Case No: 201104361B2 AND 201104375B2

Neutral Citation Number: [2011] EWCA Crim 2652
IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM
Portsmouth Crown Court before HHJ Hetherington
on 14th July 2011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/11/2011

Before :

LORD JUSTICE PITCHFORD
MR JUSTICE ANDREW SMITH
and
MR JUSTICE POPPLEWELL

- -

Between :

GEORGE ALFRED PETER VINALL	**1st Appellant**
&	**2nd**
J	**Appellant**
&	**Respondent**
REGINA	

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Roderick James (instructed by **Rowe Sparkes Partnership - Solicitors**) for the **1st Appellant**
Jeffrey Norie-Miller (instructed by **Bramsdon and Childs - Solicitors**) for the **2nd Appellant**
Paul Lodato (instructed by **CPS Appeals Unit)** for the **Respondent**

Hearing date: 1 November 2011

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Judgment
As Approved by the Court

Lord Justice Pitchford :

1. This appeal against conviction, which is brought with the leave of the single judge, again raises the issue: (1) what is required to prove "appropriation" of property (2) with intent permanently to deprive the owner of it. The second appellant is the subject of an order under section 39 Children and Young Persons Act 1939 and we shall refer to him as 'J'.

2. The appellants were, on 14 July 2011, convicted at Portsmouth Crown Court of an offence of robbery (count 1). J was charged in the alternative with an offence of assault by beating contrary to section 39 Criminal Justice Act 1988 (count 2). The jury was discharged from reaching a verdict upon count 2. Mr James and Mr Norie-Miller, for the appellants, both appeared at trial. Mr Lodato, for the respondent, did not. We are grateful for counsels' submissions, particularly for Mr Lodato's reference to some of the relevant authorities.

The case at trial

3. At about 11.15pm on Tuesday, 10 May 2011, two young men, Joshua De-Nijs and his friend, Harvey Wrixon, were riding along a cycle path alongside Purbrook Way in Waterlooville. Harvey Wrixon was in the lead. They came across three youths, two of whom were the appellants. There was insufficient admissible evidence of identity to proceed against the

third. The evidence upon which the jury convicted the appellants was primarily that of Joshua De-Nijs. Two of the youths were urinating into some bushes. As Wrixon passed them they stared at him and adopted an intimidating attitude. Someone called him "Muggins". Further along the path he stopped to wait for De-Nijs. Someone called out as De-Nijs approached, "Oh look, here comes a joker". The appellant J then punched De-Nijs from his bicycle and said, "Don't try anything stupid mate, I've got a knife". The other two were hurling abuse at him. J began to chase De-Nijs who ran off towards Wrixon leaving his bicycle behind. Wrixon said that all three chased his friend. One continued and the other two went back to the bicycle. The third also gave up the chase and the three youths walked off with the bicycle. At one point one of the youths was riding at walking pace while the others walked alongside. The police were called. The youths were caught half a mile away. The bicycle was found abandoned by a bus shelter some 50 yards from the place De-Nijs had left it.

4.At the close of the prosecution case both appellants argued that (1) there was no evidence of an intent permanently to deprive the loser of his bicycle and (2) the prosecution had failed to establish that any violence or threat of violence had been used before or at the time of and in order to steal the bicycle. The judge, HH Judge Hetherington, found that there was evidence of a joint enterprise to steal the bicycle. There was evidence of dishonest appropriation with intent either permanently to deprive the owner or to treat the bicycle as their own to dispose of regardless of the owner's rights. The judge had more difficulty with the appellants' second submission. However, he concluded:

> "Mr Jones for the prosecution says that this is pre-eminently a matter for the jury; it is not for the court to substitute its own views...as to...the connection between the violence and the taking...that is a matter for the jury. The very fact that they did take the bicycle is evidence of an intention on the part of the group at the time when the violence was meted out to the victim. That is what they intended to do because why otherwise immediately would they have taken the bicycle?...I am just persuaded that this is and remains a matter for the jury. It may, to my mind, be a weak prosecution case on the question of robbery...but that is not to say that there is no evidence from which a jury could infer...that the group activity perpetrated against the victim was in order that they could take his bicycle. It seems to me that that is a route open to the jury...[I]t is not for me to deny them consideration of that case."

The grounds

5.The appellants now argue that the judge was wrong to rule that section 6 of the Theft Act 1968 applied to the facts of the present case. The prosecution was required to prove that the appellants had an intention permanently to deprive De-Nijs of his bicycle. This the prosecution could not do because the bicycle was left in full view of passers-by next to a bus stop on a main road. Secondly, the appellants argue that the "disposal" of the bicycle provided no evidence of an intention to assume the rights of the owner. Thirdly, the appellants argue that the judge was wrong to rule that there was sufficient evidence from which it could be inferred that aggressive and violent behaviour was used in order to achieve the theft of the bicycle within the meaning section 8 of the 1968 Act. Fourthly, it is argued that the judge provided insufficient assistance to the jury upon the correct approach to the issue of the appellants' intent.

6.Section 8 Theft Act 1968 provides:

> "8(1) A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force"

Notwithstanding the hesitation expressed in *Forrester* [1992] Crim. L. R. 793 it is settled (*Raphael* [2008] EWCA Crim 1014, [2008] Crim. L. R. 995) that the word "steal" in section 8 has the same meaning as theft as defined by section 1:

> "1(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."

"Appropriation" ordinarily means the taking of property. However, section 3 provides further assistance as to what can amount to an appropriation when the defendant is already in possession or control of the property:

> "3(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 to a person acting in good faith, no later assumption by him of the 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."

A person may be deemed to have the intention permanently to deprive the owner of property. Section 6 provides:

> "6(1) A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights; and a borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.
> (2) Without prejudice to the generality of subsection (1) above, where a person, having possession or control (lawfully or not) of property belonging to another, parts with the property under a condition as to its return which he may not be able to perform, this (if done for purposes of his own and without the other's authority) amounts to treating the property as his own to dispose of regardless of the other's rights."

A case to answer

7. In our view, the judge was clearly entitled to rule that there was a case to answer based upon evidence of the circumstances of the taking. There was evidence from which the jury could infer (1) a joint intention to rob, (2) by using or threatening force in order to steal, (3) a dishonest appropriation of the bicycle by taking, (4) intending permanently to deprive the owner of the bicycle or intending to treat it as their own to dispose of regardless of the rights of the owner. There was evidence from which the jury could conclude that the two appellants and the third youth were at all times acting together even if on the spur of the moment. Wrixon was abused as he passed. All three abused De-Nijs, although one only used violence and issued threats. All three chased De-Nijs. All three walked away with the bicycle. It was open to the jury to infer an intention permanently to deprive De-Nijs of the bicycle (or his mother, who may, strictly, have been the owner) or to treat it as their own to dispose of regardless of the owner's rights when they chased the loser away.

Judge's directions – appropriation/intent permanently to deprive

8. In our view the difficult issue which arises in this appeal is whether the learned judge correctly directed the jury as to their approach to the issues of appropriation and intent permanently to deprive. He directed the jury as follows at page 5G of the transcript of his summing up:

> "It follows that the first thing you need to be sure about is that this bike was stolen. What is stealing, or theft? A person steals something if he dishonestly appropriates property belonging to another with the intention of permanently depriving another of it. If someone assumes the rights of an owner over something, that is an appropriation, and he is taken to have an intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights: so, in this case, even though the bike in question appears to have been abandoned by the bus stop, not all that far from where it was taken, **you could conclude that, in doing that, the person or persons who took it were (a) assuming the rights of an owner over it, and therefore appropriating it; and (b) because no regard was had to the rights of Joshua De-Nijs, or his mother, when leaving it at the bus stop, are to be taken as intending permanently to deprive the owner of it.** Do not forget, also, that at the time of appropriating the bike the person has to have been acting dishonestly." [emphasis added]

The judge, thus, invited the jury to concentrate upon the question whether the fact the bicycle was left at the bus shelter itself demonstrated (1) an intention to assume the rights of an owner and, therefore, an appropriation of the bicycle; and (2) a deemed intention permanently to deprive the owner of it. The appellants argue that the judge was wrong to give a direction based upon a later "disposal" of the bicycle.

Discussion

9. First, it is submitted that section 6 had no application to the facts of the case. The appellants rode or wheeled the bicycle a short distance and then left it in a place where it was likely (but not certain) to be recovered. If this was theft it is submitted there would have been no point to section 12(5) Theft Act 1968 (creating the summary offence of taking a pedal cycle for the defendant's own or another's use). Secondly, it is submitted that the abandonment of the bicycle at the bus shelter could not in the circumstances have amounted to a disposal regardless of the owner's rights and could not, therefore, amount to proof of an intention to assume the rights of the owner.

10. It is clear that the starting point for the offence of theft in the circumstances of the present case must be the taking, that is, the moments leading up to and including the removal of the bicycle from the place where De-Nijs left it. The appropriation could have occurred when De-Nijs was chased away or when the bicycle was wheeled away. It is noticeable that in his directions the judge did not expressly invite the jury to consider whether the appellants intended at the moment of the taking to deprive the owner of the bicycle permanently. He did, however, refer to the fact that the bicycle was *"taken"* before being abandoned ("not all that far from where it was taken"). That is hardly surprising because it was common ground that the bicycle was taken from the cycle path and left at the bus shelter. The jury could, the judge directed them, treat the act of taking and abandonment of the bicycle as an assumption of the rights of an owner and, therefore, an act of appropriation. In our view, this was a perfectly proper direction as to the first ingredient of the offence of theft based upon the opening words of section 3(1) ("Any assumption by a person of the rights of an owner amounts to an appropriation"). The judge then directed the jury that they could conclude that when leaving the bicycle at the bus stop, showing no regard to the rights of the owner, the appellants should "be taken as intending permanently to deprive the owner" of it. At this point in the summing up, as it seems to us, with respect to the judge, the separate concepts of appropriation and intention permanently to deprive became fatally confused. Appropriation by the appellants, their dishonesty and their intention permanently to deprive must coincide. If the intent required for theft was not present until minutes after De-Nijs was chased away the requirements of section 8 could not be proved.

11. The first question for the jury, applying sections 1, 3 and 6, was: *Did the defendants (1) appropriate the bicycle dishonestly by taking it, (2) intending permanently to deprive the owner of it or intending to treat the bicycle as their own to dispose of regardless of the other's rights?* The taking of the bicycle was itself a sufficient assumption of the rights of the owner to amount to an appropriation. The abandonment was capable of being additional *evidence* that by taking

the bicycle the appellants were, when they took it, assuming the rights of the owner (section 3). The jury could not be sure of theft, however, unless they were also sure that at the time of taking the bicycle either the appellants had an intention permanently to deprive (section 1) or they intended to treat the bicycle as their own to dispose of regardless of the other's rights (section 6). The jury did not receive these directions.

12. If the charge had been theft only, and the jury was not sure that at the moment of taking the appellants dishonestly appropriated the bicycle with intent (actual or deemed) permanently to deprive, they could next consider whether there was a later appropriation at the time of the abandonment. In that event the question for the jury would be: *Did the appellants, when they abandoned the bicycle, (1) assume the rights of an owner, (2) intending permanently to deprive the owner of it or intending to treat the bicycle as their own to dispose of regardless of the other's rights?* If so, the offence of theft was committed at the time of the abandonment. This, however, was a charge of robbery. The judge left to the jury the option of concluding that the act of theft was completed not at the time of taking but at the time of abandonment. If the theft was committed only at the moment of abandonment the prosecution case of robbery was fatally undermined. In those circumstances the prosecution could not prove that force or the threat of force was used before or at the time of and *in order to* steal.

13. The judge's direction to the jury leaves open the real possibility that the jury thought that they could convict of robbery if the requisite intention for theft was formed only when the appellants decided to abandon the bicycle. It is right to observe that the judge proceeded to direct the jury that they had to be sure that "the purpose behind the violence or the threat [was]...the theft of the bike. If it was just a free-standing act of violence not connected with any ulterior purpose to steal the bike, no-one could be found guilty of robbery". It may be that the jury spotted the importance of this direction, namely that they had to be sure that the joint intention to commit the offence of theft had been formed before or at the time of the violence or the threat of violence. Unfortunately, however, the judge did not speak of the appellants' assumption of the owner's rights at the time of the taking, only at the time of abandonment. As we see it, the judge's directions created a risk that the jury would fail to appreciate how significant was their decision as to the moment when the offence of theft was complete.

14. For these reasons, it is our view that the convictions are unsafe, the appeals must be allowed and the convictions quashed.

Robbery and section 6(1) Theft Act 1968

15. As will be apparent from our analysis, in reaching our conclusions we have assumed in the respondent's favour that the act of abandonment was capable of being evidence from which the jury could infer the appellants' intent *at the time of the taking* to treat the bicycle as their own to dispose of regardless of the owner's rights. There has, we are conscious, been much academic and judicial debate as to the scope of the first and generally expressed part of section 6(1). In his article "The Metamorphosis of Section 6 of the Theft Act", [1977] Crim. L. R. 653, J.R. Spencer, as he then was, traced the statutory emergence of section 6 in support of his argument that, despite the wide terms in which the first part of section 6(1) was drawn, the Parliamentary intention had been only to embrace the common law exceptions to the literal requirement for an intention permanently to deprive the owner of his property (as to which see Smith and Hogan Criminal Law, 13th Edition, Professor Ormerod, at page 834). In *Warner* [1970] 55 Cr App R 93, Edmund Davies LJ said at page 96:

> "Although it [the Theft Act] makes new law in certain respects, nowhere does it abandon the basic conception both of the common law and of earlier legislation that there can be no theft without the intention of permanently depriving another of his property."

At pages 96 - 97, he continued:

> "There is no statutory definition of the words "intention of permanently depriving", but section 6 seeks to clarify their meaning in certain respects. Its object is in no wise to cut down the definition of "theft" contained in section 1. It is always dangerous to paraphrase a statutory enactment, but its apparent aim is to prevent specious pleas of a kind which have succeeded in the past by providing, in effect, that it is no excuse for an accused person to plead absence of the necessary intention if it is clear that he appropriated another's property intending to treat it as his own, regardless of the owner's rights. Section 6 thus gives illustrations, as it were, of what can amount to the dishonest intention demanded by section 1(1). But it is a misconception to interpret it as watering down section 1."

In *Warner* the central issue was whether the appellant, who had hidden the owner's tools at work, may have intended to deprive him of the tools for a limited period before returning them, and the appeal was resolved upon the inadequate directions given to the jury on this issue. Had the issue been properly left to jury the appeal would have failed. At page 99, Edmund Davies LJ said:

> "What does not, we think, clearly emerge from the passage just quoted is that the essential question was whether the accused man *ever* formed the intention to deprive the owner indefinitely of the use of his tools. If he had, then he could in certain circumstances be regarded as intending to treat the thing as his own to dispose of, regardless of the other's rights, within the meaning of section 6(1)". [original emphasis]

16. In *Cocks* [1976] 63 Cr App R 79 the defence case was that the defendant had taken the victim's handbag because he was entitled to the return of £5 which she refused to return to him, and he wished to recover the money. He was charged with theft of the handbag. The trial judge directed the jury in accordance with the terms of the first part of

section 6(1). Following *Warner* the Court of Appeal held that he should not have done so. The issue was straightforward, namely whether the defendant had intended permanently to deprive the owner of the handbag. Lord Lane CJ in *Lloyd* [1985] 1 QB 829 (CA), at page 836, expressed the Court's *obiter* view that nothing in section 6 should be construed as an intention permanently to deprive which would not have been so construed prior to the Act of 1968. The Court in *Bagshaw* [1988] Crim. L. R. 321 expressed a contrary view: "There may be other occasions on which section 6 applies". In *Cahill* [1993] Crim. L. R. 141 (CA), the defendant had removed a stack of newspapers from the doorway of a newsagent's shop and left them in the doorway of a friend's house as a practical joke. The Recorder gave a direction of law based upon section 6 but omitted an essential reference to the intention "to treat the thing as his own to *dispose* of". The court held this was a material misdirection. Merely to treat the property as one's own was not enough. The intention required was an intention to treat the thing as one's own to dispose of, meaning "to get rid of, to get done with, finish". Professor JC Smith pointed out in his commentary that without the quoted words nothing was added to the meaning of appropriation provided by section 3. He expressed the opinion:

> "Section 6 need only be invoked where the defendant expected the property ultimately to find its way back into the hands of the owner."

The central issue of construction was again confronted by the Court in *Fernandes* [1996] 1 Cr App R 175 in which at page 188 Auld LJ said:

> "In our view, section 6(1), which is expressed in general terms, is not limited in its application to the illustration given by Lord Lane CJ in *Lloyd* [ransoming the owner's goods]. Nor, in saying that in most cases it would be unnecessary to refer to the provision, did Lord Lane suggest that it should be so limited. The critical notion, stated expressly, in the first limb and incorporated by reference in the second, is whether a defendant intended "to treat the thing as his own to dispose of regardless of the other's rights". The second limb of subsection (1), and also subsection (2), are merely illustrations of the application of that notion. We consider that section 6 may apply to a person in possession or control of another's property who, dishonestly and for his own purpose, deals with that property in such a manner that he knows he is risking its loss."

With respect, we find this reasoning compelling. We find no sign in section 6(1) or (2) that the governing and general words in subsection (1) were intended to be limited to specific common law exceptions to the requirements of section 1. It would have been a simple drafting device to say so (as in the Criminal Justice Act 2003). What section 6(1) requires is a state of mind in the defendant which Parliament regards as the equivalent of an intention permanently to deprive, namely "his intention to treat the thing as his own to dispose of regardless of the other's rights". The subsection does not require that the thing has been disposed of, nor does it require that the defendant intends to dispose of the thing in any particular way. No doubt evidence of a particular disposal or a particular intention to dispose of the thing will constitute evidence of the defendant's state of mind but it is, in our view, for the jury to decide upon the circumstances proved whether the defendant harboured the statutory intention.

17. Nevertheless, the Court made clear in *Mitchell* [2008] EWCA Crim 850 that the taking of a vehicle for "joyriding" and its theft are quite different offences and the distinction must not be blurred. The defendant had by force or the threat of force taken the loser's vehicle as a getaway car and abandoned it a few miles away with the engine running, lights flashing and the doors open, in order to change to another vehicle. He was charged with robbery. The Court held that the evidence was not capable of supporting a charge of theft. At paragraph 26 Rix LJ said:

> "**[26]** At some point during his submissions Mr Jackson [counsel for the prosecution], before being reminded of the words "to dispose of", which Professor Smith had emphasised in his Law of Theft (see above) and which this court similarly picked up in *Cahill*, omitted those words and emphasised, as we can well understand him saying, that the treatment of Mrs Davis showed an intention to treat the BMW as the Defendant's own regardless of the other's rights (but omitting the words "to dispose of"). Of course, everything about the taking and use of the BMW, like any car taken away without the owner's authority, indicates an intention to treat such a car regardless of the owner's rights. That is the test of conversion in the civil law. But not every conversion is a theft. Theft requires the additional intention of permanently depriving the owner or the substituted intention under s 6(1). The fact that the taking becomes more violent, thereby setting up a case of robbery, if there is an underlying case of theft, does not in itself turn what would be a robbery, if there was a theft, into a case of robbery without theft. The theft has to be there without the violence which would turn the theft into robbery."

At paragraph 28 he concluded:

> "**[28]** In our judgment the facts of this case simply do not support a case to go before a jury of theft and therefore robbery of the BMW. The BMW was plainly taken for the purposes of a getaway. There was nothing about its use or subsequent abandonment to suggest otherwise. Indeed, its brief use and subsequent abandonment show very clearly what was the obvious *prima facie* inference to be drawn from its taking which was that the occupants of the Subaru needed another conveyance that evening. We therefore consider that the judge erred in being beguiled by s 6 into leaving this count of robbery to the jury."

18. Sir Igor Judge, then President of the Queen's Bench Division, expressed the following view of the Court as to the scope

of section 6 in *Raphael* [2008] EWCA Crim 1014 at paragraph 46:

> "**[46]** Initially, s. 6(1) was narrowly construed. In effect the principles which existed before the 1968 Act came into force continued to apply. (*Warner* 135 JP 199, (1970) 55 Cr App Rep 93, [1971] Crim LR 114 followed in *Lloyd*). We ourselves doubt whether the statutory framework created by the Theft Act 1968 should always be restrictively interpreted by reference to the law as it stood before it was enacted. Authorities such as *Duru* [1973] 3 All ER 715, [1974] 1 WLR 2, 58 Cr App Rep 151; *Bagshaw* [1988] Crim LR 321 and *Fernandez* [1996] 1 Cr App Rep 175 suggest the contrary..."

It was unnecessary for the Court to reach a conclusion as to whether a wider construction of section 6 was required since upon the narrow construction accepted by Lord Lane CJ in *Lloyd* there was in *Raphael* ample evidence of theft:

> "**[48]** The express language of section 6 specifies that the subjective element necessary to establish the mens rea for theft includes an intention on the part of the taker "to treat the thing as his own to dispose of regardless of the other's rights". In our judgment it is hard to find a better example of such an intention than an offer, not to return Adeosun's car to him in exactly the same condition it was when it was removed from his possession and control, but to sell his own property back to him, and to make its return subject to a condition or conditions inconsistent with his right to possession of his own property.
>
> **[49]** This is not a case in which the vehicle was taken for what is sometimes inaccurately described as a "joy ride". Section 12 of the Theft Act has no application to it. It was only "abandoned" after the purpose of the robbery had been frustrated and its possible usefulness to the robbers dissipated. Equally the appropriation of the car was not conditional in the sense described in *Easom* [1971] 55 CAR 410 where it was held that theft was not established if the intention of the appropriator of the property was "merely to deprive the owner of such of his property as, on examination, proves worth taking and then, on finding that the booty is to him valueless, leaves it ready at hand to be re-possessed by the owner"."

19. Finally, we would draw attention to an unreported decision of the Divisional Court of the Queen's Bench Division in *The Chief Constable of Avon and Somerset Constabulary v Smith and another* (CO/661/84, 20 November 1984) (Goff LJ and McCullough J). The defendants broke into a parked car and removed a briefcase and an attaché case. Having searched them they concealed the briefcase in a nearby hedge and the attaché case in a public lavatory cubicle. In giving the leading judgment with which Goff LJ agreed, McCullough J said:

> "In my judgment, there plainly was evidence capable of establishing intent, at the time the briefcases were taken from the car, permanently to deprive the owner of them. There was clearly evidence capable of amounting to an intention, at that moment, to treat the briefcases as the respondent's own, to dispose of regardless of the true owner's rights. They were in fact so disposed of. They were not taken back to the car; one was thrown into a hedge and the other was left in the public lavatory. This evidence of disposal was, in my judgment, evidence from which one might infer an intention within the terms of section 6(1) at the time of the disposal and, having regard to considerations of time and distance, it was evidence from which one might also infer that the same intention existed at the time the articles were removed from the motor car."

As to the possibility of a later appropriation with the requisite intent McCullough J said:

> "In any event, there is an alternative way in which the Crown Court could have thought there was sufficient evidence of theft, even if it was of the view that the original appropriation which began when the briefcases were first seized was over by the time of their disposal. At that time there was, in my judgment, evidence that the respondents were assuming a right to deal with them as owners. If so, there was evidence of an appropriation at the time of disposal: section 3(1). There was also sufficient evidence of an intention at that moment permanently to deprive and of dishonesty. So, even if there was no evidence that the original appropriation was still at that moment continuing, it would have been open to the court to say that there was evidence that all three elements of theft were present at the time of disposal."

In our view, this decision represents the plain common sense of most cases of alleged theft of property. If the prosecution is unable to establish an intent permanently to deprive at the moment of taking it may nevertheless establish that the defendant exercised such a dominion over the property that it can be inferred that at the time of the taking he intended to treat the property as his own to dispose of regardless of the owner's rights (c.f. *Easom* in which the handbag was replaced approximately in the position from which it had been removed). Subsequent "disposal" of the property may be evidence either of an intention at the time of the taking or evidence of an intention at the time of the disposal. When the allegation is theft a later appropriation will suffice; when the allegation is robbery it almost certainly will not. In *Smith* the manner in which the property was disposed of was evidence supporting the inference of the section 6(1) intention; in *Mitchell* the manner in which the car was abandoned, and in *Easom* the replacement of the handbag, could not support the inference.

Conclusion

20. In the present case, we conclude that it was open to the judge to invite the jury to consider whether the later abandonment of Mr De-Nijs' bicycle was evidence from which they could infer that the appellants intended *at the time of the taking* to treat the bicycle as their own to dispose of regardless of his rights. If that was the way the judge had

chosen to leave the issue of intent to the jury, an explicit direction would have been required explaining that an intention formed only upon abandonment of the bicycle at the bus shelter was inconsistent with and fatal to the allegation of robbery. In the absence of such an explanation, it seems to this court that the verdicts were unsafe and must be quashed. This is not a case in which the Court should substitute a conviction for theft or taking a pedal cycle. These alternatives were not left to the jury. Count 2 was the only alternative the jury was invited to consider and the jury was discharged from reaching a verdict upon that count.