**45/77**

## SUPREME COURT OF VICTORIA

# *ELLIOTT v PAULIDES*

**Dunn J**

**6 April 1977**

**CRIMINAL LAW – THEFT – APPROPRIATION – DEFENDANT GIVEN LIMITED PERMISSION TO USE MOTOR CAR LEFT FOR PARKING/SERVICING – VEHICLE USED TO TRAVEL SOME DISTANCE TO BUY FOOD – DISHONESTY – VEHICLE RETURNED TO CARPARK – WHETHER DEFENDANT ACTED DISHONESTLY – NO CASE SUBMISSION UPHELD – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* 1958, S73(14).**

Johnson parked his car at the Melbourne Airport Service Centre and signed a document containing conditions, one of which declared that the servants or agents of the centre "may move, drive, or road test the motor vehicle whilst left with the centre for purposes of being parked and/or serviced".

The defendant who was the night manager of the centre, was found driving Johnson's vehicle approx. 4 kilometres away, and claimed he was using it to buy a pizza pie and then returning to the centre. He was charged with theft. The Magistrate, in upholding a 'no case' submission and dismissing the charge, accepted a submission that there was no *prima facie* case to answer based on that condition in that the defendant may have been driving with authority and thus there was no dishonest appropriation. Upon Order Nisi to Review—

**HELD: Order absolute.**

**1. The condition in the document was not an unlimited authority. All that the proprietors of the service centre, and servants and agents, were entitled to do under this authority was to move the car and to drive the car or to road test the car if they were authorised to service it. Accordingly, in the circumstances in which the car was being used on this occasion, it was clear that the defendant could get no assistance from reliance upon that clause.**

**2. In view of the evidence, there was material before the Magistrate which clearly raised a *prima facie* case. The defendant agreed expressly that he had no authority from the owner to use the car and it seemed to be a clear inference from what he said that he had no authority from his employers either.**

**3. On this occasion there was clearly evidence that the defendant did not have permission either from the owner, which he expressly admitted, or from the person in lawful possession thereof, they being the proprietors of the service centre, from the language which was used in reply to that question to use the vehicle in the manner described.**

**4. To take another person's vehicle in the circumstances of this case and use it for his own purposes by a person who was the night manager of a service station and therefore himself responsible for the safety of the motor cars and the observance of the terms on which they are left in the service station raised a *prima facie* case of the required element of dishonesty. Therefore it was clearly open to a Magistrate to be satisfied of that element if at the conclusion of all the evidence he thought it proper to take that view.**

**DUNN J:** ... That necessarily requires a review of the proper construction of the document and also consideration of the evidence that was given as to what the defendant had himself said about his driving of the motor car.

In my opinion, on its proper construction, the second condition which I have set out in full is limited to the moving, driving, or road testing of the vehicle for the purpose for which it was being parked or serviced. In other words, it is not an unlimited authority – the words that appear at the end for the purpose of being parked and/or serviced apply to the words: 'move, drive or road test', and are not merely a description of the period for purpose for which it has been left at the centre. That construction seems to me to be a natural meaning to give to these words, having regard to the purpose of the agreement between people leaving the cars and the operations at the service centre. I think there is force in the argument that there is no point in repeating the words

'for the purpose of being parked and/or serviced' if all that was intended by them was to indicate the time or the reason for the car being there.

In effect, in my view, all that the proprietors of the service centre, and servants and agents, are entitled to do under this authority is to move the car and to drive the car or to road test the car if they are authorised to service it – they might have been but not in this case under the contract – for any of those purposes and not for any others. Accordingly, in the circumstances in which the car was being used on this occasion, it seems to be clear that the defendant could get no assistance from reliance upon that clause.

When he was interrogated by the members of the police force who intercepted him, he was asked these questions and gave these answers and I quote them: 'Tell me how you came about driving the Holden LRG 802'. Answer: 'I was a bit hungry and I decided to go and get a pizza, and I decided to use one of the cars from work'. Then later down he was asked: 'How did you get into the car?' Answer: 'The keys were there, we can shift them up and down'. 'Do you know who owns the car that you were found driving?' Answer: 'No'. 'Did you have anyone's permission to drive the car to Essendon?' Answer: 'Permission? Well I was in charge'. 'Did you have permission from the owner of the car, or a person authorised by the owner to use the car and take it from the service station perimeter and drive at a distance of about four kilometres from the service station?' Answer: 'No'. Then he was asked: 'Why did you do that when you had no express permission from the owner of the motor car?' Answer: 'I don't know'. The only other relevant question and answer are in these terms: 'Didn't you think it was wrong to take the car from the service station perimeter?' Answer: 'In one way, yes, and in the other way no'. 'What do you mean by that?' Answer: 'I couldn't tell you'.

That being the state of the evidence, it seems to me that there was material before the learned Stipendiary Magistrate which clearly raised a *prima facie* case. The defendant agreed in the passages to which I have referred, he agreed expressly that he had no authority from the owner to use the car and it seems to be a clear inference from what he said that he had no authority from his employers either.

Mr Moorhead, who has argued this case as well as it could be argued in the circumstances, has urged upon me that s73(14) of the *Crimes Act* which is relied upon in this case, deals with the making *prima facie* evidence of an intention to permanently deprive the owner of a motor car if he takes, or uses, it without the consent of the owner or person in lawful possession.

Mr Moorhead contended that it was part of the material that the Crown had to prove to constitute a *prima facie* case, that not only did the person not have the consent of the owner, but also that he did not have the consent of the person in lawful possession thereof. Whatever may be said about the need on all occasions to have evidence from both those sources, it seems to me that on this occasion there was clearly evidence that the defendant did not have permission either from the owner, which he expressly admitted, or from the person in lawful possession thereof, they being the proprietors of the service centre, from the language which was used in reply to that question.

It was also submitted that the Magistrate was not obliged to hold that there was a *prima facie* case of dishonesty in these circumstances. The words of the Act that are now relevant are in s72(1) of the *Crimes Act* 1958, which says: 'That a person steals if he dishonestly appropriates property belonging to another with the intention of permanently depriving the owner of it'. There is, in substance, in the view that I have taken of the meaning of this condition and the statements made by the defendant, no difficulty about the elements of appropriating the property belonging to another with the intention of permanently depriving the other of it. But the word 'dishonestly' does need some consideration.

Mr Uren has referred me to a decision in the Court of Appeal in England in the case of *R v Feely*, (1973) 1 QB p530. The relevant passage appears at p537 in the judgment read by Lawton LJ which was the unanimous decision of the Court, and in dealing with the word 'dishonesty' the learned judge had this to say: 'This word is in common use whereas the word 'fraudulently' which was used in s1(1) of the *Larceny Act* 1916 had acquired as a result of case law, a special meaning. Jurors when deciding whether an appropriation was dishonest can reasonably be expected to and should apply the current standards of ordinary decent people. In their own lives they have to decide what is, and what is not, dishonest. We can see no reason when in the jury box they require the help of the judge to tell them what amounts to dishonesty'. Then he goes on to deal with further

of the implications of that word, and in substance it comes to this: That it is a question of fact for the tribunal of fact, whether it be a judge, a jury, or a magistrate, to determine whether in the circumstances which he finds to exist dishonesty is in fact established.

It was not necessary for the Magistrate at the stage in which he was asked to dismiss this information to reach a final conclusion as to whether the defendant was dishonest or not, but it was necessary that there should be evidence upon which he could so find, before it would be proper for me to send this case back to the Magistrates' Court. Mr Moorhead, who has appeared for the defendant, has urged first of all that the Magistrate's finding did in fact amount to a finding that he was not satisfied there was *prima facie* evidence of dishonesty, and alternatively, that in any event I should not myself be prepared to say that there was such *prima facie* evidence to justify sending the case back.

First of all, I have already indicated that I do not think the learned Stipendiary Magistrate found it necessary to apply his mind to that particular aspect of the case. As I read the reasons for his decision he did not in fact express any opinion on that particular matter. It still remains for me to express my opinion as to whether or not there is *prima facie* evidence because otherwise, unless I was satisfied there was, then this order nisi should be discharged. I have not found that an altogether easy question because in this case, unlike most other cases in which the charges of stealing motor cars arise, there seems to be no reason to doubt the statement of the defendant to the police that he intended, when he had bought his pizza pie, to return to the service station and continue his duties as night manager.

Usually, there is an absence of evidence by the person taking and using the car of any intention to return it. I have ultimately come to the conclusion that that element is not sufficient to remove this case from the ambit of this section. The Legislature has deliberately applied the concept of stealing to what used to be the offence of illegally using motor cars. No doubt this conduct would have clearly enough fallen in the original provisions of illegally using.

To take another person's vehicle in the circumstances of this case and use it for his own purposes by a person who is the night manager of a service station and therefore himself responsible for the safety of the motor cars and the observance of the terms on which they are left in the service station does seem to me to raise a *prima facie* case of the required element of dishonesty. Therefore it is my view that it is clearly open to a Magistrate to be satisfied of that element if at the conclusion of all the evidence he thinks it proper to take that view.

Nothing I have said is intended to pre-empt what must ultimately be his finding of fact on all the evidence that he has before him. For these reasons I think this order nisi should be made absolute. The order dismissing the information will be set aside and the matter remitted to the Magistrates' Court at Moonee Ponds to be dealt with according to law. I order that the defendant pay $200 costs and there will be a certificate under the *Appeal Costs Fund Act* for the defendant.

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