[2016] JMCA Crim 24

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE CRIMINAL APPEAL NO 16/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE WILLIAMS JA (AG)
THE HON MISS JUSTICE EDWARDS JA (AG)

GEORGETTE TYNDALE v R

Mr Norman Godfrey for the appellant

Mr Leighton Morris for the Crown

27 May and 15 July 2016

EDWARDS JA (AG)

Introduction

[1] The appellant, Georgette Tyndale, was convicted by His Honour Mr O Burchenson in the Resident Magistrate's Court for the parish of Manchester for the offence of simple larceny and on 28 March 2012 she was sentenced to a probation order for two years. The appellant at the time of her conviction and sentence was a police constable. The subject of the theft was a miserly piece of cheese valued at little over $100.00. This makes this a truly disturbing case.

[2] On 10 April 2012, the appellant filed notice and grounds of appeal challenging her conviction by the learned Resident Magistrate. The grounds of appeal filed were as follows:

> "1. The learned Resident Magistrate erred in law when he failed to uphold the no case submission made on behalf of the appellant.
>
> 2. The learned Resident Magistrate failed to properly and adequately assess the evidence adduced by the prosecution.
>
> 3. The learned Resident Magistrate failed to properly and adequately assess the appellant's case.
>
> 4. The learned Resident Magistrate erred in law when he failed to assess the myriad of inconsistencies and discrepancies in the prosecution's case.
>
> 5. The verdict is unreasonable and cannot be supported by the evidence."

[3] Counsel for the appellant sought and obtained leave to argue two additional grounds of appeal as follows:

> "6. The learned Resident Magistrate erred in law when he held that "the intention of the Accused is sufficiently manifested on the evidence of having no intention to purchase the article when she place [sic] it in her handbag and did not have to pass the cashier's cage to commit the offence.
>
> 7. The learned Resident Magistrate has drawn inferences that are not supported by the evidence."

A brief statement of the facts

[4] On 11 March 2008 the appellant was a shopper in the Super Plus Food Store situated in Mandeville, in the parish of Manchester. Whilst shopping she had her handbag, the basket provided to shoppers by the supermarket and her cellular phone.

She was observed picking up items in the supermarket by the assistant store manager (Mr Russell) who, for reasons unclear, instructed an employee to watch her. She was seen by the said employee with a slice of cheese in her hand which she took and placed between two water bottles on a shelf and left it there. A few minutes later the employee observed her taking up the slice of cheese, opening up her handbag and dropping the slice of cheese in it. She then went around to another aisle in the store then to the cashiers' counter. The employee duly made a report of what he observed.

[5] The appellant, having gone to the cashier's counter, proceeded to tender the items in the basket for encashment. The items were cashed and there was some evidence that some of the goods required a price check and this was done by the cashier before the goods were cashed. The purchase price for the total cost of the goods in the basket was paid by the appellant. There was some dispute as to whether she had been given her receipt and change. However, there was no dispute that she did not cash the cheese which was in her handbag.

[6] On the prosecution's case, after the appellant had cashed her items from the basket and had left the cashier's counter on her way out of the supermarket Mr Russell accosted her and informed her that she had been seen placing a piece of cheese into her handbag and she had not paid for it. The appellant is reported to have said, "eh eh it must drop in the bag whilst I was taking out the money". He thereupon invited her to his office where he called the police.

[7] Two female police officers were sent to the Super Plus Food Store where they interviewed the appellant in the presence of Mr Russell. The appellant gave an account of how the cheese may have come to be in her handbag. She told the police that the cheese must have fallen into the bag when she placed some money, given to her by a security guard in the store, into the bag. She offered to pay for the piece of cheese but Mr Russell refused. The police officers took the appellant and the cheese to the Mandeville Police Station. The piece of cheese was handed over to the woman sergeant on duty which she parcelled and labelled in the presence of the appellant. She later charged the appellant for simple larceny and upon caution the appellant made no statement.

[8] At the trial the appellant gave an account of how the piece of cheese came to be in her hand bag. She said she was shopping in the Super Plus Food Store on the day in question. A gentleman told her he had left some money with the security guard for her. At the time she had the piece of cheese in her hand. The security guard came over to her and handed over the $1000.00 left for her by the same gentleman. She took the money and placed it in her hand bag. She was on her phone when the security guard asked her for a fare to go home and she indicated to him that he should meet her at the cashier. She thereafter went to the cashier to cash the items she had picked up. The cashier cashed the items, the total cost of which was $1,400.00. She tendered $2,000.00 from money taken from her pocket.

[9] Whilst awaiting her change, someone tapped her on the shoulder and it was Mr Russell. He indicated that she had been seen placing a piece of cheese in her hand bag for which she did not pay. At this time she was still at the cashier awaiting her change and receipt. She was astonished and stomped her feet. She accompanied him to his office where she told him that it was a genuine mistake and that she was prepared to pay for the cheese. She denied that she placed the piece of cheese in her bag intentionally intending not to pay for it. After Mr Russell spoke to her she opened her bag and the cheese and money was seen right on top.

[10] She denied that she had already left the cashier counter when Mr Russell spoke to her. She denied that she deliberately placed the cheese in her bag. She had $8,000.00 apart from the $1,000.00 the security guard had given her and a US$500.00 credit card and her credit union debit card. After giving evidence she was cross-examined and then re-examined and during her re-examination she claimed that the assistant store manager had called the security guard and he had admitted to giving her the money. That was the first time the appellant was mentioning this fact in her evidence and it had not been put to Mr Russell that this had in fact occurred.

[11] Those were, in essence, the facts presented to the learned Resident Magistrate from which he concluded that the appellant was guilty of larceny of the cheese.

Submissions

[12] Counsel for the appellant, in his skeleton arguments and in oral submissions before this court, argued that the learned Resident Magistrate erred in law when he failed to uphold the no case submission made on behalf of the appellant as he misdirected himself on the case that the prosecution was advancing.

[13] He argued that the prosecution's case was not that the appellant had formed the intention to permanently deprive the owner of the cheese the moment it got into her handbag. He argued that though it was recognised that under certain circumstances the larceny could take place before the appellant passed the check-out counter this was not the case advanced by the prosecution.

[14] He also argued that, on the case for the prosecution, there was a fundamental and material inconsistency as to the point at which the assistant store manager, Mr Russell, approached the appellant and whether she had completed her transaction. It was submitted that this case required careful assessment by the learned Resident Magistrate and that this assessment was not demonstrated by his summation.

[15] Counsel submitted that the main question was whether or not the appellant had left the premises or that portion of the premises where it could be said the "*asportation*" of the piece of cheese had taken place. He argued that a subsidiary question would be whether, considering the layout of the premises, the mere fact of the cheese being in the handbag of the appellant was evidence of larceny.

[16] Counsel argued that the learned Resident Magistrate misdirected himself when he said at pages 68-69 that:

> "It is therefore of note that the intention of the accused is sufficiently manifested on the evidence of having no intention to purchase the article when she placed it in her handbag and did not have to pass the cashier's cage to commit the offence. The accuse [sic] account of how the piece of cheese came to be in her handbag is not only conflicting but flies in the face of reasoning."

[17] This counsel, contended, was a glaring misdirection. He cited **Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd** [1953] 1 QB at 401 in support of this contention.

[18] Counsel noted that the learned Resident Magistrate was required to resolve the issue of whether the appellant had passed the cashier's station before she was accosted as the prosecution's evidence on that issue was inconsistent. The appellant's evidence, he said, was that she had paid for the goods in her basket when Mr Russell accosted her at the cashier.

[19] Counsel pointed out that the evidence given by the cashier, Ms Gayle, was that she had finished cashing the appellant's purchases when Mr Russell accosted her. There was no evidence, according to counsel, that the appellant had up to then, received her change or receipt. He pointed out that neither the change nor the receipt was produced on the day she was taken into custody or at the trial. He argued that the appellant's evidence would have to be considered against the evidence of her concealing the cheese between two bottles on the shelf, then later taking it up and

dropping it in her handbag and the inconsistency between Mr Russell's evidence and Ms Gayle's evidence as to whether the appellant had left the supermarket and whether she had been given her change and receipt.

[20] Counsel argued that whilst the appellant was not denying that the cheese was not paid for, it was important for the learned Resident Magistrate to make a determination whether or not she had left the cashier's station when she was accosted. He submitted that this would go to the question of whether her transaction was complete. The importance of whether she had received her change or not, he submitted, went to the issue of whether she had in fact left the supermarket since she would not have left her change and receipt. He complained that the learned Resident Magistrate failed to consider the fact that Ms Gayle's evidence was contradictory to Mr Russell's, as to whether the appellant had left the supermarket and failed to accord it the significance it merits.

[21] Counsel further argued that the learned Resident Magistrate erred when he drew the inference that she had formed the intent at the point of dropping the cheese in her bag. He noted that it was incumbent on the prosecution to secure the change and receipt as evidence of the transaction. He argued that what was presented in the case to the learned Resident Magistrate was the fact that she had cashed items in the basket and had been called away before the transaction was complete. Counsel submitted that on this evidence, the learned Resident Magistrate ought to have upheld the no case submission.

[22] He further submitted that in a case of larceny, intent and *asportation* were important ingredients of the offence. He said that the evidence of dishonest intent (placing cheese in her bag), was not sufficient as there must be evidence of *asportation*. In such a case, he argued, where the appellant was accosted was important to the evidence of *asportation.* Counsel argued further that the learned Resident Magistrate was in error when he found that the act of larceny was complete at the point where the appellant placed the cheese in her bag because this shows that he did not take into account the question of *asportation.*

[23] Counsel for the Crown in his oral submissions reminded this court of the time honoured principle in the Privy Council decision of **Watt v Thomas** [1947] AC 484, that the trial judge's finding of fact should not be disturbed unless it was plainly wrong. He argued that the court should be reluctant to disturb findings of fact as long as credible evidence was there to support it.

[24] He further argued that in this case the actus reus (taking of the cheese) and the mens rea (placing the cheese in the bag and not paying for it) were present and so the crime was complete. Counsel for the Crown argued that though it may have been important to resolve the question of where the appellant was accosted the failure to do so by the learned Resident Magistrate, does not place the decision in the realm of being plainly unsound.

The Law

[25] The appellant was convicted for simple larceny pursuant to the Larceny Act and it is therefore important to consider the elements of that offence and what the Crown is required to prove in order to secure a conviction. The starting point of this discussion is section 3 of the Larceny Act 1942, which defines stealing as follows:

> "3. For the purposes of this Act—
> (1) A person steals who, **without the consent** of the owner, **fraudulently** and without a claim of right made in good faith, **takes and carries away** anything capable of being stolen **with intent, at the time of such taking, permanently to deprive the owner thereof**:(emphasis added)
>
> Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts it to his own use or to the use of any person other than the owner;
>
> (2) (i) 'takes' includes obtaining the possession –
> (a) by any trick;
>
> (b) by intimidation;
>
> (c) under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained;
>
> (d) by finding, where at the time of the finding the finder believes that the owner may be discovered by taking reasonable steps;
>
> (ii) 'carries away' includes removal of anything from the place which it occupies, but, in the case of a thing attached, only if it has been completely detached;

(iii) 'owner' includes any part owner, or person having possession or control of, or a special property in, anything capable of being stolen;

(3) Everything which has value and is the property of any person, and, if adhering to the realty, then after severance therefrom, shall be capable of being stolen:

Provided that—…"

[26] If the submissions of counsel for the appellant are correct, it would seem that the appellant was wrongly convicted of simple larceny. The question is whether counsel is in fact correct. The answer, we believe, depends on whether the trial judge was correct in his application of the law to the factual matrix presented to him in the instant case.

[27] Larceny is a crime involving two elements; the actual physical trespassory "taking" and the "carrying away" which forms the actus reus of the offence; and the dishonest intent, which is the mens rea or the mental element of the offence. The actus reus involves the taking, which amounts to taking actual physical possession and control of the property (even if for a short time), and such control must be complete. The law also requires there to be a "carrying away" or *asportation*. This means that the thief must not only have gained possession of the goods, but must have taken it from its original position. The slightest movement of the goods is sufficient. This is the general rule. There must be the intent to steal at the time of the taking, *animus furandi*, that is, a dishonest intent to permanently deprive the owner of his goods. All

this must be done without the consent of the owner. The taking and carrying away coupled with the intent is an imperative for the offence to be complete.

[28] The case of **Wallis v Lane** [1964] VR 293 p 41 (10 March 1964), a decision of the Supreme Court of Victoria, is an excellent example of this principle. The facts of that case are that the defendant was in charge of a truck that he drove for his employers who conducted a transportation business. He was taking goods which his employers had undertaken to transport for delivery to a particular company. These goods were packed in cartons. An employee of the company to whom the goods were to be delivered saw the accused take goods from the carton and hide them behind other boxes and under other cartons in the truck. The employee called the manager of the company and he met and spoke to the accused. The manager enquired if all the cartons were for their company and the accused said yes. The manager then told him he was going to have a look for himself.

[29] The manager looked in the truck and found the items taken from the carton hidden between some boxes on the truck. The accused denied knowing anything about them. The employee told him he had been watching him out of the window. The police officer who gave evidence at the trial stated that whilst he was interviewing the accused, the accused had admitted to taking the items but denied keeping them since they had been returned. The accused also admitted that if he had not been seen he would have stolen them. The case was dismissed on the basis that he had not taken the items out of the owner's possession.

[30] In considering what amounts to *asportation* for the purposes of the crime of larceny the Supreme Court in **Wallis** considered Halsbury Laws of England 3rd ed. Vol 10, p 767 para 1484 and Hales Pleas of the Crown Vol 1, p 508 and accepted that any movement of goods from its place with an intent to steal is sufficient to constitute an *asportation*. The court also considered and applied the case of **King v Henry Coslet** [1782] Eng R 20, 168 ER 220 where the thief moved a parcel of currants from the front of a wagon to the middle of the wagon whereupon he was interrupted and apprehended. It was held by the 12 judges that since he had removed the property from the spot where it was originally placed, and it was found he had removed it with intent to steal, it was sufficient taking and carrying away to constitute the offence.

[31] The general principle of law, therefore, is that the slightest removal of the thing being stolen from its original position is sufficient *asportation* to constitute the offence, provided it is done with the intent to steal.

[32] But stealing in the context of a supermarket or a self-serve store (as it is sometimes referred to in the older authorities), better known as "shoplifting", poses special problems. The few reported decisions on "shoplifting" in the English common law were argued on the basis of the nature of the contractual relationship between the shopper and the supermarket owner. In the earlier cases, because of the definition of larceny, it had become necessary to identify who owned the goods at the time the intent to steal them was formed and at the time they were taken and carried away. This was necessary because, if the property in goods had passed to the shopper at the

time he formed the intent to take it, then it could not be said that there was larceny of the goods. The reason is somewhat obvious. One cannot steal from one's self. Happily it is no longer necessary to determine those issues and the law in that area is now well settled. I mention it, however, because counsel for the appellant did rely on the case of **Boots**, a case which defined the nature of the contractual relationship between the shopper and the self-serve store owner.

[33] Though the case of **Boots** was not a case involving larceny, it is relevant to the establishment of the principles surrounding the contractual relationship between the customer in a self-serve store and the store owner. We will, however, also consider a few of the older cases involving the charge of larceny under the English Larceny Act of 1916 from which our Larceny Act was modelled, where the courts found it necessary to define the contractual relationship between the customer and the self-serve store owners, in coming to a decision whether the offence of larceny had been committed.

[34] In **Boots** it was held that goods displayed on the shelf in the self-service store did not amount to an offer by the store owners to sell, but was merely an invitation to the customer to offer to buy and such offer was accepted at the cashier's desk. Somervell LJ, at page 405, after considering the legal implications of the layout of the self-service store as an invitation to the customer said:

> "Is a contract to be regarded as being completed when the article is put in the receptacle, or is this to be regarded as a more organised way of doing what is done already in many types of shops- and a bookseller is perhaps the best example- namely, enabling customers to have free access to what is in the shop, to look at the different articles, and

> then, ultimately, having got the ones which they wish to buy, to come up to the assistant saying 'I want this'? The assistant in 999 times out of 1000 says 'That is all right', and the money passes and the transaction is completed."

[35] In **Lacis v Cashmarts** [1969] 2 QB 400, a case of larceny from a self-service shop where the customer paid a lower sum than the actual price for the goods, knowing that the price on the till did not represent the correct price, it was held that:

> "...when one is dealing with a case such as this, particularly a shop of the supermarket variety or the cash and carry variety, as this was, the intention of the parties quite clearly as it seems to me is that the property shall not pass until the price is paid. That as it seems to me is in accordance with the reality and in accordance with commercial practice."

[36] In this case, a 'fraudulent man' was acquitted on appeal to the High Court from the decision of the justices on the basis that a perfectly good contract had been concluded but additional goods had been handed over by the manager who had the requisite authority to do so. Since the additional goods had been taken with the consent of the owner there was no larceny.

[37] It can be seen therefore, that with the evolution of self-service stores where the customer is allowed to handle the goods before actually paying for it, it was necessary for the law to adapt to this change in the manner in which persons now conducted business, in order to avoid unnecessary and unwarranted prosecutions.

[38] The issue also arose in the case of **Martin v Puttick** [1968] 2 QB 82, a case decided under the Larceny Act of 1916. The relevant facts are taken partly from the

head notes and partly from the judgment of the Divisional Court. The defendant was a customer in a supermarket. She selected two pork chops which were wrapped and handed to her by an assistant. She thereafter placed the chops in her personal shopping bag. She selected other goods in the supermarket which she placed in a wire basket provided by the supermarket for shoppers, went up to the cashier and presented the goods in the wire basket to the cashier and paid for them. At that time or by that time she had formed the intention not to pay for the pork chops and she did not pay for them. At the invitation of the store manager, who knew she had the meat concealed in her bag and had not paid for them, she handed him her shopping bag in which he placed the items she had paid for. He saw the chops in the bag, knew she had not paid for them, but did not remove them and, thinking he had to allow her to leave the store before he could safely detain or charge her, he returned the bag to her and allowed her to leave the store with the chops. She was apprehended outside the store and was charged for larceny and brought before the justices. They dismissed the charge on the basis that when the assistant handed her the chops, property in the goods had passed to the customer and that the manager had consented to the passing of possession of the chops to her.

[39] On appeal to the Divisional Court, Winn LJ, in giving the judgment of the court, considered the position of the shopper in relation to the goods he or she selects from the shelf. He considered (at page 89, paragraph C), that whilst holding the goods, the customer carries them with the permission of the proprietor for the purpose of the transaction. He viewed this as a licence, "possibly custody subject to an overriding

course of control and continuing right of termination remaining in the proprietor". It may be more useful to set out in full the relevant portion of his judgment here, where he said starting at page 88 that:

> "The method of business at that store appears from the case stated to be clearly that nowadays usually called a supermarket store business. It is found that in the shop customers take articles which they require, except green grocery and meat, from shelves and display stands and produce them to a cashier at a cash desk placed near the exit door of the shop. The cashier then makes up the bill for the goods produced and the customer pays for them there... it seems to me when a customer does so pick up goods from shelves or other display stands in a shop which conducts its business as a supermarket store, the customer does not then become entitled to any form of property in the goods, nor does the customer acquire any exclusive possession of the goods. The basic understanding of persons trading in this way, and inviting purchases of their goods, and of the shoppers who go to such stores must, it seems to me, be that from the moment of picking up any such article until the point of time and of place, i.e. of position in terms of space, when the customer is at the cash desk and is transacting with the cashier the completion of the purchases by obtaining from the cashier the total price and paying that price, in the interval, a customer is holding the goods and carrying them by permission of the proprietor of the store for the purposes of the transaction."

[40] This licence terminated at the point where the customer presented the goods for payment at the cashier and any right to possession would also terminate unless the purchase price was paid in which case property passed to the customer. More importantly, for the purposes of this appeal, Winn LJ noted at page 89 paragraph E that:

> "the customer does in a physical sense take the article by picking it up and putting it into a basket or shopping bag,

> that is not such a taking as is contemplated by or relevant to the purposes of the Larceny Act, 1916..."

[41] Winn LJ accepted that the taking of goods off the shelf in a supermarket is not sufficient to form the actus reus contemplated by the Larceny Act, as this would have been an action permitted by the supermarket owner. He also considered that a special feature of the case was the fact that the subject of the theft was meat which had to be wrapped up by an assistant before being handed to the customer. Additionally, he considered the circumstances of how the meat came to be placed in the customer's own shopping bag. He noted that it had been dripping moisture and perhaps blood while she had it in her hand and therefore was not in a suitable state to be placed with the other items in the wire basket provided by the supermarket. In that regard, her intention to steal may not have been formed at the time she placed it in her shopping bag. However, it was accepted that at the time she presented at the cashier she had formed the intent not to pay for the meat. Winn LJ determined that the justices had in fact found that "when dealing with the cashier and by the time, at the latest, when the transaction was completed, the defendant had formed the criminal intention of avoiding payment for the chops."

[42] Further on in his judgment, having dealt with the facts and the justices findings, Winn LJ found that no property had passed to the thief at the time she was handed the meat by the assistant and found the justices' finding in that regard to be untenable. He then stated (at page 90 paragraph G):

> "So one has the defendant at the cashier's desk with a criminal mind and with two chops still in her bag. At that

> stage, of course, she has carried them no further than the point to which she was, in my view, permitted by licence of the proprietor of the shop to carry them."

[43] Winn LJ had to determine then, whether, when the manager allowed her to leave the supermarket with the meat knowing she had not paid for them, he consented to her taking it. He rejected that the customer had carried away the meat with the consent of the manager and found that there had been *asportation* against the will of the owner with the necessary criminal intent.

[44] The fulcrum of the case of **Martin v Puttick** is that *asportation,* for the purpose of larceny in the case of a self-service store or supermarket, occurs when the shopper goes to the cashier and, with the intention to permanently deprive the owner thereof, deliberately fails to pay for the goods or bypasses the cashier altogether and leaves or attempts to leave the store without paying for the goods, thus taking them without the consent of the proprietor. Until then, the shopper has physical custody and control of the goods under licence from the proprietor for the purpose of the transaction, that is, the making of the offer to purchase at the cashier and tendering the purchase price when the offer is accepted. Up to that point, the shopper's possession is subject to the right of the owner to repossess the goods at any time before the price is paid.

[45] We will only mention one case decided under the Theft Act of 1968, which replaced the Larceny Act of 1916 in England, to show that, at least with respect to when property in goods passes to the customer in a supermarket setting, the law did not change with the passing of the Theft Act in England. In **Davies v Leighton** (1978)

68 Crim App R 4, the Divisional Court was hearing a charge of theft under the Theft Act of 1968. The circumstances of the theft were the same as in **Martin v Puttick,** where the thief had been handed the goods by the shop assistant in one part of the store but failed to pay for them at the cash counter and left the store with them. At her trial for theft, the justices found there was no case to answer as property in goods had passed to her when the goods were handed to her by the assistant. The prosecution appealed and, in considering the issue, Ackner J held that the issue was well settled in relation to purchases from a supermarket, referring to Winn LJ's judgment in **Martin v Puttick** with approval.

[46] From the cases cited above we can discern certain general principles. Firstly, the relationship between the shopper and the shop owner is one of contract. Goods are placed on display in the supermarket as an invitation to treat, the shopper takes the goods he or she desires from the shelf with the consent, authority, permission or licence (whichever term one may use) of the owner and carries it to the cash register where he or she makes an offer to purchase and if the offer is accepted the goods are cashed and payment is made. Secondly, the goods remain the property of the supermarket owner until the price is paid, and it is only then that property in the goods passes to the shopper.

[47] In our view, in order to be found guilty of stealing from a self-serve store such as a supermarket under the Larceny Act, the shopper must have taken and carried away the goods without the consent of the owner with a dishonest intent to permanently

deprive the owner of it at the time of taking. The question of dishonesty in the arena of a self-serve shop or supermarket, of course, is the intent to take and carry away the goods without tendering the purchase price. The nature of the intent is a question for the jury (see **R v Farnborough** [1895] 2 QB 484).

[48] The effect of this is that although, generally, the actus reus of the crime of larceny is complete at the time of the taking and carrying away, in the particular case of shoppers in self-serve stores, the mere removal of the goods from the shelf is not sufficient to amount to *asportation*, as it is done under limited permission by the proprietor for the purpose of the transaction at the cashier and the crime is only complete where, after the licence terminates at the point of offer and acceptance, that is, at the cash station, the shopper with intent to steal, deliberately fails to tender payment for the goods.

[49] Larceny is a trespassory interference with another's possession of goods; however, in the circumstances of a supermarket where the honest shopper takes goods from the shelf, he or she so acts with the implied consent of the owner and there is no *asportation* because there is no dishonest intent at time of taking. However, one may take the view that the dishonest shopper who takes the goods from the shelf and conceals them in a handbag, with intent at the time of taking not to pay for them, may be considered to have committed the offence at the time of taking and concealment because there is no authority implied or expressed to take the goods and conceal them in order not to pay. The problem in this latter case, apart from the proof of the

dishonest intent at the moment of concealment, is the question of whether the goods have been carried away. To the extent that the dishonest shopper is still in the store with the goods in the bag, it raises the question as to whether there was *asportation*.

[50] Certainly, in the offence of larceny, the intent to steal becomes clearer if the dishonest shopper passes the cashier or checkout point without paying, for this then becomes the clearest proof of intention to steal. If, however, clear proof of intention to steal is available before the shopper leaves the store (for instance the shopper conceals the goods in a bag or under a coat) and does not tender the price at the cashier's counter, then the question arises as to whether in those circumstances there is any requirement in law to wait until the dishonest shopper has exited the store before apprehending him or her. It may be prudent to do so (if only for good customer relations) since the shopper may have an explanation, however bizarre. Whether, on a trial of the issue, this explanation is accepted, is a matter entirely for the tribunal of fact.

[51] It may also be argued that the permission of a supermarket owner in a self-serve setting is limited to taking the goods to the check out point and paying for them and that when the goods are concealed the owner loses the right, which he has reserved, to terminate the licence to handle the goods. In that regard, there is technically no permission and that dishonest taking and concealment may be sufficient *asportation*. Taking goods down from the shelf of a supermarket with intent to steal and concealing those goods with that intent is a trespass and cannot be said to have been impliedly

authorised by the owner. Such an act is a clear departure from the licence and may very well be sufficient *asportation* under the Larceny Act.

[52] In **Martin v Puttick** Winn LJ, in considering whether the manager had consented to the thief leaving the store with the meat she had not paid for, noted that at the moment when the manager became aware that the meat had been taken by the defendant and had not been paid for, he had no control over them as they were not in his possession and he could only have forcibly taken it from her or asked her permission to take them. This, in our view, shows that when goods are in the physical possession of the shopper, concealed on his or her person or in their personal property but not out in the carriers provided by the owners, over which the owners retain residual control, there is no permission or consent, actual or implied, to take and carry the goods in this manner. The shoplifter has then acquired complete and exclusive control over the property, to which the owner has not consented. In those circumstances and in that regard, there would be *asportation* the moment the item is concealed. Therefore, in such circumstances, once there is proof of the intention at the time of concealment, the offence would be complete.

[53] The rider to this, of course, is that even if the goods are suspiciously placed in a bag, where the shopper has not left the store, the jury must conclude beyond a reasonable doubt that the conduct of the shopper was such, that it was adverse to the owner's interest and without his consent. In larceny however, if the thief is caught

outside the store with goods not paid for, that perhaps is the clearest indication that all the ingredients of the offence exist.

Application of the law to the facts.

[54] We will now deal with the grounds of appeal under three broad headings as they were argued by counsel for the appellant. The first is whether the learned Resident Magistrate fell into error when he ruled that there was a case for the appellant to answer; secondly, whether there was sufficient evidence from which the learned Resident Magistrate could infer that there was an intent to steal; and thirdly, whether the learned Resident Magistrate properly considered the element of *asportation* in arriving at his decision.

[55] In this case the learned Resident Magistrate was obliged to ask himself whether all the ingredients of the offence of larceny were present and proved by the prosecution, that is, whether there was sufficient evidence on which he could find that the accused had taken and carried away the goods belonging to the complainant without consent and that at the time of the taking she had the intention to permanently deprive the owner of the goods thereof.

Did the learned Resident Magistrate fall into error when he ruled that there was a case for the appellant to answer?

[56] We will begin first with counsel's complaint that the no case submission ought to have succeeded. A no case submission was made on behalf of the appellant on the grounds that the prosecution's evidence did not disclose any *asportation* and that the

prosecution had failed to negative accident or mistake. However, the evidence of the employee Mr Allen, who said he witnessed the appellant taking the cheese and placing it in her bag, is that he saw the accused first conceal the cheese on a shelf between two bottles. He later saw her take up the cheese opened her bag and placed the cheese in it. He also denied seeing any security guard speaking to the appellant in the supermarket aisle. The evidence of Miss Gayle is that the appellant cashed the items she had in the basket and tendered payment for those items. She handed the appellant the change and the receipt but did not see where she went thereafter. The cheese was not produced or paid for.

[57] The evidence of Mr Russell was that the appellant told him that the cheese must have fallen into the bag when she went in it to take the money out. There was no evidence of her taking money out of her bag whilst in the supermarket. She had paid for the goods with money taken from her pocket. The evidence of the police is that she told them that the cheese must have fallen in the bag when she placed money, given to her by the security guard, in it. This is in direct contradiction of her spontaneous response to Mr Russell when accosted. It is also in contradiction to the evidence of Mr Allen as to what he saw. There was also the evidence of Mr Russell that she had left the supermarket when she was accosted, although his evidence as to exactly where she was accosted was inconsistent. There was sufficient evidence presented by the prosecution which, if accepted, would negative the defence of accident or mistake and called for an explanation from the appellant. The learned Resident Magistrate was correct to rule that there was a case to answer.

[58] In the context of a supermarket, every honest customer intends to permanently deprive the supermarket owner of the goods they choose off the shelf but this is usually coupled with the intent to offer to purchase those goods and to tender the purchase price at the cashier counter. The dishonest customer is an entirely different species. When he or she takes the goods, the intent at the time is not to purchase them but to take them from the shop without paying.

[59] In this case, the evidence is that the appellant took the cheese from the shelf, concealed it on another shelf of the supermarket, then later retrieved it and deliberately dropped it into her bag. She then made her way to the cashier where she paid for items in the supermarket basket but not the cheese in her bag. The question is whether there was sufficient evidence of the *animus furandi* and *asportation* for the purposes of the law.

Was there evidence of intent to permanently deprive the owner thereof?

[60] We now turn to the second aspect of the appellant's complaint before this court. Counsel, for the appellant, took the view that because the transaction was incomplete, there was no evidence of intent. He argued that because the state of the prosecution's case with respect to where Mr Russell claimed to have accosted the appellant was so inconsistent, and the learned Resident Magistrate having failed to reconcile the inconsistency, there was no evidence of *asportation* on which the learned Resident Magistrate could have relied.

[61] However, contrary to counsel's submission, the evidence accepted by the learned Resident Magistrate is that the *asportation* took place at the cashier's counter where the cheese was not paid for. In that regard he found that the intent to steal having been formed at the time of taking the cheese, concealing it between the bottles then placing it in her handbag, the offence was complete the moment she did not pay at the cashier and there was no necessity to wait until she passed the cashier's counter. He found that this was sufficient evidence of the intent to permanently deprive.

[62] On the authority of **Martin v Puttick** the learned Resident Magistrate would have been correct. When the appellant took the cheese from the shelf she did so with the permission of the proprietor of the supermarket. The interest of the proprietor is in having a contract made for the purchase of the cheese and the price tendered.

[63] However, intention is not something easily identified. No one can see into the mind of the individual to ascertain their intention and usually one must look to conduct or words spoken to determine what a person's intention is at any particular moment. The removal of the cheese from its place on the shelf to another place between two bottles, then being taken from that shelf and concealed in a bag not provided by the supermarket, would be sufficient evidence of an intention not to pay for them (*animus furandi*). It is true that at the time the goods were taken off the shelf it was done with the permission or licence of the owner so that there was no *asportation* at that time. Equally, in the ordinary course of things, there would be no "carrying away" for the same reason because the permission to handle the goods is a permission which extends

right up to the time at which the goods are placed before the cashier and the shopper makes the offer to buy.

[64] Therefore, before the learned Resident Magistrate could find the appellant guilty he had to find that she had the necessary *animus*. He considered the evidence of the conduct of the appellant and said in his reasons for decision that:

> "On the evidence the Court is placed beyond all reasonable doubt that the accused Miss Tyndale did not place the piece of cheese in her handbag by mistake. The Court is of the clear belief, on the evidence of the Witness Allen that she had placed the piece of cheese amongst bottles of water then subsequently returned and retrieved it and placed it in her handbag. This act shows a clear intention that the accused had no intention of paying for the piece of cheese and intended to have deprived the owners of their property."

[65] He clearly found, therefore, that the appellant had the necessary intention to steal when she placed the cheese in her bag. He said:

> "It is therefore of note that the intention of the accused is sufficiently manifested on the evidence of having no intention to purchase the article when she placed it in her handbag and did not have to pass the cashier's cage to commit the offence."

[66] Having found that the intention to steal was formed from the moment the cheese was deliberately placed by the appellant in her handbag, the learned Resident Magistrate thought this act was not in keeping with what was expected of the appellant, as a shopper in the supermarket. He put it this way:

> "On the facts, placing the cheese in her hand bag was not consistent with what she should have done to take the article to the cashier counter within view of the owners and giving it to the cashier for encashment."

[67] As was said before, the passing of the cashier's counter by the thief may be the clearest evidence of intention not to pay but the learned Resident Magistrate was correct to find that it was not necessary to pass the cashier's counter to commit the offence because both *asportation* and *animus furandi* coincided at the cashier's desk when there was a failure to pay.

[68] He was clearly also of the view that the intention to steal which manifested itself when the cheese was placed in the appellant's bag continued up to the point of cashing the goods at the cashier and failing to pay for the cheese. He continued by saying:

> "One would believe if one had taken an article with the intention of paying for it to the cashier and it not being accounted for, a search or enquiry would have been launched as to the where about of the missing article by the accused."

[69] The question of intention was a matter for the learned Resident Magistrate and there was more than sufficient evidence of the conduct of the accused from which he could infer what her intention was.

Did the judge fail to consider the element of asportation?

[70] The learned Resident Magistrate was then obliged to determine whether there was *asportation* coupled with the intent. This forms the gravamen of the appellant's complaint of the learned Resident Magistrate's treatment of the case. The appellant's complaint that he found that the crime was complete at the time of the concealment is a misunderstanding of the learned Resident Magistrate's reasoning. What he found was that there was no necessity for the appellant to have passed the cashier's cage for the

offence to be complete. Though he did not specifically state it in this way, it is clear from the learned Resident Magistrate's reasoning that he also found that *asportation* coupled with the intention took place at the cashier's when the appellant failed to pay. We found instructive the following statement made by the learned Resident Magistrate that:

> "[At] this stage where the accused had taken a piece of cheese from the complainant's store and having presented the other items she intended to purchase to the cashier would have clearly missed one of the items she intended to have purchased and to have presented this item to the cashier and to have enquired as to its where about. She did no such thing having concealed it in her handbag."

[71] Counsel also complained that the learned Resident Magistrate failed to reconcile the evidence of whether her transaction was complete by the tendering of her receipt and change and failed to reconcile the inconsistencies in the evidence of where she was accosted. It appears from his reasoning that the learned Resident Magistrate did not think it was fundamental in all the circumstances of what he had to determine, to reconcile the issue of whether the appellant had received her change or not. He also appeared not have considered it necessary to reconcile the evidence of whether she had passed the cashier or not when she was accosted. In considering the prosecution's case as to where the appellant was accosted, he noted that she had paid for items excluding the cheese and still had the cheese concealed in her bag. He also noted that although the appellant had denied receiving her receipt and change and was leaving when accosted, she did not deny she had not paid for the cheese or that the cheese remained concealed in her bag.

[72] Although not specifically stated in his reasons, it appears that the learned Resident Magistrate accepted the evidence of the prosecution that the appellant had in fact received her receipt and change and was leaving the store when she was accosted. Having found, however, that there was no denial that the cheese was not paid for and remained concealed in the handbag, the learned Resident Magistrate cannot be faulted for concluding that there was evidence from which he could infer that she had no intention to pay when the cheese was placed in her bag. He was also correct when he found that she did not have to pass the cashier's desk to commit the offence, for once he found that she had the intention to steal at the time she took the cheese and concealed it in her handbag, and that she went to the cashier with no intention of paying for the piece of cheese and in fact, did not pay for it, he was entitled to find that at that point there was *asportation*. This is because the owner's permission to take, handle and carry the goods without payment terminated at the cashier's desk and there was no need to wait until she had passed the cashier or was outside the store to find that the element of *asportation* was present.

[73] It may appear to be a fine point or even an artificial distinction between larceny from the person or dwelling and larceny from a self-serve store. But a distinction there is. In the case of larceny from the person or dwelling, the ingredients of a contract does not exist; there is no invitation to treat, no offer, no acceptance and no expectation that a purchase price will be tendered and finally there is no consent to the taking. In a supermarket setting all these factors exist. The situation of the self-serve store may also be juxtaposed against the situation where we might be concerned not with a self-

serve store but one in which service is effected by the owner taking the goods down from the shelf and handing it to the customer. If the customer sees an item on the shelf and somehow manages to gain access and takes it down himself with the intent to steal it, that would be sufficient taking for the purposes of the Larceny Act, because there would be no question of any permission or licence to do this.

[74] In the instant case, the appellant does not dispute the fact of the cheese being in her bag. There is no dispute that she did not pay for it at the cashier's desk. At the point where she cashed the goods in the basket and did not cash the cheese, it is our considered view that at that point all the elements of the offence of larceny were present. The *asportation*, for the purposes of this case, took place when the appellant presented herself at the cashier, cashed the other goods whilst the cheese remained in her bag and failed to present the cheese for encashment or return, coupled with the intent to steal it. At that point her licence had ended.

[75] Of course, the learned Resident Magistrate was entitled to take into account any evidence of mistake or accident however strange, unbelievable or bizarre, that the appellant may give, as to how the cheese came to be in her bag and not paid for. He did consider the appellant's evidence as to how the cheese came to be in her bag and dismissed it as unbelievable, as he was entitled to do.

[76] We do not believe that it was necessary for the learned Resident Magistrate to find that she had left the premises or passed the checkout counter in order to find the offence complete, so that counsel's complaint that he failed to reconcile the

inconsistencies in the evidence given by Mr Russell as to where he accosted the appellant, whilst a true and valid complaint, pales in importance when viewed with the appellant's own evidence and that of Ms Gayle. That evidence is that she had cashed all the items in her basket but not the cheese in her bag. Counsel's submission that her transaction was not complete because she did not get her change and receipt is untenable. The appellant's defence was not that her transaction was not complete and she had intended to pay for the cheese; it was that the cheese had inadvertently fallen into her bag, the inference being she either did not know it was there or did not remember it was there, which indicates it would not have been paid for in any event, so that when she paid for the other items and not the cheese her transaction was in fact complete. At no point at the cashier's desk did she offer to pay for the cheese before she was accosted.

[77] As counsel for the Crown reminded us, this court will not interfere with the decision of the tribunal of fact made on a proper consideration of the evidence unless it was plainly wrong or unless there was a misdirection in law. In this case the learned Resident Magistrate was required to consider whether there was *asportation* coupled with the necessary *animus*. It is clear from the judge's reasoning that he gave considerable thought to the evidence which he found proved and from which he inferred that there was an intention to steal, as well as to the evidence which could amount to *asportation* for the purposes of determining whether the offence was committed. Having accepted the prosecution's evidence that the appellant removed the cheese, placed it between the two bottles on a different shelf, then removed it again

and deliberately placed it in her own handbag, this was sufficient evidence from which he could infer she had formed the intention to take the cheese and not pay for it. Coupled with that, where he found it sufficiently proved that she went to the cashier and paid for the other items but not the cheese and did not offer to pay for it, he was entitled to find that the offence was complete at that point.

[78] Once the appellant raised the defence of mistake or accident the burden was on the prosecution to negative that defence. The prosecution had evidence that she was seen to remove the cheese from the shelf where it was displayed and conceal it between two bottles on a different shelf. Some minutes thereafter she returned for it and placed it in her bag. The evidence of the witness who saw her do this was that at no time did he see her speaking to a security guard or taking any money from the security guard and placing it in her bag. The learned Resident Magistrate found that she gave conflicting accounts of how the cheese came to be in her bag and rejected her explanation. On that evidence, the learned Resident Magistrate was entitled to find, and did find, that the prosecution had negatived mistake or accident and that the appellant's explanation was a contrivance.

[79] The learned Resident Magistrate adopted a correct view of the law and there was sufficient evidence on which he could have found the appellant was guilty of the charge of larceny.

[80] As a result we find that there is no basis on which this court should disturb the learned Resident Magistrate's finding of guilt. Accordingly, the appeal is dismissed. The conviction and sentence below are affirmed.