Neave v Trenerry [1999] NTSC 3

PARTIES:	JADE NEAVE
	v
	ROBIN LAURENCE TRENERRY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA61 of 1998 (9614652)
DELIVERED:	3 February 1999
HEARING DATES:	14 December 1998
JUDGMENT OF:	BAILEY J

REPRESENTATION:

Counsel:

Appellant:	C. Thomson
Respondent:	J. Blokland

Solicitors:

Appellant:	NAALAS
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	bai99002
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Neave v Trenerry [1999] NTSC 3
No. JA61 of 1998 (9614652)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against a conviction imposed by the Court of Summary Jurisdiction at Darwin.

BETWEEN:

JADE NEAVE
Appellant

AND:

ROBIN LAURENCE TRENERRY
Respondent

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 3 February 1999)

Background

[1] On 7 May 1998, the appellant was convicted by the learned Chief Magistrate of a charge of stealing contrary to s210 of the *Criminal Code*. The particulars of the charge were that, on 12 June 1996 at Darwin, the appellant:

> "did steal cash, valued at $671, the property of another."

[2] The appellant appealed against her conviction by notice of 7 May 1998.

[3] The facts giving rise to the charge against the appellant were not a matter of dispute before the learned Chief Magistrate. In summary:

(a) on the 12th June 1996, the appellant was with her daughter, aged seven months, at the Esplanade in Darwin;

(b) the appellant was pushing a pram containing her daughter along a path or walkway leading from the Esplanade to the shore;

(c) the appellant noticed eight Japanese banknotes (each with a denomination of 10,000 yen) "scattered all around" on the ground;

(d) the appellant picked up the Japanese banknotes and went with a male friend (who she encountered on her way) to a foreign exchange bureau in Smith Street Mall;

(e) the appellant made enquiries as to the value of the Japanese banknotes and left the foreign exchange bureau;

(f) the appellant returned to the foreign exchange bureau after some ten minutes and exchanged seven of the Japanese banknotes for $671;

(g) the appellant's male friend assisted in exchanging the Japanese yen for Australian dollars by providing evidence of identification (a Medicare card); and

(h) the appellant gave the eighth Japanese banknote to her male friend.

[4] On behalf of the appellant, Mr Thomson advanced a number of grounds of appeal which can be conveniently summarised into two categories:

(i) The learned Chief Magistrate erred in law in finding that it was not fatal to the case for the Crown if it could not prove ownership of the notes; and

(ii) The learned Chief Magistrate erred in finding that the Crown had established beyond reasonable doubt that the appellant did not have a reasonable belief that the owner of the yen banknotes could not be discovered.

Ownership of the Banknotes

[5] Mr Thomson emphasised that in order for property to be capable of being stolen it must belong to another. Section 209(1) of the *Criminal Code* relevantly provides:

> "'steals' means unlawfully appropriates *property of another* with the intention of depriving *that person* of it …" (emphasis added)

[6] In Mr Thomson's submission, in the circumstances of the present case, the Crown could not prove that the banknotes were "property of another": the notes were not marked in anyway; there was no evidence the notes had been stolen; there was no evidence that anyone had claimed to have lost such banknotes. Accordingly, in Mr Thomson's submission, the Crown could not disprove that the banknotes had been abandoned and, as such, were incapable of being stolen.

[7] For the Crown, Ms Blokland accepted that the Crown was obliged to prove that the banknotes were "the property of another" – albeit that it was not necessary to name the owner (see s306 of the *Criminal Code* and *Bromberg v O'Brien* (1990) 72 NTR 27, holding that identification of the owner in an allegation of stealing is mere surplusage unless the offence depends on any special ownership of property). However, in the Crown's submission, the circumstances of the case (in particular the value of the banknotes and the place where they were found) gave rise to an inference that the banknotes had not been abandoned by the owner.

[8] The learned Chief Magistrate in his reasons for conviction, while noting that the failure to name the owner of alleged stolen property is not fatal to a charge under s210 of the *Criminal Code*, made no express finding that the banknotes had not been abandoned. I do not consider that the absence of such a finding is either surprising or of assistance to the appellant in the present context.

[9] Counsel for the appellant at trial (Mr M. Jones) focussed upon the Crown's failure to **name** the owner of the banknotes in the information; he did not submit that the Crown had failed to disprove that the property had been abandoned.

[10] In the present context, "abandoned" does not simply mean "lost" or "left". It means that the owner has intentionally relinquished all rights of ownership in the property (see *Hibbert v McKiernan* [1948] 2 KB 142). The abandonment of goods will not lightly be inferred: see *Donoghue v Coombe* (1987) 45 S.A.S.R. 330 at 333 and *Dolby v Stanta* [1996] 1 Qd. R. 138.

[11] In the present case the banknotes found by the appellant were worth in excess of $750 (including the 10,000 yen banknote given to her friend). The banknotes were located in a public place, scattered on the ground, rather than in some appropriate receptacle for unwanted items. The banknotes were in good condition and were easily convertible to Australian currency. Having regard to the value of the property, the condition of the banknotes and the circumstances in which they were found, I consider that there was

ample evidence, from which it could be inferred, that the banknotes had not been abandoned by their owner. In my view, there was evidence from which the learned Chief Magistrate was entitled to draw the conclusion that at the time the appellant found the banknotes (and later appropriated them when she exchanged them for Australian currency), the banknotes were the property of some person. While making no express finding to this effect, it is apparent from the learned Chief Magistrate's reasons as a whole that he proceeded upon this basis.

[12] In the absence of submissions to the contrary, it is understandable that the learned Chief Magistrate did not make an express finding that the banknotes were not abandoned property. I consider that the absence of such an express finding has not occasioned any substantial miscarriage of justice. Accordingly, I do not consider that the appellant's conviction should be set aside on the basis of this ground of appeal.

The Appellant's State of Mind

[13] The principal issue at both the trial and the appeal concerned the appellant's state of mind at the time when she found the Japanese banknotes, and later exchanged seven of them for Australian currency.

[14] Section 209(1) of the *Criminal Code* relevantly provides:

> "'steals' means unlawfully appropriates property of another with the intention of depriving that person of it … *but does not include the appropriation of property by a person with the reasonable belief that such property has been lost and the owner thereof cannot be discovered."* (emphasis added)

> "'appropriates' means assumes the rights of the owner of the property and includes, where the person has come by the property without stealing it, any later assumption of a right to it by keeping or dealing with it as owner;".

[15] At common law, the relevant state of mind of an accused in relation to larceny (stealing) by finding was his or her state of mind at the time of taking possession of the property, not any subsequent intention to keep or deal with the property as owner (see, for example, *R v Thurborn* (1849) 169 ER 293; *R v Ashwell* (1885) 16 QBD 190). The definition of "appropriates" (supra) in the *Criminal Code* now makes it clear that a person who finds lost property in the Northern Territory may be guilty of stealing whether the appropriation of the property takes place immediately upon the finding of the property or at some later time. It follows that, in the present context, it was necessary for conviction that the Crown prove that when the appellant exchanged the Japanese banknotes for Australian currency, she did no have a "reasonable belief that such property has been lost and the owner thereof cannot be discovered".

[16] The effect of this provision is that, if the appellant had a reasonable belief that the banknotes had been lost *and* a reasonable belief that the owner could not be discovered, she was entitled to be acquitted; but if it appeared that she did not have one or the other of the beliefs mentioned in the provision, the section would not provide a defence. Accordingly, it was for the prosecution to prove either of the matters just mentioned: that the appellant

did not have a reasonable belief that the banknotes were lost, or that she did not have a reasonable belief that the owner was undiscoverable.

[17] Mr Thomson submitted that there was no evidence as to the appellant's state of mind when she appropriated the Japanese banknotes. He emphasised that despite participating in a record of interview, she was not asked anything about her beliefs as to the status of the property as being lost or abandoned, nor the possibility of being able to discover the owner of the property. Mr Thomson also stressed that the banknotes were not marked with anything which could be used to identify them by an owner; nor were the notes located near a dwelling or other premises at which enquiries could reasonably be made about their ownership. In Mr Thomson's submission an honest person, reasonably, would have formed the view that there was nothing to be gained by searching for the owner of the banknotes or reporting the find to the Police in view of the lack of identifying features of the property.

[18] In *Alexander Gordon MacDonald* [1983] 8 A Crim R 248, the Court of Criminal Appeal of New South Wales considered how the state of mind of a finder of property is to be established when the finder has volunteered no information pointing to their state of mind at the relevant time. The Court (Lee, Maxwell and Yeldham JJ) observed (at p251):

> "The guilty mind or animus furandi requisite in larceny by finding is thus the belief of the finder that the owner can be found, and unless that belief is established beyond reasonable doubt, a conviction for larceny is not open. The Crown of course carries the onus or proving

that belief beyond reasonable doubt, and there is no onus on the accused in any circumstances to prove that he did not have such a belief or that he believed the goods had been abandoned, or that the owner could not be found (*May v O'Sullivan* (1955) 92 C.L.R. 654). How then is the requisite belief in the finder to be established when the finder has volunteered no information pointing to the state of his mind at the relevant time, as is the case here? In *Russell on Crime* (12th edition) the learned author, at p1014, states:

> 'In cases of taking on finding some of the strongest circumstances to rebut the implication that such taking was felonious …are those which show that [the taker] endeavoured to discover the true owner and kept the goods till it might reasonably be supposed that the true owner could not be found.'

The finder's belief, in our view, is to be inferred from the facts and circumstances surrounding the finding and the taking of the goods, and in this respect regard may be had not only to what the finder does in relation to the goods but also what he does not do that might reasonably be regarded as consistent with the actions of an honest man finding goods. Did the finder examine it closely to see if it gave any clue to its owner by name tag or otherwise? What avenues were reasonably open to the finder to locate the owner? A person finding goods may be taken to know that the person who has lost those goods may well retrace his steps with a view to recovering them, and so the leaving of the finder's name and address with someone at the place of discovery may be one means of locating the owner. It is common knowledge in our community, and the finder would know, that the police will receive lost property handed in and take care of it and accordingly the finder would think that the loser might make an enquiry of the police in the area where he believes he may have lost his property. It is common knowledge that newspapers publish 'lost and found' columns. These and perhaps other considerations would ordinarily be present to the mind of an honest person finding property in a suburb of Sydney. Each case must be looked at according to its own facts, and the place where the property is found and the nature of the property will, in most instances, readily indicate the avenues that are reasonably open to find the owner."

[19] In *MacDonald*, the Court considered (at p252) that the property (a camera valued at $300) was of a kind

> "…that could, in all probability, readily be identified by its owner and was of such a value that it was not likely that it would have been abandoned by its owner."

Notwithstanding that the banknotes in the present case were not so readily identifiable by their owner, the learned Chief Magistrate adopted the approach suggested in *MacDonald*. I consider that the learned Chief Magistrate was correct to do so. His Worship considered all the circumstances, favourable and unfavourable to the appellant, in assessing whether she had a reasonable belief that the banknotes had been lost and their owner could not be discovered.

[20] The learned Chief Magistrate took into account that:

(a) the appellant did not seek to deceive the Police as to how she came into possession of the banknotes;

(b) at the location where the appellant found the banknotes there was no one present to whom enquiries might reasonably have been made regarding their ownership;

(c) the value of the banknotes was substantial;

(d) the appellant took no steps to ascertain the owner of the banknotes (for example, by reporting her find to a Police station in the vicinity; searching lost property advertisements in a local newspaper or advertising her find in such a newspaper; making enquiries at hotels located in the vicinity of her find);

(e) the appellant failed to comment on her state of mind during the record of interview conducted by the Police (albeit she was not expressly asked to so comment, but merely invited to say anything else that she wished after the police had finished questioning her).

[21] On the basis of these considerations and the circumstances generally, the learned Chief Magistrate found while the Crown had not negatived a reasonable belief in the appellant that the banknotes were lost, he was satisfied beyond reasonable doubt that the appellant did not have a reasonable belief that the owner of the banknotes could not be discovered.

[22] I consider that these findings were open to the learned Chief Magistrate on the available evidence. The value, condition and circumstances in which the banknotes were found were consistent with a reasonable belief in the appellant that the property had been lost by the owner. The same cannot be said about the appellant having a reasonable belief that the owner was undiscoverable. Mr Thomson submitted that the learned Chief Magistrate's consideration of the appellant's failure to comment on her state of mind in the record of interview amounted to a reversal of the burden of proof. I do not agree.

[23] It is apparent that the learned Chief Magistrate was concerned to consider all the circumstances. The silence of the appellant, as to her state of mind, meant no more than there was nothing to set against the inference of guilt arising from the evidence of the appellant finding property of substantial

value, and shortly thereafter taking steps to convert it to Australian currency, without taking any steps at all to ascertain the property's owner.

[24] In such circumstances, it is difficult to see how, in the absence of evidence as to the actual belief of the appellant, one could ever conclude that a belief that the owner of the banknotes was undiscoverable was held on reasonable grounds. I consider that the Crown's case was sufficient to raise a prima facie case that the appellant held no belief on reasonable grounds that the owner of the banknotes was undiscoverable. In the absence of any evidence as to the appellant's actual state of mind (whether in the form of the record of interview or sworn testimony) there was nothing to rebut the Crown's prima facie case that she did not have the requisite belief.

[25] In all the circumstances, I do not consider that there is any merit in the appellant's submissions that the Crown failed to prove that she did not have the requisite state of mind when she appropriated the banknotes. Accordingly, the present appeal must be dismissed.

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