R v BENJAMIN JAMES CHARLES BOWMAN (RULING NO. 2)

Supreme Court of the Northern Territory of Australia

Asche C.J.

7 August 1987 at Alice Springs

Criminal Code - S. 30(1) & (2) - claim of right - accused alleging sale by him to the prosecutor of a particular chattel and non-payment by the prosecutor for that chattel seized another chattel owned by the prosecutor and claimed the right to retain until paid - accused charged with stealing the second chattel - whether accused entitled to raise defence of claim of right to second chattel although alleged debt arose in relation to first chattel.

Cases considered:-

Olsen v The Grain Sorghum Marketing Board (1962) Q.R. 580
R v Walsh (1984) 2 Q.R. 407
Walden v Hensler (1986) 2 Q.R. 490

Cases referred to:-

R v Wade (1869) 11 Cox C.C. 549
R v George (1890) N.S.W.L.R. 373
R v Nundah (1916) 16 S.R. (N.S.W.) 482
Thomas v R (1937) 59 C.L.R. 279
Anderson v Nystrom (1941) Q.S.R. 56
Clarkson v Aspinall (1950) Q.S.R. 79
R v Lopatta (1984) 35 S.A.S.R. 101
R v Langham (1984) 36 S.A.S.R. 48

Counsel for the Crown	J. Karczewski
Solicitor for the Crown	N.T. Government Solicitor
Counsel for the Accused	C. McDonald
Solicitor for the Accused	Aldermans

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

No. SCC 14 of 1987

THE QUEEN

-v-

BENJAMIN JAMES CHARLES
BOWMAN

CORAM: ASCHE C.J.

RULING (NO. 2)
(Delivered the 7th of August 1987)

In the absence of the jury and before the commencement of any proceedings before the jury other than the arraignment of the accused who had pleaded not guilty, Counsel for the prosecution and Counsel for the defence have asked me to resolve a question of admissibility of evidence, based upon two documents tendered to me. Those documents are a Statement of Agreed Facts, and a Record of Interview between the Police and the accused on 12 August 1986.

The Record of Interview is not signed by the accused but for the purpose of this ruling no objection is taken by Counsel for the defence.

In a previous ruling in this case I have adverted to the caution which must be observed in a procedure such as this, and I need not repeat those observations. Suffice it to say that in the special circumstances of this case, the procedure would seem to be helpful to both the prosecution and the defence, and may clarify one aspect of the case for the defence, which, if I rule in a particular way, could become the main issue between the prosecution and the defence; or, if I rule in a different way, may cause the defence to reconsider its presentation on this aspect.

I take great care to confine myself to this one aspect, and nothing I say should interfere in any way with any other proper defence or submissions which counsel for the accused may wish to put forward. Provided these restrictions are observed, I can see no detriment to the accused in the course I now take, and which I am urged by both Counsel to take.

To clarify the issue, I now set out the facts agreed for the purpose of this ruling:

"THE QUEEN v BENJAMIN JAMES CHARLES BOWMAN

AGREED FACTS

(1) On 13 June 1985, the accused commenced employment at Haasts Bluff with a company called Ikuntji Holdings Pty. Ltd. He was employed in the position of store manager of a store called Timmys Kanparrka Store ("the business"). The terms and conditions of his employment were reduced to writing in a document entitled 'Contract of Employment'. The Contract of Employment was signed by the accused and five signatories for an on behalf of Ikuntji Holdings Pty. Ltd. including one Timmy Jugadai.

(2) The accused took up residence in a house at Haasts Bluff.

(3) In January, 1986 the accused purchased for Timmys Kanparrka Store a white Toyota Landcruiser utility registered number NT247-594 (the "Toyota"). That purchase was the subject of discussion between the accused and Timmy Jugadai. The purchase was effected by the selling or trading in of an old truck which the business owned and was supplemented by funds from Timmys Kanparrka Store.

(4) The Toyota was registered in the name of Timmys Kanparrka Store on 28th January, 1986.

(5) The Toyota was used by the accused for both business and private purposes.

(6) In July of 1986, the relationship between the accused and his employer began to deteriorate.

(7) On or about the 29th of July, 1986, the accused tendered a letter of resignation and left Haasts Bluff in the Toyota utility belonging to and registered in the name of Timmys Kanparrka Store and came to Alice Springs.

(8) On the 31st day of July, 1986, the accused attended at the Motor Vehicle Registry at Alice Springs together with the Certificate of Registration for the Toyota utility. The accused had completed the back of the form in that part which deals with change of ownership.

In the space for the name of the new owner, the accused inserted his own name and for his address, he put down 22 Madigan Street, Alice Springs.

The accused signed his name as new owner and again signed his own name as the former owner with the word "manager" printed beneath the signature. A fresh registration certificate was then issued in the name of the accused.

(9) On Wednesday, 13 August, 1986, detectives from the Alice Springs Police Station attended at number 22 Madigan Street, Alice Springs and spoke to the accused's step-daughter as the accused was not in attendance at the residence at the time. Whilst detectives were at the house, the accused arrived driving the white Toyota utility. After some conversation, the accused then accompanied the detectives back to the Alice Springs Police Station where he took part in a formal conversation in the form of a typed question and answer Record of Interview.

(10) There is a dispute between the parties in respect of a sale of the Blitz Truck."

I now add to those facts certain statements made by the accused in his Record of Interview, which again for the purpose of this ruling I take to be the way in which the accused presents his case on this one aspect. Summarising the effect of those answers for the purpose of this ruling, I conclude that in the Record of Interview, and insofar as the answers of the accused are relevant to the point under consideration, the accused alleges that before 29 July, when he took the Toyota utility to Alice Springs and thereafter on 31 July 1986 caused that vehicle to be registered in his name,

(a) he had sold to his employer Ikuntji Holdings Pty Ltd a Chevrolet Blitz truck owned by him and which he had the right to sell.

(b) The sale was affected at the request of and with the consent of one Timmy Jugadi,

(referred to in the Record of Interview as Timmy Jugari), who had authority to act on behalf of Ikuntji Holdings Pty Ltd in this transaction.

(c) The sale was for a consideration of $8,000-00

(d) Subsequently this vehicle sustained damage not caused by the accused but by other persons.

(e) The accused spent $1.760-00 of his own money to repair the damage so caused, but expected that money to be repaid to him by his employer Ikuntji Holdings Pty Ltd, presumably as an expense properly incurred by him on its behalf while he was acting as store manager of the company.

The accused further alleges that on 31 July 1986, when he caused the Toyota to be registered in his name,

(f) he had not been paid either the; $8,000-00 for the sale of the Chevrolet Blitz or the $1,760-00 expended by him for its repair.

(g) Although he had submitted his letter of resignation as manager of the company on 29 July 1986, that letter gave notice of his resignation as from 31 August 1986 and in any event no formal acceptance by the company of his resignation was received by him at any time.

(h) He therefore believed that on 31 July 1986 he had the ostensible authority to arrange the transfer of the registration of the Toyota from the company to himself. He concedes, however, that at that time he did not have the actual authority to do so, and that had he sought actual authority it would have been refused.

(i) At the time he arranged the transfer of the Toyota from the company to himself, he honestly believed that he had a legal right to do so, as a means of protecting or securing his right to be paid the sum of $9,760-00 which he honestly believed he was owed by the company.

(j) He intended to keep the Toyota in his possession until he was paid the amount he honestly believed was owing to him, and on 31 July 1986 he honestly believed that he was legally entitled to do this.

The accused is charged with the theft of the Toyota.

The question that I am asked, is whether in the circumstances I have set out and in the light of the agreed facts it is open to the accused to rely upon the defence of a bona fide claim of right.

S. 30(1) and (2) of the Code read as follows:-

"(1) Subject to sub-sections (2) and (3), ignorance of the law does not afford an excuse unless knowledge of law by the offender is expressly declared to be an element of the offence.

(2) A person is excused from criminal responsibility for an act or omission done or made with respect to or for an event caused to property in the exercise of an honest claim of right and without intention to defraud."

These two sub-sections together with S. 32 Mistake of Fact, while not in precisely similar terms to Ss. 22 and 24 of the Queensland Criminal Code, contain in my view no significant difference from the Queensland sections. One may therefore commence with the guidance of Dixon J. as he

then was, in Thomas v R (1937) 59 C.L.R. 279 at 305-6, when he remarks that the appropriate provisions of what were then the three Criminal Codes of Australia, Queensland Ss. 22 and 24; Tasmania Ss. 12 and 14 and Western Australia Ss. 22 and 24, being in the same terms, "state in my opinion the common law with complete accuracy."

Note, however, that Philp J. in Anderson v Nystrom (1941) Q.S.R. 56 at 69 to 70, while conceding that the common law and Queensland law are very similar, points out that section 22 is not as wide as the English common law and the defence of an honest claim of right under S. 22 is confined to property whereas under the common law it may not have been so confined.

This may have some relevance because the learned prosecutor for the Queen submits that the accused had and could have had no claim of right to the property involved, namely the Toyota. That, he submits, had nothing to do with the dispute between the accused and the company. His claim, if he had any, was to the Chevrolet truck. Had he taken that there would have been a sufficient nexus between the claim and the property taken, assuming of course that he took the Chevrolet as a former owner intending to keep it as security for the debts allegedly incurred by the company in respect of it, or even perhaps to sell it to reimburse himself for those debts, honestly believing that he had a right to act in either of these ways.

Mr Karczewski for the Crown relies on Olsen v The Grain Sorghum Marketing Board (1962) Q.R. 580, a decision of the Queensland Full Court. There the appellants purchased grain sorghum and conveyed it from Queensland to New South Wales and then back to Queensland, acting upon legal advice that S. 92 of the Constitution protected them in those circumstances from being successfully prosecuted for breaches of the Queensland statute prohibiting purchase of grain from persons other than the Grain Sorghum Marketing Board.

The advice was based on a decision of the State Supreme Court subsequently reversed by the High Court. The appellants therefore contended that they had purchased the grain pursuant to an honest claim of right relying on the advice given. The Queensland Full Court held that the acts of the appellants, for which they were prosecuted, were not done with respect to any "property" within the meaning of S. 22 of the Queensland Criminal Code. Mansfield C.J. put it this way at page 585:

> "The offence charged in the instant case was that of buying a commodity from a person other than one permitted by law to sell it and was not in my view an offence relating to property within the meaning of the section. The claim asserted by the appellants was not a claim that they were entitled to buy the particular property, the subject of the claim, by reason of any right in or to that property peculiar to themselves, but was in effect a claim that they could buy any sorghum from any person because they honestly but wrongly believed that the provisions of the Primary Producers Organisations and Marketing Acts 1926 to 1957 did not apply to the transaction. This amounts to a

claim that because they were ignorant of the law they were not criminally responsible. I therefore think that the offence charged was not one relating to property and that the act done was not done in the exercise of an honest claim of right within the meaning of section 22 of the code. The appellant's claim is therefore one which is covered by the first paragraph of that section and is not excepted from its operation by the second paragraph.

Stable J. said at page 593 'Without going into the implications of the words 'and without intention to defraud' in section 22 of the code, which words must have considerable significance in the construction of that section, I repeat my clear view that this was not an act done with respect to any property within the meaning of section 22 of the Criminal Code."

Hanger J. said at page 589:

"On the facts it is to be taken that the appellants believed that in buying grain they were doing nothing unlawful. It being conceded that this belief was wrong, I should have thought that all that the appellants raised before the magistrate was that they had made a mistake as to the law which in itself is no defence to any criminal prosecution. Section 22, after stating that ignorance of the law is no excuse, does not proceed to say that ignorance of the law is an excuse in the case of an offence relating to property for an act done with respect to property. It refers to an act done in the exercise of an honest claim of right and without intention to defraud. In Cooper v Phibbs (1867) L.R.2 H.L. 149 at 170, Lord Westbury has some remarks which I think are relevant: 'It is said 'Ignorantia juris non excusat'; but in that maxim the word 'jus' is used in sense of denoting general law, the ordinary law of the country. But when the word 'jus' is used in the sense of denoting a private right that maxim has no application'. It is this distinction that must be kept in mind in construing and applying section 22 of the code."

Mr Karczewski submits that similarly here the appropriation of the Toyota was not an act for which a claim

of right could be made, but rather an act to which S. 30(1) applies, being at most an act based on ignorance of the law.

In my view, however, Olsen's case does not support this submission. Indeed it goes some way to supporting the opposite argument. Their Honours in the passages I have quoted seem to me to be drawing a distinction between acts in breach of the law not based on any specific claim to any particular property, but based on an erroneous view that there was a general right to deal in certain property; and acts based on positive and particular claims, albeit erroneous, but personal to the actor and to specific property.

The former are not acts "with respect to property" because they are based on more generalised claims. The latter are truly "with respect to property" because the claim is narrowed down to the particular. Hence the comments of Mansfield C.J. that the appellants did not assert any right peculiar to themselves, and the distinction emphasised by Hanger J. between general law and private rights.

This distinction is again emphasised in Walden v Hensler (1986) 2 Q.R. 490 where an Aboriginal was convicted of an offence against the Fauna Conversation Act for shooting a protected bird without having any licence or authority to do so. His plea that it was his traditional

right to do so was not regarded as a claim of right within the meaning of S. 22 of the Queensland Code. He was making a generalised defence based on tradition, rather than a specific claim to that specific animal based on circumstances peculiar to the actor himself. At page 496 Thomas J. says:

> "It is immediately obvious that this applicant did not claim any particular property in the bird or that he had any greater right to it than anybody else. It was based upon a belief that he, along with all Aboriginals, had the right to hunt it and take it in the manner he described. In short, there was no claim to any individual personal right."

See also R v Walsh (1984) 2 Q.R. 407 where the appellant, who was charged with unlawfully killing three bullocks, raised what he maintained was an honest claim of right to protect his avocado trees which had been damaged by straying cattle. In that case, Kneipp J. said:

> "The argument for the appellant, as I understand it, was that the right which he was claiming was the right to protect his property based on his ownership of that property. In my opinion that is not the sort of right to which the provision refers. In my view, the provision refers to a right relating to the property to which the charge relates. A right, which if it existed, would be - to adopt language used by Mansfield C.J. in Olsen's case - a right in or to that property which would be peculiar to the person asserting the right."

But the learned Crown Prosecutor relies on these cases in another way. He submits that the analysis of

Kneipp J., which is supported by and adequately summarises the views of the judges in the cases previously cited, is fatal to the accused's defence under S. 30(2). For if the right claimed is a right relating to the property to which the charge relates, or a right in or to that property which would be peculiar to the person asserting the right, then the right which the accused here asserts is a right to be paid in relation to the chevrolet truck and not in relation to the Toyota, which is here the property to which the charge relates.

I do not accept so narrow a construction, nor do I consider that the passages cited justify it. Although a claim of right may arise with respect to dealing with a particular chattel, (for example R v Wade (1869) 11 Cox C.C. 549) there is no reason why the claim cannot be honestly though mistakenly made with respect to property, other than that which was first the matter in dispute. In this sense the only relevance of the dealings between the accused and the company with respect to the chevrolet truck is that in the mind of the accused, if his version is to be accepted, that created a debt which he believed he could enforce by some form of seizure of another chattel as security.

An act with respect to property in the exercise of an honest claim of right need not necessarily be an act in respect of the property concerning which the alleged debt was incurred, any more than a writ of execution need relate

only to the property, the purchase of which first created the debt. It is the exercise of the claim which occasions the act with respect to property; and if specific property is then taken, the person taking it is claiming a right in respect of that property peculiar to him; but it is the claim which is peculiar or special or particular to him, not necessarily the property.

This can be illustrated by R v George (1890) N.S.W.L.R. 373 where the accused demanded from the prosecutor one pound which he had lent him the day before. On the prosecutor saying that he had not got the pound, the accused threatened him and then seized his watch, saying that when he gave him the pound he would give the watch back. He was charged with robbery. It was held that the proper question to leave to the jury was whether the accused took the watch in the honest belief that he was entitled to do so to secure repayment. Now, the watch was obviously not property which had any connection with the original debt, but the taking became an act with respect to property and the right claimed was a right relating to the property to which the charge related. See also R v Lopatta (1984) 35 S.A.S.R. 101.

In R v Langham (1984) 36 S.A.S.R. 48 at 51 King C.J., referring to the defence of claim of right and commenting on R v Skivington (1967) 51 C.A.R. 167 said, as to that case,

> "I think that properly understood, it is authority for the proposition that what is required is simply a genuine belief in the accused's legal entitlement to the property taken and not necessarily to his right to take it, either in the particular way in which he has taken it or in any other way. I think the older authorities referred to in Skivington confirm that view."

It is, of course, well settled and the Crown concedes, that a claim of right need only be honest and need not be reasonable. See R v Nundah (1916) 16 S.R. (N.S.W.) 482; Clarkson v Aspinall (1950) Q.S.R. 79 at 89.

I am satisfied, therefore, that the accused here may adduce evidence tending to establish a claim of right based on the circumstances set out in his Record of Interview.