48/82

SUPREME COURT OF VICTORIA

WATERBEEK v MONUMENT

King J

3, 18 March 1982

CRIMINAL LAW – THEFTS FROM SHOPS – DEFENDANT CLAIMED NO RECOLLECTION OF EVENTS – ADMITTED TAKING A QUANTITY OF SEREPAX TABLETS PRIOR TO COMMISSION OF OFFENCES – CLAIM THAT LOSS OF MEMORY OCCURRED – CLAIM OF LACK OF NECESSARY INTENTION – BURDEN OF ESTABLISHING NECESSARY INTENTION BEYOND REASONABLE DOUBT ON THE PROSECUTION – AUTOMATISM – CHARGES DISMISSED – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* 1958, S74.

1. The crimes alleged against the defendant entailed three mental elements contemporaneous with the taking of the goods by the respondent, namely, voluntariness, dishonesty and intention to deprive permanently of such goods the shops from which they were taken. The burden of establishing the existence of the requisite categories of intention beyond reasonable doubt was, from beginning to end of the case, on the prosecution. It was for the magistrate to consider whether in the light of the evidence of loss of memory on the part of the respondent, of her ingestion of a large dose of the tranquilliser Serepax, and of the actual and possible effects of that dosage, he had a reasonable doubt as to whether she had all of those categories of intention.

2. Evidence of loss of memory of the relevant events could not, of itself, justify the magistrate's doubt. Nor could evidence of intoxication of the respondent by an overdose of Serepax, of itself or together with the evidence of loss of memory, do so. It is necessary to look at all the evidence and to consider whether the defendant's state of intoxication would have been sufficient to divorce her will from the movements of her body so that such movements were truly involuntary, or to prevent the formation of the necessary intent requisite to the crime charged.

***R v O'Connor* [1980] HCA 17; (1980) 146 CLR 64; (1980) 29 ALR 449; (1980) 4 A Crim R 348; (1980) 54 ALJR 349 at p352 per Barwick CJ, applied.**

3. In order to establish a reasonable doubt as to whether the defendant's acts were conscious and voluntary, it would be necessary for the evidence to establish a reasonable possibility of automatism. Automatism entails a complete loss of consciousness where the body is wholly out of control, as in the case of sleep-walking or an epileptic seizure.

4. In the present case the defendant, after over-dosing herself with a tranquilliser and during a period of which she alleges she has no memory, got off a tram in the City and made her way through the City to various shops where she picked out a number of items of mainly wearing apparel which fitted her. She could not have made the judgments necessary to carry out this chain of actions unless conscious of what she was doing. An inference could thus not reasonably have been drawn that she was possibly acting involuntarily. Accordingly, the magistrate was in error in dismissing the charges.

KING J: I have had returned before me thirteen orders nisi to review under s88 of the *Magistrates' Courts Act* 1971, in which the applicant is Jennifer M. Waterbeek and the respondent Robyn Leonie Monument. They arise out of a number of informations brought before the Magistrates' Court on 15 April 1981, in which the applicant was informant and the respondent defendant. Under the informations, the defendant was charged under s74 of the *Crimes Act* 1958 with stealing on 17 February 1981 a number of items of clothing and other personal property belonging to Myer Melbourne Pty Ltd and twelve other named Melbourne shops. The Stipendiary Magistrate constituting the said Court heard the informations and ultimately dismissed them all. It is his orders which are brought before me on review.

Carol Hobday, Security Officer employed by Myer Melbourne Pty Ltd, testified to seeing the defendant take several articles in Myers and carry them away in shopping bags. Miss Hobday accosted the defendant and the defendant accompanied her to an office. Miss Hobday asked her to place on the table any items she had that were not paid for. The defendant produced from her shopping bags some articles, including those which Miss Hobday had seen her take. She said

that everything else was paid for. She proceeded to empty one of her shopping bags on request and Miss Hobday asked her whether she could produce any receipts for the contents. She said she could not and Miss Hobday asked her to place on the table any items that she had not paid for. The defendant then took one record from the Coles shopper and placed both shopping bags on the table, saying, "Everything". Miss Hobjoy said, "Are you saying that none of these items are paid for?", to which the defendant replied; "That's right." Miss Hobday also said that when she spoke to the defendant the latter was rational and appeared to know that was happening, and that she did not notice that the defendant was affected by any drugs or liquor.

The informant, Policewoman Constable Waterbeek then gave evidence for the Prosecution. She said that on 17 February 1981 after Miss Hobday, in the defendant's presence, had told her what had taken place, she asked the defendant whether what Miss Hobday had said about her stealing items from Myer that day was true. The defendant said "yes." Constable Waterbeek asked the defendant whether the items in the shopping bags had been stolen by her, to which the defendant said, "Yes". Constable Waterbeek said that she and the defendant then went to Russell Street, where they made eleven records of interviews, which were shown to His Worship. According to these recorded interviews, the defendant admitted having taken the goods concerned from the respective shops named in the informations. When asked what her reason was for leaving Myers without attempting to pay for any of the items, she said she did not know and, when asked what she intended to do with them, she said; 'Use them.' However, her usual answer in the recorded Interviews to the question why she stole an article was that she wanted it. Her intention, she said, was to keep them.

Constable Waterbeek then said that she had been a member of the police force for about eighteen months, that she had had experience with people involved with drugs and liquor, that the defendant did not appear to be affected by liquor or drugs, and that she appeared quite normal and to be understanding all that was taking place. The defendant then gave evidence to the effect that she was employed as a telephonist with Telecom Australia at Windsor. She said her job was very boring and that she had suffered a nervous condition and depression. She agreed that she had attended Dr Marshall's clinic and confirmed the prescribed medication. She said that on 17th February 1981 she was not working and awoke at 10.00 a.m., feeling depressed. At 11.00 a.m. she took ten Serepax tablets, knowing this to be an overdose. She had taken Serepax before in overdose, but not so many, and claimed that she had been taking these tablets for some time she had built up some degree of tolerance for them. She then left her home by tram to travel to the City. She could remember getting on the tram but not alighting from it. She had no memory of being in any of the stores but could recall leaving Myers at the time of her arrest. She said that at that particular time she felt relaxed and did not care what was happening to her. She also said that at Russell Street Police Station she said; "no comment" to the questions asked of her. However, when the informant began making out records of interview, she admitted all the offences. Under cross-examination she agreed that all the items of property were her size. When asked whether she needed clothing, she said; '"Yes". She said also that she had read the records of interview at Russell Street and that at the time she did not object to their contents and agreed to sign each of them.

In summary, the Magistrate said that both the informant and Miss Hobday had given sworn evidence that on the day in question the defendant was not affected by drugs or liquor. This was contrary to the defendant's own evidence whereby she had sworn she had taken drugs. He said that nobody, including himself or the prosecutor, could say whether the defendant took the drug because she was the only one who could give evidence on the point and she had said that she took the drug on the day in question. He said that although he had some doubts about the case, he should not let them run away from him if the defendant did take the drug on that day. He said that the case of the *R v O'Connor* [1980] HCA 17; (1980) 146 CLR 64; (1980) 29 ALR 449; (1980) 4 A Crim R 348; (1980) 54 ALJR 349, which had been cited to him, may apply. He said that if the defendant was under the influence of drugs, criminal responsibility should not be held against her. He was not prepared to say that the defendant was a liar because of the property said to have been obtained from the Witchery store. He said finally that he accepted that on the balance of probabilities the defence had been sustained and that all charges would be dismissed.

In such a case as this, where the prosecution carries the burden of proving beyond reasonable doubt that the offences were committed, the Magistrate's decisions can be set aside

only if it appears that there is no reasonable view of the evidence consistent with them. If, on any reasonable view of the evidence, those decisions can be supported, then the party who complains of the decisions cannot have them set aside and the contrary decisions that he desires substituted for them. He is entitled to a contrary decision only when that decision is the only possible decision that the evidence on any reasonable view can support. *Young v Paddle Brothers Pty Ltd* [1956] VicLawRp 6; (1956) VLR 38 at p41; v, per Herring CJ; *Head v Baillieu* (Unreported, 26th November 1979, per Lush J at p10.

The evidence and the admissions made on behalf of the defendant make it clear that she took the goods concerned. However, it is an important feature of this case that the defendant gave evidence before the Magistrate that she had no recollection of events from the time that she got on the tram for the City until the time she left Myers under arrest. This evidence was given some support by Dr Marshall, but, without her own evidence of amnesia, his evidence would not have established amnesia on her part. Her own evidence of having taken an overdose of a tranquilliser also does not go as far as her own evidence of amnesia. Her statement that she recalls nothing of what took place before she went to Russell Street is consistent with her further evidence that later, in reply to the questions of the police, she said; "No comment", and that at the time she could see the labels on the goods.

It was open to His Worship to give enough credence to the defendant, who gave evidence before him, to doubt whether she had any memory of what took place, to doubt that her alleged admissions were made with a clear and uninfluenced mind, and to attribute the police knowledge of the article taken from the Witchery shop to their subsequent enquiries. Mr Kirkham, who appeared for the applicant, has submitted that loss of memory on the part of the respondent does not, of itself, mean that she lacked the necessary intention when she took the goods to commit the offences alleged against her. The crimes alleged against the respondent thus entailed three mental elements contemporaneous with the taking of the goods by the respondent, namely, voluntariness, dishonesty and intention to deprive permanently of such goods the shops from which they were taken.

Mr Ramsey, of counsel for the respondent, has submitted that there was sufficient evidence before the magistrate, including the defendant's evidence of loss of memory and the medical evidence, to justify the magistrate in having a reasonable doubt as to whether the defendant had at the relevant time one or more of the above-mentioned categories of intention. The burden of establishing the existence of the requisite categories of intention beyond reasonable doubt was, from beginning to end of the case, on the prosecution. It was for the magistrate to consider whether in the light of the evidence of loss of memory on the part of the respondent, of her ingestion of a large dose of the tranquilliser Serepax, and of the actual and possible effects of that dosage, he had a reasonable doubt as to whether she had all of those categories of intention.

I agree with Mr Kirkham that evidence of loss of memory of the relevant events could not, of itself, justify such a doubt. Nor could evidence of intoxication of the respondent by an overdose of Serepax, of itself or together with the evidence of loss of memory, do so. It is necessary to look at all the evidence and to consider whether the respondent's state of intoxication would have been sufficient to divorce her will from the movements of her body so that such movements were truly involuntary, or to prevent the formation of the necessary intent requisite to the crime charged: *R v O'Connor* [1980] HCA 17; (1980) 146 CLR 64; (1980) 29 ALR 449; (1980) 4 A Crim R 348; (1980) 54 ALJR 349 at p352 per Barwick CJ.

In order to establish a reasonable doubt as to whether the respondent's acts were conscious and voluntary, it would be necessary for the evidence to establish a reasonable possibility of automatism. Automatism entails a complete loss of consciousness where the body is wholly out of control, as in the case of sleep-walking or an epileptic seizure. In the present case the respondent, after over-dosing herself with a tranquilliser and during a period of which she alleges she has no memory, got off a tram in the City and made her way through the City to various shops where she picked out a number of items of mainly wearing apparel which fitted her. She could not have made the judgments necessary to carry out this chain of actions unless conscious of what she was doing. An inference could thus not reasonably have been drawn that she was possibly acting involuntarily.

It has however also to be considered whether there is any basis in the evidence on which the magistrate could have had a reasonable doubt that she had at the time formed a dishonest intention or an intention to deprive the shops concerned permanently of their goods Normally, if she was conscious of what she was doing as I have found must have been the case, she would have known that what she was doing was contrary to the accepted standards of honesty in the community, and that taking and keeping the goods taken would result in the owners of them being permanently deprived of them. There is nothing in the evidence to suggest she intended to return them. On the contrary, the evidence of Miss Hobday shows that during the respondent's period of amnesia she understood the significance of not having paid for the goods.

The question then is whether her state of drug intoxication was possibly such as to prevent her having either or both of those last mentioned two categories of intention. There is nothing in the evidence to justify any inference that it was. I note that a similar conclusion on similar evidence was arrived at by the Full Supreme Court in *Head v Baillieu* (*supra*). The only positive evidence which approached this subject was that of Dr Marshall, but he disclaimed any expertise on the relevant psychological effect of the ingestion of a massive dose of Serepax. I think that on all the admissions and evidence in this case the only decision to which the Magistrate could reasonably have come was that the respondent was guilty of all the charges against her. I order therefore that all orders nisi be made absolute, that all thirteen orders of the Melbourne Magistrates' Court, including all informations, be remitted to the Magistrate with a direction that all charges should be found to have been proved.

APPEARANCES: For the plaintiff Waterbeek: Mr AJ Kirkham, counsel. Mr D Yeaman, Crown Solicitor. For the defendant Monument: Mr A Ramsey, counsel. Ridgway Clements, solicitors.
