

18/93

## SUPREME COURT OF VICTORIA

**HEYWOOD v CANTY**

Harper J

21 January 1993

**CRIMINAL LAW – THEFT OF MOTOR VEHICLE – ELEMENT OF THEFT – DISHONEST APPROPRIATION – DEFENDANT FOUND TO HAVE HAD HONEST BELIEF AT TIME OF APPROPRIATION – WHETHER GUILTY OF THEFT: *CRIMES ACT 1958*, s72.**

**It is fundamental to the law relating to theft that the appropriation must be dishonest. Accordingly, a defendant could not be properly convicted of the offence of theft of a motor car where the Magistrate found that the defendant had an honest belief that she had permission to take the motor car.**

**HARPER J: [1]** This is an appeal from a decision of the Magistrates' Court at Heidelberg on 16 August 1991. The Magistrate then had before him the present appellant Heidi Marie Heywood. She had been charged with a number of offences arising out of a motor car accident and a preceding incident early on the morning of 9 December 1990. Before the accident, the appellant had attended a party in a vacant block in the Heidelberg district. Also at the party was one David Kenneth Smith. He was the owner of a Toyota motor vehicle of which he was apparently proud. He spoke with the appellant about the vehicle and some time after that conversation or conversations the appellant drove it away from the site of the party to Panton Hills and was returning from Panton Hills when the accident occurred.

Later on the morning of 9 December, Mr Smith made allegations that the vehicle had been driven away by the appellant without his permission. The appellant was subsequently charged with theft of the vehicle. That was one of the charges which was before the Magistrate on 16 August. Having heard the evidence for the prosecution and the defence, the Magistrate concluded, and I quote from the affidavit of the appellant sworn of 5 September 1991:

"I find that the defendant had an honest belief that she had permission to take the car, but in the circumstances it was not a reasonable belief. The defendant was, in my view, affected by alcohol to a significant degree. She may well have misinterpreted what was said to her or done. I therefore find the matter proved."

On the basis of that finding, the appellant appealed to this court. Her principal submission is that having found that she had an honest belief, it was not open to the Magistrate to convict her of the offence of theft. **[2]** That offence is defined in s72 of the *Crimes Act 1958* in the following terms:

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

It is fundamental to the law relating to theft that the appropriation must be dishonest. It is, in my opinion, fundamental to the definition of dishonesty that the person charged does not have an honest belief that the appropriation, if proved, is one that the accused is entitled to effect. If this is right then it follows that once the Magistrate had properly found an honest belief in the defendant that she had permission to take the car, it was not open to him to come to the further conclusion that she was guilty of theft.

Mr Gebhardt who appeared for the respondent on this appeal accepted, as I understand him, the propositions of law to which I have just referred. He argued, however, that it was not open to the Magistrate to find that the defendant had an honest belief. In support of that submission, Mr Gebhardt took me to certain questions and answers recorded in a record of interview made between the appellant and the informant/respondent at the Heidelberg Police Station on Sunday,

24 February 1991. I have read the questions and answers to which my attention has been drawn.

Although, no doubt, it might be said that the evidence thus put before the court is not entirely without ambiguity, it cannot be said, in my view, that no reasonable Magistrate could, on the basis of that evidence, have found that the defendant had an honest belief. It follows that I cannot interfere with the finding of the Magistrate that the defendant had an honest [3] belief, and it further follows, once that finding is accepted, that the defendant could not be properly convicted of the offence of theft. Accordingly the appeal must be dismissed.

**APPEARANCES:** For the appellant Heywood: Mr B Stafford, counsel. Elliott Stafford & Associates, solicitors. For the respondent Canty: Mr SP Gebhardt, counsel. Solicitor for the Director of Public Prosecutions.

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