19/81

SUPREME COURT OF VICTORIA

HEDDICH v DIKE

Gobbo J

24 March 1981 — (1981) 3 A Crim R 139

CRIMINAL LAW – THEFT – PROPERTY TAKEN WITH CONSENT OF SHOP ASSISTANT – CHARGE DISMISSED – FINDING BY MAGISTRATE THAT NO EVIDENCE TO SUPPORT CHARGE IN VIEW OF SHOP ASSISTANT'S CONSENT – MAGISTRATE SAID THERE WAS EVIDENCE OF OBTAINING PROPERTY BY DECEPTION BUT REFUSED TO AMEND THE INFORMATION – ELEMENTS OF THEFT – WHETHER OWNER'S CONSENT IS AN INGREDIENT OF THE OFFENCE – WHETHER CHARGES OF THEFT AND OBTAINING PROPERTY BY DECEPTION OVERLAP – COSTS – GRANTED TO DEFENDANT – MAGISTRATE SAID POLICE SHOULD BE PENALISED FOR LAYING WRONG CHARGES – WHETHER APPROPRIATE CONSIDERATION: *CRIMES ACT* 1958, SS72, 73(4), 81(1).

D. was charged with the theft of printing plates. He went to the shop of the owner of the plates and convinced the shop assistant to hand them over without paying for them. D. was later charged with theft of the plates. At the hearing, the magistrate dismissed the charge saying that the shop assistant had handed the plates over to D and accordingly there was no evidence of theft. The magistrate was of the view that there was sufficient evidence for the charge of obtaining property by deception but said he could not amend the information because it was not under the same section. Upon an application for costs, the magistrate awarded D. the sum of $50 saying that the wrong charge had been laid and he would award costs to remind the police of their obligation to lay proper charges in future. Upon appeal—

HELD: Order nisi absolute. Remitted to the magistrate for determination according to law.

1. It is no part of the modern offence of theft to have as an essential ingredient the absence of consent. The ingredients of theft are fourfold, namely, (1) a dishonest (2) appropriation of (3) property belonging to another (4) with the intention of permanently depriving the owner of it. In the present case, each of these elements was capable of being made out on the evidence. Consent is not an element in theft. It follows that the Magistrates' Court was in error in upholding the submission of no case to answer.

***R v Lawrence* [1971] UKHL 2; (1972) AC 626, followed.**

2. On the view of the offence contained in s81 of the *Crimes Act* 1958, not only are the offences in ss72 and 81 not mutually exclusive but there is a total overlap so that the offence of obtaining by deception has within it the four elements of the offence of theft.

3. In *Thomson v Lee* the court said that there could properly be an amendment of the information to delete the reference to thoroughfare and to leave the matter at large or, if necessary, to provide a reference to enclosed land. It is erroneous to proceed upon the basis that an amendment is only to be granted if it is one for what is described as a cognate offence within the same section. The power to amend is not so limited.

***Thomson v Lee* [1935] VicLawRp 65; (1935) VLR 360; [1935] ALR 458, headnote in Law Report considered.**

4. In relation to the question of costs, it is not a relevant consideration for a magistrate to use the power to award costs to penalise police officers for failing to lay the proper charges. Nor is there any rule that costs shall not be awarded against informants except in exceptional circumstances.

GOBBO J: This is the return of an order nisi to review the decision of the Magistrates' Court at Oakleigh on 21st April 1980. The court had upheld a submission of no case to answer. The court had also declined to permit the information to be amended from one being a charge of theft under s72 of the *Crimes Act* to a charge of obtaining property by deception under s81 of the *Crimes Act*.

The defendant, had been charged that at Clayton on the 24th of October 1979 he did steal 350 aluminium offset printing plates valued at $1,925, being the property of Anthony Max Lyne – contrary to s72 of the *Crimes Act*. The evidence was as follows. There was first the evidence of a shop assistant employed at the shop of the owner of the plates. She said that the defendant had called at the shop and had said that he had come to collect all the old printing plates, whereupon

the shop assistant had shown him where the plates were, believing, she said, that her employer must have contacted the defendant and asked him to collect them. She also said in her evidence that the defendant had told her of an arrangement in relation to the collection of the plates with her employer and that, but for that information, she would not have taken the defendant into the back room to collect the plates. There was also evidence from the owner as to the fact that he had not given any person permission to remove the plates from his business premises and as to the value of the plates. The owner in cross-examination had denied any suggestion that the plates were valueless and that he had ever sold them as scrap.

Finally, there was evidence from the informant largely consisting of evidence as to an interview conducted with the defendant. It had been put to the defendant that he had stated to the shop assistant that he had contacted the management and that arrangements had been made for the defendant to collect the printing plates. The defendant had denied this, but later in the interview there was a number of admissions, including the admission that he more or less had intended to take the printing plates from the premises without paying for them and that he had decided to try and get the plates for as cheaply as possible and, if not, to take them. At the conclusion of the informant's case, counsel for the defendant had made a submission as follows, namely:

> "There is no evidence to support the charge of theft of the property as the property was handed over apparently by the witness Sliwo (that is to say the shop assistant) and therefore if a charge was to be sustained at all it should have been an alternative of obtaining property by deception."

At this point the informant applied to amend the information to one of obtaining property by deception. The Magistrate, refused stating:

> "Although I am satisfied that the case has been established for a different charge I cannot amend the information as it was not under the same section."

Mr Weinberg, who appeared for the applicant/informant, relied on five grounds of the order nisi which in substance amounted to two grounds, namely, that the court was wrong in finding there was no case to answer and in dismissing the charge and, secondly, that in any event the court was in error in declining to permit an amendment of the information. There was also a further ground in relation to the matter of costs.

The charge of theft under s72 of the *Crimes Act* is in these terms, namely:

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

Section 73(4) provides:

> "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."

The charge of obtaining property by deception is found in s81(1) of the *Crimes Act* and is in these terms:

> "A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of felony and liable to imprisonment for a term not exceeding ten years."

Sub-s2 provides:

> "For purposes of this section a person is to be treated as obtaining property if he obtains ownership, possession or control of it, and 'obtain' includes obtaining for another or enabling another to obtain or to retain."

The essence of the submission on behalf of the defendant at the Magistrates' Court appears to me to have been that as the property was handed over by the person in lawful possession of the property with her apparent consent, then there could be no theft and only the different

charge of obtaining such possession by deception could be pursued. In my view this submission was erroneous. It is no part of the modern offence of theft to have as an essential ingredient the absence of consent. This is clear from the decision of the House of Lords in *R v Lawrence* [1971] UKHL 2; (1972) AC 626. The House of Lords rejected the argument that theft necessarily imported absence of consent. Viscount Dilhorne at p631 said as follows:-

> "Prior to the passage of the *Theft Act* 1968, which made radical changes in and greatly simplified the law relating to theft and some other offences, it was necessary to prove that the property alleged to have been stolen was taken "without the consent of the owner". (*Larceny Act* 1916, section 1(1)). These words are not included in section 1(1) of the *Theft Act*, but the appellant contended that the subsection should be construed as if they were, as if they appeared after the word "appropriates.' I see no ground for concluding that the omission of the words 'without the consent of the owner' was inadvertent and not deliberate, and to read the subsection as if they were included is, in my opinion, wholly unwarranted. Parliament by the omission of these words has relieved the prosecution of the burden of establishing that the taking was without the owner's consent. That is no longer an ingredient of the offence."

The charge of theft in the *Crimes Act* is in the same terms as that in the English Act and I see no reason why the House of Lords decision is not precisely in point and binding upon me. The submission put to the Magistrates' Court was therefore an erroneous one. The question arises as to whether there was sufficient evidence to make out a case to answer on the charge of theft. The ingredients of theft are fourfold, namely, (1) a dishonest (2) appropriation of (3) property belonging to another (4) with the intention of permanently depriving the owner of it. Here, each of these elements was capable of being made out on the evidence. It follows that the Magistrates' Court was in error in upholding the submission of no case to answer. It was further submitted that if the shop assistant had intended only to transfer possession then it might have been argued that that again was a matter that ought not to make the charge of theft sustainable, upon the basis that the argument as to absence of consent had not been raised. In my view this submission is not a tenable one having regard to the decisions of the Court of Appeal and also of the House of Lords in *R v Lawrence, supra*, even though there is some warrant in *R v Skipp* (1975) Crim LR 114 for such an argument.

It was further argued that the shop assistant had transferred the plates to the defendant with the intention of passing property in them and that in these circumstances the charge of theft could not be sustained. The argument was, in effect, that at the time of the appropriation by the defendant of the plates, they were no longer property belonging to another and thus the offence of theft could not be made out. It needs to be pointed out that on the evidence there was nothing to suggest that the shop assistant had any authority to pass ownership in the property at all.

Cases that might appear to support this line of argument, namely, *R v Meech* (1974) 1 QB 549, *R v Skipp* (1975) Crim LR 114; *R v Hircock* (1979) Crim LR 184 were cited. There is considerable support for the proposition, however, that there is an overlap between the offences in s72 and s81 of the *Crimes Act* to the extent that every case of obtaining property by deception – save when the subject matter is land – contains the offence of theft. This was the view of the Court of Appeal in *R v Lawrence* [1971] UKHL 2; (1972) AC 626 (1971) 1 QB 373 and is the view favoured by a number of textbooks writers in criminal law. It is true that the House of Lords in *R v Lawrence* did not express a view on this matter in the same terms as did the Court of Appeal but I do not find that the decision of the House of Lords, on a close analysis of it, reduces the persuasive force of the Court of Appeal decision.

As to the decisions said to reject what is being described as the total overlap theory, I am not persuaded that they should lead me not to adopt the view of the Court of Appeal in *R v Lawrence*. The court in *Meech's case* appeared to me to proceed on a view of appropriation that is too exacting and appears inconsistent with the view adopted in this court in *Stein v Henshall* [1976] VicRp 62; (1976) VR 612, and *Howard v Edwards* (MC33/1980) an unreported decision of Fullagar J delivered on 20th March 1980. In those cases the view was expressed that in order to bring about an appropriation it is only necessary that the defendant assume any of the rights of an owner and not necessarily all the rights of an owner.

As to *Skipp's case*, that is capable of supporting two views of the relationship of the two sections, namely, the partial overlap view or the mutual exclusivity view but on reflection it is difficult to see how *Skipp's case* could support a total overlap view. The decision in *Hircock's case* is said to be inconsistent with the total overlap theory because if the two counts in respect of

the same subject matter in that case were both theft then one would have two acts of theft by the same person in respect of the same subject matter. I do not find that possibility as one that undermines the argument that the offence of obtaining property by deception contains within it the offence of theft. It is not illogical or contrary to common sense to have a theft based on the taking of possession followed by a theft based on a taking of property; one is based upon possession, the other one is based upon interference with ownership. They may involve quite different acts.

In the present case the learned Stipendiary Magistrate giving the decision of the court said that he was satisfied that the case had been established for a different charge meaning, I take it, a charge of obtaining property by deception. On the view of the offence contained in s81 that I prefer, not only are the offences in ss72 and 81 not mutually exclusive but there is a total overlap so that the offence of obtaining by deception has within it the four elements of the offence of theft. It is not however necessary for me to express a conclusive opinion on this matter as I take the view that the submission to the Magistrates' Court was directed to the proposition that consent was still an element in theft and was so understood. But I have, however, taken the course of indicating that if the submission is not to be so understood then I would still find, on the view I take of the analysis of the nature of the offence of obtaining by deception as containing within it the offence of theft, that the Magistrate, being satisfied that there was an obtaining of property by deception, should not have found that there was no case to answer.

This makes it unnecessary for me to deal with two further matters argued before me, namely, that the Magistrates' Court was in error in not permitting an amendment and finally that it should not in any event have made an order for costs against the informant. It is desirable however that I take the somewhat unusual course, nonetheless, of indicating my views since the matter was argued before me and since the learned Stipendiary Magistrate may have been misled by the way in which the matter was argued before him. As to the amendment ground it was argued by Mr Weinberg that the learned Stipendiary Magistrate failed to apply any discretion at all but in effect applied a non-existent rule of law. The court apparently relied upon the words of the headnote in *Thomson v Lee* [1935] VicLawRp 65; (1935) VLR 360; [1935] ALR 458, viz:

> "On the hearing of an information, if the facts proved do not establish the charge as laid, but do establish a cognate offence under the same section, the justices should amend the information so as to accord with the facts proved."

On a close reading of the decision of the court, I am satisfied that the headnote is not made out and does not accurately represent the decision of the court. The court did not say in terms that it was necessary to have a cognate offence under the same section to justify amendment. Even ignoring the fact there was no language of the kind embraced in the headnote, the substance of the decision does not, in my view, support the notion embraced in the headnote. In *Thomson v Lee* the court was prepared to say that there could properly be an amendment of the information to delete the reference to thoroughfare and to leave the matter at large or, if necessary, to provide a reference to enclosed land.

I am therefore of the view that it is erroneous to proceed upon the basis that an amendment is only to be granted if it is one for what is described as a cognate offence within the same section. The power to amend is not in my view so limited. It is not appropriate for me on this occasion to go further and discuss what is the ambit of the power to amend, but I felt it necessary to draw attention to what appears to be an inaccuracy in the headnote in the case of *Thomson v Lee*, since I suspect that it was that headnote, which was relied upon by the informant in his amendment application, that may have led the Magistrate into making the decision that he did in declining to permit an amendment of the information.

The final matter that had been argued before me was the question of costs. It is unnecessary, but desirable, having regard to the views expressed by the learned Stipendiary Magistrate, that I say something briefly about that matter. The learned Stipendiary Magistrate, after declining to amend the information, had heard argument on the question of costs and stated as follows:

> "I have in mind the decision of the Supreme Court of Victoria in *Liu v Caughey* delivered 18th December 1979 which I have taken from the stipendiary notes 16/1980 which deals with the matter of costs against police and other public officials. It revealed that the Magistrates had a discretionary power in relation to such matters and unless there were exceptional circumstances costs will not be awarded against the police informants."

His Worship had then gone on to say:

> "I consider that the Dike matter was such an exceptional case where a decision to prosecute on an incorrect charge had been made by an officer and it was the Department's duty that such errors did not occur. The awarding of costs would serve as a reminder of these responsibilities. I award $50 costs against the Informant."

The views expressed by the learned Stipendiary Magistrate appear to proceed upon the basis that there is a rule that, unless there are exceptional circumstances, costs will not be awarded against police informants. Using that, as it were, as a rule, the learned Stipendiary Magistrate had then gone on to find that it was an exceptional circumstance that the wrong charge had been laid and that he would exercise his discretion to award costs so as to remind the police of the obligation to lay proper charges in these cases, It appears to me that there may be error on both matters. I do not understand Murray J in *Caughey's case* (unreported) to have laid down a rule that costs shall not be awarded against informants except in exceptional circumstances. That matter had been debated before the Full Court in *Puddy v Borg* [1973] VicRp 61; (1973) VR 626 and the Full Court had dealt with the case before them on the circumstances of that case and had declined to give a view as to the two competing arguments, namely, that costs in criminal proceedings should be dealt with as they would be dealt with in civil proceedings, and the contrary argument that no costs should be awarded unless there were special circumstances. It is true that Murray J said that it was not the practice to award costs against informants. But I did not read his decision as purporting to say that this practice, though a wide and long established one, amounted to a rule of law. I should also indicate that even if it is a proper approach to treat it as an exceptional matter to award costs against informants, (and as to that, I do not offer any view) then I would not regard it as a proper relevant consideration to use the cost power to penalise the police, as it were, for failing to lay the proper charges.

It may be, however, that the learned Stipendiary Magistrate was not saying this at all, but was simply saying that where the error had arisen from the conduct of the informant, then he should not decline an application for costs, assuming that there were other valid considerations. It follows that the order nisi should be made absolute, and I order that this matter be remitted to the Magistrates' Court at Oakleigh to be dealt with according to law in the light of this decision.
