Concepts of appropriation under the theft act law essay

ASSIGN BUSTER

The Theft Act 1968[1]was legislated as a result of complicated, confusing and highly technical prior statutes and case law. Antiquated terminology like larceny, embezzlement and false pretences were to be replaced by a simple and short Act that was aiming towards codification of the criminal law. The Criminal Law Revision Committee advised on the recommendation, which as a result fully transpired. The report affirmed " larceny, embezzlement and fraudulent conversion should be replaced by a single new offence of theft. The important element of them all is undoubtedly the dishonest appropriation of anotherer's property".[2]Unfortunately the courts interpretation of the Theft Act has not went as smooth as anticipated; it became highly disputed as the House of Lords reached contrasting outcomes on several cases. Parliament was possibly at fault to some extent due to the Act being formulated very simplistic, the consequence was that judges had to work out exactly what the law was. My purpose will be to chronologically evaluate the crucial case law, academic opinion, as well as objectively conclude from a theoretical and practical perspective.

The definition of The Theft Act 1968 is " 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."[3]This section is pivotal and fundamental as the whole Act is structured around this definition. Dispute surrounds the element of appropriation. Academics and lawyers have and still are extensively contesting on whether consent should be relevant or irrelevant for an individual to appropriate property. The Criminal Law Revision Committee which prompted the Act stated " We hope and believe that the concept of

dishonest appropriation will be easily understood even without the aid of further definition.”[4]This lack of further definition in hindsight, demonstrated poor judgment from the Committee as cases will illustrate that interpretation of appropriation has led to difficulties even in straightforward circumstances.

In Lawrence[5]an Italian student who was unfamiliar with the currency opened his wallet to a taxi driver to allow him to acquire the fare. The driver took money which was well over the excess of the fare. The driver disputed that his conduct could be appropriation because the student consented. The House of Lords held that it was irrelevant the student consented and dismissed the defendant’s appeal; the driver’s conviction was upheld. This case concluded that appropriation can occur even when the victim has consented in handing over their property. Under the old Larceny Act 1916 a requirement for appropriation was ” without the consent of the owner”[6]. Viscount Dilhorne highlighted this contrast in his judgment as he quoted “ Parliament by the omission of these words has relieved the prosecution of the burdon of establishing that the taking was without the owner’s consent[7]. Furthermore, Lawrenece means that certain crimes of deception may also be identical to crimes of theft, due to consent being irrelevant. Surely Parliaments intentions were not to have it amalgamated with s15 Obtaining Property by Deception. P. R. Glazebrook brought up this illogical consequence as he wrote “ Should it matter tuppence whether a crook snitched his victim’s property or tricked him out of it? Parliament thought not”.[8]I myself find it hard to comprehend that Parliament enacted a meaningless provision but this is a practical and theoretical effect of the

courts verdict. Shute and Horder also disagreed with the crimes being amalgamated by writing in a journal “ The label thief does not carry the same moral import as the label conman”;[9]they also went on to say “ The nature of the wrongdoing in theft has a separate moral foundation from that of obtaining by deception”. There is no doubt that these crimes are entirely different in reality and should be treated entirely different by the law; the outcome of Lawrenece does seem to question the merit and practicality of the Theft Act.

The House of Lords in the case of Morris[10]casted uncertainty on this proposition as they held that the defendant must have done something objectively criminal for appropriation to occur. The facts involved the defendant exchanging labels on goods in a supermarket in order to pay less for the item; he was seized before paying and charged with theft. His council submitted that he could not have appropriated the item as he had handled the item in the supermarket with implied consent of the owner. Judging on Lawrence the defendant should have been convicted but the court completely opposed. Lord Roskil quoted “ appropriation in my view involves not an act expressly or impliedly authorised by the owner but an act by way of adverse interference with or unsurpation of those rights”.[11]So on this judgment, a consensual acquirement of property would not be theft since the element of appropriation is absent. For the next eight years until R v Gomez[12], this case was used in preference to Lawrence.

The facts of Gomez involved the defendant who was an employee of a store in. He convinced the manager to sell goods to an accomplice and accept payment by cheques. He told the manager that the cheque was “ as good as

cash” but was aware that they were stolen. Gomez was convicted of theft at the trial court. The defendant appealed to the Court of Appeal, Lord Lane CJ was very clear on his position and stated “ anyone who obtains goods in return for a cheque which he knows will be dishonored on presentation, or indeed by way of any other similar pretence, would be guilty of theft”[13]. He then went on to say that appropriation never occurred as “ There is no appropriation at the moment when he takes possession of the goods because he was entitled to do so under the terms of the contract of sale.”[14]Lord Lane expressed that this conduct should not fall within the Theft Act as in practice it expands it enormously. Professor Shute obviously agreed with Lord Lane’s reasoning as he wrote “ To create a new offence of theft to include conduct which ordinary people would find difficult to regard as theft would be a mistake”.[15]Lord Lane also stressed that by making consent irrelevant created a clear conflict between civil and criminal law.

Gomez was appealed to the House of Lords. The house had to clarify if consent was relevant and if appropriation involved” adverse interference with, or usurpation of, some right of the owner”[16]The lords concluded 3: 2 in favor for Lawrence against Morris and decided that consent is irrelevant to appropriation. Lord Keith quoted in the leading judgment “ Belief or the absence of belief that the owner had such knowledge is relevant to the issue of dishonesty, not to question whether or not there has been an appropriation”.[17]This decision was of vast importance and had extensive implications to the offence of theft. In practical situations it could determine the point of arrest, for example, an individual can in theory be arrested in a shop for simply touching an item, perhaps just looking at the ingredients, if

the law enforcement suspect the individual is planning to steal this item then in theory then they can be arrested. In practice this seems completely absurd; in addition it means the law authorities have enormous arbitrary powers resulting from this legislation. Although in practice I doubt this example would occur often but arbitrary powers this broad should be taken very seriously as it may contravene human rights, the rule of law and the manifest criminality rule[18]that George Fletcher discusses. This rule maintains the notion that a reasonable person should identify the theft that has occurred. To some degree criminal activity like theft should be obvious to the objective observer.

Alarmingly, by omitting the consent element for appropriation means that it practically vanishes the necessity to have an actus reus for a conviction. Also, there is no doubt that in certain cases consent will distinguish if the defendants conduct was dishonest or not. By dismissing consent the law is virtually relying on the entire mens rea element. Lord Lowry dissented in Gomez cited a dictionary definition of appropriate, he quoted " take possession of, take to oneself, especially without authority."[19]He concluded that consent was relevant and there had to be some sort of adverse interference, which I do believe should be an element of appropriation.

Later on in the 1990s, appropriation was at the centre of a further legal concern. The question the courts had to address was; could a recipient of a valid gift in civil law have appropriated property and be charged with theft if there was no deception? Again, consent was questioned. There were several cases with similar facts but it was R v Hinks[20]which resolved the issue. The

defendant befriended a man of limited intelligence and naivety although he was mentally able of understanding the concept of ownership and a gift. The defendant encouraged the man to withdraw sixty thousand pounds and deposit it in her account. The Court of Appeal held that it was irrelevant the gift was valid in civil law and the question was certified to the House of Lords. Hinks defence submitted sound reasoning on why it would be wrong to hold a valid civil gift as appropriated, they referred to numerous examples of when contractual problems under such a expansive definition of appropriation which could now become theft. The defence also highlighted that it would create disharmony and a blatant conflict with civil law. Lord Steyn countered this issue as he quoted " The tension between the civil law and the criminal law is therefore not in my view a factor which justifies a departure from the law as stated in Lawrence and Gomez."[21]In addition, on the matter of consent and authority he said this was " immaterial". [22]The court appeal was dismissed as the gift was appropriated, only with Lord Hobhouse dissenting. Therefore in practice if there is an acquisition of property through dishonestly then the gift will have been appropriated and stolen.

There are several consequences of the final decision in Hinks. First of all it means that there is no longer any distinction between fraud and theft, which does not seem to be logical as they are entirely different crimes. Lord Steyn discarded appropriation as being narrow due the number of unjustified acquittals that may be the consequence. Although this is a convincing justification and I can see the logic due to the defendant's unconscionable conduct, but I believe this should not be the criminal law. The contrast with

civil law could been evaded by perhaps declaring the gift voidable due to undue influence. The court asserting the legitimacy of the gift as irrelevant was perhaps unconvincing. J. C Smith strongly disapproved as he wrote" Who ever heard of ordinary literate people describing the receipt of a gift as an appropriation?"[23]Numerous academics have agreed with Smith and understandably criticized the courts decision. Clarkson and Keating have described Hinks decision in particular as " lamentable"[24]as the House of Lords do not identify what actually constitutes appropriation. J. C Smith emphasized how expansive appropriation is currently, the commentary stated " Millions of employees are appropriating their employers property, millions of customers are appropriating the property of shopkeepers, husbands are appropriating the property of their wifes and vice versa every hour of the day"[25], therefore if mens rea is perceptible then these examples can all be theft.

Reflecting on the judgments, journals and commentary, I believe adverse interference should be present in the definition of appropriation. Perhaps the negative aspect is there may be an undeserved acquittal but better this than innocent individuals convicted due to the law being so expansive. It is simply more practical and just for adverse interference to be an element in of the Theft Act. Adverse iterference establishes the progress from actual guilty contemplation or consideration to which should be the full mens rea of theft. Individuals with criminal thoughts and ideas should not be liable for theft if the criminal act has not been executed. Unfortunetly due to adverse interference being ommitted from the requirement of the Theft Act, thoughts

and ideas can be criminal in the present law which in my opinon is completely unsound and dangerously premature for a justifiable conviction.