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Case Comment

Theft: appropriation through submitting false claims? Darroux v R

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Case:

R. v Darroux (Pamela) [2018] EWCA Crim 1009; [2018] 2 Cr. App. R. 21 (CA (Crim Div))

J. Crim. L. 287 D worked for a housing association where she was employed as a manager of the charity. Her responsibilities included the general running of a particular residential care home and she would oversee and authorise all care home staff salaries, holiday and overtime payments, including her own. Once payments had been approved, they would be faxed over each month to a separate company named PCS whose role it was to process the payments. An agreement was in place where D was entitled to claim additional payments in the event that she either did overtime or covered for other staff members. She was also entitled to claim payment in lieu of untaken holiday. Between 2002 and 2011, an arrangement was in place where D's claims would be approved separately by the charity's chairman of the Board of Trusts. However, when a new chair was appointed that year, this process lapsed and the majority of D's claims went unchecked.

D was dismissed from her role in 2014 and a resultant Care Quality Commission investigation discovered various administrative shortcomings at the care home and a financial audit was carried out where financial irregularities surrounding D's claims for additional payments were discovered. It was alleged that D had falsely claimed overtime, on-call claims and holiday payments for the period between January 2011 and February 2014 totalling GBP£49,465.

D was charged with nine counts of theft. The indictments (covering each monthly claim) were all similar to count 1 which was worded in the following manner:

PAMELA DARROUX between 1st day of January 2011 and the 30th day of January 2011 stole monies belonging to Sunridge Court Housing Association.

It was the particular wording of these indictments, paired with the choice of offence which was problematic in this case. At trial, D was convicted of six of the nine counts on the indictment with D's dishonesty the primary focus of argument. It was argued by counsel for the appellant that the convictions for theft were unsustainable as, although D had been dishonest, there were no acts constituting an appropriation of property. At trial, this issue had not been left for the jury to decide with the trial judge stating the following:

As I say, you probably don't need me to tell you this, but the issue in this case was not whether the property was appropriated, because Mrs Darroux did get the money that's been complained about in each of those charges, or at least most of it … and the money, the prosecution say, belonged to Sunridge Court and they say that … [she was] keeping it permanently ….

J. Crim. L. 288 **Held, allowing the appeal,** that the key issue in this case was appropriation and it had not been satisfied that this had taken place. The Court of Appeal identified the stolen property, referred to as "monies' on the indictment, as being a chose in action in the form of the right over money in a bank account. If the charge was that she appropriated this chose in action, then by merely filling out the relevant and fraudulent claim forms, D was not assuming any rights of the owner with regard to the bank account. The Court of Appeal criticised the decision to charge D using the s. 1 of the Theft Act 1968 and accepted that a charge under ss 1 and 2 of the Fraud Act 2006 would have been more appropriate (at [63]). Having accepted this, however, the Court refused to substitute an alternative verdict of fraud on the basis that the decision to charge D with theft was a deliberate

decision rather than an administrative error and that the two offences were not necessarily coterminous (at [68]).

Commentary

The Court of Appeal correctly identified that the more appropriate charge in this case would have been under s. 2 of the Fraud Act 2006. Under this section, an offence is committed when a person "dishonestly makes a false representation and intends, by making the false representation, to make a gain for himself or another or cause loss to another or expose another to a risk of loss'. The Act specifies that a representation is false if it is untrue or misleading and the person making the representation knows this. If D completed claim forms for the GBP£49,465 knowing that she was not entitled to the claims, and did so dishonestly, there would be very little difficulty in obtaining a conviction had this been the offence on the indictment. This rings particularly true considering the jury agreed that D had been dishonest at her initial trial.

It is perhaps regrettable for the Crown that they decided not to pursue a charge under s. 2 Fraud Act 2006, and in refusing to substitute the theft charges for those of fraud by false representation, Davies LJ noted that such an action would be beyond the Court's powers under s. 3 of the Criminal Appeals Act 1968. His Lordship noted that "the question is whether *on the indictment* the jury could have [convicted of some other offence].' (at [69]) In applying this interpretation emphasised in *R* v *Graham* [1997] 1 Cr App R 302 and *R* v *AD* [2016] EWCA Crim 454 his Lordship asserted that "A thief is not necessarily a fraudster. A fraudster is not necessarily a thief' (at [68]). The lesson the Court were keen to advance to the Crown is the importance on ensuring the appropriate offence is charged and that the indictment is worded in a careful manner. It is apparent that the CPS erred on both of these points in the case at hand. Indeed, Davies LJ's opening gambit in his judgment was to quote Blackstone's Criminal Practice (18th Ed):

Where an alleged theft involves a thing in action such as a credit balance in V's bank account, or the right to payment on a cheque, it can be sometimes be particularly difficult to identify the crucial part of the act of appropriation, even where it seems clear that D has dishonestly enriched himself at V's expense. In most such cases, the prosecution would be well advised to use charges other than theft …. (at [B4.48])

His Lordship adding that "[t]hese are wise words. But unfortunately this was not a course followed in this case.' (at [2])

But although the charge of theft on the indictment was not ideal and more difficult to establish than that of fraud by false representation, should the Crown's decision to pursue this particular offence have been as fatal to the safety of the appellant's conviction as their Lordships made out? Counsel for the respondents, although accepting a charge under s. 2 of the Fraud Act 2006 would have been possible, argued that on the particular facts at hand, it did not circumvent an alternative prosecution of theft.

Under s. 1 of the Theft Act 1968, it is an offence if a person "dishonestly appropriates property belonging to another with an intention to permanently deprive the other of it'. At trial, D had been found to be dishonest by the jury. By making the requests for payments it was clear that her intention was to keep the money she received and based on the facts of this case, no effort was made to return the money. ***J. Crim. L. 289*** Therefore, the real issue in this case centred on the *actus reus* elements of theft, namely, appropriation of property belonging to another.

Under s. 3(1) of the Act, appropriation is defined as "[a]ny assumption by a person of the rights of an owner … and this includes … any later assumption of a right by keeping it or dealing with it as owner'. The Court of Appeal identified that the property involved in this case concerned a chose in action in the form of the rights over money in the charity's bank account and accepted that under cases such as Kohn [1979] 69 Cr App R 395 and Graham [1997] 1 Cr App R 302 such a right is capable of being stolen under the definition of property found in s. 3 of the Theft Act 1968.

In Preddy [1996] AC 815 two men were convicted of obtaining property by deception under s. 15(1) of the Theft Act 1968. The appellants made numerous applications to lenders to obtain money secured by mortgaged properties. The applications contained numerous false statements and the appellants knew these statements to be false. It was submitted by the appellants that the conviction was unsafe on the basis that no property had been obtained. The Court of Appeal considered whether the debiting of one bank account and the corresponding crediting of another's account through a

dishonest misrepresentation could amount to an appropriation under the Act. In answering in the negative, Lord Goff stated:

[W]hen the bank account of the defendant (or his solicitor) is credited, he does not obtain the lending institution's chose in action. On the contrary that chose in action is extinguished or reduced *pro tanto,* and a chose in action is brought into existence representing a debt in an equivalent sum owed by a different bank to the defendant or his solicitor. In these circumstances, it is difficult to see how the defendant thereby obtained property belonging to [the lender]. (at [834])

However, Preddy was distinguished by *R* v *Williams* [2001] 1 Cr App R 23 where it was held that a builder, who obtained sums of money through unnecessary or overvalued building work, had appropriated property when he attempted to cash the cheques received in payment. In *Williams,* Turner J cited Graham, Ali and Others [1997] 1 Cr App R 302 and adopted Sir John Smith's subsequent analysis of Graham [1997] Crim LR 340 where it was argued:

The credit balance in V's account at the beginning of the transaction is undoubtedly property belonging to V. The thing in action belonging to V, to the value of £x, has not gone anywhere, but it has gone for ever-it is extinguished … The difficulty lies in finding an appropriation. If D or his agent caused the diminution in that balance, it is submitted that D stole it. If D was paid by a cheque which he presented and which was honoured, it seems clear that he did appropriate V's balance. Unless the processing of the cheque was fully automated, the actions of one or more persons would intervene, but these were in effect innocent agents. Where funds are transferred by telegraphic transfer or CHAPS order, the position is less clear because D does not personally initiate the process by which V's account is debited. True, he has procured the whole course of events by his deception but he may not be aware of the process by which the transfer of funds is effected. (at [344])

In adopting Smith's position as a sound and reliable test, Turner J identified a distinction between obtaining under s. 15 of the Act and appropriation under s. 1 and restricted Preddy's reach. As Elliott (*R* v *Williams* [2001] JCL 65, 113) puts it "Preddy had created unnecessary … loopholes for defendants to avoid criminal liability … [It was] fatal to a conviction of obtaining property by deception … [and was] likely to be fatal to a conviction for theft as well.' Elliott describing the decision in *Williams* to be a "neat solution to maintain the theft conviction.' (at [127]) In the present case, the principle from Preddy was advanced by the Crown. Davies LJ accepted that although there is a difference between "obtaining' and "appropriation', the Preddy approach supported a "preparedness to adopt a strict approach to the language which Parliament had used in the 1968 Act'. (at [37])

Along with Graham, the cases of Kohn (1979) 69 Cr App R 395 and Hilton [1997] 2 Cr App R 445 were cited by his Lordship. In each of these cases, a conviction for theft of a balance in a bank account was upheld. The fundamental difference, however, was that the appellants in each case were in control of the accounts in which the money was stolen and so a direct assumption of the owner's rights was clearly ***J. Crim. L. 290*** identified. Davies LJ was concerned that in *Darroux* the appellant had no such control. Payments were sent to a payroll company for authorisation so the process was not automatic. His Lordship reasoned that:

She had no contact with the bank at all and no control of the bank account. What she did, we consider, was too far removed to be an act of appropriation with regard to the bank account. It may well be that such conduct was an essential step in procuring, via the instructions of PCS to the bank, the ultimate payment out (and thence the diminution pro tanto of the credit balance). But conduct which ultimately is causally operative in reducing a bank balance does not necessarily become an assumption of rights of the owner with regard to the bank balance simply and solely because it is causally operative. (at [61])

The role played by PCS therefore becomes fundamental in this case. As an intermediary, it was PCS who controlled the money in the charity's account and not D. But should the consent of PCS to make the payment prevent an appropriation if this is brought about by the dishonest actions carried out by D? In Gomez [1993] AC 442, the principle has long been established that appropriation need not be adverse. A shopkeeper agreeing to transfer goods to a thief on the belief that a fraudulent cheque is, in fact, valid will not prevent the thief from appropriating such goods. In Hinks [2001] 2 AC 241, the receipt of a consensual gift of money will amount to appropriation and if done so dishonestly, a theft conviction is possible. This suggests a broader approach in terms of appropriation in relation to theft under s. 1 of the 1968 Act.

Great reliance was placed on Briggs [2003] EWCA Crim 3662, and it was ultimately this precedent

which decided the current case. In Briggs, a conveyancing firm were instructed to pay the proceeds of sale for one house towards the purchase of a second house. The sellers consented to the payment, but this consent was induced by fraud. The argument put forward by counsel for the appellants in Briggs followed the ruling of Hutchinson LJ in Naviede [1997] Crim LR 662 where his Lordship said "[w]e are not satisfied that a misrepresentation which persuades the account holder to direct a payment out of his account is an assumption of rights of the accountholder, such as to amount to an appropriation [under s. 1 of the Theft Act 1968]' (at [666]).

Catherine Elliott (2004) J Crim L, 68(2), 103 is critical of the decision in Briggs, suggesting that the Court of Appeal seem determined to create a boundary between theft and fraud. In achieving this they have followed a stance of (1) requiring an "act' of appropriation and (2) treating certain acts as being too remote. On the requirement of an act, she points out that this is something Smith opposed in The Law of Theft where he submitted such a stance would "set the law back 200 years' (at [16]), and Elliott suggests that this sits uneasily with the existing case law such as Hinks (at [104]). Regarding remoteness, Elliott cites Blackstone's Criminal Practice 2003, paragraph B4.28, which suggests that the distinction on this basis is very artificial (at [105]). In following Briggs, the Court of Appeal in *Darroux* were in disagreement with the requirement for an act but did consider the actions of D to be too remote. The causal link between D and the transfer was, in their view, too remote because PCS were acting beyond the role of a mere agent for D.

It may be of note, however, that the wording of the indictment in the present case was that D "stole monies belonging to Sunridge Court Housing Association' between certain specified dates. The Court of Appeal were quick to interpret this as the appropriation of a thing in action in the form of the rights over the charity's bank accounts, however, the ambiguous nature of this wording could have provided more flexibility in upholding the conviction. The problem in this case was that in completing the forms and sending them to PCS, as D had no direct control over the charity's account, this could not amount to an appropriation. Nor, in the Court's view, could the appropriation take place once the money had arrived in D's personal bank account as by this stage the property no longer belonged to another (see *Edwards* v *Ddin* [1976] 1 WLR 942). This view, however, would follow an assumption that the charity no longer held any proprietary rights or control over the money in D's account by that point in time.

Under s. 5(1) of the Theft Act 1968, property will not only belong to another person if they have possession or control of it but alternatively if they have any proprietary right or interest. Section 5(2) ***J. Crim. L. 291*** recognises proprietary rights to include those under a trust, and s. 5(4) requires that if a person obtains money by mistake they are obliged to restore the money accordingly (see Attorney-General's Reference (No. 1 of 1983) [1984] WLR 686). It was recognised by Lord Browne-Wilkinson in *Westdeutsche Landesbank* v *Islington Borough Council* [1996] AC 669 that "equity operates on the conscience of the owner of the legal interest'. (at [705]). Under equitable principles, when PCS wrongly paid the money from the charity's account into that of D, D on receipt of the money and having submitted false claims would have been aware that she was not entitled to it. It would have, therefore, been unconscionable for D to retain or use the money for her own purposes and under equity, a constructive trust would arise. An argument could, therefore, be made that although D held the legal title of the money paid to her, the charity would still hold an equitable interest over the balance in her account. By assuming rights over the money in the account, it is submitted that D would have appropriated the property and the *actus reus* for theft would be established. Under the wording of the indictment, if this occurred between the dates set out under the indictment, then she would have appropriated "monies' belonging (by virtue of a constructive trust) to the Housing Association. This view would be consistent with that put forward by Sir John Smith (1997) "Appeal/Theft Act Offences--appeal--proviso--effect on Criminal Appeal Act 1995', Crim LR, 340 where "D is the primary owner of the thing in action but it does not follow that no-one else has an interest in it.' (at [344]).

Ultimately, the decision in *Darroux* takes a narrow view of appropriation which sits uneasily with cases such as Gomez and Hinks. It serves as a stark warning for prosecutors to consider closely the wording of indictments and to ensure the appropriate charge is brought, as the Court of Appeal correctly identified that a prosecution under the Fraud Act 2006 would have been both simple and effective. It seems that the Court of Appeal is minded to create a distinction between theft and fraud and is reluctant to use s. 1 of the Theft Act 1968 as a catch-all offence. If the suggestion from Catherine Elliott is that *R* v *Williams* closed off some of the problematic loopholes created in Preddy, then by taking a strict approach in the current case, the Court of Appeal is potentially opening them back up again.

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J. Crim. L. 2018, 82(4), 287-291