IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2024] EWCA Crim 130

No. 202300263 B1

Royal Courts of Justice

Friday, 26 January 2024

Before:

LORD JUSTICE POPPLEWELL
MR JUSTICE CHOUDHURY
HIS HONOUR JUDGE ANDREW LEES

REX
V
MOHAMMED ABDI MAHMUD

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MR N. WELLS appeared on behalf of the Appellant.
MR P. EDWARDS appeared on behalf of the Respondent.

J U D G M E N T

LORD JUSTICE POPPLEWELL:

1 On 2 July 2021, following a trial before Mr Recorder Miskin and a jury in the Crown Court at Isleworth, the applicant was convicted of robbery on Count 1 of the indictment. He was acquitted of threatening another with an article with a blade or a point on Count 2.

2 His application for an extension of time of 543 days for leave to appeal against conviction was referred to the full court by the single judge. The circumstances of the delay are such that if there is merit in the appeal, justice would require an extension of time. We therefore focus on the merits of the grounds advanced.

3 The alleged offence arose out of an incident on 31 January 2021. In the early evening, the complainant, Mr Mussa, was waiting at a bus stop in South Road, Southall. Mr Mussa and the applicant were known to each other from the Somali community. Mr Mussa's evidence was that he was approached by the applicant who was walking in the opposite direction. The applicant demanded a mobile phone. They tussled before the applicant held Mr Mussa in a bearhug, grabbing at the mobile phone in his pocket, which was a white Samsung 10 model. The applicant produced a knife in the struggle, and when Mr Mussa had grabbed for it, he dropped his mobile telephone. The applicant then grabbed the phone and ran off. The phone was then recovered from him by bystanders and the police were called. That was Mr Mussa's account.

4 In interview, the applicant, who was aged 50 at the time and of good character, gave a prepared statement and expanded upon it in his answers to questioning. His account was as follows. He was the victim of an assault by Mr Mussa. He denied having had a knife. He said that he had sold a gold iPhone 6S+ to Mr Mussa a little over a year earlier in December 2019. Mr Mussa had agreed to pay £600 for the phone, saying he had no money at the time, but that he would pay for it after three months, being due a tax return in March. Mr Mussa had not paid any part of the price. On the 31 January 2021, he, the applicant, had just returned from Germany following cancer treatment and saw Mr Mussa at the bus stop by chance. He went up to Mr Mussa and asked him to give him the phone or the money. Mr Mussa gave him the phone and the applicant asked him to take the SIM card out. Mr Mussa produced a knife and then grabbed back the phone, as a result of which the applicant fled. The applicant stated that he had fallen when Mr Mussa had hit him.

5 The incident was caught on a number of closed circuit television cameras.

6 At trial, the applicant's evidence was as set out in interview, save that did he not maintain that Mr Mussa had freely given over the mobile telephone, which was inconsistent with the CCTV footage. As is now accepted on his behalf, the CCTV shows that he grabbed Mr Mussa and took the phone. His evidence was that he believed it was his phone and that he wanted to be paid or have it back. He said that he had not realised until after the police had been called that it was not the gold iPhone which he had sold to Mr Mussa. This, it was submitted, provided a defence of lack of dishonesty in relation to the theft element of the robbery charge.

7 There was a stark conflict in the evidence as to what happened during the incident, but for present purposes we can focus on the evidence in relation to the applicant's assertion of his belief about the phone being his, and the Recorder's directions touching on that issue. There was considerable evidence, both from Mr Mussa and other witnesses, that the applicant had referred to the phone as being his during and immediately after the incident. Mr Mussa's evidence-in-chief was that as the applicant approached, the applicant was shouting "Give me my phone. Give me my money". Mr Mussa confirmed in cross-examination that that was

what the applicant had said or sometimes “give me my money, give me my telephone" in that order. Mr Mussa said that during the struggle he had said to the applicant something like "I don't have any money for you. I don't have for you telephone. I paid you already." Mr Mussa's evidence was that this was a reference to the fact that he had bought a mobile telephone from the applicant some months earlier for £200 and had paid for it in full in cash at the time of sale. Mr Mussa denied that he bought the gold iPhone for £600 or owed the applicant any money.

8 There was a statement from PC Wilkinson, the arresting officer, which was read to the jury. It confirmed that when cautioned the applicant had said "This is my phone. This is my phone" and "Today I saw him and said “Give me my phone”".

9 There was a statement of PC Tweed, who spoke to Mr Mussa at the scene after the applicant's arrest, which was also read to the jury. It recorded that Mr Mussa's account at the scene was that the applicant had approached him saying "It is my phone. It’s my phone".

10 The applicant's evidence-in-chief was that he had said to Mr Mussa when he first approached him, "I want you to pay me back". Mr Mussa had said "There's nothing I'm going to give you now" and that that was when he, the applicant, said "I want you to give me my phone". He said that he believed the phone that he had recovered was the one that he had sold to Mr Mussa and referred to it again as "his phone". He said he did not realise it was not gold and was not an iPhone until the police told him later. He repeated in his evidence in cross-examination that what he had been trying to do was to recover "my phone".

The Law

11 Section 1 of the Theft Act 1968 provides:

> "Basic definition of theft.
>
> (1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and 'thief' and 'steal' shall be construed accordingly.
>
> (2) It is immaterial whether the appropriation is made with a view to gain, or is made for the thief’s own benefit.
>
> (3) The five following sections of this Act shall have effect as regards the interpretation and operation of this section (and, except as otherwise provided by this Act, shall apply only for purposes of this section)."

12. Section 5(1) of the Act provides that for the ingredient of "property belonging to another”:

> “’Property’ shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest)."

12 In *R v Turner No.2* [1971] 2 AER 441 a car owner had sent his car to the garage for repair. The owner removed the car in the middle of the night with a view to avoiding payment for the repairs. The jury were directed that they need not consider whether the garage owner had had a repairer's lien and the issue of dishonesty was left to the jury. On appeal against conviction, it was argued that in the absence of a lien the garage owner was merely a bailee at will, whose possessory interest could not make the true owner guilty of taking property

belonging to another. This Court rejected that submission, holding that all that was required for the fulfilment of s. 5 was actual possession or actual control in fact. The decision has been regarded as controversial in so far as it is authority that a bailee at will's interest is sufficient against the true owner to fulfil the ingredient of property belonging to another: see for example *Smith, Hogan and Ormerod's Criminal Law 16th ed* at para.18.3.3.1; and compare *R v Meredith* [1973] Crim LR 253.

13 The case is not of direct relevance to the instant appeal, in which there was no issue about this ingredient of the offence. The phone taken was in fact Mr Mussa's Samsung, which belonged to him, and that was a phone in which the applicant had no proprietary interest. We mention the case here, however, because it appears to have influenced the Recorder in what he said to the jury, to which we shall return.

14 Section 2 of the 1968 Act provides:

> "'Dishonestly'
>
> (1) A person's appropriation of property belonging to another is not to be regarded as dishonest—
>
> (a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person."

15 This is sometimes referred to as a defence of claim of right. Where the ingredients of the subsection are fulfilled, it is conclusive in favour of the defendant on the issue of dishonesty. It requires a genuine belief in an entitlement in law to deprive the other person of the property. The burden of proof on this issue lies on the prosecution and the standard is the criminal standard. If it was, or may have been, the belief of the defendant that he had in law the right to deprive the other of property, then the defendant is not guilty of theft, or of robbery, of which the ingredients of the offence of theft form part.

16 The converse is not true. Dishonesty is a matter for the jury generally, irrespective of s.2, and a jury is entitled to treat conduct as honest where s.2 is not fulfilled, for example, where the defendant's belief is in a moral rather than a legal entitlement.

17 The test for dishonesty now established is that set out at para.74 of *Ivey v Genting Casinos* [2017] UKSC 67, [2018] AC 391 approved by this court in *R v Barton and Booth* [2020] EWCA Crim 575, [2021] QB 685:

> "When dishonesty is in question, the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practise determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable. The question is whether it is genuinely held ... Once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is by those standards dishonest."

18 In *R v Matthews-Williams* [2023] EWCA Crim 1486 this Court held that where the possibility of a defence of claim of right arises, it is not always necessary to give a separate direction; and it is not necessarily a misdirection simply to give the standard direction on dishonesty without an additional and separate direction tailored to s.2. Such a specific

tailored direction is only necessary where it would add materially to the dishonesty direction.

The Recorder's Directions

19 There had been some discussion during the course of the hearing about whether a defence of claim of right arose. When the Recorder first raised it with Mr Nayager, who was counsel for the defence at trial, Mr Nayager did not in terms refer to a claim of right or to s.2 of the 1968 Act, but did say that the applicant's belief negated dishonesty. During a break in the applicant's evidence-in-chief, after the jury had retired at the end of the day, the Recorder invited Mr Nayager to clarify with the applicant in his evidence the next day the terms of the sale of the gold iphone to Mr Mussa, because, the Recorder said, property usually passes at the point of sale. That is indeed the presumption provided for by s.18 of the Sale of Goods Act 1979, albeit subject to a contrary intention. When the applicant was asked about this at the beginning of his evidence the following day, he referred only to an agreement to pay the price. A little later he said:

> "The agreement was either to give me money or give my phone back so I say 'Give me the phone or give me the money'".

20 The legal directions were agreed with counsel before being provided to the jury. During the discussion of those directions, the Recorder had referred to the applicant's evidence and characterised it as his just wanting the money and not being interested in the phone. Mr Nayager resisted that suggestion, referring to the words that he had used ("Give me my phone"). Mr Nayager agreed, however, that it went to the issue of dishonesty; and that given the stark contrast in the evidence in the case, and that he was concerned not to complicate things, he was content with the standard direction on dishonesty being given. The direction given to the jury was as follows:

> "So the questions you need to ask yourself are these on the facts of this case.
>
> Has the prosecution made you sure that:
>
> (1) MM appropriated (took) the telephone.
>
> (2) The telephone belonged to AM.
>
> (3) MM intended to deprive AM permanently of it.
>
> (4) MM was acting dishonestly when he took it.
>
> (5) MM used force or threat of force in order to accomplish the taking.
>
> If your answer to all five questions is 'yes', then MM is guilty. If your answer to any of those questions is 'no', then MM is not guilty.
>
> Question 1. There is no issue about this. MM admits he took the telephone.
>
> Question 2. There is no issue about this. The telephone belonged to AM.
>
> Question 3. Again, it is agreed that in fact there is no issue about this. The words have a technical meaning and even on the defence case, MM admits that he took it, because he wanted to use it to negotiate the return of the money which he says was owed to him. To make a return of property conditional on the payment of a debt is to treat the telephone as his own and amounts to an intent to deprive AM of it.

Question 4. This is one of the two central issues in this part of the case.

The first thing that you must do is to decide what actually happened and what was the true background to the offence. This is because you must fit the legal directions to the facts as you find them. The prosecution say that this was a straightforward piece of dishonesty, the stealing of a phone using force under threat of the use of a knife to accomplish it.

The defence say that MM had sold a phone to AM some time earlier, but AM had not paid for it, swearing either to pay for it later or return it. In addition, MM had lent AM money. Only a small proportion of the monies were repaid. MM buttonholed AM in the street and tried and succeeded in getting back what he then genuinely believed was his phone, although he was much more interested in obtaining repayment, although it turned out that it was not his. The violence or threat of violence came from AM.

The prosecution say that what D did was obviously dishonest, that D knew it and that D is now putting forward a false story to avoid being convicted. The defence say that MM was only acting on the facts as he saw them.

So you must first consider the circumstances in which the behaviour occurred, including what D knew or believed to be the factual situation, having that in mind when you ask yourself whether in the light of any understanding of the situation D had (or may have had) you are sure that D's action in taking the telephone was dishonest by the standards of ordinary decent people.

If you are sure it was, the prosecution will have proved that D acted dishonestly (whether or not D thought his behaviour was dishonest) and you will then go on to consider question 5, but if you are not sure that D's behaviour was dishonest by those standards, the prosecution will not have proved that D acted dishonestly and your verdict will be not guilty."

21 Having retired, the jury sent a note in the course of retirement which was in the following terms:

"Your Honour, we would like some clarity on Question 4 (Count 1). The question of dishonesty and whether Mr Mahmud was acting dishonestly, does that relate to Mr Mahmud's perception of whose phone he was taking? If he believed it to be his iPhone, then was taking it from Mr Mussa dishonest? Some further guidance on the application of use of the term 'dishonesty' would be valuable for our discussion. Thank you."

22 The Recorder discussed the terms of the note with counsel. He again expressed the view that no question arose of a defence of claim of right because:

"The applicant was not saying that he was entitled to deprive the other person of that property ... property passes on sale".

23 The Recorder later made the point that s.2 required a belief "in law" and the applicant had not said anything about his belief in law. The recorded concluded:

"He has not raised the defence in my judgment of a claim of right, but I shall tell them about it".

24 Mr Nayager assented to that course. The Recorder then called the jury back and gave them this direction in answer to their question:

> "Well, I will do my best to help you like this. Would you just turn to p. 2 of the legal directions: "A robbery is committed where a person steals and uses force. Stealing is the dishonest appropriation of property belonging to another with the intention of permanently depriving that other of it."
>
> What your question may focus on is that issue of the appropriation of property belonging to another. Now, the essence of the law of theft is the protection of possessory rights. So, if I deliver a car to a garage for repairs, this is my car, and in the middle of the night, break in and take that car back, I have, in fact, taken property belonging to another. Because the expression – because it regards property as belonging to any person who has the possession or control of it. The question then arises whether or not by breaking into the garage and taking it in the middle of the night is honest or not. Do you follow? There is a very limited class of case – and some of you may have heard this – there is a very limited class of case where a man may raise what is called a claim of right where he genuinely believes, perhaps baselessly, that he has the right, in law, to deprive the other person of the property. But this does not arise here because, first of all, Mr Mahmud has not asserted that as a matter of law – it has to be a matter of law that he was entitled to deprive Mr Musse of it – indeed, remember he said that although there was an agreement, he would expect one of the elders to resolve it and if they – the elders could not, well then you might have to go to the law. But there is another reason and that is because he said he had sold it, albeit subject to an agreement to pay or return it. And in law, save in exceptional circumstances, property passes – property and the object passes at the point of sale. If I handed it over subject to a promise to pay, then that property passes from me to that other person. So, his belief that the phone he was taking was his begs the question of what that means when he says, 'His phone'. Was it his phone? Well, he had sold it, had he not, is the answer to that question, so the property had passed. But even if he thought – even if he thought it was his phone, okay, rather like the man who takes the car back from the garage which belongs to him, the issue is whether his conduct in doing so is honest by the standards of ordinary and decent people. Just like the man taking the car back from the garage in the middle of the night, or whatever. So, that, I hope is an answer to that question, members of the jury. All right? Thank you."

Analysis

25 We do not agree with the Recorder that no defence of claim of right under s.2 arose in this case. It was not a fair characterisation of the applicant's evidence that he was only interested in payment, not the return of the phone. That was not consistent with the numerous strands of evidence showing that he had asked Mr Mussa for "my phone". Nor is it necessary in order for s.2 to apply for a person to have said that they thought they were entitled to the property *in law*, using that express term. Most members of the public cannot be expected to be aware of the nuances of the law governing the passing of property in the civil law of sale of goods. It will be a matter of inference in most cases as to whether a person holds a belief about legal entitlement or merely by reference to some non-legal concept of fairness. The applicant's evidence was that he demanded the phone back because he had not been paid for it and he referred to it as his phone, both when demanding it back and to the police afterwards. That was an assertion of ownership, which in this context at least, amounts to an assertion of a legal right of ownership. The inevitable inference from his explanation that he had not been paid for the phone and from his assertion of ownership, if honestly given, together with the undisputed fact that he asserted such ownership before taking it by saying "give me the phone," was that he believed he was legally entitled to take

it back or at least may have believed that. It would amount to an honest belief about legal entitlement sufficient to engage s.2. If the jury accepted that was or may have been his belief, it provided a defence under s.2.

26 It was not necessarily fatal to the safety of the conviction that no separate s.2 direction was initially given to the jury, and that the matter was left to be addressed by them in the context of the direction on dishonesty. That is the effect of *Matthews-Williams*. However, once the jury had asked how the dishonesty question should be answered if the applicant believed the phone was his, it was necessary to direct them that that would mean that the applicant was not dishonest and must be acquitted. On the facts of this case, if the jury accepted that he believed the phone was his, they would necessarily conclude that he had the belief required for s.2; and therefore, that as a matter of statutory defence, he was not dishonest.

27 The jury should therefore simply have been told that the answer to their question "if he believed it to be his iPhone, then was taking it from Mr Mussa dishonest?" was "no"; and that if they concluded that he believed or may have believed that, they should acquit.

28 If we were wrong in this conclusion, and a belief that the phone was his is not dispositive of whether he believed he was entitled to take it *in law*, the latter question was nevertheless a matter which arose and which the jury would have needed to consider, because it was clearly a tenable view of the applicant's evidence, to put it at its lowest. On that hypothesis, the jury would have had to have been told that if they concluded that the defendant believed or may have believed the phone was his, they should then go on to ask themselves whether the applicant believed or may have believed that his belief that the phone was his entitled him in law to take it; and that if so they should acquit; and that if not, they should still then go on to consider whether he had acted dishonestly, because a belief in a moral entitlement to take the property was capable of being honest or dishonest and that would be a matter for them.

29 Moreover, we think that the terms in which the Recorder referred to claims of right was bound to confuse the jury. He said that the jury questions might have arisen because they were focusing on the issue of appropriation of property belonging to another, although in our view that was more likely to have been in the Recorder's mind than that of the jury. The Recorder then went on to give by way of an example the case of the car owner and a garage, which was likely inspired by the facts in *Turner No. 2*. That was indeed a case which was concerned with the issue of what was meant by "belonging to another". But the issue of whether the phone belonged to another was not an issue in the current case, because it was common ground that the phone taken was in fact Mr Mussa's Samsung. The car owner/garage example was not a helpful example on the facts of this case, especially as the Recorder gave no guidance as to whether the actions of the car owner recovering his car from the garage would or would not involve dishonesty. The focus in the direction on property having passed at the moment of sale, and the tenor of the direction, ran the risk of leaving the jury with the impression that if as a matter of law he was not entitled to take the phone, which the Recorder specifically told them that he was not, then his belief that it was his phone would not prevent him having acted dishonestly. That would have misled the jury.

30 In all these circumstances, we are bound to conclude that the way the jury were directed renders the conviction unsafe. We therefore grant the extension of time, allow the appeal and quash the conviction.

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