

42/80

## SUPREME COURT OF VICTORIA

**SPICER v CORNEA**

Kaye J

22 February 1980

**CRIMINAL LAW – THEFT OF TAPPET COVER AND STEERING WHEEL FROM CAR STRIPPED DOWN AND DUMPED – SITE OF DUMP KNOWN TO DEFENDANT – AT TIME ARTICLES WERE TAKEN VEHICLE HAD REGISTRATION PLATES AFFIXED AND A REGISTRATION LABEL AFFIXED TO THE WINDOW – DEFENDANT SAID THAT HE BELIEVED THAT THE OWNER OF THE VEHICLE HAD ABANDONED IT – MAGISTRATE SAID THAT AS THE REGISTRATION LABEL AND PLATES WERE STILL AFFIXED NO REASONABLE PERSON WOULD HAVE HAD ANY DIFFICULTY IN FINDING THE TRUE OWNER – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: CRIMES ACT 1958, S73(2)(c).**

C. who lived opposite a site known as "The Dumps" took a tappet cover and a steering wheel from a vehicle which had been stripped down and left at the site. When C. was later apprehended he said that he did not believe that he was stealing the property and that at all times he believed that the owner of the vehicle had abandoned it. C. said that he saw that the vehicle had registration plates affixed but he did not see the registration label affixed to the window. In finding the charge proved, the Magistrate said that in view of the label and plates being attached to the vehicle no reasonable person would have had any difficulty in finding the true owner. Upon appeal—

**HELD: Order absolute. Conviction and sentence set aside.**

**1. The test which the Magistrate should have applied was whether C. had acted dishonestly in the sense of what was the state of mind of S. when he removed the two items from the abandoned car. In the record of interview there are clear and unequivocal statements forming the evidence which was before the Magistrate, that C. did not have the necessary dishonest intent.**

**2. From those answers in the record of interview, the only inference that could be drawn was that C. believed that the vehicle had been abandoned and that when he took the items from it, there was no person who had any rights in the vehicle. Nothing emerged in the course of evidence thereafter, from which the Magistrate could have concluded that he did not have such an honest belief. Those matters were sufficient to cast reasonable doubt upon whether C. dishonestly appropriated the parts of the vehicle. When taken in conjunction with the uncontradicted evidence of C. that cars were dumped and abandoned in that area, the Magistrate could not have reasonably found that the defendant had the necessary dishonest intent to constitute the crime of theft.**

**KAYE J:** This is the return of an Order nisi made by Master Brett on 23 February 1979 calling upon the Respondent to show cause why a conviction and sentence imposed by Thompson SM on 7 December 1978 at the Williamstown Magistrates' Court should not be reviewed.

The defendant was charged with stealing one tappet cover and one steering wheel being property belonging to Richard Kowalski. The evidence before the Magistrate was that Mr Richard Kowalski was the owner of a Holden Torana motor vehicle which, at 7.30 am on 25th October 1978, he parked outside his place of employment. On his return to where he had left his car, at quarter to five in the afternoon of the same day, Mr Kowalski found that his car was missing. The vehicle had been left by him in a roadworthy condition. Subsequently the vehicle, in a stripped condition, was found on a vacant allotment known as "The Dumps" in Rosshire Road, Newport West. That position was opposite, or almost opposite premises in which the defendant resided.

"The Dumps" was an area in which vehicles were often found stripped down and dumped, and it was an area in which various items which were no longer used were left. Mr Kowalski's vehicle was found stripped down, with the dashboard, engine, gearbox, instruments and bucket seats taken from it. In addition to those matters the steering wheel and the tappet cover were missing. In a record of interview, or in the course of an interview the defendant made no answers to questions which could have been used for the purposes of concluding that the defendant dishonestly appropriated portions of the vehicle to his own use.

The defendant gave sworn evidence in which he deposed that he was aware that from time to time vehicles were dumped and abandoned on the site. He noted the condition of Mr Kowalski's vehicle and took from it the two items which formed part of the charge. The defendant swore that at no time did he believe he was stealing the items in question and that at all times he believed that the owner of the vehicle had abandoned it. In the course of cross-examination the defendant said that he had seen registration plates affixed to the vehicle but he did not see the registration label affixed to the window. He also said that the boot of the vehicle was locked. At the close of all the evidence the gravamen of the submission was that the defendant, at the time when he removed the plates, did not do so with any dishonest intention to appropriate them. In particular the defendant did not have the necessary dishonest intention to constitute the crime of theft. In reply, the prosecutor, drew the Magistrate's attention to s73(2)(c) of the *Crimes Act*. The Magistrate then said that in view of the fact that the registration sticker was still affixed to the vehicle and the number plates still thereon, no reasonable person would have had any difficulty in finding the true owner, and that the defendant had taken no steps that a reasonable person would have taken to find the true owner. He then proceeded to say that the charge had been proved.

In my view the principal ground on which this matter turns is that there was no evidence on which the learned Stipendiary Magistrate could have been satisfied beyond reasonable doubt that the applicant did not have the belief that the vehicle had been abandoned. It appears to me that the Magistrate, when determining whether the defendant had a dishonest intent at the time he appropriated the property, took as his standard what was set out in s73(2)(c), of the *Crimes Act*. If he did not do so consciously, in any event, the standard that he did apply in deciding the matter was similar to the provisions of s73(2)(c).

The Magistrate, stated that because the registration sticker was still affixed to the vehicle and the number plate was still on it, no reasonable person would have had any difficulty in finding the true owner, and that the defendant had taken no steps that a reasonable person would have taken to find the true owner. That however was not the enquiry which the Magistrate ought to have made in order to establish whether it had been proved beyond reasonable doubt that the defendant had dishonestly appropriated property belonging to another with the intention of permanently depriving him of it. In *R v Waterfall* (1970) 1 QB 148; [1969] 3 All ER 1048; [1969] 3 WLR 947, Parker LCJ, delivering the judgment of the Court of Criminal Appeal in connection with an information under s16(1) of the *Theft Act* 1968, at p151 said:

"The test here is a subjective test whether the particular man had an honest belief and of course whereas the absence of reasonable ground may point strongly to the fact that the belief is not genuine, it is at the end of the day for the jury to say whether or not in the case of this particular man he did have that genuine belief."

With the greatest respect to his Lordship I consider that that passage perhaps ought to have read as follows:

"The test here is a subjective test, whether the particular man did not have an honest belief, and of course whereas the absence of reasonable ground may point strongly to the fact that the belief was not genuine, it is at the end of the day for the jury to say whether or not in the case of the particular man, he acted dishonestly."

His Lordship there made it clear that the test is not what a reasonable man would have done but upon the whole of the evidence whether the accused had acted dishonestly in the sense that his intention was a criminal one. The Magistrate in forming the view that the charge had been made out, acted upon the view that the test of the accused's conduct and state of mind was to be judged by what a reasonable person would have done in the circumstances in which the defendant found himself. That in my view was not the test for him to apply. It was necessary for the Magistrate to apply the test of whether the defendant had acted dishonestly in the sense of what was the state of mind of the defendant when he removed the two items from the abandoned car. Having said that, it is clear to me that had the Magistrate applied his mind in that way, the evidence would have pointed in one direction only. In the record of interview there are clear and unequivocal statements forming the evidence which was before the Magistrate, that the defendant did not have the necessary dishonest intent.

From those answers, the only inference that can be drawn is that the defendant believed

that the vehicle had been abandoned and that when he took the items from it, there was no person who had any rights in the vehicle, Nothing emerged in the course of evidence thereafter, from which in my view the learned Magistrate could have concluded that he did not have such an honest belief. But in any event those matters in my view were sufficient to cast reasonable doubt upon whether he dishonestly appropriated the parts of the vehicle. When taken in conjunction with the uncontradicted evidence of the defendant that cars were dumped and abandoned in that area, and indeed that evidence was corroborated by Police Officer Spicer. In my opinion the Magistrate could not have reasonably found that the defendant had the necessary dishonest intent to constitute the crime of theft. For those reasons the Order must be made absolute, and the conviction and sentence set aside.

**APPEARANCES:** For the applicant/defendant Cornea: Mr EN Magee, counsel. Messrs Home, Wilkinson and Lowry, solicitors. For the informant/respondent: Mr PC Golombek, counsel. Mr EL Lane, Crown Solicitor.

---