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QUEEN'S BENCH DIVISION (UK)

BOGGELN v WILLIAMS

Lord Widgery CJ, O'Connor and Lloyd JJ

14 July 1978

[1978] 1 WLR 873; [1978] 2 All ER 1061; 67 Cr App R 50; [1978] Crim LR 242

CRIME – THEFT – ELECTRICITY, ABSTRACTION OF – ELECTRICITY SUPPLY RECONNECTED TO HOUSE WITHOUT CONSENT OF ELECTRICITY BOARD – INTENTION TO PAY FOR ELECTRICITY USED – DEFENDANT'S BELIEF AS TO HIS HONESTY – WHETHER DISHONEST USE OF ELECTRICITY – DEFENDANT ACQUITTED OF CHARGE – WHETHER COURT IN ERROR: *THEFT ACT 1968* (c.60), S13.

HELD: Appeal dismissed.

1. When one looks at section 13 of the *Theft Act 1968*, the elements of the offence are dishonestly to use, without due authority, any electricity. There are the two necessary elements: to use without due authority and to do so dishonestly.

2. It was established in the present case, without doubt, that the defendant was using electricity without due authority and he accepted that; but there remained the issue, and the burden was on the prosecution to establish it, as to whether in so doing he was acting dishonestly.

3. The fact that the defendant did not believe at the time he reconnected his supply that he had the consent of the board did not of itself make the defendant's conduct dishonest in law. It was a question of fact in each case for the tribunal of fact whether the necessary dishonesty was proved or not.

4. Given the finding by the tribunal that the defendant believed that, by giving notice of his intention to reconnect and by ensuring that consumption of electricity was duly recorded through the meter, he was not acting dishonestly in reconnecting. It followed that the Crown Court was right to acquit.

LLOYD J: This is a case stated by the Crown Court at Aylesbury. The question for the opinion of the court is whether a person can be convicted of dishonestly abstracting electricity contrary to section 13 of the *Theft Act 1968*, if he intends to pay for the electricity when payment is due, and that intention is based on a genuine belief that he will be able to do so.

The facts are set out, if I may say so, with admirable clarity in the case. The defendant was convicted by the Stony Stratford magistrates' court on February 25, 1977, of dishonestly abstracting electricity to the value of £6.06. He was given a conditional discharge. He appealed to the Crown Court, who allowed the appeal against conviction.

The facts were these. On October 27, 1976 a representative of the East Midlands Electricity Board had disconnected the defendant's supply of electricity after due warning had been given by reason of the defendant's failure to pay an outstanding amount of £39.65. The defendant thereupon spoke to one of the board's employees and informed him that he was intending to reconnect the supply himself. Shortly thereafter he broke the seal on the board's main fuse box and reconnected the supply by means of a piece of wire which he inserted in place of the main fuse which the board's employees had removed. The way in which he carried out the re-connection meant that the electricity which he used would continue to be recorded on the meter in the usual way.

There is then this important finding of fact in paragraph 2(5) of the case:

'As a result of the said conversation the (defendant) did not believe that the board consented to reconnection by him. The (defendant) nevertheless did believe that, by giving notice of his intention and by ensuring that consumption was duly recorded through the meter, he was not acting dishonestly in reconnecting.'

That finding of fact is supported by the further finding in paragraph 2(6) of the case that the defendant knew how to effect reconnection in such a way that consumption would not be recorded, in other words by by-passing the meter. There is then another important finding of fact in paragraph 2(8):

'At the time when the (defendant) reconnected the supply, the (defendant) believed, as he asserted, that he would be in a position to pay for electricity consumed thereafter at the date when payment was due. We were satisfied that this belief was a genuine one and we were not satisfied that it was unreasonable.'

There is no specific finding anywhere in the case as to the defendant's intention to pay for the electricity, but it is common ground in this case that that can be inferred. Finally, in paragraph 5 of the case it is stated:

'We were of opinion that the defendant did believe that, when payment became due, he would be able to pay for electricity consumed; that this belief was not proved to be unreasonable; and that the defendant's state of mind at the relevant time (i.e. when reconnecting the supply) was not dishonest.'

The question for the opinion of the court is as follows:

'Is an intention to pay for electricity knowingly used without the authority of the electricity board capable of affording a defence to a charge under section 13 of the *Theft Act* 1968, if that intention is based on a genuine belief that the user will be able to pay at the due time for payment?'

Section 13 of the *Theft Act* 1968, provides as follows:

'A person who dishonestly used without due authority, or dishonestly causes to be wasted or diverted, any electricity shall on conviction on indictment be liable to imprisonment for a term not exceeding five years.'

I might also refer to section 2(2) of the Act, which provides: 'A person's appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property'. I stress the word 'may' in that subsection because, although a person may be guilty of dishonesty even though he is willing to pay, nevertheless it is in each case a question of fact for the tribunal of fact whether the defendant is guilty of dishonesty or not.

That is a question which relates to the defendant's state of mind, and must, in my judgment, be answered subjectively: did the defendant have a dishonest mind or not? That being the question, it seems to me that it is answered for us in the present case by the finding which I have referred to in paragraph 2(5), and which I will read again: 'The defendant nevertheless did believe that, by giving notice of his intention and by ensuring that consumption was duly recorded through the meter, he was not acting dishonestly in reconnecting.'

Mr Hordern for the prosecution argues that that finding does not really help the defendant because a man's belief as to his own honesty or dishonesty must, he says, be irrelevant. In my judgment, that finding is not only relevant but crucial.

Mr Hordern referred us to *R v Williams* (1953) 1 QB 660; [1953] 1 All ER 1068; (1953) 37 Cr App R 71; [1953] 2 WLR 937 and *R v Cockburn* [1968] 1 All ER 466; [1968] 1 WLR 281; (1968) 52 Cr App R 134. But those decisions must be read in the light of the later decisions of a five-judge court in *R v Feely* [1973] QB 530; [1973] 1 All ER 341; (1973) 57 Cr App R 312; [1973] 2 WLR 201. It seems to me that that case governs the present one.

Mr Hordern says that both *Feely* and the two previous cases were cases which were concerned with the taking of money, and that enables him to distinguish the present case. But, in my judgment, the principles stated in *Feely* are not so limited.

Applying that decision to the present case, and in particular the standard of the ordinary decent man which is there referred to, the finding of the Crown Court in para. 2(5) is one which the Crown Court was amply entitled to make; and that finding in turn supports the conclusion (which I take it to be) which is stated in paragraph 5 of the case. The fact that the defendant did not believe at the time he reconnected his supply that he had the consent of the board does not

of itself make the defendant's conduct dishonest in law. It is a question of fact in each case for the tribunal of fact whether the necessary dishonesty is proved or not.

Mr Hordern says that, if this decision were to go in favour of the defendant, it would create great difficulties for the electricity boards and other people in their position. I would only say this. The fact that this case may be decided in favour of the defendant does not mean that every other case will be so decided. In particular I would like to echo the remark of Lawton LJ in *Reg. v Feely* where he said, at p535:

'Nothing in this judgment should lead anyone, particularly those tempted to put their hands into other people's tills, to think that for the future the prospects of acquittal will be substantially improved.'

Lastly, I should mention for completeness that Mr Hordern wishes to reserve the question whether *Reg. v Feely* was or was not correctly decided. But taking the law, as I do, from that case, and the facts as found by the Crown Court I answer the question which has been posed for us 'Yes'. It follows, in my judgment, that the Crown Court was right to acquit, and I would uphold its decision.

O'CONNOR J: I agree, and in deference to the arguments addressed to us by Mr Hordern I will add a few words. He submitted to us that the offence under section 13 is committed where the consumer of electricity, who has had his supply cut off knowing that the board are unwilling for him to consume any more of their electricity, with that knowledge deliberately reconnects himself to the supply and uses it, and that that necessarily involves a dishonest intent.

In support of that contention, he submitted to us that, if one was considering the case under section 1 of the *Theft Act* 1968, the facts were that the owner of some articles refused to give them to the defendant, who, with the knowledge that he had no right to take them, nevertheless determined to help himself to them, it would be unnecessary to prove any further facts before a jury would be bound to come to the conclusion that he was acting dishonestly.

For my part, as and when a case under section 1 comes before the court, I would reserve the question on that topic, but I would point to the paragraph in the judgment of Lawton LJ in *Reg. v Feely* (1973) QB 530, 537, where he says that in section 1(1) of the *Theft Act* 1968 the word 'dishonestly' can only relate to the state of mind of the person who does the act which amounts to appropriation. If that be so, when one looks at section 13, the elements of the offence are dishonestly to use, without due authority, any electricity. There are the two necessary elements: to use without due authority and to do so dishonestly.

It was established here, without doubt, that the defendant was using electricity without due authority and he accepted that; but there remained the issue, and the burden was on the prosecution to establish it, as to whether in so doing he was acting dishonestly. That inevitably is a question of fact for the jury, if it be trial by jury. Despite the warning given by Lawton LJ about the undesirability of seeking to say what is meant by 'dishonestly', inevitably when a case under section 13 is under consideration it seems to me that one test at all events must be the mental position of the defendant as to whether he is able and willing to pay for that which he uses. I need say no more about it. I agree that the appeal should be dismissed.

LORD WIDGERY CJ: I also agree, and I think it important that the flexibility of section 1 of the *Theft Act* 1968 should not be lost by putting the word 'dishonestly' in a strait jacket of definition.