

Pamela Darroux v The Crown

Case No: 2016/03297/B1

Court of Appeal (Criminal Division)

4 May 2018

[2018] EWCA Crim 1009

2018 WL 02065566

Before: Lord Justice Davis Mr Justice King and Mrs Justice Cheema-Grubb DBE

Date: 04/05/2018

On Appeal from Crown Court at Wood Green

Hearing date: 13 April 2018

Representation

Laurie-Anne Power for the Appellant.

Christiaan Moll for the Respondent.

Approved Judgment

Lord Justice Davis:

Introduction

1 In Blackstone's Criminal Practice (18th ed.) at paragraph B4.48 the following is stated: "Where an alleged theft involves a thing in action such as the credit balance in V's bank account, or the right to payment on a cheque, it can sometimes be particularly difficult to identify the crucial 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..."

2 These are wise words. But unfortunately this was not a course followed in this case. In circumstances where the charges could readily and appropriately have been framed by reference to [s. 1 of the Fraud Act 2006](#) (this case being virtually a paradigm example of fraud by false representation within the ambit of [s. 2](#) of that Act) the charges were all framed by reference to [s. 1 of the Theft Act 1968](#).

3 The consequence has been, in the light of the appellant's conviction, an appeal to this court of a kind which much engaged the courts (and academic commentators) in years gone by: a consequence which the [Fraud Act 2006](#) had in truth been designed to counter.

4 The potential legal difficulty arising had not been identified below, either by trial counsel or trial judge. In fact it was only first identified by the Criminal Appeal Office, the appellant having lodged grounds of appeal of her own composition raising entirely unrelated points (which are not now pursued). In granting leave - "without, I confess, the slightest degree of enthusiasm", as he put it - the single judge observed that it was no answer to say that no one took the point below. That, in the circumstances of this case, is correct. If the case and evidence presented at trial could not in law sustain counts of theft, then convictions on such counts cannot be regarded as safe.

5 The appellant, Pamela Darroux, was represented before us by Ms Power. The respondent Crown was represented before us by Mr Moll. Ms Power had not appeared at the trial below. Mr

Moll had.

Background Facts

6 The background facts, in summary, are these.

7 The appellant was from 2 November 2002 until 1 April 2014 employed as a manager by a charity known as the Sunridge Court Housing Association. She was a trusted and senior employee, managing the residential care home for elderly people operated by the Housing Association in Golders Green. She had responsibility for the general running of the home. Her responsibilities extended to the pay-roll of all employed staff, including herself.

8 The appellant was contracted to work from Monday to Friday, between 9 am and 5 pm. It was an agreed term that when she did overtime, or covered for other members of staff, she was entitled to claim additional payment. She was also entitled to claim payment in lieu of holiday not taken.

9 So far as the staff were concerned it was the responsibility of the appellant, among other things, to check their rotas, claims for overtime and on-call work, holiday entitlements and so on. However, in her own case the arrangement initially was that such claims by her should be approved by the chair or committee of the Board of Trustees of the Housing Association.

10 It seems that the practice of the appellant throughout the period of her employment was to fill in the relevant forms by hand. There were standard Annual Holiday Requests forms and standard forms for overtime and on-call claims.

11 Once the relevant claims were approved the forms would be sent on a monthly basis by the appellant, apparently by fax, to a company called PCS Limited, whose services the Housing Association had retained and who, in effect, provided pay-roll services. Perhaps because of the course which the proceedings took at the trial below, the evidence relating to that aspect was limited. At all events, it appears that on receipt of the relevant forms PCS would make the necessary computations for each employee; arrange for the appropriate deductions, with a view to accounting to the Revenue, in respect of PAYE and National Insurance contributions; prepare and send to each employee, including the appellant, the relevant monthly Pay Advice (which would include recording payment for hours worked in excess of the basic contracted amount); and arrange for the payment by bank transfer to each such employee accordingly.

12 So far as this last aspect was concerned, the evidence again was limited. As we gather, PCS had some form of mandate from the Housing Association, permitting it in effect to operate the relevant bank account of the Housing Association maintained at Barclays Bank. It is to be assumed that PCS did so by electronic instruction. The sums in question would then be paid out of the Housing Association's account via BACS and the corresponding amount would then appear as a credit in each individual employee's designated bank account.

13 Until 2011 the chairman of the Board of Trustees was Brian Levy. The appellant would place her own pay-roll details before Mr Levy for his approval. He was to say in evidence that he was always satisfied with the overtime claims which she put in, as also with any holiday payment claims: such queries as he occasionally raised were answered to his satisfaction. He also said that he considered her to work hard and conscientiously. As put by the trial judge in the summing-up, Mr Levy "didn't say a word against Mrs Darroux".

14 In 2011 Linda Stone took over as chair of the Board of Trustees. Ms Stone, as she had made clear before she agreed to take on the role of chair, did not involve herself in the day-to-day financial details of the Housing Association; and she did not follow the system of reviewing the appellant's monthly pay claims which had been adopted by Mr Levy. Accordingly she did not herself check or approve the monthly pay and overtime sheets; although she did review (or was intended to review) the Annual Holiday Request forms and did counter-sign at least some of them – how many, became an issue at trial.

15 In 2013 there was an outbreak of Legionella at the home. It is not now said that this was by reason of any neglect on the part of the appellant. But at all events a report from the Care Quality Commission resulted. This report highlighted various administrative shortcomings within the Housing Association's operations. The appellant was thereafter given notice of dismissal. Her

internal appeal was unsuccessful and her employment was terminated on 1 April 2014. Thereafter she made a claim at the Employment Tribunal for unfair dismissal. Her claim also included an allegation of racial discrimination. An offer of settlement in the sum of £5,000 was rejected by her. Thereafter, the employment proceedings appear to have been overtaken by what became criminal proceedings.

16 By reason of the shortcomings noted as a result of the report of the Care Quality Commission Ms Stone requested Rachael Barkoff, the Executive Director of the Housing Association, to undertake an audit of the financial position, including payroll payments. The upshot of this was to result in a claim by the Housing Association that the appellant had defrauded the charity by submitting falsely inflated overtime/on call claims and claims in lieu of holiday entitlement. In due course the total amount said to be involved was quantified at £49,465 for the period between January 2011 and February 2014.

17 On 15 July 2014 the appellant was arrested and interviewed. She was legally represented. She made no comment to all questions asked. Her case at trial was that there had been no dishonest submission of claims and that she had been entitled to all of the payments made to her. It was, among other things, also suggested that the allegations of the Housing Association had been prompted by the claim made in the Employment Tribunal by the appellant.

18 The appellant was of previous good character.

The Indictment and Course of Proceedings

19 In the event the Indictment contained nine counts of theft. The counts covered various monthly periods between 1 January 2011 and 30 April 2014.

20 Count 1 was drafted in these terms:

"Statement of Offence

THEFT, contrary to [s. 1 \(1\) of the Theft Act 1968](#)

Particulars of Offence

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

The other counts were similarly drafted.

21 This straightaway should have set alarm bells ringing. No one had ever suggested that the appellant had stolen cash in a till or in a safe. The "monies" in question related to the Housing Association's (in credit) bank account. While in lay terms it is commonplace to talk of money in the bank, it is in legal terms elementary that a bank account constitutes a chose in action, representing the debt due from the bank to the account-holder. So on any view the counts were incorrectly particularised.

22 We asked Mr Moll why the counts had been framed in theft rather than in fraud under the [Fraud Act 2006](#). He said that the matter had been considered at the time but that it had been concluded that theft was the "simpler" and "more appropriate" charge. He said that the matter both would and should have been charged as fraud had there been an actual deception of a trustee in approving the monthly forms; but, he said, as the allegations post-dated the supervision of Mr Levy that was not the position here. Hence theft was the appropriate charge.

23 We find that explanation to be as puzzling as it is unsatisfactory. It was pointed out to Mr Moll in argument that [s. 2 of the Fraud Act 2006](#) does not require that there be actual operative deception. The section is principally directed at conduct (with the necessary intent), not at the result actually achieved. Mr Moll, when this rather obvious point was put to him, necessarily had to accept that. He maintained, however, that even if the charges could properly have been framed in fraud – as he now accepted – still they could also properly be framed in theft.

24 Be that as it may, it is in any event hard to understand how it could be assessed that no operative deception (on the Crown's own case) had occurred. It may be that no trustee had been induced specifically to approve these monthly overtime claims. But the appellant had authority to, and did, submit these claim forms to PCS for processing; and it was an implicit representation to PCS (as the Housing Association's agents) that such claims were genuine and made in good faith. They would not have been processed or have resulted in payment out otherwise. Yet further, at least some of the alleged false holiday entitlement claims had in fact been put before Ms Stone for her signature in any event.

25 Nevertheless the case proceeded to trial in the Crown Court at Wood Green on the basis of the indictment as so drafted. Counsel then appearing for the defence raised no challenge to the form of the indictment.

26 At trial there was a further development. On re-reading her witness statement at court Ms Stone formed the view that some of her purported signatures on some of the Annual Holiday Request forms were not in fact hers. The trial thereafter, with leave of the judge, proceeded on the footing that those particular signatures had, according to the prosecution, been forged by the appellant. That added a further complication. However, no ground of appeal is now pursued on that point.

27 Much of the trial was devoted to a painstaking analysis of the various forms and to a correlation of the entries made by the appellant with the hours she had actually worked or could have worked. Various individuals on behalf of the Housing Association were to say that they had no role in, or supervision of, the completion of the forms. Ms Barkoff gave lengthy evidence on the details of the forms and payments. The appellant herself gave evidence and was cross-examined.

28 It thus seems that virtually the whole trial was devoted to the issues of whether the appellant had been entitled to these overtime payments and payments in lieu of holiday and whether there had been any dishonesty on her part.

29 In such circumstances the trial judge, understandably enough, dealt with the legal ingredients of the offence of theft shortly in his summing-up. Having set out the statutory definition, he then said this to the jury:

"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..."

30 After a very lengthy retirement, the jury on 15 June 2016 convicted on six counts on the indictment. They acquitted on one other count. The prosecution offered no evidence on two other counts. On those counts on which the jury convicted they had, on the invitation of the judge, returned special verdicts setting out the amounts they had found to be dishonestly taken (these in fact being rather less than alleged by the prosecution).

31 In due course the appellant was sentenced to 16 months imprisonment.

The Statutory Provisions

32 As is all too familiar, [s. 1 \(1\) of the Theft Act 1968](#) provides as follows:

"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."

33 "Appropriation" is dealt with in [s. 3](#) . That provides as follows:

"(1) Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.

(2) Where property or a right or interest in property is or purports to be transferred for value to a person acting in good faith, no later assumption by him of rights which he believed himself to be acquiring shall, by reason of any defect in the transferor's title, amount to theft of the property."

[Section 2](#) deals with dishonesty. [Section 4](#) includes a wide definition of "property": this explicitly extends to all property, real or personal, including things in action. [Section 5](#) explains the circumstances where property is regarded as "belonging to another".

34 For completeness, we also set out the relevant parts of the provisions of [s. 1 and s. 2 of the Fraud Act 2006](#) :

" [S. 1](#) Fraud

(1) A person is guilty of fraud if he is in breach of any of the sections listed in subsection

(2) (which provide for different ways of committing the offence).

(2) The sections are—

(a) [section 2](#) (fraud by false representation),

(b) [section 3](#) (fraud by failing to disclose information), and

(c) [section 4](#) (fraud by abuse of position).

....

[S2](#) Fraud by false representation

(1) A person is in breach of this section if he—

(a) dishonestly makes a false representation, and

(b) intends, by making the representation—

(i) to make a gain for himself or another, or

(ii) to cause loss to another or to expose another to a risk of loss.

(2) A representation is false if—

(a) it is untrue or misleading, and

(b) the person making it knows that it is, or might be, untrue or misleading.

(3) "Representation" means any representation as to fact or law, including a representation as to the state of mind of—

(a) the person making the representation, or

(b) any other person.

(4) A representation may be express or implied.

(5) For the purposes of this section a representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention)."

The arguments in outline

35 It is the argument of Ms Power that, on the facts and circumstances of this case, counts of theft were unsustainable. She necessarily accepts that, by their verdicts, the jury had found the appellant to be dishonest in respect of the counts on which she was convicted. But here, she submits, there were no acts constituting the appropriation of property belonging to another. She accepts - indeed avers - that the facts alleged would bring this case within the ambit of [s. 2 of the Fraud Act 2006](#) ; but not, she says, within the ambit of [s. 1 \(1\) of the Theft Act 1968](#) .

36 Mr Moll, as we have said, conceded that matters could have been charged as fraud under the [Fraud Act 2006](#) . But he says that the operative cause of the payments out of the Housing Association's bank account, on the instructions of PCS, was the prior submission by the appellant to PCS of the monthly forms. Without those there could and would have been no payment out. He says that, even though not a signatory to the account, the appellant de facto had control over it for these purposes: and thus that in submitting the monthly forms she was to be taken as having assumed rights of an owner over the bank account.

Discussion

37 In the written arguments there was some debate as to whether what had been allegedly appropriated constituted "property belonging to another". This was a red herring. By receiving the monthly payments into her own bank account the appellant had not (pro tanto) stolen such sums from the Housing Association. This is because the balance in the Housing Association's account represented a chose in action constituted by the debt owed by the bank to the account holder. But the sum credited to the appellant's account constituted a *different* chose in action: viz. the debt owed by her bank to her. Thus there could have been no appropriation of "property belonging to another." That is the effect of the decision of the House of Lords in [Preddy \[1996\] AC 815](#) (a decision made by reference to [s. 15](#) of the, unamended, [Theft Act 1968](#)). But that simply does not correspond to the case now advanced by the prosecution on this appeal. The principal potential relevance of [Preddy](#) for present purposes is that it illustrates a preparedness to adopt a strict approach to the language which Parliament had used in the 1968 Act.

38 The real issue here, as counsel before us rightly accepted, thus was whether, in the circumstances of this case, there was an "appropriation". As will be gathered, the summing-up had not left that as an issue to the jury.

39 It was possible to discern in some aspects of Mr Moll's arguments before us a tendency to exasperation that such technical points, as he would style them, have – whilst not raised below – been so vigorously deployed on appeal. One of course can accept, on the jury's verdicts, that mens rea cannot now be disputed. The jury have concluded that the appellant was dishonest. But the appellant cannot be convicted of theft simply by reference to her dishonest state of mind. The statute also requires there to be an appropriation, with the necessary intent, of property belonging to another as the actus reus; which must be established by the prosecution.

40 It has been authoritatively decided that any assumption of the rights of an owner can be equated with the assumption of any rights of an owner. It further is established that "appropriating" is not to be equated with "obtaining" for the purposes of the statute.

41 As we see it, it is plain that a chose in action, representing the credit balance in a bank account, is capable of being stolen. That is consistent with the wide definition of "property" contained in [s. 3](#) . Thus if, for example, a company director who is signatory to a company's bank account dishonestly procures payments out of that account to himself by signing cheques

payable to himself he has committed theft. He has committed theft because he has assumed rights of an owner in procuring such payments to himself out of an account over which he has control: thereby reducing its credit balance.

42 So much, indeed, was decided in the case of [Kohn \[1979\] 69 Cr App. R 395](#) : a decision expressly affirmed in the addendum to [Graham \[1997\] 1 Cr. App. R 302](#) at p. 334, where Lord Bingham also said this:

"We wish to make it clear that nothing we said was intended to cast doubt on the principle that the theft of a chose in action may be committed when a chose in action belonging to another is destroyed by the defendant's act of appropriation as defined by [section 3 \(1\)](#) of the Act."

43 The same conclusion was reached in [Hilton \[1997\] 2 Cr. App. R 445](#) . That was a case where an individual having authorised control over a charity's bank account dishonestly procured, once by way of signing and presenting a cheque and twice by written instructions given directly to the bank in question, payments out to other accounts in order to discharge his own personal debts.

44 Those are cases where the defendant in question had authorised control over the bank account in question. But in the present case the appellant had no such control in respect of the Housing Association's bank account. She was not a signatory on it. She was not authorised or empowered to give instructions to the bank to make payments out of that account. Had she done so the bank would have had no authority to make such payments out and would have been required to refuse to give effect to any such instructions, if so given by the appellant.

45 Does this make a difference from cases such as [Kohn](#) and [Hilton](#) ? Ms Power says that it makes all the difference. Mr Moll says that it does not. At all events, the present scenario illustrates the potential distinction between (a) a defendant's own direct act in respect of the victim's property, where the defendant has dishonestly obtained the victim's consent and (b) a defendant's act causing the victim himself to transfer his property by reason of his consent having been dishonestly so obtained. As noted in Smith & Hogan's Criminal Law (14th ed.) at page 905 this distinction can sometimes seem to be, in effect, very refined: but there nevertheless is such a distinction.

46 In this context, it may also be observed that, in contrast with the narrow approach to the interpretation of [s. 15](#) of the statute as illustrated by [Preddy](#) , a broad approach has been taken in other cases relating to appropriation.

47 Thus in [Gomez \[1993\] AC 442](#) , a case involving physical goods, it was held by the House of Lords that an act expressly or impliedly authorised by the owner of property, or consented to by him, could amount to an appropriation of property within the ambit of [s. 1 \(1\)](#) , where the authority or consent had been obtained by deception. In [Hinks \[2001\] 2 AC 241](#) , it was held that "appropriation", as used in the 1968 Act, was in effect a neutral word. It was further confirmed, endorsing [Gomez](#) , that the transfer of title in property by an owner was capable of amounting to an appropriation if dishonestly procured by a defendant. Thus the interesting outcome is that an act which can give rise to a valid (even if voidable) transfer of property under the civil law can also ground liability under the criminal law of theft of property. Although Mr Moll did not cite or refer to these cases in his argument, he in effect would doubtless seek to adopt the broad approach there taken.

48 But that still leaves the question of whether there was, on the facts of this particular case, an "appropriation" by the appellant.

49 Yet further authority on this issue was placed before us. Ms Power, in the course of her excellent arguments, referred to [Naviede \[1997\] Crim LR 662](#) and to the commentary of Professor Sir John Smith on that decision. In that case (which was primarily a case on [s. 15](#) of the 1968 Act) the Court of Appeal among other things had to consider whether an alternative verdict of theft could be substituted. The court decided that it could not be. As shortly stated by Hutchison LJ, giving the judgment of the court:

"We are not satisfied that a misrepresentation which persuades the account holder to direct payment out of his account is an assumption of the rights of the account holder as

owner such as to amount to an appropriation of his rights within [s. 3 \(1\)](#) of the 1968 Act."

50 Ms Power submitted that that governs the present case. Here the dishonest misrepresentation of the appellant in submitting false monthly forms had persuaded the Housing Association (by its innocent agents PCS) to direct payment out of its bank account to the appellant. But that was not an assumption of rights over the bank account as owner so as to constitute an appropriation.

51 She further relied on the decision of another constitution of this court in the case of [Briggs \[2004\] 1 Cr. App. R 34](#).

52 In that case, the defendant dishonestly deceived the victims into signing an authorisation to a conveyancing firm to pay part of the credit balance, in the sum of £49,500 derived from the sale of their home, to a firm of solicitors acting in the purchase of what was intended to be a replacement home. The defendant in fact procured, by design, that the new home be placed in the names of herself and her father. She was charged with, among other things, theft so far as the transfer of the £49,500 was concerned.

53 The court distinguished [Hilton](#). It adopted the statement of Hutchison LJ in *Naviede* and approved the commentary thereon (and on another similar case) by Professor Sir John Smith. The court stated (at paragraph 12) in a judgment delivered by Silber J:

"In other words, we consider that where a victim causes a payment to be made in reliance on deceptive conduct on the part of the defendant there is no "appropriation" by the defendant."

54 Having so concluded, the court went on to say this (at paragraph 13):

"We are fortified in coming to that view by three further factors. First, no case has been cited to us where it has been held that an "appropriation" occurs where the relevant act is committed by the victim albeit as a result of deception. Second, if Mr. Barry was correct, there would be little need for many deception offences as many acts of deceptive conduct would be covered by theft but it is noteworthy that the [Theft Act 1968](#) (as amended) contains deception offences to deal with the case where a defendant by deception induces a person to take a step which leads to the wrongdoing of gaining property by deception ([section 15](#)) or obtaining a money transfer by deception ([section 15A](#)) or obtaining a pecuniary advantage ([section 16](#)). Third, we have already referred to the explanation of the word "appropriation" in [section 3\(1\) of the Theft Act 1968](#) and it is a word which connotes a physical act rather than a more remote action triggering the payment which gives rise to the charge. The Oxford English Dictionary defines "appropriation" as "to take possession for one's own, to take to oneself". It is not easy to see why an act of deceiving an owner to do something would fall within the meaning of "appropriation"."

55 We have to say that we have, with respect, considerable reservations as to the correctness of aspects of this further reasoning as set out in paragraph 13. As to the first factor, no reference was made to - and presumably there had been no citation of - the cases of [Gomez](#) or [Hinks](#) or [Roy Williams \[2001\] 1 Cr. App. R 362](#) (which we discuss further below). As to the second factor, it is precisely the consequence of cases such as [Gomez](#) and [Hinks](#) that it potentially makes virtually redundant other offences such as obtaining property by deception contained in the then version of the 1968 Act: as indeed had (unsuccessfully) been argued by counsel in those cases. As to the third factor, it is well established that appropriation, within the meaning of [s. 3 \(1\)](#), does not necessarily require there to be a "physical" act (even though there often will be).

56 We drew the attention of counsel to the decision of another constitution of this court in *Roy Williams* (cited above). In that case, the defendant, a builder, targeted elderly householders. He grossly and dishonestly overcharged them for building works and obtained cheques for payment from the householders for such works. He then presented the cheques to the bank, thereby diminishing the credit balance on each householder's account. The court held, following [Kohn](#) (cited above) and [Hallam \[1995\] Crim. LR 323](#), that there had been an appropriation. In

presenting the cheques the defendant, it was held, had exercised the rights of an owner with regard to the relevant credit balances (it is to be deduced that the court rejected any proposition to the effect that the defendant had solely been exercising his rights as payee of the cheques).

Disposal

57 It has to be said that the various decisions of the courts in this context have not given rise to a wholly unambiguous or clear cut approach. Further, the approaches variously adopted sometimes seem to veer between the narrow and the broad. But it may be that this is, to an extent, a consequence of each case being fact specific.

58 The core point remains that in this case, as in any other case of theft, there has to be an appropriation (as defined) of property belonging to another. There has to be an actus reus. So what are the facts that establish that the appellant was assuming rights of an owner with regard to the Housing Association's credit balance?

59 In our view, there were no sufficient facts, in the present case, to establish this.

60 It was a feature of Mr Moll's argument that it seemed to assume that PCS were in effect complete ciphers, automatically giving effect to the monthly forms submitted by the appellant. But the limited evidence thus far available does not justify the making of such an assumption. PCS had a payroll service to perform. It was common ground before us that it was not part of their obligations positively to check if the forms had been completed honestly and in good faith. But they would still need to check the forms before preparing the pay slips; and it is difficult to think that had, for example, a form been so completed as to contain a clear arithmetical error or had a form included overtime payments for (say) 30 and 31 February in a particular year (although in point of practice they may not always have been filled in with that level of detail), PCS would not have been entitled, and even obliged, to withhold processing the form pending further instructions or clarification. Put another way, there was no evidence that PCS was required automatically to give effect, at the behest of the appellant, to the monthly forms. Ms Power in fact told us, on instructions, that there were occasions when PCS did indeed first raise queries before processing the forms.

61 In submitting the monthly time forms and holiday forms the appellant was not, in our judgment, assuming any rights of an owner with regard to the bank account. The situation here is different from that in *Roy Williams*. The monthly forms are not to be equated with cheques. The monthly forms of themselves conferred no rights on the appellant with regard to the bank account. Rather, the appellant was doing, albeit in some instances dishonestly, what she was employed to do as part of her employment – viz. submitting to PCS the monthly forms for payroll preparation purposes. 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. Thus in the present case the appellant dishonestly induced the Housing Association (by its agents PCS) to do acts – viz. instruct the payments out – which, we accept, would be an appropriation, through PCS, by the Housing Association itself. But that did not thereby necessarily render the dishonest conduct of the appellant an appropriation by *her* of the relevant chose in action.

62 Cases such as *Kohn* and *Hilton* are, in this respect, distinguishable. In those cases the defendant was a signatory on, and had direct and authorised control of, the account in question and gave the necessary instructions. Here, however, the appellant did not. Control of the account rested solely with the Housing Association and, for payroll purposes, with PCS, the authorised agents of the Housing Association. PCS were not the agents of the appellant in any true sense. Rather, they were her dupes. The appellant successfully deceived the Housing Association and PCS. But such deceit was not of itself, in our judgment, an appropriation, for the purposes of the 1968 Act, of the chose in action representing the Housing Association's bank balance.

63 Accordingly, given those facts, we conclude that the charges were not properly framed in theft. This was, on the facts, a clear potential case of fraud by misrepresentation. But that was

not charged.

64 We add two observations.

(1) While the above cited statement in *Naviede*, as restated in *Briggs*, may in general terms frequently represent the correct position, as will be gathered we do not think that such statement should be taken as an inflexible statement of principle of invariable application. As we see it, there may be cases where a deceptive representation inducing an account holder to make payment out of his bank account could constitute an appropriation (within the meaning of the 1968 Act). It would depend on the circumstances.

(2) It has been suggested, most notably by Professor Sir John Smith, that cases where a cheque is dishonestly obtained and presented are different from cases where payment out of an account is procured in circumstances where the bank uses electronic or automated means. In common with the court in *Hilton*, we have some difficulty with that. It is at all events hard to see how or why (as is suggested) the latter scenario may give rise to a break in the chain of causation but the former not. That said, as will also be gathered, we do not regard the causative impact of a deception as of itself determinative of whether there has been an appropriation by a defendant with regard to a bank account in any particular case.

65 In the result, the appeal must succeed. Sharing the views of the single judge, we reach such a conclusion with no enthusiasm. The jury had found the appellant to be dishonest. But it would be wrong to distort the import of the statutory language, as properly to be applied to the facts of this case, in order to overcome the difficulties thrown up by a wrong charging decision. The remedy in cases such as this is clear: to formulate the appropriate charges in the first place.

Substituting a verdict for an alternative offence.

66 Mr Moll invited the court, on the footing that we were against him (as in the event we are), to substitute alternative verdicts of fraud under the powers conferred by [s. 3 of the Criminal Appeal Act 1968](#).

67 We decline to do so.

68 This is not a case where the counts were misstated by obvious clerical slip or drafting error as occurred in cases such as *Stocker [2014] 1 Cr. App. R 18* and *D (A) [2016] 2 Cr. App. R 18*. To the contrary, this was a conscious prosecutorial decision to charge theft rather than fraud by false representation. Besides, theft and fraud are not coterminous, even though they may have dishonesty in common. A thief is not necessarily a fraudster. A fraudster is not necessarily a thief.

69 Further, whilst the facts here would (on the verdicts of the jury) have grounded convictions for fraud by false misrepresentation, one has to have regard to the actual terms of [s. 3 of the Criminal Appeal Act 1968](#). The question is not just whether on the facts the jury could have convicted of some other offence. The question also is whether *on the indictment* (emphasis added) the jury could have so convicted. The importance of these words in the section was emphasised in *Graham* and *D(A)* (cited above). It is difficult to see how that requirement could be satisfied in the present case.

70 Yet further, Ms Power submitted that had the trial been conducted on the footing of fraud by false representation the defence case may well have been conducted differently. For example, she said that the defence stance towards the late introduction of the forgery allegations, and the decision not to press for an adjournment, may well have been different. She gave other possible examples. We accept that the formulation of the counts in theft, as opposed to fraud, may have impacted on the preparation and conduct of the defence case at trial.

71 For all these reasons, we decline to substitute verdicts of guilty for some other offence.

Conclusion

72 In the circumstances, the court is constrained to allow the appeal. The convictions are quashed.

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