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SUPREME COURT OF VICTORIA

McGILL v SHEPHERD

Murphy J

21 July 1976

CRIMINAL LAW – THEFT – DISHONEST APPROPRIATION OF THINGS FORMING PART OF THE LAND BY SEVERANCE – SEVERANCE OF CATTLE FEED BY GRAZING CATTLE – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* 1958, SS71, 72.

The defendant was charged under the *Crimes Act* 1958 with stealing cattle feed by the method of cutting fencing wire on another person's land to permit his cattle to graze thereon. The defendant admitted the cattle were on the relevant land for about a month and that he had put them there for the purpose of grazing them and that he had no permission to do so. The Magistrate acceded to a submission of "no case" stating the charge would fail because the provisions of s71(6)(b) of the *Crimes Act* "would not apply to the defendant as it only referred to appropriation of things severed from land by human beings and not by an animal put on the land as was the case in the circumstances in question". Upon Order Nisi to review—

HELD: Order absolute. Dismissal set aside.
1. The Magistrate came to the conclusion that s73(6) of the *Crimes Act* 1958 ('Act') covered only severance by human agency. The Magistrate was not correct in this conclusion. There was no reason at all to temper the provisions of the Act in this manner.

2. Section 73 of the Act qualifies s72, but it does not have the result or the effect that the Magistrate found, namely that it required that the particular thing forming part of the land and severed from it must be so severed by a human being. The Magistrate was in error in finding that an appropriation by severance by an animal agency could not amount to an appropriation within the meaning of the Act.

3. Appropriation is defined by s72(4) of the Act. Any assumption by a person of the rights of an owner amounts to appropriation. A person appropriates by severance, grass or herbage, if he purposefully employs animals to do so for him. They are 'innocent agents'; this concept is well known in the law.

4. The decision of the Magistrate, in acceding to the submissions made by the solicitor for the defendant in this matter, was wrong, and wrong as a matter of law. It followed that the Magistrate's decision should be set aside.

MURPHY J: Before the *Crimes (Theft Act)* 1973 (Victoria) larceny of realty, an immovable, was not recognized at common law, see Volume 1, Hale, *Pleas of the Crown* p510. Immovables could not be carried away. Likewise, things planted in the soil became part of the soil, and the maxim *quicquid plantatur solo solo cedit* applied then, as it does today, in the law of property.

The crime of larceny involved an asportation, and an interference with the possession of another. The act of a stranger in severing a crop or a tree or grass from the soil and carrying it away immediately could not have amounted to larceny, because the severed article had no separate existence prior to severance and had not been reduced into possession, either actual or constructive, by the owner of the land. It could not have been so reduced prior to severance. If the severed article was left on the earth and later taken away, this could be larceny, for it would amount to an interference with the constructive possession of the true owner, see Pollock & Wright, *Possession and the Common Law*, p230 *et seq*.

Whether the crop or grasses were *fructus naturales* or *fructus industriales* (as to which see *Benjamin Sale of Goods*, 1974 edition, paragraph 84 and following) was not to the point. If the commodities formed part of the land, a charge of larceny would not lie, whether the crop or grasses or commodities were consumed or carried away by a third party.

The amendment to the *Crimes Act* effected by the *Crimes (Theft) Act* 1973 have been made for the purpose of doing away with many of these subtleties which developed as products of the common law, see *R v Feely* (1973) 1 QB 530. It is thus possible today for a person to steal if he severs things growing on the land of another even though he immediately carries the severed articles away.

During the course of proceedings before me, much reliance has been placed on several sub-sections contained in s73 sub-s(4) & (6). It is perhaps of assistance to compare the provisions of our *Crimes Act* as introduced by the *Crimes (Theft) Act* no. 8425 of 1973 with the provisions of the English *Theft Act* 1968. It is clear from such a comparison that the amendments to our *Crimes Act* are modelled on the English *Theft Act*. However, there are important differences, mainly by way of omission from the Victorian Act.

The English Act contains a provision specifically exempting mushroomers and wild fruit pickers who do not intend to use the articles picked from the land for sale or commercial gain. Section 4(3) of the English *Theft Act* reads:—

> 'A person who picks mushrooms growing wild on any land or who picks flowers, fruit or foliage from the plants growing wild on any land does not (although not in possession of the land) steal what he picks unless he does it for reward or for sale or other commercial purpose. For the purposes of this sub-section mushrooms includes any fungus and plant includes any shrub or trees.'

The Victorian Act contains no such provision. This studied omission may provide assistance in the solution of the present problem. It is therefore necessary to construe the relevant provisions of the Victorian *Crimes Act*. I have already read the definition contained in s72 and the other provisions upon which reliance has been placed in the debate before me.

The question becomes: Can a person be guilty of theft if he deliberately (*ex hypothesi*) puts cattle on to land known by him to belong to someone else with the intention and result that the cattle eat the grass and herbage on the land? If it were not for s73(6)(b) it would be reasonably easy to conclude that anyone who dishonestly appropriated grass or herbage belonging to another committed theft.

In England, however, the bald concept that this could be considered theft would not appear to be acceptable or readily appreciated. In Australia, different considerations may well apply. The importance of natural grasses and herbs and cultivated grasses may be more significant in this country. It is not perhaps surprising that the Victorian statutory provisions, although modelled on the English Act, specifically omit the provisions of s4(3) of the English *Theft Act*.

It may be important to ask, though, why was it necessary for the English *Theft Act* to include s4(3) and then to ask a further questions why was the sub-section omitted from the Victorian Act? It seems that the second question is easier to answer and the answer would appear to me to be that, either for political reasons, or because of the influence which might be brought to bear by pastoralists upon the likely passing of such legislation, or the absence in this country of perhaps the same long-standing traditions which apparently prevail in England, such considerations have led to the omission of the sub-section from our Act.

In England apparently it is regarded as an innocent pastime to take mushrooms from the land of another or to take anything growing wild, be it blackberries or any other fruit, from the land of another, provided one does so not for the purposes of commercial gain. In other words, the omission from our Acts of these provisions of sub-section (3) of s4 would seem to be related purely to local considerations.

However, the mere fact that it was necessary to include s4, sub-s3 in the English *Theft Act*, suggests that if it had not been so included, mushroomers or persons picking blackberries and the like, would be guilty of theft within the provisions of the Act. If this is true, it would seem to me to follow that sections 71, 72, combined with s73 sub-s4, make the dishonest appropriation of grass by severance, theft within the meaning of the statute.

The magistrate, in this case, came to the conclusion that the statute covered, (that is to say, s73 sub-s6; covered) only severance by human agency. In my opinion, he was not correct in his conclusion. I see no reason at all to temper the provisions of the Act in this manner.

If the grass had been cut for hay by a harvester and baled and taken away nonetheless, it would be a theft of the pasture. If the pasture was rolled into icons and later consumed by cattle, it can still, in my opinion, amount to a theft of the pasture. We are required to look afresh at the taking of things forming part of the land. I can see no reason why the deliberate depasturing of stock on the land of another, with the consequent and purposeful consumption of pasture does not amount to an appropriation by severance of the grasses and herbage in question.

There has been considerable debate by counsel as to the meaning in the statute of the words 'by his directions', appearing in s73 sub-s6, and as to the meaning of the words 'or causing it to be severed', in s73 sub-s6(b). It has also been argued that s73 cuts down the meaning of 'property', as that word is used in s72 of the Act. In my opinion s73 does qualify s72, but it does not, in my opinion, have the result or the effect that the Magistrate found, namely that it requires that the particular thing forming part of the land and severed from it must be so severed by a human being. In effect, the Magistrate found that an appropriation by severance by an animal agency could not amount to an appropriation within the meaning of the Act. In my opinion he was wrong in this regard.

Appropriation is defined by s72 sub-s4, as I have already mentioned. Any assumption by a person of the rights of an owner amounts to appropriation. In my opinion, a person appropriates by severance, grass or herbage, if he purposefully employs animals to do so for him. They are, 'innocent agents'; this concept is well known in the law, and reference has only to be made, (without dilating upon it) to *Blackstone's Commentaries* Volume 4, Chapter 3 pp34 & 35; *Archbol*d, 34th Edition paragraph 4122; Kenny's *Criminal Law*, 18th Edition, paragraph 67; *Glanville Williams* 1st Edition, *Criminal Law* pp178 and 179; *Russell on Crime*, Volume 1, 12th Edition, pp129 and 130. As is stated in this last mentioned reference, 'In point of law, the act of the innocent agent is as much the act of the procurer as if he were present and did the act himself'.

Mr Gillard submitted to me that 'you can lead a horse to water but you cannot make him drink', and by this he was wishing to direct my attention to the fact that the words 'by his directions', in sub-s6, cannot really apply to cows which cannot, perhaps, be directed to eat the grass. But that is an imaginative, impractical and novel approach to the problem. Animals have long been considered as instruments akin to innocent agents. I am unable to agree with his submission.

It follows from what I have said that the Magistrate's decision could not be sustained if the reasons expressed by him for arriving at it are the only reasons available.

Mr Gillard has argued today that there are other reasons why the Magistrate's decision should be upheld, and he has entertainingly submitted that the Magistrate could not have found that the defendant was not in possession of the land. I do not agree with this submission. Indeed, I doubt whether it would have been open to the Magistrate to find otherwise than that the defendant was not in possession.

I agree with both Mr Ostrowski and Mr Gillard that the question as to whether or not a person is in possession is for the purposes of this Act a matter of fact. It is, of course, a matter, you might say, of mixed fact and law.

I do not embark upon any determination as to the conclusion at which the Magistrate would have to arrive, save to say that Mr Gillard's submission is not, in my view, a submission to which I should accede. His submission had to be that the Magistrate could not have found that the defendant was not in possession of the land. This is, of course, sufficient to dispose of Mr Gillard's argument on this point. See *Preston Ice and Cool Stores Proprietary Limited v Hawkins* [1955] VicLawRp 17; [1955] VLR 89 at p92; [1955] ALR 371.

I do not intend to endeavour to paraphrase the meaning of the various words used in sections 71, 72 and 73 of the *Crimes Act*. Usually, any attempt that is made to paraphrase the meaning of the words in a statute leads to disaster at some stage or other in the future. It is not possible, with precision, in my view, to paraphrase the meaning of the several words used. It is sufficient for me to say that the decision of the Magistrate, in acceding to the submissions made by the solicitor for the defendant in this matter, was wrong, and wrong as a matter of law. It follows, in my opinion, that the Magistrate's decision should be set aside.