

CITATION: *Peach v Henderson* [2006] NTMC 060

PARTIES: David Nicholas Peach
v
Helen Jeyamony Henderson

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Criminal

FILE NO(s): 20312879

DELIVERED ON: 28 June 2006

DELIVERED AT: DARWIN

HEARING DATE(s): 19 & 20 June 2006

JUDGMENT OF: D LOADMAN, SM

CATCHWORDS:

Stealing contrary to Section 210 of the Criminal Code – onus on Prosecution – inter alia to disprove an hypothesis advanced by or on behalf of the defendant consistent with innocence and not for the defendant to prove the hypothesis

REPRESENTATION:

Counsel:

Plaintiff: Ms Heske
Defendant: Mr Rowbottom

Solicitors:

Plaintiff: Summary Prosecutions
Defendant: Withnalls

Judgment category classification: B

Judgment ID number: 2006 [NTMC] 060

Number of paragraphs: 36

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20312879

BETWEEN:

DAVID NICHOLAS PEACH
Appellant

AND:

HELEN JEYAMONY HENDERSON
Respondent

REASONS FOR DECISION

(Delivered 28 June 2005)

Mr David LOADMAN SM:

1. The Charge Relates to the alleged theft of the following items
 - (i) A single packet of orange Tic Tacs, a multi pack of Tic Tacs (precisely how many single packs are contained allegedly in such an item the Court does not know).
 - (ii) A greeting card and pink envelope.
 - (iii) One large tin of Milo.
 - (iv) A large sized Pantene shampoo and hair conditioner.
2. The Defendant entered the Coles store pushing a trolley. An allegedly empty bag was hanging from the child seat inside the trolley and was from Big W. In the trolley was another bag from Big W and a third bag which was from PriceLine. The bag hanging from the child seat was empty "...It was obvious to tell the way it would have been moving that there was, there were not any items in it". The Court remarks immediately that that

observation is not comprehended. There was a child located in the child seat of the trolley.

(Transcript T8.)

3. A second child was in the body of the trolley and Adair (a Store Security Officer) concluded as a consequence of forming the view about the empty Big W bag that the Defendant was a potential shop lifter.
4. Having entered the confectionery section “she selected a packet of – a single packet of orange Tic Tacs which she opened up and gave to the child to begin to consume them. She also selected a multi-pack, which is where you have several packets of the Tic Tacs in a sealed bag, which was then put into the trolley T10.
5. “She went to our magazine come card area where she selected a card that was in a pink envelope and put it in the envelope”. Apparently this section is about five to six metres from the confectionery section. T10.
6. In the coffee aisle “it was there that I saw her select the tin of Milo and place that...”. T11. The Milo allegedly was placed at the back of the trolley where allegedly a Big W bag was placed to conceal the Milo tin. The height of the tin was 20 to 30 centimetres. The Defendant then entered the Health and Beauty section aisle prior to which she had selected unidentified items in general shopping. “...I saw her select two large bottles of Pantene shampoo and conditioner which she placed in the back of the trolley”. T12
7. In the “toilet paper” aisle she walked past the Defendant conversing with another staff member, allegedly overhearing a request to leave some footwear on one of the children until such time they had been paid for. She allegedly observed these shoes being put back on the shelf. T13
8. She then went through the freezer, dairy and bakery selection and then the checkout. The Milo was not removed at the checkout. T14

9. Peculiarly Adair said all the loose things in the trolley were removed at the checkout. It is common ground that they were not all paid for and this piece of evidence is incomprehensible.
10. “I introduced myself to her as a Loss Prevention Officer from Coles. I outlined my observations to her and – in regards to the Milo her response was that she got it from Big W”. T14
11. At this moment the Defendant allegedly had the handles of the trolley pushing it Adair was in front of her. T23
12. “I told her that she had not (got the Milo from Big W) and advised her of my observations that I followed her from the time she entered the store

And what does she say in return if anything? ---I can’t recall” (this Court’s underlining). There was then some evidence about an offer on the Defendant’s part to pay for the Milo although at T24 the word “money” is used (presumably a mistake). She refused to return to the store, but upon the threat of calling centre security down the Defendant returned to the store. The rest of the exchange is not relevant.
13. The Defendant provided details of her driver’s licence and address in the Point of Sale office in the store. The Cole’s receipt for the purchases ultimately found its way into evidence as D2 and records that on the 1 May 2003 one Niki at 10:56am processed the sale of “fresh WHT CHS BCN rolls 6pk and then two further items of the same kind, seedless grapes, 250ml Circle drink, fuji apples, rice snack/cheese, chicken munchees, jam fancies, rice pepper crackers x two, a stapler and two packets of Pringle chips, a total of 15 items at a cost of \$33.98. Self evidently the card, the Tic Tacs, the shampoo and conditioner are not reflected on that receipt (although removed from the trolley). T28 (and see 9 above)
14. Adair said she located the Pantene shampoo and conditioner, Tic Tacs and the card and the pink envelope she said in a Big W bag. The Defendant

maintained a pink envelope and card was in Fila bag which Adair said was not at any stage in the shopping trolley.

15. A photograph of these items was excluded by the Court for reasons given at the time. Nothing revelatory can be gleaned in any event from that photograph save the face of the envelope is not visible it being common ground that the four items in question had not been paid for at Coles. The single pack of Tic Tacs opened and from which some confectionery was allegedly given to one of the Defendant's children doesn't seem to have been located and is not referred to in any further evidence. Bearing in mind the Defendant had provided her driver's licence and the particulars of it; it seems a little melodramatic and indeed confirmatory of unnecessary zealotry on the part of Adair that there was then a following out to the car park to get the registration number which would not have advanced the matter at all. T36 The furthest point from the Defendant that Adair took up at any time was approximately the length of the aisle namely 30 metres. T36.
16. She was certain that the Fila bag was not in the trolley. Security tape reflects that to be incorrect.
17. At T37 she concedes there would have been times including the confectionery area where she could not see the Defendant.
18. Adair gave evidence on 19 June and surprisingly had never seen the security videos, Exhibit P6. She was pressed to recount the exact words uttered by her and to her during her interview of the Defendant, but she unsurprisingly said she could not do so. She could not recall recovering the receipt exhibit D2. She conceded the Defendant had requested that she be allowed to pay for the Milo. For the first time she revealed that her observation of the Defendant at the health and beauty section had been by way of a reflection in a compact mirror in other words she had her back to the Defendant. She conceded there were gaps in her observation of Defendant intermittently.

19. Nothing of particular utility emerges from the evidence of the other prosecution witnesses save obviously that Sarah Speed always did exist despite Adair's denial and any contention that she was a fictitious person has no merit. Sandra Sneddon a person with 15 years of familiarity with the computer data base and its operations described several exercises undertaken by her. In effect none of the coded chattels were reflected as having been sold together in the system until 11:30am on the 1 May 2003. There is in accordance with the evidence of both the Prosecution and the Defence the evidence of the exchange and no probative value is therefore capable of attaching to this evidence because it is quite possible these items were never discreetly charged for but some of the other items for instance the clothing was.
20. Perhaps unfortunately she was not asked to explain how charges would have been made if goods were returned for exchange as was the alleged position by the Defendant.
21. The defendant said that on the day she had first gone to Big W with her two children to do some shopping and a specific reason for going to Big W was to locate an eight pack of Poppers. She said that she had purchased some clothing on a prior occasion and she was exchanging that clothing for other items. She denied ever saying to Adair that she had bought the Milo from Big W and asserted that she had taken it from the shelf in Coles and had simply overlooked payment at the checkout. She also explained that the conversation with the staff member in relation to the shoes was in relation to sandals that had been left behind or lost and he told her what to do about that. That evidence is accepted in preference to the Adair's version of what she allegedly overheard.
22. She said that she had purchased the conditioner, shampoo and Tic Tac products from Big W and that at all times a card, not from Coles, was located in the Fila bag with a stamped but not an addressed envelope. She

said that she was not certain how the Big W checkout person had dealt with the charging up of what she had to pay for. She said that she was entitled to a credit of \$28.40, but with the purchases she had made and the substituted clothing she took by way of exchange she could not say for what items she had been charged.

23. The relevance of this particular piece of evidence as debated with Ms Heske is that it obviously allows the conclusion that the shampoo conditioner and Tic Tacs may not have been reflected on the cash registrar receipt issued at Big W at all, but in the event the Big W receipt was not in evidence. It has been alleged by the Defendant that Adair had removed the receipt, Adair contending that she had looked at it, implying she had not removed it.
24. Of course this receipt would be a critical piece of evidence and it is significant that on the 13 May 2003 the Defendant addressed a letter a copy of which is P7 in the proceedings complaining about Adair's actions, but also asserting that in a paragraph numbered three "...and TOOK ALL MY SHOPPING DOCKETS that I had from other shops and Coles". The Court would have expected this to be specifically addressed by her evidence, but it was not.
25. The Defendant said it was about 10:00 or 10:15 that she left Big W having completed her shopping there. Mr Rowbottom argued it was not possible to say what actually had been charged to the Defendant by Big W therefore he had not pursued the proof of what Big W computer records showed for the day. The fact that they may have shown nothing, was simply confirmatory of what his client had said, that is some charge had been made over and above the \$28.40 and was not possible to say for what items the charging had occurred. The Court must and does accept that as a reasonable hypothesis.
26. The Defendant denied that in the interview with Adair, shampoo and Tic Tacs had been removed from the trolley and although that creates a conflict

in the evidence between the two women it doesn't seem to the Court to be particularly important or probative of any critical issue. Whether Adair was correct or whether the Defendant was correct those particular chattels were quite obviously in the shopping trolley when it was searched by Adair.

27. She said that Adair had never questioned her about the shampoo, conditioner or the card, but did ask her where she obtained the Tic Tac product. She denied ever saying that the Milo had been obtained by Big W contending in Court that she had consistently maintained that she had indeed taken the product from Coles and not paid for it, but explained how that had occurred.
28. She said that Sandra Parsons had opened the door to allow her to leave the interview room where Adair had interviewed her. She said that the stapler which was one of the items on D2 had been purchased the same day and that item had been obtained in a location parallel to the health and beauty aisle, but two down.
29. Clearly there was no observation by Adair of the Defendant in that location or the taking of a stapler from anywhere at all. Sandra Parsons gave evidence after being subpoenaed by the defence and recalls seeing the Defendant in Coles supermarket on that day. She was summoned as she puts it to the interview room and she heard Adair asking for receipts for chattels purchased although she couldn't recall what those chattels were. The Defendant she described as angry and Adair a little bit rude. She was opening all the bags in the trolley without having the Defendant's permission to do so and she did not observe anything being removed from the trolley by Adair.
30. The overwhelming reality is that from the moment Adair laid eyes on the Defendant on the 1 May she was convinced that the Defendant was going to indulge in shoplifting. That is a highly relevant factor since it is obviously something which could have coloured her observations and perceptions. "Perception is reality" – a phrase of particular application here.

31. In relation to the single packet of Tic Tacs firstly there is no evidence they were found in the trolley or anywhere else after the Defendant was apprehended. The Defendant was unequivocally in possession of a multi pack. She says that she purchased that item at Big W. Ms Heske urged me to observe from the security tape Adair's capacity to have observed what she said she did. The Court played the tape several times. It appears to this Court that at the moment Adair passed the Defendant she was at the very end of the confectionery aisle and certainly once Adair becomes visible again she is totally unable to see the Defendant at that time. For some time prior to Adair's appearance on the video the Defendant is in front of what is apparently the confectionery aisle. The video certainly cannot exclude the possibility that if there was a multi pack taken from the Coles shelf it was not put back. The Court's simply not prepared on the evidence to find that there was an acquisition and retention of a multi pack of Tic Tacs.
32. In respect of the pink envelope and the card there is no evidence of where it was placed. There is indeed no evidence that it was placed in the trolley. The Defendant admits that a pink envelope with a card in it was in the black sports bag that Adair denied was in the trolley. The evidence is unsatisfactory in relation to being able to find as a fact that there was an acquisition and a retention of a card and envelope and this Court is not prepared to find that the card which the Defendant admits was in her possession was a card acquired and secreted at Coles by her.
33. The Defendant admits selecting the large tin of Milo and not paying for it. The only incriminating aspect of Adair's evidence in regard to the Milo is the alleged statement that the Defendant obtained the Milo from Big W. The unsatisfactory state of exactly what was said by Adair is apparent and was pressed by Mr Rowbottom with no success. Assuming that she did outline the observations about which she gave evidence, and if she did it is inexplicable or why she couldn't say so, then clearly there is a serious possibility of confusion because the Defendant maintained and always

apparently has maintained that the Pantene Shampoo and conditioner and the Tic Tak multi pack were acquired at Big W. The Court does not look upon the statement appearing in transcript 14 with any degree of conviction and accepts the Defendant's version of events namely that she selected the tin of Milo and put it in the trolley intending to pay for it and forgot to do so.

34. Adair then alleges that she observed selection by the Defendant of a bottle of Pantene shampoo and conditioner. Although there is an assertion by Adair that she made the observation there is a denial by the Defendant and an explanation as to where they came from. The Court recites the trite position that the onus of proving beyond reasonable doubt the facts and the elements of the offence rests on the Prosecution. The Court says that there is an explanation as to what occurred in Big W which is of course consistent with innocence and it is not for the Defendant to establish the truth. It is for the Prosecution to establish the negative, that is that beyond reasonable doubt she did not purchase the relevant items at Big W.
35. There is no positive identification of the shampoo conditioner and Tic Tacs as having in some way a proprietary connection with Coles. There is no evidence that the code on each of the items (assuming there was one) for instance identified the chattels as the products of Coles. Exhibit D1 and P2 don't take the matter anywhere and the evidence of Sneddon doesn't exclude the explanation given by the Defendant as being a valid explanation.
36. In those circumstances the Court is not prepared to find the Defendant's guilt proved beyond reasonable doubt and the Defendant is entitled to and is found not guilty and is discharged.

Dated: 26 June 2006

DAVID LOADMAN
STIPENDARY MAGISTRATE