44/81

COURT OF APPEAL (ENGLAND)

KAUR (Dip) v CHIEF CONSTABLE for HAMPSHIRE

Lord Lane CJ and Lloyd J

29 January 1981

[1981] 2 All ER 430; [1981] 1 WLR 578; [1981] Crim LR 259; (1981) 72 Cr App R 359; (1981) 145 JP 313

CRIMINAL LAW – THEFT – DISHONEST APPROPRIATION – SELECTION OF GOODS IN STORE WITH TWO DIFFERENT PRICE LABELS – INTENTION TO OBTAIN GOODS AT LOWER PRICE – CASHIER CHARGING LOWER PRICE – WHETHER CONTRACT OF SALE VOID – WHETHER APPROPRIATION OF PROPERTY BELONGING TO ANOTHER: *THEFT ACT* (UK) 1968 (C60), S1(1).

Shoes were displayed in a store on two racks, shoes on one rack being priced at £6.99 and on the other at £4.99. The defendant selected a pair of shoes from the £6.99 rack and noticed that one shoe bore a price label to that effect and the other had a £4.99 label. Without concealing either label, she took the shoes to the cashier with the intention of obtaining the advantage to the lower price, and on being asked for £4.99 she paid and left the store with the shoes. Outside the store she was stopped and later charged with theft contrary to s(1) of the *Theft Act* 1968. The justices held that the cashier had no authority to accept an offer to pay £4.99 and that, since the defendant knew that that was not the correct price, the contract was void and the defendant had appropriated property belonging to the store and was guilty of theft. On appeal by the defendant—

HELD: Appeal allowed. The fact that the cashier had authority to charge the price marked on the shoes, and the fact that she chose the lower of two prices so marked did not mean that she was acting without authority. A mistake as to the price induced by wrong marking was not so fundamental as to destroy the validity of the contract of sale, but merely rendered it voidable. Accordingly, since the contract had not been avoided by the time that the defendant left the store, property in the shoes passed on payment and the defendant had not appropriated property belonging to another.

The following cases are referred to in the judgment of Lord Lane CJ:
Anderton v Wish (1981) 72 Cr App R 23; (1980) Crim LR 319; *Hartog v Colin and Shields* (1939) 3 All ER 566; *Lacis v Cashmarts* (1969) 2 QB 400; (1969) 2 WLR 329; *Pilgram v Rice*-Smith (1977) 1 WLR 671; (1977) 2 All ER 658; *R v Lawrence (Alan)* [1971] UKHL 2; [1972] AC 626; (1971) 3 WLR 225; (1971) 2 All ER 1253.

LORD LANE CJ: It is sometimes of advantage to reduce this sort of problem to its ingredients. In order to bring the charge home to the defendant the prosecution had to prove the following matters: first of all, that the defendant acted dishonestly; secondly, that she appropriated the shoes, that is to say, she assumed over the shoes the rights of an owner; thirdly, that at that moment those shoes belonged to somebody else; and fourthly and finally, that she intended permanently to deprive the owner of them.

It was found by the justices that she realised that the correct price of the shoes selected by her was £6.99, and that she believed it would be wrong to take the shoes out of the shop in the circumstances. They came to the conclusion that it was right to describe that as dishonest. She certainly assumed the rights of an owner when, having paid, she took the shoes in the paper bag from the cashier in order to go home. I do not pause to inquire at the moment whether "appropriation" is an accurate description of what she did. There is no doubt that she intended permanently to deprive the owner of the shoes. So the only matter in issue in this case is whether the prosecution had proved that at the moment she took the shoes out of the shop, the ownership of the shoes offence was proved; if not, it was not proved.

There is ample authority for the proposition that, so far as supermarkets, at any rate, are concerned, and insofar as an ordinary transaction in a supermarket is concerned, the intention of the parties, under section 18 of the *Sale of Goods Act* 1979, is that the ownership of the goods should pass on payment by the customer of the price to the cashier. It also seems to accord with

good sense, and if any authority is needed for that, it is to be found in *Lacis v Cashmarts* (1969) 2 QB 400.

Prima facie, then, when the defendant picked up the shoes to take them home, she was already the owner of the shoes. They did not then belong to somebody else, and she was not intending to deprive the owner of them. But the prosecutor contends that the apparent contract between the shop and the defendant was no contract at all, was void, and that therefore, despite the payment made by the defendant, the ownership of the shoes never passed to the defendant, and the offence was accordingly made out. Mr Mylne puts it with very great simplicity: she never paid the price, he says, and so there was never any contract at all. He went so far as to suggest that if this lady had been given 10p too much by way of change and realised that she had been given 10p too much by way of change and had walked out of the shop with the shoes, in those circumstances she would likewise have been guilty of theft of the shoes.

The first thing to note, as indeed the justices did, is that this was not a case where there was any deception at all perpetrated by the defendant. She had not switched the price labels, as happened in *Anderton v Wish* (1981) 72 Cr App R 23; (1980) Crim LR 319, in which it was held that the property was appropriated when the price tickets were changed. There is no need to comment on that decision, although it has been the subject of adverse criticism. The prosecution, before the justices, as they did here, relied upon the decision in *Hartog v Colin and Shields* (1939) 3 All ER 566. In that case there had been extensive negotiations between the parties, both oral and in writing, about the sale by the defendants to the plaintiffs of hare-skins. All those negotiations had been based on a price of so many pence per piece. The final offer by the defendants to sell was mistakenly quoted in so many pence per pound. Skins worth 10¾d each were on this basis being offered at 3¾d. On discovering their obvious mistake, the defendants refused to deliver the skins and the plaintiffs claimed damages. The report of the *ex tempore* judgment of Singleton J is not altogether clear, but the facts are so far divorced from those on the present case that they provide little assistance. We were also referred to *Pilgram v Rice-Smith* (1977) 2 All ER 658; (1977) 1 WLR 671. That was a case where the shop assistant and the customer agreed together to defraud the shop-owners, and likewise does not provide any guidance.

The justices based their conclusion primarily on the fact that the cashier had no authority to accept on behalf of the retailer an offer by the defendant to buy the shoes for £4.99. In my judgment they were in error. The cashier had the authority to charge the price which was marked on the ticket on the goods. The fact that there were two different prices marked and that she chose the lower one does not mean that she was acting without authority. No false representation was made by the defendant. This is not one of those cases where the true offence was really obtaining by deception under section 15, and where the prosecution should, accordingly, have alleged that offence, and have resisted the temptation to charge theft. This was either theft or nothing.

It seems to me that the court should not be astute to find that a theft has taken place where it would be straining the language so to hold, or where the ordinary person would not regard the defendant's acts, though possibly morally reprehensible, as theft. In essence here, as I have already said, the problem is whether the ownership of the shoes passed to the defendant, or whether the apparent contract was void by reason of mistake. Where questions of mistake are involved there will always be great difficulty in deciding where the line is to be drawn and what renders a contract void and what renders a contract merely voidable. The mistake here was the cashier's, induced by the wrong marking on the goods as to the proper price of these goods, It was not to the nature of the goods or the identity of the buyer. Speaking for myself, I find it very difficult to see how this could be described as the sort of mistake which was so fundamental as to destroy the validity of the contract. It was in essence, as Lloyd J pointed out in argument, very little, if at all, different from a mistake as to quality. A mistake as to quality has never been held sufficiently fundamental so as to avoid a contract. The cashier was in effect thinking that these were £4.99 quality shoes, when in fact they were £6.99 quality shoes. Consequently in my judgment the prosecution failed to prove that this alleged contract was void. If it was merely voidable it had certainly not been avoided when the time came for the defendant to pick up the shoes and go.

LLOYD J: I agree.