16/98; [1997] VSC 53; [1997] VICSC 53

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v PARSONS

Winneke ACJ, Tadgell and Ormiston JJA

2, 24 October 1997 — [1998] 2 VR 478; (1997) 97 A Crim R 267

CRIMINAL LAW – OBTAINING PROPERTY BY DECEPTION – CHEQUES OBTAINED BY FALSE PRETENCES – WHETHER CHEQUES ARE CHOSES IN ACTION OR VALUABLE INSTRUMENTS – WHETHER CHEQUES ARE CAPABLE OF BEING DISHONESTLY OBTAINED BY DECEPTION – WHETHER CHEQUES CAPABLE OF BEING "PROPERTY BELONGING TO ANOTHER": ***CRIMES ACT*** **1958 S81(1).**

1. As a matter of practical reality, cheques are so readily negotiable as to make them little different from cash. Cheques are not simply intangible property or choses in action but are instruments of inherent value which are regarded as "property belonging to another" and capable of being stolen or obtained.

R v Preddy & Ors **[1996] UKHL 13; [1996] AC 815; [1996] 3 All ER 481; [1996] 3 WLR 255; [1996] 2 Cr App R 524, not followed.**

2. Where a person pleaded guilty to several counts of dishonestly obtaining cheques by false pretences, it was open in law for a court to find that the cheques were "property belonging to" the persons from whom they were obtained and convict the defendant on the offences charged.

WINNEKE, ACJ: *[After setting out the facts, the grounds of appeal and relevant statutory provisions, his Honour continued]* … **[8]** It was, as I have earlier stated, Mr Wendler's submission that the offences to which his client had pleaded guilty, because they alleged the dishonest obtaining of cheques by deception, were indeed offences which he could not, in law, have committed. This submission was wholly founded upon the authority of the reasoning of the House of Lords in *R v Preddy* [1996] UKHL 13; [1996] AC 815; [1996] 3 All ER 481; [1996] 3 WLR 255; [1996] 2 Cr App R 524 that a person who induces, by deception, another to part with a cheque does not "obtain property belonging to another with intention of permanently depriving the other of it" within the meaning of s81(1) *Crimes Act* 1958. I take no account of the fact that the offences as described in the presentment did not allege, in any case, that the cheques obtained were "property belonging to" the person from whom they were obtained. It is, of course, a critical element of the offence created by s81(1) that it is "property belonging to another" which must be obtained by deception before the offence can be committed. However it must be accepted that the applicant was pleading to the offence created by s81(1) and was thus acknowledging his guilt of each of the elements created by that offence.

It was Mr Wendler's submission that the essence of the decision in *Preddy's case* was that where the deception of the accused had induced the victim to hand over a cheque, the accused did not obtain any property belonging to the victim. In particular he relied upon the passage in the speech of Lord Goff of Chieveley (whose reasons were adopted by the other members of the House), where his Lordship said (at pp835-6):

> "I start with the time when the cheque form is simply a piece of paper in the possession of the drawer. He makes out a cheque in favour of the payee, and delivers it to him. The cheque then constitutes a chose in action of the payee, which he can enforce against the drawer. At that time, therefore, the cheque constitutes 'property' of the payee within s4(1) of the [*Theft*] *Act* 1968. Accordingly if the cheque is then obtained by deception by a third party from the payee, the third party may be guilty of obtaining property by deception contrary to s15(1). [This section is in the same terms as s81(1) *Crimes Act* 1958 (Vic).] But if the payee himself obtained the cheque from the drawer by deception, different considerations apply. That is because, when the payee so obtained the cheque, there was no chose in action belonging to the drawer which could be the subject of a charge of obtaining property by deception. This was decided long ago in *R v Danger* [1857] EngR 45; 169 ER 1018; [1857] Dears & B 307; (1857) 7 Cox CC 303."

His Lordship then recited with approval a passage from the judgment of Campbell CJ in

Danger (at 309) and commented that it was unfortunate that *Danger* had not been cited to the Court of Criminal Appeal in *R v Duru* [1973] 3 All ER 715; (1972) 58 Cr App R 151; [1974] 1 WLR 2 where the Court had held that the appellant had been properly convicted of obtaining property by deception when the property alleged to have been obtained was a cheque. Megaw LJ, who had delivered the judgment of the Court in that case had treated the cheque as a chose in action in the hands of the drawer. He said (at WLR 8):

> "So far as the cheque itself is concerned, true it is a piece of paper. But it is a piece of paper which changes its character completely once it is paid, because then it receives a rubber stamp on it stating that it has been paid and it ceases to be a thing in action, or at any rate it ceases to be, in its substance, the same thing as it was before; that is an instrument on which payment falls to be made. It was the intention of the defendants dishonestly and by deception, not only that the cheques should be made out and handed over, but also that they should be presented and paid, thereby permanently depriving the Council of the cheques in their substance as things in action."

Lord Goff of Chieveley, having referred to this passage in *Duru*, pointed out that the decision had been the subject of much academic criticism and concluded (at 836):

> "The point is simply that, when the cheque was obtained by the payee from the drawer, the chose in action represented by the cheque then came into existence and so had never belonged to the drawer. When it came into existence it belonged to the payee, and so there could be no question of his having obtained by deception 'property belonging to another'. This is the point which was decided in *Danger*. The case of a cheque differs from *Danger* only in the fact that the cheque form, unlike the paper upon which the bill was written in *Danger*, did belong to the drawer. But there can have been no such intention on the part of the payee permanently to deprive the drawer of the cheque form which would on presentation of the cheque for payment to be returned to the drawer via the bank."

His Lordship accordingly found that the case of *Duru* had been wrongly decided, as had cases which had followed it. Mr Wendler submitted that the facts of the case in *Preddy* were "on all fours" with the facts of this case and that this Court should follow the reasoning of Lord Goff and find, as a consequence, that the applicant had not "obtained property belonging to another with the intention of permanently depriving the other of it" within the meaning of s81(1). He pointed out, as is the fact, that s81(1) *Crimes Act* 1958 is in the same form as s15(1) *Theft Act* 1968 (Eng.) and that "property" is defined in the *Crimes Act* in the same way as it is defined in the *Theft Act*. His submission, if accepted, will produce some rather startling consequences because, since the introduction of s81(1) into the *Crimes Act* by the *Crimes (Theft) Act* of 1973, it has been commonplace for the Crown to allege offences of "dishonestly obtaining the property of another" where the property said to have been obtained has been in the form of cheques. Recent examples which have been before this Court include *R v Michelle Rose* (unrep, 10 April 1997), *R v Yaldiz* (unrep, 4 December 1993), *DPP v Kostikidis & Anor.* (unrep, 12 September 1996), *R v Walsh* (unreported, 4 September 1997). It is true that in none of these cases was the point now raised the subject of debate, no doubt because in each such case the Court accepted, as it and other courts in this State have done for many years, that a person who by deceptive words or conduct obtains a cheque from another is obtaining property belonging to that other.

A decision of the House of Lords, although not binding on this Court, has none the less always been regarded as highly persuasive. However, unless the Court is persuaded that they are clearly wrong, it should be prepared to follow its own established authorities and practices even if, by doing so, it might result in a departure from a contrary opinion of the House of Lords (*Cook v Cook* [1986] HCA 73; (1986) 162 CLR 376 at 390; (1986) 68 ALR 353; [1986] Aust Torts Reports 80-061; (1986) 4 MVR 161; (1986) 61 ALJR 25; *Britten v Alpogut* [1987] VicRp 77; [1987] VR 929 at 938; (1986) 79 ALR 457; (1986) 23 A Crim R 254 per Murphy J; *R v Liberti* (1991) 55 A Crim R 120 per Kirby P at 122). Whilst the views of Lord Goff of Chieveley expressed in *Preddy's case* at pp835 ff. on the question, which his Lordship titled "payment by cheque", are entitled to great respect, they should not, in my view, lead this Court to depart from its own authorities or its established practice of regarding cheques as "property belonging to another" capable of being obtained by deception within the meaning of s81(1) *Crimes Act* 1958. I have come to this conclusion for reasons which I shall explain.

In the first place the views so expressed were not strictly necessary to answer the questions which had been submitted by the Court of Appeal for the consideration of the House of Lords. Lord Goff himself acknowledged as much (p835). The essence of the question submitted was

whether the "electronic transfer of funds" from the victim's account at one bank to the account of the accused's solicitor at another bank could amount to the "obtaining of property belonging to another" within the meaning of s15(1) of the *Theft Act* 1968. This question was answered in the negative, the view being taken, perhaps not surprisingly, that properly analysed the transaction resulted in the extinguishment or reduction of a chose in action which the victim had against his or her bank and the simultaneous creation of a chose in action in favour of the accused, or the solicitor, against his or her bank. Although a chose in action, being intangible property, fell within the wide definition of "property" contained in the *Theft Act*, there was no concept of "transfer of property" such as is contemplated by the element of "obtaining property belonging to another" (see per Lord Goff at 824).

But, perhaps even more significantly, it seems to me that the reasoning of their Lordships in *Preddy's case* was very much influenced by the facts of the case before it and the relationship which those facts bore to the legislative history of s15(1) *Theft Act* 1968. *Preddy's case* concerned "mortgage frauds" in which the several accused had obtained loans or advances from a lending institution upon the faith of representations which were accepted to be dishonest and deceitful. Indeed, in each case, the indictment preferred against the accused alleged the "obtaining of the advance" by deception and not, in cases where the advance was made by cheque, the obtaining of the cheque. Essentially, therefore, the criminal conduct alleged was in the nature of obtaining credit by fraud rather than obtaining property belonging to another by fraud with intent to permanently deprive that other of its property. Lord Goff (at 830 ff.) traced the history of the legislative debates leading to the passage of the *Theft Act* 1968, and s15(1) in particular, and concluded that it was "improbable that obtaining a loan such as a mortgage advance by deception should have been intended to fall within s15(1) of the Act of 1968" (*Preddy's case*, supra, 832). This was because, as he said, it had been the initial intention of the legislature to include within s15 a separate offence of "dishonestly obtaining credit by deception"; but that the course of the debate had led to the somewhat extraordinary conclusion (inter alia) that the offence of obtaining credit by fraud had been excluded from the Legislation. "Thus", as Lord Goff observed (832) "was the baby thrown out with the bath water".

As I have stated, this analysis of the legislative history, and the conclusion that, properly interpreted in the context of that history, s15(1) *Theft Act* 1968 was not intended to comprehend an offence of "obtaining credit by fraud", seems to me to have significantly influenced the reasoning in *Preddy's case*. Indeed, in concluding that the electronic transfer of funds could not come within the meaning of the section, Lord Goff observed (834):

> "In truth, s15(1) is here being invoked for a purpose for which it was never designed, and for which it does not legislate."

For my own part, I would apprehend that their Lordships' conclusion that "credit advances" were never intended to be charged under s15(1) is the reason why they were at pains to emphasize that their reasons were to be closely allied to the facts of the cases which they had been asked to consider. Thus (at 828) Lord Goff said:

> "The central point in each appeal was whether, <u>having regard to the nature of the transactions</u>, the appellants were properly charged with and convicted of obtaining property by deception contrary to s15(1)." (emphasis added)

And then, having set out the questions submitted by the Court of Appeal for the consideration of the House, his Lordship noted (830):

> "It is the first of these three questions which is central to these appeals, since it addresses the question whether it is appropriate to charge a person, <u>accused of a mortgage fraud</u>, with the offence of obtaining property by deception." (emphasis added)

It thus seems to me that *Preddy's case* stands as authority for the proposition that a person who has obtained a credit advance from another by deception cannot commit the offence created by s15(1) *Theft Act* 1968 whether he receives that advance by electronic transfer, or through the "Clearing House Automated Payment System" (C.H.A.P.S.), or by cheque or by other means. Accordingly the analysis which Lord Goff of Chieveley made of the nature of a "cheque transaction" was, as he said, unnecessary for the purposes of the determination of the critical

question. Nevertheless, the analysis which his Lordship did make suggests that a cheque is not "property belonging to another" which is capable of being obtained by deception within the meaning of s81(1) *Crimes Act* 1958 (Vic). The reasoning therefore has a bearing on the facts of the case with which this Court is concerned.

Lord Goff, in *Preddy's case*, treated a cheque, not as physical property, but as intangible property. Thus, when the victim makes out the cheque to the accused, or some other person at his direction, it constitutes a chose in action of the payee which the latter can enforce against the drawer. In this regard it should be noted that the offence created by s81(1) does not require the property obtained to be obtained for the benefit of the accused. It is sufficient if the accused obtains it for the benefit of himself or some other person, in this case "Canyon Bay" (see s81(2)). However what it does require is that "property belonging to another" be obtained by the deception of the accused. So long as the cheque is to be regarded as something which creates a chose in action of the payee, it would necessarily follow that it could scarcely be property belonging to or obtained from the victim.

In concluding that this was the proper analysis of a cheque, Lord Goff of Chieveley in *Preddy's case* (at 835-6) relied upon the case of *R v Danger* [1857] EngR 45; 169 ER 1018; [1857] Dears & B 307; (1857) 7 Cox CC 303, which, as I have already said, he said had "unfortunately" not been cited to the Court of Criminal Appeal in *R v Duru* (*supra*); the latter itself being a case of a "mortgage advance" obtained by fraud. Lord Goff noted that the facts in *Danger's case* were different from the usual case of obtaining a cheque in that the bill form which *Danger* obtained was at all times in his own possession and control and had only been placed in the custody of the prosecutor for the purpose of obtaining his endorsement. However Lord Goff eschewed the notion that a cheque was a form of physical property comprising the cheque form, saying that there could be "no intention on the part of the payee to permanently deprive the drawer of the cheque form, which would on presentation of the cheque for payment be returned to the drawer, via his bank" (*Preddy's case*, supra at 836-7).

This reasoning by the House of Lords as to the property characteristics in a cheque has not escaped criticism. In an article in the *Criminal Law Review* ([1997] CrimLR 396), Professor JC Smith concluded that the reasoning was wrong and ignored the practical realities of the situation. It was his opinion that the cheque is a valuable security and property belonging to the person from whom it was either stolen or obtained. It was, he said, immaterial that the victim knows that the piece of paper will be returned to him or his bank because he also knows that what he will get back "unlike what he parted with, is useless. The virtue will have gone out of it" ([1997] CrimLR at 405). It was Professor Smith's view that the definition of property in the *Theft Act*, s4 (as in s71 *Crimes Act* 1958 (Vic)) was wide enough to comprehend what had previously been defined in the *Larceny Act* (Eng) and the *Crimes Act* (Vic) as "valuable security". As he said ([1997] CrimLR at 400):

> "[A valuable security] ... was not just a piece of paper, any more than a key is just a piece of metal, or a swipe card is a piece of plastic. ... The physical thing was one which had special properties. It is not any old piece of paper which will cause, say, a bank clerk to hand over £1000; but a cheque will do that. Of course the cheque is (i) a piece of paper which (ii) creates a thing in action but it is also ... (iii) a valuable security. The *Theft Act* 1968 does not specifically refer to valuable securities as property which may be stolen or obtained, any more than it refers to title deeds to land, or dogs, or other things which the *Larceny Acts* specifically provided could be stolen. There was no need to refer to any of them, because they are all property, as widely defined for the purposes of theft and obtaining by s4(1). Just as a dog or title deeds may now be stolen, so may a valuable security; and that means not the thing in action, nor a mere piece of paper, but the instrument, the physical thing with certain writing on it. And if it may be stolen, it may also be obtained by deception. It is certain that the wide definition of property in the *Theft Act* was intended to include anything which could be stolen or obtained under the *Larceny Acts* or at common law."

For my own part I find this reasoning persuasive. If a person, by deception, induces another to make out a cheque and deliver it to him, the fraudster has obtained an instrument of value at the expense of the victim. As I would understand it, that is why, as a matter of reality, people take steps to ensure that their cheques are not stolen and why, if they are, steps are taken to stop payment. Of course, we do not know what type of cheques were being considered by the House of Lords in *Preddy's case*, but in the case with which we are concerned most of the cheques were

"bearer cheques" and some of them were "bank cheques". In either case I would have thought that they were so readily negotiable as to make them little different in their nature from cash which, on any view is property capable of being stolen or obtained. Like Professor Smith, it seems to me that practical reality would dictate that these cheques are "valuable property" in the hands of the victim and are capable of being stolen or obtained from him. It is perhaps of interest to note, as Professor Smith did in his article, that *Danger's case* upon which the House of Lords relied in *Preddy's case*, has itself been the subject of criticism (see *R v Governor of Brixton Prison, ex parte Stallmann* [1912] 3 KB 424 per Darling J at 448 and Phillimore J at 451). The fact is that all *Danger* received was a signature on a piece of paper which at all times belonged to him. As Phillimore J remarked in *ex parte Stallmann, supra*, at 451 in respect of *Danger's case*:

> "It [i.e. the bill] was when it passed from the hands of the prisoner to the prosecutor already a piece of paper of considerable value. It had a bill stamp on it and the drawer's name as the drawer. In those circumstances it might well be held by the Court - that is all I need say - drawing inferences of fact, that there had been no gift to the prosecutor, and that the piece of paper never was the prosecutor's property; and, if that be so, it was never obtained from him. I agree that the court also took the point that it was not a valuable security till it left the prosecutor's hands. Upon that I should like to express a pious opinion that they went too far ... ."

For my own part, I agree with the view of Professor Smith when he says [1997] CrimLR at 403:

> "Phillimore J's 'pious opinion' is right. All that *Danger* got from V. by his fraud was a signature on a document which was already his and which probably remained in his possession throughout when merely put in front of V. to be signed. When, on the other hand, the cheque form belongs to V., it flies in the face of general experience and practice to assert that it is of no value to the drawer. We take care, or should take care, to prevent our cheques from falling into the wrong hands."

These sentiments seem to me to accord with practical reality. In my view the courts of this State have regarded cheques as instruments of inherent value which are capable of being stolen or obtained, and not simply as intangible property or choses in action. For the reasons which I have stated, it is appropriate in my opinion for the courts to continue to so regard them. In the course of this application we were referred to only one authority in this country in which the decision in *R v Preddy* (supra) has been considered (*R v Hunt* (1996) 83 A Crim R 307). That was a case however which involved the interpretation of s178A *Crimes Act* 1900 (NSW) and the consideration of *Preddy's case* arose in circumstances quite different from those which have been raised on this application.

For the foregoing reasons I am not persuaded that the applicant pleaded guilty to offences of which he could not, in law, have been convicted. The application for leave to appeal against the convictions recorded in accordance with his plea of guilty should thus, in my view, be dismissed. *[His Honour then dealt with the application for leave to appeal against sentence.] [Tadgell and Ormiston JJA delivered separate judgments concurring in the judgment of Winneke ACJ.]*

APPEARANCES: For the Crown: Mr PA Coghlan QC and Mr RA Elston, counsel. PC Wood, Solicitor for Public Prosecutions. For the Applicant: Mr GD Wendler, counsel. Allan McMonnies, solicitor.
