05/84

HOUSE OF LORDS

R v MORRIS; ANDERTON v BURNSIDE

Lord Fraser of Tullybelton, Lord Edmund-Davies, Lord Roskill, Lord Brandon of Oakbrook and Lord Brightman

20, 21 July, 13 October 1983

[1984] UKHL 1, [1984] AC 320; (1983) 3 WLR 697; (1983) 3 All ER 288; (1983) 77 Cr App R 309; [1983] Crim LR 813; discussed 127 SJ 833; noted [1984] CLJ 7 and 48 MLR 167

CRIMINAL LAW – THEFT – APPROPRIATION – LABEL SWITCHING IN SELF-SERVICE STORE – WHETHER APPROPRIATION WHERE DEFENDANT ARRESTED AFTER PAYING LOWER PRICE AT CHECKOUT POINT – WHETHER APPROPRIATION WHERE DEFENDANT ARRESTED AT CHECK-OUT BEFORE PAYING LOWER PRICE – OBTAINING PROPERTY BY DECEPTION – LABEL SWITCHING IN SELF-SERVICE STORE – CASHIER DECEIVED INTO CHARGING TOO LOW A PRICE – WHETHER THEFT AND OBTAINING PROPERTY BY DECEPTION: *THEFT ACT* 1968 (UK) SS1(1), 3(1), 15(1).

(1) In Morris' case, Morris took articles from shelves in a self-service store and switched labels taken from lower-priced articles. At the check-out point, M. was asked for and paid the lower prices as shown on the substituted labels. He was then arrested and subsequently convicted on counts of theft.
(2) In Burnside's case, Burnside switched the label on an article taken from a self-service store shelf with a lower-priced article. This was detected at the check-out point before he had paid for the article. He was arrested, charged with theft, and convicted. On appeal by the defendants by leave of the House of Lords—

HELD: Both appeals dismissed.
(1) The element of "appropriation" involves adverse interference with, or usurpation of, some right of the owner.

(2) Such interference/usurpation may be evidenced by an act, or combination of acts, which need not be overt, the precise moment of appropriation occurring varying according to the circumstances.

(3) By removing the goods from the shelves and switching the labels, the defendants adversely interfered with or usurped the rights of the owners of the goods to ensure that they were sold and paid for at the proper prices.

(4) Accordingly, the defendants were rightly convicted of theft.

(5) Where a shoplifter has passed the check-out point and, by deception, has obtained goods by paying a lesser price due to his label-switching it would be preferable for a charge of "obtaining property by deception" to be laid.

(6) When the dishonesty has been detected before the defendant has reached the check-out point, and has been arrested before that point so that no property has been obtained by deception, then theft is the appropriate charge.
[NOTE: Decision of the Court of Appeal (MC 45/83) affirmed.]

LORD ROSKILL: (with whom the other Law Lords agreed *[set out the facts, relevant provisions of the* Theft Act *1968 (UK) and continued]:* … **[702 WLR; 292 All ER]** The starting point of any consideration of Mr Denison's submissions must, I think, be the decision of this House in *R v Lawrence (Alan)* [1971] UKHL 2; [1972] AC 626. In the leading speech, Viscount Dilhorne expressly accepted the view of the Court of Appeal (Criminal Division) in that case that the offence of theft involved four elements, (1) a dishonest (2) appropriation (3) of property belonging to another, (4) with the intention of permanently depriving the owner of it. Viscount Dilhorne also rejected the argument that even if these four elements were all present there could not be theft within the section if the owner of the property in question had consented to the acts which were done by the defendant. That there was in that case a dishonest appropriation was beyond question and the House did not have to consider the precise meaning of that word in section 3(1).

Mr Denison submitted that the phrase in section 3(1) any assumption by a person of the rights" (my emphasis) "of an owner amounts to an appropriation" must mean any assumption of "all the rights of an owner." Since neither respondent had at the time of the removal of the goods from the shelves and of the label switching assumed all the rights of the owner, there was no appropriation and therefore no theft. Mr Jeffreys for the prosecution, on the other hand, contended that the rights in this context only meant *any* of the rights. An owner of goods has many rights – they have been described as "a bundle or package of rights." Mr Jeffreys contended that on a fair reading of the subsection it cannot have been the intention that every one of an owner's rights had to be assumed by the alleged thief before an appropriation was proved and that essential ingredient of the offence of theft established.

My Lords, if one reads the words "the rights" at the opening of section 3(1) literally and in isolation from the rest of the section, Mr Denison's submission undoubtedly has force. But the later words "any later assumption of a right" in subsection (1) and the words in subsection (2) "no later assumption by him of rights" seem to me to militate strongly against the correctness of the submission. Moreover the provisions of section 2(1)(a) also seem to point in the same direction. It follows therefore that it is enough for the prosecution if they have proved in these cases the assumption by the respondents of any of the rights of the owner of the goods in question, that is to say, the supermarket concerned, it being common ground in these cases that the other three of the four elements mentioned in Viscount Dilhorne's speech in *Reg v Lawrence (Alan)* had been fully established.

My Lords, Mr Jeffreys sought to argue that any removal from the shelves of the supermarket, even if unaccompanied by label switching, was without more an appropriation. In one passage in his judgment in *Morris's case*, the learned Lord Chief Justice appears to have accepted the submission, for he said [1983] QB 587, 596; [1983] 2 All ER 448; [1983] Crim LR 559; (1983) 77 Cr App R 164; [1983] 2 WLR 768:

> "it seems to us that in taking the article from the shelf the customer is indeed assuming one of the rights of the owner – the right to move the article from its position on the shelf to carry it to the check-out."

With the utmost respect, I cannot accept this statement as correct. If one postulates an honest customer taking goods from a shelf to put in his or her trolley to take to the checkpoint there to pay the proper price, I am unable to see that any of these actions involves any assumption by the shopper of the rights of the supermarket. In the context of section 3(1), the concept of appropriation in my view involves not an act expressly or impliedly authorised by the owner but an act by way of adverse interference with or usurpation of those rights. When the honest shopper acts as I have just described, he or she is acting with the implied author of the owner of the supermarket to take the goods from the shelf, put them in the trolley, take them to the checkpoint and there pay the correct price, at which moment the property in the goods will pass to the shopper for the first time. It is with the consent of the owners of the supermarket, be that consent express or implied, that the shopper does these acts and thus obtains at least control if not actual possession of the goods preparatory, at a later stage, to obtaining the property in them upon payment of the proper amount at the checkpoint. I do not think that section 3(1) envisages any such act as an "appropriation," whatever may be the meaning of that word in other fields such as contract or sale of goods law.

If, as I understand all of your Lordships to agree, the concept of appropriation in section 3(1) involves an element of adverse interference with or usurpation of some right of the owner, it is necessary next to consider whether that requirement is satisfied in either of these cases. As I have already said, in my view mere removal from the shelves without more is not an appropriation. Further, if a shopper with some perverted sense of humour, intending only to create confusion and nothing more, both for the supermarket and for other shoppers, switches labels, I do not think that that act of label switching alone is without more an appropriation, though it is not difficult to envisage some cases of dishonest label-switching which could be. In cases such as the present, it is in truth a combination of these actions, the removal from the shelf and the switching of the labels, which evidences adverse interference with or usurpation of the right of the owner. Those acts, therefore, amount to an appropriation and if they are accompanied by proof of the other three elements to which I have referred, the offence of theft is established. Further

if they are accompanied by other acts such as putting the goods so removed and re-labelled into a receptacle, whether a trolley or the shopper's own bag or basket, proof of appropriation within section 3(1) becomes overwhelming. It is the doing of one or more acts which individually or collectively amount to such adverse interference with or usurpation of the owner's rights which constitute appropriation under section 3(1) and I do not think it matters where there is more than one such act in which order the successive acts take place, or whether there is any interval of time between them. To suggest that it matters whether the mislabelling precedes or succeeds removal from the shelves is to reduce this branch of the law to an absurdity.

My Lords, it will have been observed that I have endeavoured so far to resolve the question for determination in these appeals without reference to any decided cases except *Reg v Lawrence (Alan)* [1972] AC 626 which alone of the many cases cited in argument is a decision of this House. If your Lordships accept as correct the analysis which I have endeavoured to express by reference to the construction of the relevant sections of the *Theft Act*, a trail through a forest of decisions, many briefly and indeed inadequately reported, will tend to confuse rather than to enlighten. There are however some to which brief reference should perhaps be made.

First, *R v McPherson* [1973] Crim LR 191. Your Lordships have had the benefit of a transcript of the judgment of Lord Widgery CJ. I quote from page 3 of the transcript:

> "Reducing this case to its bare essentials we have this: Mrs McPherson in common design with the others takes two bottles of whisky from the stand, puts them in her shopping bag; at the time she intends to take them out without paying for them, in other words she intends to steal them from the very beginning. She acts dishonestly as the jury found, and the sole question is whether that is an appropriation of the bottles within the meaning of section 1. We have no hesitation whatever in saying that it is such an appropriation and indeed we content ourselves with a judgment of this brevity because we have been unable to accept or to find any argument to the contrary, to suggest that an appropriation is not effective in those simple circumstances."

That was not, of course, a label switching case, but it is a plain case of appropriation effected by the combination of the acts of removing the goods from the shelf and of concealing them in the shopping bag. *R v McPherson* is to my mind clearly correctly decided as are all the cases which have followed it. It is wholly consistent with the principles which I have endeavoured to state in this speech. It has been suggested that *R v Meech* [1974] QB 549, *R v Skipp* [1975] Crim LR 114 – your Lordships also have a transcript of the judgment in this case – and certain other cases are inconsistent with *R v McPherson*. I do not propose to examine these or other cases in detail. Suffice it to say that I am far from convinced that there is any inconsistency between them and other cases as has been suggested once it is appreciated that facts will vary infinitely. The precise moment when dishonest acts, not of themselves amounting to an appropriation, subsequently, because of some other and later acts combined with those earlier acts, do bring about an appropriation within section 3(1) will necessarily vary according to the particular case in which the question arises.

Of the other cases referred to, I understand all your Lordships to agree that *Anderton v Wish (Note)* (1980) 72 Cr App R 23 was rightly decided for the reasons given. I need not therefore refer to it further. *Eddy v Niman* (1981) 73 Cr App R 237 was in my view also correctly decided on its somewhat unusual facts. I think that Webster J, giving the first judgment, asked the right question at p241, though, with respect, I think that the phrase "some overt act ... inconsistent with the true owner's rights" is too narrow. I think that the act need not necessarily be "overt." *Kaur (Dip) v Chief Constable of Hampshire* [1981] 2 All ER 430; [1981] 1 WLR 578; [1981] Crim LR 259; (1981) 72 Cr App R 359; (1981) 145 JP 313 is a difficult case. I am disposed to agree with the learned Lord Chief Justice that it was wrongly decided but without going into further detail I respectfully suggest that it is on any view wrong to introduce into this branch of the criminal law questions whether particular contracts are void or voidable on the ground of mistake or fraud or whether any mistake is sufficiently fundamental to vitiate a contract. These difficult questions should so far as possible be confined to those fields of law to which they are immediately relevant and I do not regard them as relevant questions under the *Theft Act* 1968.

My Lords, it remains briefly to consider any relationship between section 1 and section 15. If the conclusion I have reached that theft takes place at the moment of appropriation and before any payment is made at the checkpoint be correct it is wrong to assert, as has been asserted,

that the same act of appropriation creates two offences one against section 1(1) and the other against section 15(1) because the two offences occur at different points of time; the section 15(1) offence is not committed until payment of the wrong amount is made at the checkpoint while the other has been committed earlier. It follows that in cases such as Morris's two offences were committed. I do not doubt that it was perfectly proper to add the third count under section 15(1) in this case. I think the assistant recorder was right to leave all three counts to the jury. While one may sympathise with his preventing them from returning a verdict on the third count once they convicted on the theft counts if only in the interests of simplification, the counts were not alternative as he appears to have treated them. They were cumulative and once they were left to the jury verdicts should have been taken on all of them.

My Lords, these shoplifting cases by switching labels are essentially simple in their facts and their factual simplicity should not be allowed to be obscured by ingenious legal arguments upon the *Theft Act* which for some time have bedevilled this branch of the criminal law without noticeably contributing to the efficient administration of justice – rather the reverse. The law to be applied to simple cases, whether in magistrates' courts or the Crown Court, should if possible be equally simple. I see no reason in principle why, when there is clear evidence of both offences being committed, both offences should not be charged.

But where a shoplifter has passed the checkpoint and quite clearly has, by deception, obtained goods either without paying or by paying only a lesser price than he should, those concerned with prosecutions may in future think it preferable in the interests of simplicity to charge only an offence against section 15(1). In many cases of that kind it is difficult to see what possible defence there can be and that course may well avoid any opportunity for further ingenious legal arguments upon the first few sections of the *Theft Act*. Of course when the dishonesty is detected before the defendant has reached the checkpoint and he or she is arrested before that point so that no property has been obtained by deception, then theft is properly charged and if appropriation, within the meaning that I have attributed to that word in this speech, is proved as well as the other three ingredients of the offence of theft, the defendant is plainly guilty of that offence.

My Lords, as already explained I have not gone through all the cases cited though I have mentioned some. Of the rest those inconsistent with this speech must henceforth be treated as overruled. I would answer the certified questions in this way:

> "There is a dishonest appropriation for the purposes of the *Theft Act* 1968 where by the substitution of a price label showing a lesser price on goods for one showing a greater price, a defendant either by that act alone or by that act in conjunction with another act or other acts (whether done before or after the substitution of the labels) adversely interferes with or usurps the right of the owner to ensure that the goods concerned are sold and paid for at that greater price."

I would dismiss these appeals.
