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SUPREME COURT OF VICTORIA

AKBULUT v GRIMSHAW

Hampel J

10 September, 17 October 1997 — [1998] 3 VR 756; (1997) 96 A Crim R 599

CRIMINAL LAW – THEFT OF VALUE OF TELEPHONE CALLS – "PROPERTY" – WHETHER PROPERTY MUST EXIST TO BE APPROPRIATED – WHETHER MAKING OF CALLS DEPRIVED THE OWNER OF "PROPERTY" – WHETHER THEFT: *CRIMES ACT* 1958, SS71(1), 72.

Section 71(1) of the *Crimes Act* 1958 ('Act') provides (so far as relevant):

"'property' includes money and all other property real or personal including things in action and other intangible property."

A. entered business premises without authority and made a number of unauthorised telephone calls. He was later charged with 35 counts of theft of telephone calls each of a specified value. In convicting A., the magistrate found that a telephone call is capable of being stolen because the debt created in the subscriber to the telephone service was "property" within s71 of the Act. Upon appeal—

HELD: Appeal allowed. Convictions quashed.
1. "Property" even as defined in s71 of the Act must be in existence before it is capable of being appropriated.

2. In the present case, there was no "property" vested in the owner which was capable of being appropriated before the acts which were the telephone calls. By making the calls, A. created an obligation in the owner of the service to pay for the calls but did not deprive the owner of anything that could be said to be "property", even intangible property. Accordingly, the acts of making the calls did not in law amount to thefts and the magistrate was in error in finding the charges proved.

HAMPEL J: [1] This is an appeal from the convictions of the Appellant, Mr Akbulut, in the Magistrates' Court, of theft of telephone calls. The background to this appeal can be stated briefly and is common ground between the parties. The appellant entered business premises without authority, while the occupier was away, and made unauthorised telephone calls. As a result, the appellant was charged with 35 counts of theft of telephone calls, each to a specified value. The Magistrate dismissed a "no case" submission and found that a telephone call is capable of being stolen because the debt created in the subscriber to the telephone service was "property" within the definition of section 71 of the *Crimes Act* (Vic) 1958. Section 72 of the *Crimes Act* provides:

> "72(1) A person steals if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.
> (2) A person who steals is guilty of theft..."

Section 71 of the *Crimes Act* extends the definition of "property" as follows:–

> "'property' includes money and all other property real or personal including things in action and other intangible property."

Mr Perry, for the appellant, submitted that the Magistrate erred in holding that a telephone call is capable of being stolen. He argued that there is no "property" capable of being appropriated prior to the act of the making of the telephone call. Mr Perry also submitted that the act of making the telephone call does not deprive the subscriber of anything as it does not affect the continuation of the subscriber's contractual right to use the telephone service. Mr Perry referred to *Lowe v Blease* [1975] Crim L Rev 513. In that case, the defendant entered premises as a trespasser and made telephone calls. He was charged with stealing electricity while using the telephone. On appeal, the Court held that the electricity was not "appropriated" and could not be described as "property" within the meaning of **[2]** section 4 of the *Theft Act* 1968 which had an extended definition of

"property" to include "things in action and other intangible property". Section 13 of the same Act created the offence of dishonestly using electricity. Mr Perry argued that it is significant that in Victoria, Parliament specifically enacted legislation, namely the *Electric Light and Power Act* 1958 (Vic), deeming the fraudulent abstraction, wasting or diversion of electricity to be theft.

Mr McArdle, for the respondent, submitted that the rights or benefits that a subscriber obtains from an agreement with a telephone service provider amount to property. As such, they fall within the definition of section 71. He cited *R v Kohn* (1979) 69 Cr App R 395 where an accountant drew cheques on his employer company's account to meet his personal liabilities. The Court held that where the bank account was either in credit or can be overdrawn within an agreed limit, the bank had an obligation to meet cheques drawn on it. The customer has a right of property, a chose in action. Mr McArdle argued that similarly, the rights of the subscriber fell within the definition of "property" and were capable of being stolen by a dishonest assumption of those rights without authority. Mr McArdle also relied on *Attorney-General of Hong Kong v Nai-Keung* [1987] 1 WLR 1339; (1988) 86 Cr App R 174. In that case, the director of a company had general authority to deal in its export quotas. He set up his own company and sold the export quotas to it at what was alleged to be a considerably undervalued price. It was held that an export quota is property capable of being stolen because, although it is not a chose in action, it is "other intangible property". Mr McArdle argued that the concept of intangible property is wider than choses in action, and the rights of a subscriber to a telephone service in exchange for payment of a fee or undertaking to pay an account at least amount to "property" being "other intangible property".

I agree with Mr Perry's submissions that property, even as defined by section 71, must be in existence before it is capable of being appropriated. In *Nai-* **[3]** *Keung's* case, *ibid*, export quotas which were deemed to be "other intangible property" were registrable with the Department of Trade and Industry and could be bought and sold on a temporary or permanent basis. The dishonest dealing with an export quota will deprive the owner of the benefit it confers. Similarly, in the case of *Kohn*, the causing of the employer's bank account to be diminished, was an appropriation of a liability to pay owed to the employer company by the bank. Such an appropriation had the effect of depriving the employer of its entitlement. In the present case, there is no "property" vested in the owner which is capable of being appropriated before the acts which were the telephone calls. By making unauthorised telephone calls, the appellant created an obligation in the owner of the service to pay for the phone calls made but he did not deprive the owner of anything that could be said to be "property", even intangible property. He did not deprive the owner of use of the service or any rights the owner may have to make phone calls pursuant to the agreement with the telephone service.

What the appellant undoubtedly did, was to engage in dishonest conduct to the detriment of the subscriber because the subscriber was obliged to pay for the telephone calls made without his authority. Such conduct gave the appellant an advantage because he was able to make the phone calls for which he would not have to pay. Such conduct may well have constituted fraudulent acts such as obtaining a financial advantage by deception in breach of section 82 of the *Crimes Act*. However, in my opinion, those acts could not, in law, amount to thefts which must involve a dishonest appropriation of "property", intangible or otherwise, belonging to its owner. It follows that the Magistrate erred in convicting the appellant of theft of the telephone calls. The appeal is allowed and the convictions quashed.

APPEARANCES: For the appellant: Mr M Perry, counsel. Galbally & O'Bryan, solicitors. For the respondent: Mr J McArdle, counsel. Office of Public Prosecutions.
