

25/81

## SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

**R v BONOLLO**

Young CJ, McInerney and McGarvie JJ

19 December 1980 — [1981] VicRp 63; [1981] VR 633; (1980) 2 A Crim R 431

**CRIMINAL LAW – DISHONESTLY OBTAINING CHEQUES BY DECEPTION – MEANING OF WORD "DISHONESTLY" AS USED IN SECTION 81 OF THE CRIMES ACT 1958.****HELD:**

(1) The word "Dishonestly" as used in s81 of the *Crimes Act 1958* is not used in its ordinary or primary meaning but in a somewhat special sense.

(2) The word "Dishonestly" is an element of the offence which must be proved and imports that the accused person obtained the property without any belief that he had in all the circumstances a legal right to deprive the other of the property. Belief in a moral right will not suffice.

(3) Because of the special meaning attributed to the word "Dishonestly" upon a jury trial, the trial judge has a duty to direct the jury as to the meaning of the word "dishonestly" in the circumstances of the facts in that particular case.

*R v Feely* (1973) QB 530; [1973] 1 All ER 341; (1973) 57 Cr App R 312; [1973] 2 WLR 201, considered and not followed.

*R v Salvo* [1980] VicRp 39; (1980) VR 401; (1979) 5 A Crim R 1 followed;

*R v Brow* [1981] VicRp 75; [1981] VR 783, followed.

**YOUNG CJ:** I have had the advantage of studying in draft the reasons for judgment prepared by McGarvie J. His Honour has set out the facts fully and there is no need for me to repeat them. Since the only ground of appeal argued concerned the direction as to the meaning of the word "dishonestly" I shall turn at once to the question whether the learned Judge's direction as to the meaning of that word was in accordance with the law. It is, I think, important that the question should be formulated in that way, for it is not the function of the Court to decide what the law ought to be: the function is to say what the law is.

I agree with McGarvie J that a trial judge should explain to a jury what "dishonestly" means in s81. In my view, the proper interpretation of the statute is a matter of law and such a matter must whenever necessary be explained to a jury. It is then for the jury to apply the law to the facts. Although "dishonestly" is an ordinary English word, I agree with what Murphy J said in *R v Salvo* [1980] VicRp 39; (1980) VR 401 at p422; (1979) 5 A Crim R 1, viz. that the word is clearly used in a special sense in s81(1): see also per Fullagar J at p427. Moreover, as Murphy J observed at the same page, a direction to the jury is particularly necessary because the very concept of obtaining something by deception and yet not obtaining it dishonestly, is something which few people other than lawyers would normally see to be possible. Accordingly I am unable with the greatest respect to agree with the observation of Lawton LJ in *R v Feely* (1973) 1 QB 530 at p537; [1973] 1 All ER 341; (1973) 57 Cr App R 312; [1973] 2 WLR 201 that judges should not define what dishonestly means.

What then is the special sense in which "dishonestly" is used in s81(1)? In my opinion that question has been authoritatively answered by the judgments of the majority in *R v Salvo* and I think it is the duty of this Court to follow that decision, whatever our personal opinions might be as to the correctness of the decision of the majority in that case. As will appear below, it is my opinion that the decision of the majority in *R v Salvo* was correct, but that is not the point with which I am presently concerned. It is, I think, of the utmost importance that the principle of *stare decisis* should be upheld. Failure to do so leads to uncertainty in the law and, particularly in the criminal law, uncertainty leads to injustice.

The answer given by the majority in *Salvo's Case* to the question as to the meaning of the

word "dishonestly" is compendiously expressed as "without a claim of right". Fullagar J spelled out that meaning at p433 of the report as follows:

"The belief which spells innocence is, to use legal language not necessarily to be employed before a jury, the belief that the actor has a legal right to or in respect of 'the property' by reason of which (it is believed) the deprivation of the other does not constitute either a criminal or a civil wrong."

That sentence, in my opinion, contains the essence of His Honour's decision. Moreover, repeated study of the judgments of the majority in *Salvo's Case* has convinced me that Murphy J took the same view. Thus His Honour made it plain (at p420) that a belief in a moral right would not excuse an accused. Murphy J said:

"In this case, the jury should have been told, in my view, that the Crown had to prove beyond reasonable doubt that the accused himself did not believe that he had in all the circumstances a legal right – not a moral right – to deprive Kapauks of the motor car. I agree with Fullagar J that if the accused sincerely believed that he had a right to take the car – a right not stemming from the law of the land but stemming from some other consideration – it would avail the accused not at all. For example, a sincere belief entertained by the accused that Karma required that he should retake the car would not prevent the retaking from being dishonest. But a sincere belief that the law of the land allowed him to do so, would. The subjective aspect of this case was therefore limited to the determination by the jury of the issue whether the accused himself believed he had a legal right in all the circumstances to take the car from Kapauks. If they were left in reasonable doubt as to this matter then he, the accused, should have been acquitted."

Again at p423 His Honour said:

"In many cases, as I have said, the resolution of the issue whether the accused has acted "dishonestly" in obtaining property by a deception may be easy, and require no more than a direction from the judge that the Crown must prove that the accused had no belief in a claim of right to the property, for that is the element of the crime, which is added by the adverb."

The reasoning of Their Honours leaves no room in my opinion for acceptance of a view that in some other circumstances a sincere belief by an accused that he had a moral right to obtain the property in question by deception would afford a defence. Nor does it allow for acceptance of a view that anything less than a sincere belief in an entitlement to do what he did without infringement of the law would afford a defence.

The same view of the decision of the majority in *Salvo's Case* has been taken by another Full Court in *R v Brow* [1981] VicRp 75; [1981] VR 783. In the joint judgment of all the members of the Court in that case this passage appears:

"Reduced to essentials the submission for the applicant on this ground was that *R v Salvo* was distinguishable; that in the circumstances of this case the trial Judge should have directed the jury as a matter of law that it was not necessarily sufficient, in order to prove that the property was dishonestly obtained, that the Crown negate any belief by the accused of a legal claim of right to obtain the property; and that the jury should have been positively directed that it was open to them not to be satisfied that the applicant obtained the property dishonestly notwithstanding that they were satisfied that he had no such belief.

The submission contained overtones of the reasoning of the Court of Appeal in *R v Feely* (1973) 1 QB 530; [1973] 1 All ER 341; (1973) 57 Cr App R 312; [1973] 2 WLR 201 (which was rejected by the majority of the Court in *R v Salvo*) that honesty is to be regarded as an amorphous concept a transgression beyond the confines of which will be recognised by a properly instructed jury when they see it. Indeed it was inherent in counsel's argument that the reasoning of the majority in *R v Salvo* was inconsistent with the reasoning in *R v Feely* only in a case where, unlike this case, the only possible defence to an allegation that property was dishonestly obtained is a *bona fide* belief in a claim of right."

The decision in *R v Brow* reinforces the view, if reinforcement were necessary, that we should follow and apply the reasoning of the majority in *Salvo's Case*. There is, in my opinion, consistently with the application of *stare decisis*, no room for giving to the word "dishonestly" any meaning other than that given to it in *Salvo's Case* and *Brow's Case*. As I have already indicated I respectfully agree in the reasoning of the majority in *Salvo's Case*. I think that the meaning there attributed to "dishonestly" in s81(1) was arrived at by the application of the proper principles of

statutory interpretation and I see no reason why it should not be applied in the present case. I do not think that the strength of the reasoning of the majority in *Salvo's Case* can be impugned by conjuring up imaginary situations in which persons might be charged with offences in circumstances in which right-thinking people would regard the person's conduct as being without moral blameworthiness. There may be a number of answers that might be made to a suggestion that a person might be prosecuted in some of the supposed circumstances. A trial judge in such a case might well encourage a jury to acquit and in any event juries do not commonly convict in cases in which they think that the prosecution should never have been launched.

I do not mean by these observations to suggest that it is not a legitimate means of testing a proposed interpretation of a statute to consider its operation in particular circumstances. But the process cannot be used to defeat the meaning of the words used by Parliament according to their proper interpretation; see, for example, *Crichton v Victorian Dairies* [1965] VicRp 6; (1965) VR 49, especially at pp53-54 where the unsuccessful argument for the defendant was based on the view that the construction of the statute contended for by the informant could in some circumstances produce absurd results. Reference may also be made to a warning by Fullagar J in *McCarter v Brodie* [1950] HCA 18; (1950) 80 CLR 432 at p497; [1950] ALR 385, where His Honour said:

"Nothing but futile exaggeration of the difficulties of s92 can result from an insistence on imagining border-line cases which are excessively unlikely to arise in practice."

I would, with respect, apply the observation to the word "dishonestly" in s81(1). In the case of many statutory offences it is possible to conjure up situations which, it may readily be assumed, Parliament did not intend to fix with criminal liability. And yet although such supposed situations are within the literal language of the statute creating the offence, it is remarkable that reports of them are not to be found in the books. This situation is not new. Even under the English *Larceny Act* 1916 it would not be difficult to think of situations within the Act as interpreted by the Courts which right-thinking people would not regard as appropriate for the sanction of the criminal law.

Of course, the decision in every case must be read *secundum subjectam materiam* but the reasoning of the majority in *Salvo's Case* is not to be defeated by abbreviating that reasoning to the phrase "without a belief in a claim of right" and treating such an abbreviation as inapplicable to a different set of circumstances. The *ratio decidendi* of the majority is to be found succinctly stated in the passage I have already quoted from Fullagar J's judgment at p433. As His Honour is careful to say, the legal language he uses to express his reasons is not necessarily to be employed before a jury. A trial judge must express the idea in the language which is most appropriate to the case before him. It may not always be sufficient merely to say that "dishonestly" means "without a claim of right". Did the youth who obtained alcoholic liquor from a publican by deceiving the latter as to his age believe that his action involved no offence? Did the employee who obtained an advance from his employer by deception believe that he had a right to do so? Examples may be multiplied but it is unnecessary to do so for I perceive no difficulty in the application of the decision.

In the present case the question for the jury was whether the applicant at the time of the obtaining had any genuine belief that in the obtaining she was not committing any breach of the civil or criminal law. Did she obtain the cheque with disposition to take or withhold from First Chicago that which it was First Chicago's right to retain? (See: *Salvo's Case* at p426) The answer to the latter question must be in the affirmative because she knew that First Chicago owned the money and had the right to retain it against all persons except someone to whom it freely (and not under misapprehension) chose to give it. Her disposition was permanently to deprive First Chicago of the property nonetheless. The fact that she intended or hoped to repay the money is simply irrelevant.

Mr Weinberg who appeared for the applicant before us conceded, quite properly, that if we thought that the case was governed by *R v Salvo* no criticism could be directed to the learned Judge's charge. It follows that, in any opinion, the application should be dismissed.

**McINERNEY J:** The facts giving rise to this appeal against conviction have been sufficiently stated in the draft judgment of my brother McGarvie which I have had the advantage of reading. He has

taken the view that it is sufficient to state the facts involved in the conviction on the first count and I agree with that view. The appeal against conviction involves a consideration by yet another Full Court – as I understand it at least the third – of the provisions s81(1) of the *Crimes Act* 1958 as enacted by the *Crimes (Theft) Act* 1973, Act 8425 which introduced into Victoria the provisions of the English *Theft Act* 1968. The draftsmen of that legislation in England entertained the confident expectation that they had thereby simplified the whole of the law of theft. The subsequent course of case law on the matter would indicate that their expectations have not been fulfilled.

One of the previous Full Court decisions is *R v Salvo* [1980] VicRp 39; (1980) VR 401 in which I was the dissentient Judge. The other is *R v Brow* [1981] VicRp 75; [1981] VR 783. It will be necessary to examine each of these decisions. It was argued before us that the instant appeal was concluded by the decision of the majority in *Salvo's case* (*supra*). There has emerged in this case a divergence of judicial opinion as to what *ratio decidendi* is to be extracted from the majority decision in that case. Before examining the *ratio* in *Salvo's case*, it is desirable to state certain propositions – basic propositions – affecting this decision and any other decision in respect to s81.

The first is the very elementary proposition that in a trial by Judge and jury, in which an accused is charged with an offence against the statute, the construction of the statute is a matter of law for the Judge. It is for the Judge to interpret the statute and to instruct the jury as to the legal meaning of the statute.

The second proposition, which follows from the first, is that it is for the trial Judge to say whether a word used in an enactment is used in its ordinary meaning or in some technical or special meaning. When a Judge tells a jury that the word "dishonestly" is an ordinary word in the English language used in its ordinary meaning he is performing this function of law of interpreting the statute. If, on the other hand, he says that such a word, e.g. the word "dishonestly" is used in the section in a special sense, he is discharging the same function of law and the jury at the particular trial is bound by the direction he gives the jury in that respect.

I do not understand that there was any difference of opinion as to the foregoing propositions between the Court of Appeal in *Feely's case* (*R v Feely*) (1973) QB 530; [1973] 1 All ER 341; (1973) 57 Cr App R 312; [1973] 2 WLR 201; and the majority Judges in *Salvo's case*, or for that matter myself. I believe that the Court of Appeal, in *Feely's case*, believed – as I certainly did in *Salvo's case* – that those propositions were so elementary as to require no express statement of them in a judgment. The conflict between *Feely's case* and the majority opinion in *Salvo's case* – or at least between *Feely's case* and the opinions of Murphy and Fullagar JJ in *Salvo's case*, is whether the word "dishonestly" was used in its ordinary or primary meaning or in a special sense.

Accepting that full effect has to be given to the *ratio decidendi* of the majority judgments in *Salvo* (*supra*), I desire to state at the outset that in my opinion the word "dishonestly" is used in its ordinary meaning and not in a special meaning in sub-section (1) of s81 of the *Crimes Act* 1958 which is in the following terms:

"A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of felony and liable to imprisonment for a term not exceeding ten years."

Much of the difficulty in relation to that sub-section has arisen from the coupling of the words "deception" and "dishonestly". That coupling has given rise to the suggestion that the Legislature envisaged that there could be cases where a person might obtain property "honestly by deception".

I venture to suggest that some of the difficulty is avoided if one construes the section as penalising, in the sense of making criminal, cases where the accused dishonestly obtains property belonging to another with the requisite intent of permanently depriving the other of it, but penalising such conduct only where the obtaining is done by means of a deception. Cases where the person dishonestly obtains property belonging to another with the requisite intent of permanently depriving the other of it do not fall within the section unless the mode employed to obtain the property was the mode of a deception. In other words the word "dishonestly" attaches



to the obtaining of the property belonging to another with the intention of permanently depriving the other of it. The deception is merely the means by which that property is dishonestly obtained.

If this be the correct view, the fact finding tribunal must look at all the facts and say whether on all the facts, including of course the fact that the property was obtained by a deception, the obtaining of the property was done dishonestly. The deception is merely one matter to be taken into account in determining whether the obtaining was done dishonestly subject, however, to this: that unless the property has been obtained by a deception the obtaining of it is not within s81(1). Put another way, one of the ingredients that the Crown must prove is that the accused obtained the property of the victim by a deception practised on that victim.

Unless the jury is satisfied that the property was so obtained, then the case is not within s81(1). But once the jury is affirmatively satisfied that the property was obtained by deception, then the matters that the jury must be satisfied about are whether the property belonging to the victim had been dishonestly obtained and whether it was obtained with the intention of permanently depriving the other of it. I say nothing for present purposes as to the meaning of the word "property" within the meaning of the section or as to the meaning of "belonging to another" within the meaning of the section.

I may perhaps be permitted to repeat what I said in *Salvo's case*, namely that the word "dishonestly" is, in my view, not a technical word but a word in ordinary parlance. It is a word, moreover, which is used in or is implicit in almost every one of the offences dealt with in Division II of Part 1 of the *Crimes Act* – ss72, 81 and the offences derivative from s72 created by ss75, 75A, 76, 77 and 79. It was obviously the view of the specially constituted Court of Appeal in *R v Feely* (*supra*) that the word "dishonestly" was used in its ordinary meaning and that it was therefore unnecessary for a Judge to expound the meaning of this word to the jury other than to tell them that it was used in the statute in its ordinary and popular meaning and that it was a question for them whether they found that the accused had obtained the property dishonestly within the ordinary meaning of that term.

If the word "dishonestly" is used in its ordinary meaning, as the Court of Appeal held in *Feely's case*, it is in my opinion undesirable for a Court to attempt an exhaustive definition of that word since it is a word of elastic content capable of application in an almost infinite variety of facts or combinations of facts. Again if the word is used in its ordinary sense then it is for the jury to say as a matter of fact whether the conduct is honest or not and it can never be for the Judge as a matter of law to say that the conduct is dishonest. The question of guilt or otherwise is for the jury not for the Judge. It was because the trial Judge in *Feely's case* had not left it to the jury to decide whether the prosecution had proved that the defendant had taken the money dishonestly that the Court in *Feely's case* set aside the conviction. According to the Court of Appeal, the trial Judge made that error because he seems to have thought that he had to decide as a matter of law what amounted to dishonesty and he expressed his concept of dishonesty as follows:

"If someone does something deliberately knowing that his employers are not prepared to tolerate it, is that not dishonest?"

It is, in my view, a dangerous matter for a Court to seek to paraphrase Acts of Parliament. Where Parliament had used an ordinary word such as "dishonestly" I would be slow to believe that the word has been used in some different and special and exhaustive sense. If, however, judicial authority requires that all Courts in this State are required to hold that the word "dishonestly" is not used in its ordinary sense but in a special sense, that special sense ought, for the instruction of trial Judges, to be stated clearly and precisely. The divergence of judicial views in this State alone as to what the word "dishonestly" means ought to give one pause before attempting to rewrite the statute with some judicial exposition.

It was the submission for the Crown in this case that the majority of Judges in *R v Salvo* held that in s81(1) the word "dishonestly" had a special meaning which was an exhaustive meaning to be applied in all cases and circumstances. It was said that the word "dishonestly" in s81(1) meant that a person who obtained property belonging to another with the intent to permanently deprive the other of it could be convicted only if the jury were satisfied that he did not believe that he had any legal right to deprive that other person of the property. It was the contention of

counsel for the applicant on the other hand that *Salvo's case* was to be taken as a decision on its own facts involving the question of possession or ownership of a specific chattel and that it threw no light on the question of the meaning of "dishonestly" as applied to a case such as the present where the question relates to the obtaining of money pursuant to a contract into which the other contracting party has been induced to enter by deception.

Looking at the judgment of Fullagar J, it would appear to me that the ratio of his decision is to be found in the second paragraph on p432 of the report of that case (1980) VR 401 at 432):

"In my opinion, "dishonestly", in this statute, is used in that sense of 'with disposition to defraud' which means 'with disposition to withhold from a person what is his right' and in the special context thus imports into the offence the element that the actor must obtain 'the property' without any belief that he himself has any legal right to deprive the other of it."

His Honour returned to this theme at p435 of the report as follows:

"For the reasons that I have given, I have concluded that the element imported by the word "dishonestly" into the offence created by s81(1) is the element that the accused person has no belief that he has a legal right to deprive the other of 'the property'. The element the Crown must prove. In my opinion it is the duty of the trial judge, upon a trial for an offence against s81(1), to convey to the jury, not necessarily in so many words but in some suitable fashion tailored to the occasion, the substance of the requirements of the element I have attempted to define and to relate it to the facts of the case."

It is more difficult to discern whether the *ratio decidendi* of the judgment of Murphy J is to be taken as broadly based or as confined to the facts of *Salvo's case*. Most of His Honour's judgment appears to proceed on the footing of confining his reasons for decision as to what was the direction appropriate to be given on the facts of that case. Assuming that His Honour was endeavouring so to confine his decision – and almost everything in his reasons for judgments points that way – the essence of His Honour's decision appears in the passage at the end of p423 of the report:

"Certainly in the present case the Judge should have directed the jury—

(1) as to the relevance of a claim of right to the word "dishonestly";

(2) that the question as to what constitutes "dishonestly" was not to be answered following consideration by the jury of the morality of the accused's action, but rather following consideration whether the accused believed that he had legal right to obtain the relevant property;

(3) that the accused could be convicted only if the Crown proved that the accused did not in fact believe that he had in the circumstances a legal right to obtain the property in question.

In my view, the charge in the present case was defective in that it did not instruct the jury adequately on this matter."

If one confines the *ratio* to the passage just quoted, then the submissions of Mr Weinberg of counsel for the applicant as to the *ratio* in *Salvo's case* could be accepted. But it appears to me that there is a further ingredient in the *ratio* of the judgment of Murphy J which appears at p422, where His honour said:

"For I think that the word "dishonestly" is clearly used in a special sense in s81(1) of the *Crimes Act* 1958."

Murphy J did not in *Salvo's case* – so far as I can discern – specify or define the special sense in which (in his view) the word "dishonestly" is used in s81(1) save insofar as it can be discerned from the conclusion that on the facts in *Salvo's case*, if the accused in fact believed he had a legal right to obtain the car from Kapauks, intending to deprive Kapauks permanently of it, the element in the crime charged designated by the word "dishonestly" had not been established and the accused should have been acquitted.

It is my own view that the majority in *Salvo's case* decided first, that the word "dishonestly" in s81(1) was not used in its ordinary or popular meaning but was used in a special sense, and, secondly, that when the property the subject of the charge under s81(1) was a specific chattel the element of "dishonestly" required that the accused should have believed that he had no legal

right to obtain the property from the victim.

The reasons for judgment of the majority judges in *Salvo's case* do not, in my view, throw any light on what is the special sense in which the word "dishonestly" in s81(1) is to be applied in a case such as the present. My brother McGarvie, whose draft reasons for judgment I have had the advantage of reading, is of the view that it was a practical necessity in the present case for the trial Judge to have explained to the jury the meaning and application of the word "dishonestly". Insofar as he is impelled to that conclusion by the observation of Murphy J in *Salvo's case* that "the very concept of obtaining something by deception yet not obtaining it "dishonestly" is something which few people other than lawyers would normally see to be possible." (1980 VR 401 at p422), I think, as already stated, that much, if not all, of this difficulty is avoided if it is realised that the words "by any deception" merely specify the mode by which property is dishonestly obtained. Once it is understood that the offence is not the practising of deception but dishonestly obtaining the property by means of a deception, so that the deception is merely one of the ingredients to be taken into account in determining whether the obtaining of the property was done dishonestly, much of the apprehended difficulty disappears. As the examples given by my brother McGarvie (of the farmer at harvesting) or the example which I gave in *Salvo's case* at p407 lines 16-26 illustrate, the ordinary person can understand how the use of a deception in either such case would not involve the consequence that the property had been dishonestly obtained.

My brother McGarvie takes the view that the observations of Lord Widgery CJ, in *Boggeln v Williams* [1978] 2 All ER 1061; (1978) 1 WLR 873 at p878 to the effect that the "flexibility of s1 of the *Theft Act* 1968 should not be lost by putting the word "dishonestly" in a strait jacket of definition" have their main effect in the area of trial practice. I do not take issue with that comment but in my view His Lordship was seeking to emphasise that the word "dishonestly" is a word of everyday usage capable of being applied in a great variety of circumstances and that it is undesirable to overlay that word with a multiplicity of judicial expositions which very often carry the consequence that the words of the statute are themselves overlaid and forgotten. Indeed some of these judicial expositions might be said, in the language of Kitto J, in *Ballas v Theophilus* (No. 1) [1957] HCA 49; (1957) 97 CLR 186 at p196 "to carry expressions which have been used in other cases to such a length as to desert the language of the statute." I think we should be careful that we do not by a process of judicial exposition overlay the meaning of the word "dishonestly" in such a way as finally to desert the language of s81(1).

In *Salvo's case* (at p408) I uttered a warning against the attempt to formulate a general and exhaustive definition of the word "dishonestly". The passage from the judgment of Higgins J in the *Municipal Employees' case* [1919] HCA 73; (1919) 26 CLR 508 at 574 (cited by my brother McGarvie) adds the weight of his authority to what I there said. I agree with McGarvie J that the word "dishonestly" has a constant meaning but that the considerations which are relevant to determine whether a person has acted dishonestly may vary according to the circumstances. It will be for the trial Judge to draw to the attention of the jury the facts in the case which are relevant to determine whether the accused has acted dishonestly. The facts must always include the fact that the property was obtained by means of a deception and the jury will have to be told that the employment of that deception is a fact which is relevant though not necessarily decisive in determining whether the obtaining of the property was done dishonestly.

The concept of a belief in a claim of right to a chattel which was in issue in *Salvo's case* cannot, in my view, be applied *simpliciter* to a case such as the present, in which we are concerned not with the obtaining of property which is a chattel but with the obtaining of property which is a cheque or the money represented by that cheque to which the applicant had no previous claim of ownership or possession. The only right to obtain that property arose from the agreement or arrangement which has been induced by the deception. Some other test of the honesty of the obtaining of that cheque or the money representing the proceeds of that cheque than that applied in *Salvo's case* must therefore be found.

If honesty as used in ordinary parlance signifies (as I think it does) respect for and compliance with the duty imposed by the moral virtue of justice to respect and give effect to the rights or interests of others in respect of material things or as in the case with which we are presently concerned in respect of the contractual relationship intended to arise out of the negotiations between the parties, then it may be said that dishonesty involves a disregard of

those rights or interests and an intention to cause detriment, by means of the deception to the rights or interests of that other. I do not know that I would regard either that disregard or that intention as being, in all cases, sufficient to establish dishonesty and indeed I can foresee that it could cause difficulty if applied to a case such as *Salvo's* where the accused obviously intended to cause detriment to the interests of Kapauks by intentionally depriving Kapauks permanently of his ownership and/or possession of the car.

My brother McGarvie is of the opinion that the constant meaning of the word "dishonestly" in s81(1) is that an accused person obtaining property by deception obtains it dishonestly if he is then conscious that by obtaining the property he will produce a consequence affecting the interests of the person deprived of it; and if that consequence is one which would be detrimental to those interests in a significant practical way. This opinion obviously proceeds on the view that the word "dishonestly" is used not in its ordinary meaning but in a special meaning which would of course have to be explained to the jury in every case. In my view the special meaning proposed by my brother McGarvie is no more acceptable than that propounded by the majority in *Salvo's case*.

If the view put to my brother McGarvie were accepted as the correct approach in the present case it would follow that the direction of the learned trial Judge, which proceeded on the basis of applying the law as laid down by the majority in *Salvo's case*, was wrong and that the conviction would have to be set aside and a new trial directed. This could hardly be regarded as a satisfactory result and it would offer no comfort to trial Judges forced to speculate as to what differently constituted Full Courts would be likely to say as to their direction. On that basis, it would appear that the law to be applied in relation to s81(1) would be in a state of intolerable uncertainty.

It will be apparent from what I have so far written that I take substantially the same view of the scope of the majority decision in *Salvo's case* as does McGarvie J. The learned Chief justice, whose reasons for judgment I have had the advantage of reading, is, however, of the view that *Salvo's case* is authority for a wider proposition, namely, that the meaning of the word "dishonestly" in s81(1) is compendiously expressed as without a claim of right. If I were free to form my own opinion as to the meaning of the word "dishonestly" in s81(1) I would adhere to the views on that matter which I expressed in *Salvo's case*. (at pp407 (line 30) to 408 (line 31)). *Sed dis aliter visum*, and I do not think I am now at liberty to act on those views.

In view of the divergence of opinion between the members of this Court as to the ratio of *Salvo's case* it becomes necessary to see whether the matter of this appeal is concluded by the decision of the Full Court (Young CJ, Crockett and Tadgell JJ) in *R v Brow (supra)*. *Brow's case* was under consideration at the time when the present application was argued, but the reasons for judgment were not delivered until first drafts of reasons for judgment in this case had been prepared by some members of this Court. Examination of the reasons for judgment in *Brow's case* has impelled me to the conclusion that my own view of what was decided in *Salvo's case* is not, having regard to the doctrine of *stare decisis*, now open to me.

The view I personally hold as to the scope of the decision of the majority in *Salvo's case* was put to but not accepted by the Full Court in *R v Brow (supra)*. The trial Judge in that case had directed the jury that property is dishonestly obtained if the person obtaining it knows or believes that he has no legal right to obtain it. The Full Court observed (p13) that "in so instructing the jury His Honour was avowedly applying the reasoning of the majority of the members constituting this Court in the recent decision of *R v Salvo* [1980] VicRp 39; (1980) VR 407; (1979) 5 A Crim R 1." So far as here relevant the attack on the learned trial Judge's charge was stated and rejected by the Full Court as follows:

"Counsel for the applicant submitted that the trial Judge erred in confining the meaning of the word "dishonestly" in that way, and submitted further that the reasoning of the majority in *R v Salvo* did not require it. In so confining the question of dishonesty, it was said, the Judge deprived the applicant of a full consideration of his defence. The submission accepted the correctness of the reasoning and the conclusion of the majority judgments in *R v Salvo* but only on the footing that the sole defence in that case was that the accused did believe he had a legal claim of right to obtain the property there in question. In the present case, on the other hand (so it was argued), the defence did not depend upon any belief by the applicant that he had a legal claim of right as such to obtain the relevant



property: his defence to the allegation of dishonesty was that he had no dishonest intent because he had no intention when obtaining the property to cause loss to those from whom he obtained it. The argument therefore was that *R v Salvo* does not apply to a case such as this, in which the question of dishonesty was, to use counsel's words, 'at large'. In such cases the jury will not be assisted, it was submitted, by a simple reference to an absence of belief of a legal claim of right as a criterion of dishonesty, and the accused will be disadvantaged by it; such a reference tends to put the concept of dishonesty into a strait-jacket.

In this case, it was argued, it deprived the accused of the opportunity to have the jury conclude that, although he could not assert a belief of any legal claim of right in the strict sense, he believed that what he did was not dishonest because, having regard to the manner in which he had arranged his business, he honestly believed that no pecuniary or other disadvantage would accrue to those with whom he dealt. Against the background of those submissions counsel for the applicant contended that the question of dishonesty should have been left to the jury by a direction to consider whether the applicant believed that he was entitled to obtain the property in question and whether that belief was reasonable in the light of his business arrangements and all other relevant surrounding circumstances standards of honest and decent conduct.

Reduced to essentials the submission for the applicant on this ground was that *R v Salvo* was distinguishable; that in the circumstances of this case the trial Judge should have directed the jury as a matter of law that it was not necessarily sufficient, in order to prove that the property was dishonestly obtained, that the Crown negate any belief by the accused of a legal claim of right to obtain the property; and that the jury should have been positively directed that it was open to them not to be satisfied that the applicant obtained the property dishonestly notwithstanding that they were satisfied that he had no such belief.

The submission contained overtones of the reasoning of the Court of Appeal in *R v Feely* [1973] 1 QB 530; [1973] 1 All ER 341; (1973) 57 Cr App R 312; [1973] 2 WLR 201 (which was rejected by the majority of the Court in *R v Salvo*) that honesty is to be regarded as an amorphous concept of transgression beyond the confines of which will be recognised by a properly instructed jury when they see it. Indeed it was inherent in counsel's argument that the reasoning of the majority in *R v Salvo* was inconsistent with the reasoning in *R v Feely* only in a case where, unlike this case, the only possible defence to an allegation that property was dishonestly obtained is a *bona fide* belief in a claim of right. In our opinion these submissions cannot be sustained."

If the passage cited is intended as an exhaustive definition of the word "dishonestly" it would appear that the Full Court in *Brow's case* regarded the *Salvo* test propounded by Fullagar J as applicable not only in cases involving the obtaining of a specific chattel but also to all cases of obtaining property by deception. I have, however, given careful attention to other passages in the judgment in *Brow's case*, particularly at pp17-13 which suggest that the Full Court did not regard the *Salvo* test as of universal application. I refer especially to the passage on p18 reading as follows:

"*R v Salvo* might or might not leave room for those or similar cases to be regarded on their particular facts as not involving dishonest appropriation or obtaining, as the case may be. It is unnecessary, however, to decide that point here because it does not arise. If there are cases in which a person who by deception obtains property without any *bona fide* belief of a legal claim of right but who nevertheless does not obtain the property dishonestly in terms of s81 this is not one of them."

If the *Salvo* test is not of universal application it would follow that it would be open to this Court to enunciate yet another view of the special meaning of the word "dishonestly" and hold that the direction to the jury in the instant case was erroneous and that the application should be granted. That such a result should follow upon a trial Judge's direction founded upon the majority decision in *Salvo's case* would, in my view, be so altogether extraordinary as to throw the law into confusion and to bring its administration in criminal trials into disrepute. Accordingly I feel constrained – in the interests of the attainment of certainty in the administration of criminal trials – to act on the view that *R v Brow* must be taken to have not only endorsed the majority opinion in *Salvo's case* that "dishonestly" is used in s81(1) in a special sense, but also to have accepted the special sense formulated by Fullagar J in *Salvo's case* as being of universal application.

I therefore concur in the result arrived at by the Chief Justice and the order which he proposes, namely, that the application for leave to appeal against conviction should be dismissed.

**McGARVIE J:** [His Honour in a detailed judgment, set out the facts, the particulars in the presentment,

*the ground of appeal and the judgments in Salvo's case and concluded] .... Eventually I have come to the conclusion that the proper implication from the decision in R v Brow is that it does bind the Court in the present case. In that case the Court treated the majority decision in Salvo's case as establishing that belief in a claim of right is the test of dishonesty in a case where no such belief was raised as an issue of the trial.*

The test which the Court held to be the proper test in *Brow's case*, a case where no issue of claim of right was raised, is inconsistent with the test which would have been applied upon my view of the meaning of "dishonestly" in s81(1). Upon my view of the meaning of that word the test would have been whether Brow believed that by obtaining the consideration he was producing the consequence that the purchasers, who expected to obtain clear title to cars, were to be left for some limited or indeterminate period, or permanently with no title or an encumbered title, and if so, whether this would be a significant practical detriment to their interests. The Court in *Brow's case* must have taken the view that the word 'dishonestly' did not have the constant meaning which I consider it has. As the word presumably has a constant meaning, the Court must have proceeded on the basis that its meaning is the one which Fullagar J in *Salvo's case* concluded it has. If, as the Court decided in *Brow's case*, the test was whether the accused believed he had a claim of right to the property, I can see no logical distinction between that case and this case which would lead to a different test being applied in this case.

Accordingly I conclude that I am bound by part of the *ratio decidendi* in *Brow's case* to decide that this application must be dismissed.

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