

53/79

SUPREME COURT OF VICTORIA

McCARTHY v HICKEY

Crockett J

7 August 1979; revised 8 September 1979

CRIMINAL LAW – THEFT – LEATHER COAT BELONGING TO ANOTHER PERSON TAKEN BY DEFENDANT – STATEMENT BY DEFENDANT THAT THE OTHER PERSON OWED HIM MONEY – IF MONEY PAID TO DEFENDANT COAT WOULD BE RETURNED – CHARGE LAID – FINDING BY MAGISTRATE THAT DEFENDANT HAD A GENUINE BELIEF AT THE TIME HE TOOK THE COAT THAT THE OWNER OF THE COAT OWED HIM MONEY – FURTHER FINDING BY MAGISTRATE THAT THAT GENUINE BELIEF WAS NOT BASED ON REASONABLE GROUNDS – STATUTORY DEFENCE AVAILABLE IF DEFENDANT APPROPRIATES PROPERTY IN THE BELIEF THAT HE HAS IN LAW THE RIGHT TO DEPRIVE THE OTHER OF IT – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT 1958*, SS72(1), 73(2)(a).

HELD: Order nisi absolute. Conviction and sentence set aside. Information dismissed.

1. Section 73(2)(a) of the *Crimes Act* provides that a person's appropriation of property belonging to another is not to be regarded as dishonest if he appropriates the property in the belief that he has in law the right to deprive the other of it on behalf of himself or of a third person.
2. The magistrate reached the view that the defendant had a genuine belief at the time he took the coat that the coat's owner owed him money. The magistrate proceeded to determine that the holding of that genuine belief was not based upon reasonable grounds. However, the reasonableness of the grounds upon which a belief as to a claim of right rests was irrelevant.
3. It was open on the evidence to find that the defendant asserted he held a belief that he had a right in law to take the coat when he did.
4. The Magistrate must be taken to have accepted the defendant's evidence to the effect that the defendant did not believe it was wrong in law to take the coat under the circumstances. Further, there is everything in the magistrate's reasons, as referred to in his affidavit, to indicate that he concluded that the defendant had a genuine belief in law that he had a right to take the coat, and that the only reason the magistrate did not give effect to that as a defence to the information was that he believed that that claimed right in law rested upon a belief that was, although genuinely held, unjustified in the circumstances.
5. Accordingly, the magistrate misdirected himself in law in that the need for there to be reasonable grounds for the belief was relevant to the ultimate conclusion as to whether the belief that there was a right to deprive the owner of the coat was a genuine belief.

CROCKETT J: I have before me the return of an order nisi to review an order made the 15th day of August 1978 by the Magistrates' Court at Prahran consisting of Mr P Rodda, Stipendiary Magistrate. The order was made upon the hearing of an information in which the applicant had been charged that on the 19th June 1978 he did steal a brown leather coat the property of Margaret Anne Straker and valued at \$175. At the conclusion of the hearing the applicant was convicted and fined \$100 in default of payment of which he was ordered to be imprisoned for ten days.

The facts concerning the circumstances in which the information came to be laid were not greatly in dispute. What occurred was that on the day in question the applicant went to the apartment of Miss Straker, only to find that she was not at home. However, a person who was at the premises opened the door and to that person the applicant identified himself. He also said that Miss Straker owed him some money which she had not paid. He then took Miss Straker's coat, which was in the hallway, and told the person by whom he had been admitted to the premises that Miss Straker should be told that she could come to the Swan Hotel, where the applicant would be waiting for the money which Miss Straker had collected during the past month and with respect to which she had to account to the applicant, and that upon her doing so she could get her coat back.

It appeared further from the evidence that Miss Straker had, prior to the incident in question, been the manageress of a massage parlour, and in the performance of that office she was required to collect a stipulated weekly sum from each of the girls who worked in the business. Those sums of money were then to be handed by the manageress to the applicant, who, in turn, had to account to the owner of the business for such sums as received less the commission earned by the applicant in acting as a collecting agent.

In giving evidence about the matter the applicant pointed out that he had not visited Miss Straker's premises for about a month before 19th June 1978, due principally to his being in hospital during part of that time. As a result, he had, he said, an honest belief that during such a period Miss Straker must have money from the business for which she was accountable to him. He, in any event, when he first went to the premises did not have any intention of taking the coat. Nor did he attempt to claim it as his own in lieu of the debt which he said was owed to him, and he did not intend to sell the coat in order to retrieve the moneys which he said he was owed, but which he said it appeared for one reason or another Miss Straker was avoiding paying to him.

In those circumstances the applicant relied upon three defences. In order to understand how each of those defences arises it is necessary to refer to the relevant provisions of the *Crimes Act* which bear upon the offence with which the applicant had been charged. Section 72(1) provides:

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

That, of course, is the definition of the offence of theft which the Act creates. However, by s73(2) certain specified sets of circumstances are designated so that if in any given case such a set of circumstances should exist, then dishonesty in connection with the commission of the alleged offence is thereby negated. The subsection so far as is presently relevant is as follows:-

"A person's appropriation of property belonging to another is not to be regarded as dishonest—
(a) if he appropriates the property in the belief that he has in law the right to deprive the other of it on behalf of himself or of a third person."

Now, having regard to those statutory provisions, the applicant, through his legal representative, contended at the hearing in the Court below, firstly, that the magistrate should not be satisfied that the appropriation of the coat was with an intention permanently to deprive the owner of it. The magistrate found as a fact that there was such an intention and that finding is not challenged in the proceedings before me.

Next, it was said that the appropriation of the property (which of course was not contested) should it have been with the intention of permanently depriving Miss Straker of it, could not be said to have been a dishonest appropriation. That was said to be for two reasons. In the first place, it was said that the magistrate should have been satisfied that the appropriation was with a belief on the part of the applicant that in law he had the right to deprive Miss Straker of the coat. Should that contention not succeed, it was said that in any event in all the circumstances the appropriation was not dishonest. The magistrate found against the applicant on both of those contentions, and it was his finding in respect of each of those two particular defences which was, by the grounds taken in the order nisi, made the subject of argument before me as to why the magistrate's finding should be found to be at fault.

So far as the submission that, quite apart from what I might describe as a belief in the existence of a claim of right is concerned, the circumstances were such that the magistrate was wrong in concluding that there was a dishonest appropriation is concerned, two arguments were advanced. In the first place, it was said that the weight of the evidence which, as I have already indicated, was not in any serious way, or in any important aspect, contested, was such that the only inference open to the magistrate to be drawn from it was that the appropriation that occurred was not dishonest having regard to all of the circumstances revealed in the material before me. I think that contention must fail. There is evidence which, if accepted by the magistrate, would have permitted him, in my view, to have reached the conclusion that there was a dishonest appropriation, apart from the question of the application of s73(2)(a).

It was then said that in any event the magistrate's conclusion in that regard was in error, because he adopted a wrong test for the purpose of determining whether the appropriation was dishonest. The error was said to lie in a mistaken application of what the Court of Appeal said was the manner by which dishonesty in such circumstances should or should not be shown to exist. The case is *R v Feely* (1973) QB 530; [1973] 1 All ER 341; (1973) 57 Cr App R 312; [1973] 2 WLR 201. The argument addressed to me was that the reference by the magistrate to *Feely's* case for the purpose of the extraction of the appropriate criterion was unexceptional, but that the method of its application by the magistrate was wrong inasmuch as it was applied so as to produce an objective rather than a subjective test.

I am not altogether sure that I fully understand the implications of the submission made in this connection, and it may be, as counsel suggested, that in its application to particular cases what the Court of Appeal had to say in *R v Feely* is not without difficulty. However, my provisional view of the matter is that the magistrate did not fall into error in the manner in which he approached the question as to whether or not there was a dishonest appropriation (and again, I emphasise I am not concerned for the moment with s73(2)(a)) but it is unnecessary for me to express any concluded view about the matter because of the opinion I have formed concerning the argument addressed to me in support of the second ground relied upon by the applicant.

That ground asserts error on the part of the stipendiary magistrate in his consideration of the defence which for its success depended upon s73(2)(a). As I have indicated, the applicant, through his counsel, contended in the Court below that the magistrate should have concluded that the appropriation of the coat was in the belief genuinely held by the applicant that he had in law a right to deprive Miss Straker of that coat.

The stipendiary magistrate has taken the trouble to swear and have filed an affidavit in this matter and I am bound to say that I am indebted to him for the production of the material to be found in that affidavit. The affidavit sets out the magistrate's findings where relevant and the reasons that led him to make findings and which in turn led him to conclude that the applicant's defences failed. It is unnecessary, for the reasons I have already indicated, to refer to what the magistrate had to say in his affidavit concerning the matters that touched upon the first two defences of the applicant, to which I have already referred.

However, with regard to the defence that relates to the existence of an alleged claim of right, I refer to para 6 of the magistrate's affidavit, in which he says that: -

"(a) My acceptance of the defendant's evidence as referred to in para 4(a) hereof was subject to the limitations and reservations imposed upon it by my views as stated hereunder."

In para 4(a) of his affidavit the magistrate stated that he accepted the defendant's evidence that at the time of taking the coat he had a belief that Margaret Straker owed him money. And the magistrate continued:-

(b) I consider the defendant's evidence of the facts and circumstances upon which he alleged Margaret Straker owed him money was based on suspicion rather than on actual knowledge.

(c) I could find no reason why I should reject Margaret Straker's evidence denying that she owed money to the defendant.

(d) I was not satisfied that Margaret Straker had or did in fact owe money to the defendant as he alleged.

(e) Upon consideration of the views mentioned in paragraphs 4(a), 6(a), (b), (c) and (d) hereof, together with the remainder of the evidence, I was satisfied that the belief of the defendant referred to in paragraph 4(a) hereof was unreasonable and accordingly I was not satisfied that the defendant had a reasonable belief that in had in law a right to deprive Margaret Straker of the coat."

And finally the magistrate concludes with the statement that:-

"Due to the view mentioned in paragraph (e) hereof I was not satisfied that the defendant's belief fell within the provisions of Section 73(2)(a) of the *Crimes Act* 1958.

The ground relied upon in connection with that finding is manifestly incorrect. The passages to which I have referred clearly show that the magistrate reached the view that the applicant had a genuine belief at the time he took the coat that Miss Straker owed him money. The magistrate in an irrelevant and gratuitous finding, proceeded to determine that the holding of that genuine belief was not based upon reasonable grounds. However, the reasonableness of the grounds upon which a belief as to a claim of right rests is irrelevant. It is true that the magistrate has not expressly said that the applicant did not have reasonable grounds for the belief that he had in the right in law to deprive Miss Straker of the coat. What the magistrate has said is that the belief that he had the right to take the coat was not based upon reasonable grounds. That that finding indicated that the magistrate had misdirected himself in law is conceded by counsel for the respondent, inasmuch as the magistrate apparently believed that the need for there to be reasonable grounds for the belief was relevant to the ultimate conclusion as to whether the belief that there was a right to deprive Miss Straker of the coat was a genuine belief.

The concession of counsel for the respondent is undoubtedly correct, as the Court of Appeal in *R v Skivington* (1967) 1 All ER 483; (1968) 1 QB 166 at p170 said:

"If the honest belief that a man has a claim of right is a defence to larceny, then it negatives one of the ingredients in the offence of robbery without proof of which a full defence is not made out. That principle, simply stated as such, has been upheld in case after case."

What, however, counsel for the respondent has said is that the magistrate is not to be taken as having gone the further step and determined that the applicant did or did not have a genuine belief that he had a right to deprive the owner of her property, and that, accordingly, I should either remit the matter for that question to be determined by the magistrate, or that I should remit the matter for a complete rehearing before a different magistrate.

In my view, I should adopt neither of those courses, as I think that the matter can be finally disposed of in this Court. It is true, of course, that I cannot myself proceed to determine facts in order to assist in an ultimate determination of the matter, but it is unnecessary for any such course to be adopted.

Respondent's counsel submitted that the evidence fell short of the provision of any material on which it could be said that the applicant claimed that he did have a belief that he had a claim in law to take the coat. In my view the evidence was sufficient to permit such a finding to be made. The applicant has sworn in his affidavit that he said in evidence "that when I took the coat I honestly believed I had a right to take the coat and keep it until such time as the debt was paid or until such time as the said Margaret Straker explained to me the circumstances under which she left the business premises. That I did not believe it was wrong in law to take the coat under these circumstances." Although the proposition is there stated negatively, I think that it is open to be construed as providing an affirmative assertion that a belief did exist on the part of the applicant that he had a right in law to take the coat when he did.

Furthermore, I think that the true interpretation of what the magistrate has said in his affidavit bearing on this matter, namely, "I was satisfied that the belief of the defendant that at the time of taking the coat Margaret Straker owed him money was unreasonable and accordingly I was not satisfied that the defendant had a reasonable belief that he had in law a right to deprive Margaret Straker of the coat", means that, had the magistrate disregarded the gratuitous irrelevancy that he introduced wrongly into the determination of the matter so that he was left with a satisfaction that the applicant had a genuine belief that at the time of taking the coat its owner owed him money, the magistrate would inevitably have gone on to have found that, because of that genuine belief as to money being owed to him at the time he took the coat, he had a belief that he had a right in law to take the coat. I think that the true construction of the magistrate's reasons, as expressed by him in that connection not only permit, but compel, that conclusion to be reached, and in consequence, it is unnecessary to delay this matter further by any reference back of it.

That being so, the interpretation of the magistrate's reasons as applied to the facts which he found, or, which it can be inferred he found, amounts to a conclusion that the defence based upon s73(2)(a) must have been made out to the magistrate's satisfaction when he viewed the

matter freed of irrelevancies. That he must be taken to have accepted the applicant's evidence to the effect that the applicant did not believe it was wrong in law to take the coat under the circumstances may be accepted, because an affidavit sworn by the respondent does not suggest that that evidence was not given by the applicant, as the applicant in these proceedings deposes, and there is nothing in the magistrate's affidavit to suggest that he did not accept such testimony and, as I have already endeavoured to indicate, there is everything in the magistrate's reasons, as referred to in his affidavit, to indicate that he did conclude that the applicant had a genuine belief in law that he had a right to take the coat, and that the only reason that the magistrate did not give effect to that as a defence to the information was that he believed that that claimed right in law rested upon a belief that was, although genuinely held, unjustified in the circumstances.

In the result, the order nisi will be made absolute. I will order that the conviction and sentence be set aside. In lieu I order that the information be dismissed and the respondent is ordered to pay the applicant's costs fixed at \$200. There will be a certificate in favour of the respondent under s13 of the *Appeal Costs Fund Act*.

APPEARANCES: For the applicant/defendant Michael Thomas McCarthy: Mr Z Zayler, counsel, instructed by Mr Donald Campbell. For the informant/respondent Hickey: Mr B McTaggart, counsel, instructed by the Crown Solicitor, Mr EL Lane.
