rights. What (if anything) he plans to do with the coil if it does not fit is neither here nor there. He has said to himself, "I will keep it if it fits my car", and such a state of mind has no regard to the owner's rights. The necessary intention would similarly have been present if his state of mind had been, "I will keep this coil if it rains tomorrow".

[3] Sub-section (12) speaks of the intention to treat the thing as his own to dispose of regardless of the other's rights, but this does not require an intention to make the property over to someone else. An employee takes a coil home from the factory; he intends to keep the coil if it fits his car and otherwise to do something else with it. As to that something else his intention may so far be unformed, or he may on the other hand have already decided what he will do with the coil if it does not fit – throw it away, or destroy it, or sell it, or give it away, or return it. The

intention, if any, that he has in this regard makes no difference. He intends to treat the coil as his own to dispose of regardless of the owner's rights, in that his intention is to keep the coil if it is useful to him and otherwise to dispose of it in some other way (which he may or may not have determined upon). Nothing in the authorities or learned writings to which we were referred leads me to doubt that on the facts found the respondent would be guilty of theft.

NATHAN J: [1] The presiding Judge has recited the facts, I shall not re-capitulate them. McCormick's statement in response to the question "What are you going to do with this coil?" – viz " .. I was going to see if it fits and if it didn't I was going to put it back" admits, in my view, an offence under s73(12) *Crimes Act* 1958. The dishonest appropriation of the coil was conceded by the defendant's counsel (following *R v Bonollo* [1981] VicRp 63; [1981] VR 633; (1980) 2 A Crim R 431 it could not be otherwise) and the intention to treat the thing as his own is there manifest. At the time of the taking, it was for the purpose of fitting it to his car. It was not for a temporary purpose. Subsequently that disposition of the chattel might be replaced by another of acting upon a possibility of returning it. The subjunctive tense employed by Sharp does not exculpate him. A question about a future event such as, "What are you going to do with it?" almost inevitably invites a reply in the subjunctive, viz "I will try to take it home in my car. I will see if it fits. Maybe I will bring it back". If the question had been asked at the actual time McCormick was appropriating the coil, "What are you doing?"; that form of question in the present tense would probably have **[2]** elicited a reply in the present tense. "I am taking the coil to fit it to my car and if not return it." Thus the stated intention may vary at the time the question is asked. The Court, however, must have regard to the stated intention and the extrinsic facts at the time of taking, and not only the options the person says he might put into effect in the event of subsequent events occurring. In my opinion, *R v Easom* (1971) 2 QB 315 (1971) 3 WLR 82; (1971) 2 All ER 945; 55 Cr App R 410 is not relevant.

The fact situation there was that the defendant was on a scouting mission to see whether there might be something in the handbag worth stealing; if it was he would then steal it. The "impossibility" cases where the desired object of theft is not available are also irrelevant. *DPP v Nock* (1978) AC 979; (1978) 67 Cr App R 116, *Attorney-Generals References Nos. 1 & 2* (1980) QB 180. The proper characterisation of McCormick's intention at the time of appropriation was that he was of resolute mind to deprive the owner of its coil either permanently or by then treating it as his own with an option of returning it. The order nisi should be made absolute and the matter returned to the Magistrate for rehearing.

Solicitor for the applicant: RJ Lambert, Crown Solicitor.
Solicitors for the respondent: Holding Redlich and Co.
