30/03; [2003] VSC 457

SUPREME COURT OF VICTORIA

DPP v OLCER

Nathan J

29 October, 27 November 2003 — (2003) 143 A Crim R 337

CRIMINAL LAW – THEFT (SHOPLIFTING) – WHILST IN STORE DEFENDANT REMOVED PRODUCT FROM BLISTER PACKS AND HID DRILL BITS IN HIS CLOTHING – WHEN LATER INTERVIEWED, DEFENDANT SAID HE HAD NO MEMORY OF THE EVENTS BUT REPLIED TO QUESTIONS IN A COGNITIVE MANNER, RESPONSIVELY AND UNHESITATINGLY – STATEMENT THAT DEFENDANT HAD TAKEN MEDICATION PRIOR TO INTERCEPTION – EVIDENCE GIVEN BY PHYSICIAN OF EFFECT OF SUCH MEDICATION INCLUDING DISSOCIATIVE BEHAVIOUR – CHARGES DISMISSED ON GROUND OF NON-INSANE AUTOMATISM – WHETHER MAGISTRATE IN ERROR.

O. entered a store and was seen to remove remove two cartridges of glue from their blister packs and put them in his pocket. He then went to another aisle where he took six drill bits from a shelf and put them in the sleeve of his jacket. He then left the store without paying for the goods. O. was later charged with theft of the items. He said he could not remember the alleged events. At the hearing, evidence was given on O's behalf by a physician who detailed the effects certain medication might have on a person. It was contended by O's counsel that at the time of the alleged shoplifting O. was in a dissociative state induced by the medication and as such his mind did not follow his body and he was in a state of non-insane automatism. The magistrate upheld the no case submission and dismissed the charges. Upon appeal—

HELD: Appeal allowed. Dismissal set aside. Remitted to the Magistrates' Court for hearing before another magistrate.

1. In the absence of evidence to the contrary it must be presumed that an act done by a person who is apparently conscious is in fact a willed or conscious act performed voluntarily.

***R v Falconer* [1990] HCA 49; (1990) 171 CLR 30; (1990) 96 ALR 545; 50 A Crim R 244; 65 ALJR 20, applied.**

2. In a case where non-insane automatism is raised as a contention, it must be supported by credible evidence which raises a reasonable possibility that the alleged criminal act of the accused was performed automatistically. If the automatistic act was induced by a medical or pharmacological condition then the evidence supporting that proposition must come from an expert in the relevant field.

3. The contention of non-insane automatism did not amount to a reasonable possibility that the act of the accused was dissociative or non-insane automatistic. There was no medical evidence of any persuasiveness, expert or otherwise as would support such a contention. There was no evidence whether sufficient or reasonably possible to warrant consideration of the contention. The contention was ethereally based and without substance and the magistrate was in error in upholding the contention and dismissing the charges. [cf *DPP v Canty* MC53/1994]

NATHAN J:

1. Ekrem Olcer is a Leading Senior Constable of police. Christine Grant is the police informant who alleged that Olcer committed thefts contrary to the s74 of the *Crimes Act* 1958 ("the shoplifting"). The shoplifting is alleged to have occurred at a Bunnings store at Broadmeadows on 27 June 2002. On 27 May 2003, the charges were dismissed by the presiding magistrate at Broadmeadows, apparently on the ground that Olcer was not guilty by reason of non-insane automatism. (But more of this later.) The Director of Public Prosecutions has appealed from the decision dismissing the shoplifting charges.

2. The questions of law raised in this appeal are:

(1) Whether the magistrate erred in concluding there was sufficient evidence to raise the issue of automatism; and

(2) whether the magistrate had a discretion to dismiss the charges upon the issue of non-insane automatism being raised in the given circumstances.

3. There is some confusion as to what the magistrate actually did. Her decision, and the transcript, reveals she dismissed the case as an exercise of her discretion grounded upon the authority of *Benney v Dowling*[1], this has given rise to the second ground of appeal. However, the court record as certified by the Registrar, states that the case was dismissed pursuant to a no-case submission by the defendant. In the end result, the confusion is not pertinent. Had it been so, I would have been obliged to follow the court record rather than the magistrate's comments. It appears Registrars in the Magistrates' Court only certify the record as correct after confirmation and approval by the presiding magistrate.

4. The magistrate did, however, state this:

> "Having considered all the evidence before the court and taking the prosecution case at its highest I am not satisfied that the onus falling upon the prosecution has been discharged. I have been referred to the case of *Benney v Dowling*. In line with that authority I exercise my discretion to discharge the defendant charges dismissed."

5. The same issue arises whether there was a no-case submission, a proposition disavowed by Olcer's counsel, or, the exercise of a discretion. That is, whether there was sufficient evidence raised, so as to require the Crown to displace the contention sometimes referred to as a defence, of non-insane automatism.

The Contention of Non-Insane Automatism

6. The contention arose in the following way. Olcer was on sick leave at the time of the alleged shoplifting, awaiting a surgical procedure to repair a hernia. On the day of the alleged offences he told the investigating officers he had taken three Mogadon tablets at 2.30 am. (These are a prescribed sleeping draft, 5mg tablets usually consumed one or two at a time.) At 10.00 am he took Panadeine Forte, (a low potency, non-prescribed analgesic). After visiting his GP, about 1.00 pm on the same day he drove to the Bunnings store at Broadmeadows, a distance of approximately five to seven kilometres. He was observed by the store detective (Natta) entering the store. It was frankly put by the defence counsel at the initial hearing, that Natta had previous dealings of a shoplifting nature with Olcer at another store some weeks previously, which accounted for Natta devoting attention to him. Attempting to conceal his own identity, Natta then followed Olcer. He said he saw him take two packets of araldite glue from a shelf. The packets were of the blister variety, 22mm x 12mm. As Olcer walked down the aisle he was seen to take the cartridges of glue from the blister packs, put them in his pocket and then place the empty blister packs on a display case some distance from the shelves.

7. Natta said Olcer continued his perambulations around the store, and he then saw him in another aisle take half a dozen drill bits from a shelf and put them in the sleeve of his jacket. The drill bits are in packets of 19mm by 4mm. Olcer continued his perambulation and then left the store. After exiting, Natta apprehended him and then called the police.

8. Olcer's conversations with the Natta were lucid, coherent, and he denied a suggestion that the matter was only a little thing by producing his police identity card to the store detective. He then purported to have a lack of memory of the events in the store.

9. Of the events following his apprehension, the magistrate said:

> "Some eight police officers gave evidence of their observations of the defendant during the arrest, during the three interviews conducted with the defendant and at various stages during his apprehension, including various welfare checks undertaken upon him. Whilst concern was expressed as to his welfare and his medical condition acknowledged, his answers to all questions asked of him were said to be clear and given without hesitation."

10. As the magistrate accepted this evidence, it must be, she concluded Olcer was capable of lucid, cognitive responses to questions, as well as being aware of his predicament.

11. Maurice Simon Odell, a police forensic physician, was called on Olcer's behalf. He has the qualifying medical degrees and is a Fellow of the Royal Australian College of General Practitioners. At no time did he either consult or examine the defendant. He prepared a report which detailed a history given to a police officer. That report stated that Olcer was taking medication and had

taken three Mogadon tablets at 2.30 on that morning and a quantity of Panadeine Forte at 10.00 am. Mr Olcer said that this medication normally made him feel euphoric.

12. At his interview which commenced at 4.23 pm on the same day, Mr Olcer claimed not to be able to remember the alleged events that had occurred about three and a half hours previously.

13. Of the Mogadon, Dr Odell reported as follows:

> "Drugs of this type are well known to cause amnesia of events occurring whilst under its influence. The occurrence of amnesia, however, does not imply that there was a significant drug effect with respect to consciousness, comprehension or thinking at the time. It is possible to behave in a completely normal and rational fashion while taking these drugs and still suffer amnesia for events at some later time."

14. In respect of the Panadeine Forte, Dr Odell did say:

> "It's a bit like the other drug, they're both drugs that can affect a person's memory of what they are doing and in that respect it's always hard to know whether a person knew what they were doing at the time because if you ask them questions about it afterwards it can impair their recollection. It can certainly make some people quite confused."

15. Dr Odell did not contend he was a pharmacist or had any special knowledge as to the pharmacological effects of Mogadon and/or Panadeine whether consumed singly or in conjunction.

16. The magistrate in her findings as to the effect of the drugs found:

> "A full range of effects could include dissociative behaviours. I note that the psychiatric report suggested to be obtained by Dr Odell was not obtained."

17. She had heard a submission by defence counsel that Olcer was in a dissociative state at the time of the alleged shoplifting, induced by the Mogadon, Panadeine Forte and his underlying anxiety due to the approaching surgery, and as such his mind did not follow his body and he was in a state of non-insane automatism.

18. The magistrate then went on to dismiss the charges as already rehearsed.

19. The notion that a person's actions may not follow their mind, thus a criminal act committed whilst in such condition lacks the element of voluntariness, required to convict is no longer new or startling to the law. For a short history on the matter see *R v Carter*[2] and the articles referred to therein. However, I am bound by *R v Falconer,*[3] an often referred to High Court authority, a decision which discussed and defined automatism although it was decided upon a point not relevant to this case. It is clear authority for the proposition that in the absence of evidence to the contrary it must be presumed that an act done by a person who is apparently conscious is in fact, a willed or conscious act performed voluntarily. Mason CJ, Brennan and McHugh JJ, in their joint judgment[4] said there must be "sufficient evidence from which it may be inferred that the act was involuntary and that the evidence of the person themselves will rarely be sufficient unless it is supported by medical evidence which points to the cause of mental incapacity". The judges also referred to expert medical opinion which would be required before the issue of sane automatism could realistically be said to have arisen. They said, "Moreover those conditions which will admit of involuntariness that is not the product of a disease or natural mental infirmity will be quite confined.[5] A few suggested instances would seem to include sleep walking in some instances, some cases of epilepsy, concussion, hypoglycaemia and dissociative states." Deane and Dawson JJ at their joint judgment said, "It follows that in a case where an issue of sane automatism is raised by positive evidence, including expert medical evidence, an accused will be entitled to an acquittal if the prosecution fails to disprove sane automatism beyond reasonable doubt. Justice Toohey whilst dealing with non-insane automatism said this:

> "Evidence admissible to raise the issue of non-insane automatism may consist of evidence from those who observed the accused's conduct at the time. The defence depends on all the circumstances in particular the credibility which attaches to the accused's description and the strength of the psychiatric evidence."

20. Gaudron J[6] contributed this:

> "The evidentiary presumption of voluntariness can only be displaced by credible evidence assigning a cause sufficient to explain what, if it happened at all, must be viewed as an extraordinary event. In practical terms a claim of automatism will almost certainly be frivolous unless supported by medical evidence that identifies a mental state in which acts can occur independently of the will, assigns a causative explanation for that state and postulates that the accused did or may have experienced that state. In practical terms, because what is postulated is of its nature, extraordinary that evidence must be very persuasive even to raise involuntariness as a reasonable hypothesis such that a jury could find that the prosecution had failed to prove beyond reasonable doubt that the will of the accused accompanied the act charged." (Emphasis added).

21. More pertinent to this case because it dealt with the issue of non-insane automatism is the New South Wales Court of Criminal Appeal decision in *R v Yousseff*.[7] In my view, the head note accurately reflects the decision when it states:

> "Where an accused raises the issue of involuntary behaviour he must produce evidence that his automatism was sane, not insane automatism."

22. Hunt J, after reciting the proposition that the Crown must remove any reasonable possibility that the act of the accused was incidental, went on to state:

> "The legal onus upon the Crown does not mean however that the Crown must bring evidence `to meet every such defence which could possibly arise in relation to the offence charged'. In every case the accused bears a evidentiary onus to point to or to produce sufficient evidence or material in an unsworn statement from which it could be inferred that – as I would prefer to put it – there is at least a reasonable possibility that, for example, the act of the accused was accidental or that it was provoked or done in self-defence." (Emphasis added).

23. He reiterated this proposition later in the judgment when he said:

> "Others and most Australian authority, in my respectful view, more in accordance with principle and logic when they say that there must be evidence from which it could be inferred that there is the reasonable possibility that the act of the accused was of such a nature."

24. He went on to state:[8]

> "If the accused is able to point to or to produce evidence from which it could be inferred that there is at least a reasonable possibility that his act was involuntary as a result of a state of automatism the Crown in effect bears the onus of removing the reasonable doubt thereby raised by establishing that the act was voluntary."

25. In order to meet the defence assertion of a disassociative state there was cross-examination of Dr Odell at the hearing before the magistrate. This cross-examination was designed and in effect removed Dr Odell's evidence from being either psychiatric or expert in nature. He specifically disavowed any such expertise. Neither the defendant nor the magistrate was entitled to rely on Dr Odell's evidence as providing any psychiatric support for the proposition that Olcer was in a disassociative state or automatistic. Dr Odell's report dealt with memory loss after the event and not with an asserted disassociative state at the time of its commission.

26. The contention was more recently considered in the United Kingdom in the matter of Attorney-General's Reference No. 2.[9] The court considered the contention to amount to a defence, in circumstances where the driver of a truck which ran off a motorway and killed people in another vehicle, contended he was driving in a state of automatism. It was contended he drove without awareness, being in a trance-like condition resulting from repetitive stimuli received as a result of driving long journeys on straight, flat and featureless motorway. The Court of Appeal in a joint judgment was of the opinion that before the defence of automatism could be submitted to a jury a proper evidential foundation for it had to be laid. The Court ruled the defence of automatism required the total destruction of voluntary control by the defendant and merely reduced or partial control was insufficient to found the defence. They held that the issue of automatism should not, in those circumstances have been left to the jury, as there was insufficient evidence to float it as an issue for the jury's consideration. I take this to mean that "sufficient" evidence must be raised, not mere assertions.

27. The Court of Appeal in *Reg v Leonboyer*[10] considered the concept of non-insane automatism in another case where there was much evidence from expert forensic psychiatrists. That was a case of much vexed opinion based upon examinations as well as expertise. Neither of which is apposite here. I have found the American and Canadian authorities to be in line with *Falconer* and peculiar to their facts and the due process procedures.

28. I come to my decision in this case guided by the legal principles I have enunciated, those which bind me and others which are highly persuasive. They may be shortly stated thus. In a case where non-insane automatism is raised as a contention it must be supported by credible evidence which raises a reasonable possibility that the alleged criminal act of the accused was performed automatistically, if the automatistic act was induced by a medical or pharmacological condition then the evidence supporting that proposition must come from an expert in the relevant field.

29. In this case the contention was raised by counsel in submission, relying on the statements the accused had given to investigating police officers. It was not supported in my view by the evidence of Dr Odell. Neither, in my view, was there support for such a contention arising out of the evidence of the police officers. Rather, the evidence when taken in its totality, points in the contrary direction. Olcer replied to questions in a cognitive manner, responsively and unhesitatingly. His statements that he could not recall the events in the Bunnings store are marginally short of preposterous. His actions immediately prior to the alleged commission of the offence all point to deliberativeness and a capacity of volition. Driving to a selected destination does not indicate involuntariness. The removal of the araldite from its blister packs and abandoning the possibly incriminating empty packages do not point to any dissociative state, rather, the opposite. The perambulation around the store and hiding the drill bits in his clothing do not bespeak dissociation from reality or automatistic behaviour but rather, the deliberate selection of items suitable for concealment. The further perambulation around the store and exiting therefrom does not indicate dissociation from reality but rather, an awareness of it.

30. The evidence from Dr Odell was delivered with appropriate qualifications and subtractions. He conceded he had neither consulted with, nor, examined Olcer. That he was not a psychiatrist nor had any speciality in that field. It is apparent he was not a pharmacist, nor able to give any expert evidence as to the precise effects of the alleged consumption of Mogadon and Panadeine Forte. In any event, the alleged consumption of the drugs supposedly leading to a dissociative state were some ten and a half and three hours prior to the episode, and they came from a contested statement of the accused. It was not supported by sworn testimony either from him or any other witness.

31. Dr Odell's evidence relating to the effects of the drugs was equivocal and delivered in the abstract. His evidence related to the possible effects those drugs might have on a person and he said it was impossible to tell what the effects might have been upon Olcer. The magistrate, in my view, appears to have misunderstood this evidence by selecting equivocations and converting them into a subjective likelihood. She appears to have made a positive finding that the consumption of the drugs caused confusion, whereas the bulk of the evidence from the police officers indicated there was little of it.

32. In my view, and it is one I hold quite firmly, the contention raised here did not amount to a reasonable possibility that the act of the accused was dissociative or non-insane automatistic. There was no medical evidence of any persuasiveness, expert or otherwise, as would support such a contention. There was no subjective evidence from the accused himself. There was no evidence whether "sufficient or reasonably possible" to warrant consideration of the contention. The contention was ethereally based and without substance, but it led to magistrate into the legal error complained of in the first ground of appeal.

33. It follows that whether the magistrate dismissed the case on a no case submission or as an exercise of her discretion, she was in error on both grounds. The appeal will be upheld and I shall remit the matter to the Magistrates' Court at Broadmeadows for hearing before another magistrate.

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[1] [1959] VicRp 41; [1959] VR 237; [1959] ALR 644.
[2] [1959] VicRp 19; [1959] VR 105; [1959] ALR 335 per Sholl J.

[3] [1990] HCA 49; (1990) 171 CLR 30; (1990) 96 ALR 545; 50 A Crim R 244; 65 ALJR 20.
[4] At 40.
[5] Emphasis added.
[6] At 834.
[7] [1990] HCA 49; (1990) 171 CLR 30; (1990) 96 ALR 545; 50 A Crim R 244; 65 ALJR 20.
[8] At 4.
[9] (1994) QB 91.
[10] [2001] VSCA 149.

APPEARANCES: For the appellant DPP: Mr J McArdle, QC, counsel. Director of Public Prosecutions. For the respondent Olcer: Mr CB Boyce, counsel. Kenna Croxford & Co, solicitors.
