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SUPREME COURT OF VICTORIA

MARKS v MAYNE

Gray J

18 August 1983

CRIMINAL LAW – THEFT – OBTAINING PROPERTY BY DECEPTION – USE OF BANKCARD BELONGING TO ANOTHER – PAYMENT BY USER OF PART OF BANKCARD ACCOUNT – WHETHER USE OF BANKCARD "DISHONEST": CRIMES ACT 1958, S81(1).

Mayne came into possession of a bankcard mailed to the previous occupier of his premises. He signed the previous occupier's name on the bankcard, and then used it to obtain property from various places totalling \$740.59. Before being interviewed by police, Mayne paid \$200.00 off the account, and by the time the matter came on for hearing he had paid the full account. The magistrate considered that Mayne's conduct in respect of the repayment of the account was sufficient to conclude that it was not dishonest, and accordingly, he dismissed the charges. Upon order nisi to review—

HELD: Order nisi absolute.

1. The Crown must prove that the defendant obtained property belonging to another, without any belief that he had a legal right to deprive the other person of the property.

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

2. There is a clear distinction to be drawn between a belief in a legal right to obtain property on the one hand, and a moral claim on the other. A belief in the latter does not afford a defence.

R v Bonollo [1981] VicRp 63; (1981) VR 633; (1980) 2 A Crim R 431, applied.

3. The inescapable inference in the circumstances was that the defendant had no belief in the legality of his conduct, notwithstanding his intention to repay the account.

GRAY J: *[After setting out the facts and the reasons for dismissal by the Magistrate, His Honour continued]:* ... [6] The question in issue was whether the prosecution had shown that the property had been obtained in circumstances amounting to dishonesty on the part of the defendant. It is clear from the evidence that all the elements of the crime had been adequately proved by the Crown, subject to the disputed element. There was no dispute that the defendant had been guilty of deception whereby he obtained property belonging to the store, and there was no dispute that his intention was to permanently deprive the store of its property. The only remaining question was whether that conduct was carried out dishonestly. That being a mental ingredient of the crime, it is ordinarily only capable of being proved [7] by drawing an inference about it from the surrounding circumstances.

It is clear from *R v Salvo* [1980] VicRp 39; (1980) VR 401; (1979) 5 A Crim R 1 that what the Crown must prove is that the defendant obtained the property, being property belonging to another person, without any belief that he had in all the circumstances a legal right to deprive the other person of the property. The emphasis is on the expression "legal right". It is now clear that the law as laid down in *R v Salvo* is to be taken as the definitive authority on this point. The same question came before the Full Court in the following year in *R v Bonollo* [1981] VicRp 63; (1981) VR 633; (1980) 2 A Crim R 431 the reference to which I have already given. At p634 the learned Chief Justice said this:-

"What then is the special sense in which 'dishonesty' is used in s81(1)? In my opinion that question has been authoritatively answered by the judgements 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 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."

Accordingly, one can look to the majority judgments in *Salvo* for the authoritative statement

of the law. Those judgments draw a clear distinction between a belief in a legal right to obtain the goods, on the one hand, and a moral claim on the other. I might refer to a passage in the judgment of Murphy J at p420 of [8] *Salvo's case*:-

"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 ... 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."

I might also refer to the passage from the judgment of Fullagar J at p433 :-

"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 civil or criminal wrong."

Returning to *Bonollo's case*, I might finally cite a passage at p635 in which the learned Chief Justice is referring to the majority judgments in *Salvo's case*:-

"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 the infringement of the law would afford a defence."

Accordingly to provide this defendant with a defence, he had to entertain a belief that he was legally entitled to obtain the goods by the deception he practised. In the context of a criminal prosecution, the prosecution had to prove beyond reasonable doubt the absence of any such belief on the part of the defendant. Accordingly, to convict the defendant, [9] the learned magistrate would have had to draw an inference of an absence of such a belief on the part of the defendant.

I might say that, ordinarily, if a man steals a bankcard belonging to another and proceeds to a store and pretends that he is the lawful owner of the bankcard and forges the lawful owner's signature on it and by means of that deception obtains goods, the inference of an absence of a belief in the lawfulness of his conduct would seem to be inescapable. To my mind, the only circumstance which removes this case from a routine case of that description is the fact that the defendant paid \$200 off the account before being spoken to by the police.

A reading of the learned Magistrate's reasons would suggest that the learned Magistrate did not draw any distinction between a belief in a legal entitlement to obtain the goods and a moral entitlement. It is clear that the learned Magistrate focused his attention on the fact that the defendant intended to repay the bankcard account. It is clear, in my opinion, that he based his reasonable doubt as to the element of dishonesty upon that consideration.

In my opinion that circumstance cannot reasonably be relied upon to avoid drawing the inference of guilt which would otherwise be quite inescapable. As I have said, the Court was presented here with the spectacle of a man who admitted to stealing the bankcard of another, admitted to the forging of that other's [10] signature and admitted to practising a deception on the storekeeper to obtain goods. This inference, to my mind, is quite inescapable that such a person had no belief in the legality of his conduct. Can it be said that by reason of the defendant forming an intention to repay the bankcard account that a reasonable doubt arises concerning the dishonesty of his initial conduct? Having considered the matter carefully, I am satisfied that the inference that the defendant had no belief in the legality of his conduct remains inescapable, notwithstanding his intention to repay the account. I consider that the likelihood is that the learned Magistrate did not have in his mind a clear distinction between conduct which might be morally blameless and conduct which is recognised to be unlawful. Accordingly, even accepting the defendant's case that he intended to fully repay the bankcard account, the inference that he dishonestly obtained the property in question remains inescapable on the admitted facts of this case. Accordingly, I consider that the learned Magistrate erred in law in not drawing the inescapable inference of guilt from the evidence before him.

APPEARANCES: For the applicant/informant Marks: Mr P Murdoch, counsel. RJ Lambert, Acting Crown Solicitor. For the respondent/defendant Mayne: Mr W Morgan-Payler, counsel. Legal Aid Commission Victoria.