**53/94**

## SUPREME COURT OF VICTORIA

# *DPP v CANTY*

**JD Phillips J**

**19, 20 August 1992**

**CRIMINAL LAW – THEFT – LABELS CHANGED – LOWER PRICE PAID – EVIDENCE GIVEN OF DEFENDANT'S MENTAL STATE AT TIME OF OFFENCE – SAID TO BE SUFFERING FROM DISSOCIATIVE DISORDER – EVIDENCE ACCEPTED – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR – WHETHER EVIDENCE OF DISORDER MAY BE RELATED TO QUESTION OF INTENTION: *CRIMES ACT* 1958, S72(1).**

C. was charged with shoplifting by changing the labels on several items and paying the lower price to the cashier. At the hearing, C. denied any dishonest intent and called several witnesses as to his mental state at the time of the alleged offence including one who expressed the opinion that C. was suffering from a dissociative psychiatric disorder. The magistrate accepted the medical/psychiatric evidence and dismissed the charge on the ground that the prosecution had not proved beyond reasonable doubt that C. had the necessary dishonest intent at the time of the alleged offence. Upon appeal—

**HELD: Appeal dismissed.**
**Whilst C's conduct in changing the labels and taking the goods past the cashier was conscious, voluntary and deliberate, the Magistrate was not in error in finding that C. was labouring under a dissociative disorder and that the requisite intent had not been proved beyond reasonable doubt. Further, the magistrate was not in error in relating the dissociative state to the question of intention.**

**JD PHILLIPS J: [1]** This is an appeal under s92 of the *Magistrates' Court Act* 1989 from the decision of a magistrate, Mr Dennis, at Box Hill Magistrates' Court on 29 November 1991. The respondent was charged with theft in that contrary to s72(1) of the *Crimes Act* 1958 "at Eltham in the State of Victoria on the 12th day of April 1991 (he) did steal one bottle of Imperial Leather After-shave, one packet of Gillette Contour Razor Blades, four cans of "My Dog" dog food and one packet of Arnotts Classic Biscuits, the property of Woolworths Victoria Ltd trading as Safeway and to the value of $17.40". The matter was heard by the magistrate on 29 November 1991 and both parties were represented by counsel. After hearing evidence and submissions, the magistrate dismissed the information.

The order required under R 58.09 for the institution of the appeal was made by Master Wheeler on 19 December 1991 and two affidavits are now before me, one in support sworn by Peter Anthony Given on 18 December 1991 and one in answer sworn by William James Allgood on 17 February 1992. The two affidavits are not altogether in agreement and Mr Gebhardt very fairly referred me in this regard to *Tampion v Chiller* [1970] VicRp 46; [1970] VR 361 at 363. But the affidavit of Mr Allgood is in the main supplementary to that of Mr Given and such conflict as exists did not assume any significance in the argument. I say at the outset that whatever doubts I entertain about the questions of fact that were resolved by the magistrate in this case, I have in the end reached the conclusion that no error of law has been demonstrated and so this appeal fails. My reasons are as follows.

**[2]** The evidence about the respondent's conduct at the time in question was not in dispute. It appears that he went into a supermarket, took some goods from the shelves and in respect of a number of items changed the label on the goods to indicate that they had a lower price than that with which they were first marked. He went then to the check-out point, paid the amount due according to the labels as then affixed and was apprehended as he left the store. In an interview with the police shortly thereafter, he admitted having changed the labels on several of the items in question, and admitted paying for the goods only according to the altered labels. He admitted also knowing that it was wrong to change the labels although he said that he could not explain his conduct. In the ordinary case, such evidence would point perhaps irresistibly to a conclusion that not only was the relevant conduct proved, but also that the respondent had had the requisite

intention at the time – that is, according to s72 of the *Crimes Act*, dishonestly to appropriate the property of another with the intention of permanently depriving the other of it: and see *R v Morris* [1983] QB 587; [1983] 2 All ER 448; [1983] Crim LR 559; (1983) 77 Cr App R 164; [1983] 2 WLR 768.

In this case, however, the respondent in evidence denied any dishonest intent and a great deal of evidence was led on his behalf about his mental state. There was evidence from friends and relatives, including his wife; from co-workers in the Police Force and also from his general practitioner, Dr Moffat, from Dr Robert Montgomery, a consultant psychologist and from Dr Epstein, a practising psychiatrist. From all this evidence it appeared that the respondent had been labouring under considerable stress from **[3]** some time before 12 April and at least one of the doctors expressed the opinion that the respondent was suffering, in his view, from a dissociative disorder. Dr Montgomery said in evidence: "I am prepared to stake my professional reputation on my diagnosis that at the time of the incident Mr Canty was suffering severe stress and was in a depersonalised state whereby he would not be fully aware of much at all and would have no clear understanding of his actions". Dr Epstein said: "I have concluded that any person who is subjected to the range of pressures being experienced at the time by Mr Canty would be adversely affected to the extent that while in such a dissociated state he carried out actions which though potentially self destructive, amounted to cries for help. The dissociated psychiatric disorder which he was suffering I believe, was in an acute form at the time of this incident".

It was submitted to the magistrate that on the basis of the evidence, the respondent should not be convicted. It was urged that on the totality of the evidence the magistrate could not be satisfied beyond reasonable doubt that the respondent had had the necessary dishonest intent at the time of the alleged offence. Unfortunately, counsel referred the magistrate to the High Court decision in *R v Falconer* [1990] HCA 49; (1990) 171 CLR 30; (1990) 96 ALR 545; 50 A Crim R 244; 65 ALJR *20* dealing with dissociative states. I say "unfortunately" because while *Falconer* does deal extensively with the effect of dissociative states on criminal responsibility, it relates such states to the question whether the alleged conduct of the accused **[4]** is voluntary that is, an act of the will. That was not in issue before the magistrate before whom it was common ground that the respondent's conduct in changing the labels and taking the goods past the cashier was conscious, voluntary and deliberate. It is only after that issue has been resolved that the question of intention arises and *Falconer* did not deal with that question at all. If the magistrate confused the two issues, he might have fallen into appealable error.

According to the affidavit filed in support, the magistrate announced his decision to dismiss the appeal as follows:-

> "The magistrate stated that he accepted the submissions of Mr McInerney for the defendant and he dismissed the information. The magistrate stated that he had considered the evidence of the defendant's answers during the record of interview and the evidence on oath as to the breakdown of the marriage. The defendant had been faced with a dilemma which was the cornerstone of the expert medical evidence. The magistrate stated he had considered the evidence of Dr Montgomery that the defendant was under great stress at the time of the offence and the evidence of Dr Epstein that the defendant had been suffering from a dissociate disorder at the time of the offence. There was also the evidence of the defendant on oath that he could not explain why he had committed the offence. The magistrate concluded that the defendant had discharged the required onus on the balance of probabilities and that accordingly the appropriation could not be said to have occurred with a dishonest intent."

According to the affidavit filed in answer, when **[5]** announcing his decision and his findings the magistrate

> "concluded that the defendant had discharged the required onus on the balance of probabilities in that he was satisfied that the defendant at the time of the alleged theft was suffering from a dissociated psychiatric disorder and due to such disorder and upon the evidence given, he could not be satisfied beyond reasonable doubt that the appropriation had occurred dishonestly. The magistrate said he was fortified in his view by strong evidence of character presented throughout the case."

The Director of Public Prosecutions, on behalf of the informant, Peter Anthony Given, now appeals under s92 of the *Magistrates' Court Act*. An appeal under s92 lies to this court only "on a question of law" and although the Master's Order identifies in terms five separate questions of law, the first of these was not pursued on the appeal and the other four came down to much

the same thing, whether it was open to the magistrate to have dismissed the information as he did. It was, I think, common ground in argument before me that the appeal lay in the particular circumstances of this case only if the magistrate had misdirected himself on the law or if, on all of the evidence, it was not open to the magistrate to conclude that the requisite intention had not been proved beyond reasonable doubt. It is a question of fact whether the defendant was labouring under a dissociative disorder or whether the defendant did have the requisite intent; as to the latter see *R v Feely* [1973] QB 530; [1973] 1 All ER 341; (1973) 57 Cr App R 312; [1973] 2 WLR 201. Neither of those two questions can be the subject of appeal to this court under s92; see and compare **[6]** *Motor Accident Board v Coutts* [1984] VicRp 69; [1984] VR 790; (1984) 1 MVR 407.

In an interesting argument, Mr Gebhardt, who appeared for the Appellant, submitted that the magistrate had misdirected himself by relying upon *Falconer* and ruling upon the intention of the respondent by reference to the dissociative state considered in that decision. The reference made by the magistrate to the defendant's having established his mental condition "on the balance of probabilities" could be explained, he said, only by reliance upon *Falconer*, and he referred in particular to the judgment of Mason CJ, Brennan and McHugh JJ, 171 CLR at 55-57. Mr Gebhardt submitted that the evidence led on behalf of the respondent, while plainly relevant to mitigation, simply did not bear on the question of intention and that the magistrate was therefore in error in concluding by reference to that evidence that he was not satisfied that the respondent had had the requisite intention at the time of the alleged offence. It was submitted that the only conclusion reasonably open on the evidence was that all elements of the offence, including intention, had been proved beyond reasonable doubt.

For the respondent, Mr McInerney submitted that *Falconer* had not been misapplied in any way, that the only issue raised before the magistrate had been that of intention and that reference had been made to *Falconer* only to support the evidence of the doctors that the respondent had indeed been suffering from a dissociative disorder. To show that such evidence could be relevant to intention, as distinct from the issue whether conduct was conscious, voluntary and deliberate, Mr McInerney referred me this **[7]** morning to the Full Court decision in *R v O'Connor* [1980] VicRp 60; [1980] VR 635 (dealing with intoxication) and, perhaps more pertinently, to the more general remarks made by Barwick CJ in the High Court when that case went on appeal; see (1980) 146 CLR 64 especially at 87-88. And in support of his contention that the magistrate therefore did not err in considering the question of intention in the light of the evidence here of the dissociative state, he referred me in particular to what was said by Dr Epstein in the course of his evidence (according to the affidavit in answer): "that having diagnosed Mr Canty as set forth in the Affidavit he stated that people suffering from such a disorder can perform actions without having any specific intent at the time of carrying out such actions".

For myself, I have some doubt whether the elements of the dissociative state identified in *Falconer* (more particularly at 171 CLR 56) were shown to have been present in the instant case, but the question whether the respondent was suffering from a dissociative disorder at the relevant time was a question of fact and I cannot say, in the light of the evidence that was led, that it was not open to the magistrate to have concluded that he was suffering from such a disorder: on such an issue of fact, see *Pujick v Savic* [1971] VicRp 76; [1971] VR 632. Nor can I conclude that the magistrate misdirected himself in relation to *Falconer* in the present case because he related the dissociative state to the question of intention; for although that was not the course followed in *Falconer* it was, I think, open to the magistrate to take that step on the evidence **[8]** actually given in this case. The link lies not so much in the considerations explored in *Falconer*, as in the evidence actually given by Drs Montgomery and Epstein.

And once the evidence of dissociative state may be related to the question of intention, the magistrate is not shown to have fallen into error when he concluded on the evidence as a whole that he was not satisfied beyond reasonable doubt of the respondent's dishonest intention at the time of the incident. As I have said, that was essentially a question of fact for the magistrate and I cannot say that he must have concluded otherwise, once all of the evidence fell to be considered in relation to it. The reference made by the magistrate to the defendant's having established the dissociative state to his satisfaction "on the balance of probabilities" can be explained, I think, by a concession made by respondent's counsel in the course of submissions to the magistrate. According to the affidavit filed in support, "Counsel further submitted that the sole question for the Magistrate was whether the defendant's admitted appropriation was dishonest and he conceded

that the evidential onus on the question of the defendant's mental state at the time of the incident clearly rested on the defence on the balance of probabilities". It is, I think, unnecessary to look elsewhere to explain the magistrate's reference to the balance of probabilities. If the concession made was too favourable to the prosecution (and on that I express no opinion at all, because it is unnecessary for me to do so) it is not a point which assists the appellant now.

**[9]** For these reasons, I have concluded that the appellant has not established that the magistrate either misdirected himself in relation to the proper use of *Falconer* or reached a conclusion on the facts that was not open to him on the evidence. No error of law has been made out and so the appeal must fail. It therefore becomes unnecessary for me to consider whether the argument raised by Mr Gebhardt fell within or ranged outside the questions of law identified in the Master's order and whether, if it went beyond those questions, there should be leave to amend. The appeal will be dismissed with costs.

**APPEARANCES:** For the applicant DPP: Mr SP Gebhardt, counsel. Solicitor to the DPP. For the respondent Canty: Mr M McInerney, counsel. Maurice Blackburn & Co, solicitors.

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