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| **Judgments - Hinks (On Appeal From The Court of Appeal (Criminal Division)**  For the sake of completeness, I should mention that it is not necessary for the present appeal to consider the questions of timing that may arise in relation to appropriation. A carrier may receive goods of which he intends to deprive the owner at a convenient moment. (*R v Skipp* [1975] Crim.L.R. 114, *R v Fritschy* [1985] Crim.L.R. 745.) If goods are entrusted to the defendant for one purpose and he takes possession of them for another, it may well be that he has then and there appropriated them since he is thereby assuming the rights of an owner not those of a bailee. This also helps with understanding the supermarket cases. Putting back an article which has been lifted off the shelf in order to read the label or packet does not without more assume any right of ownership. Nor does taking the article to the check-out in order to offer to buy it; that is merely to comply with an implicit request by the owner (the supermarket). On the other hand to interfere with the price label or to take the article with the purpose of smuggling it out of the shop without paying is an assumption of the rights of an owner. (*R v Morris*)    The considerations which I have discussed now at some length all lead to the conclusion that sections 1 to 6 of the Theft Act should be read as a cohesive whole and that to attempt to isolate and compartmentalise each element only leads to contradictions. This vice is particularly clear where alleged gifts are involved. In such a situation greater care in the analysis is required under sections 2, 3 and 5 and it will normally be necessary to direct the jury in fuller terms and not merely ask them if they think that the defendant fell below the standards of an ordinary and decent person and realised that such persons would so regard his conduct.*The Authorities: The House of Lords:*    The appellant has submitted that your Lordships should, if needs be, over-rule *R v Lawrence* [1972] AC 626 and *R v Gomez* [1993] AC 442. I do not consider that either case should be over-ruled nor is it necessary for the decision of the present case. Neither is inconsistent with my analysis of the law. What appears to have happened is that some of the language used in the three successive House of Lords decisions (*Lawrence, Morris, Gomez*) has been misread without sufficient regard to the context in which the language in each case was used and without a constructive consideration of the intent of sections 1 to 6 as a whole.*Lawrence* was the case of the deceitful taxi driver and the foreign student. It was decided shortly after the Theft Act came into force. The two questions certified were questions of the construction of the Theft Act. They both sought to perpetuate features of the Larceny Act and rightly received a robust response. The first was whether the words "without the consent of the owner" should be read into s.1(1). The second was whether s.1 and s.15 were mutually exclusive. The student had allowed the taxidriver to take £6 out of his wallet (making £7 in all) for a 10s. 6d. fare. The transaction was vitiated by the taxidriver's fraud; in truth the student never agreed to pay him £6. The taxidriver got the money as the result of a mistake of the student induced by the taxidriver's fraud. The facts of the case fell "far short" of establishing that the student had consented.    Viscount Dilhorne with whom the other members of the House agreed said, at p. 632:"That there was an appropriation in this case is clear. Section 3(1) states that any assumption by a person of the rights of an owner amounts to an appropriation. Here there clearly was such an assumption. That an appropriation was dishonest may be proved in a number of ways. In this case it was not contended that the appellant had not acted dishonestly. Section 2(1) provides, inter alia, that a person's appropriation of property belonging to another is not to be regarded as dishonest if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it. *A fortiori, a person is not to be regarded as acting dishonestly if he appropriates another's property believing that with full knowledge of the circumstances that other person has in fact agreed to the appropriation*." (emphasis supplied)This passage, including the important (but sometimes overlooked) sentence which I have emphasised, supports what I have said above in relation to s.2(1)(b). He added:"Belief or the absence of belief that the owner had with such knowledge [*ie* knowledge that £7 was far in excess of the legal fare] consented to the appropriation is relevant to the issue of dishonesty, not to the question whether or not there has been an appropriation."    If one asks the question "was there a dishonest appropriation?" the need to make the distinction disappears. The perceived difficulty only arises because the definition is fragmented. As I have pointed out in relation to s.5(1), where the defendant himself removes the property from the owner, he will be taking property belonging to another. The situation in *Lawrence* is not problematical. The whole transaction was driven and coloured by the taxidriver's fraud. It does not strain the language to describe what happened as an appropriation of property belonging to another. It was never a case of consent except possibly in a technical Larceny Act sense. The damaging legacy of the *Lawrence* judgment has been the adoption of the fragmented approach and the separation of the statement that consent was not relevant to appropriation from its context and from the accompanying statement that knowledge of actual consent is incompatible with dishonesty.    The second question was answered by saying that sections 1 and 15 were not mutually exclusive. This of itself should not have caused any further difficulty once an authoritative decision had been given. But a reluctance to leave behind the features of the law of larceny has meant that the inter-relation of those sections has been a recurring sub-plot in the decisions subsequent to *Lawrence*.*R v Morris* [1984] AC 320 was a supermarket case. The defendant dishonestly switched the labels so as to show lower prices. He then acquired the goods by paying only the lower price at the check-out as was his intention throughout. The submission was that this fell outside s.1(1) and could only come within s.15(1), obtaining property by deception, and that the changing of the label was only relevant to the deception. (The significance of the distinction was apparently to the time at which the offence was committed and the consequences which flowed from that: pp.334-335.) The House unanimously agreed with Lord Roskill in rejecting the submission. He held that an assumption of *any* of the rights of an owner would suffice and answered the certified question by saying that such conduct did amount to a dishonest appropriation where it "adversely interferes with or usurps the right of the owner to ensure that the goods concerned are sold and paid for" at the full price. Lord Roskill clearly treated the phrase "dishonestly appropriates" as a composite one (a view which seems to have led him to distinguish the example of the practical joker: p.332).    In the Court of Appeal in *Morris* Lord Lane, CJ [1983] QB 587, 596 had expressed the opinion that merely taking the goods to the check-out in order there to pay the proper price was an appropriation. Lord Roskill disagreed [1984] AC 320, 332. It was not an assumption by the shopper of the rights of the supermarket."In the context of s.3(1), the concept of 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 usurpation of those rights. When the honest shopper acts as I have just described, he or she is acting with the implied authority of the owner of the supermarket to take the goods from the shelf, put them in the trolley, take them to the checkpoint and there pay the correct price at which moment the property in the goods will pass to the shopper for the first time. It is with the consent of the owners of the supermarket, be that consent express or implied, that the shopper does these acts ..."Applying the same reasoning to the case of the dishonest shopper who removes goods from the shelf and hides them in her shopping bag intending from the very beginning to steal them, he approved the decision in *R v McPherson* [1973] Crim.L.R. 191 that in that situation there was an appropriation.    The contentious part of this decision was (or should have been) the treatment of the assumption of *any* right of an owner as sufficient for s.3. But, given their decision on that point, the decision is wholly consistent with the decision in *Lawrence* and is free from the influence of the language of Visct. Dilhorne which I have criticised. On the same basis, the decision and the speech of Lord Roskill correctly understood the intent of sections 1 to 6 of the Theft Act: this was clearly the view of the remainder of the House and is a view I respectfully share.    However, some of the language used by Lord Roskill itself gave rise to difficulty. It was believed that he had been saying that any consent to the act of the defendant necessarily negatived appropriation and that he was contradicting *Lawrence*: fraudulently induced consent would be as conclusive as any other form of consent or authorisation. This belief was only plausible if the reader of his speech was adopting the mind-set of the Larceny Act. It is clear that Lord Roskill was not intending to contradict the decision in *Lawrence*.    It was in these circumstances that the matter of consent and fraud was brought back before your Lordships' House nine years later in *Gomez* [1993] AC 442. The defendant, Gomez, an employee of a shop selling electrical goods, fraudulently accepted from an associate called Ballay cheques, which both of them knew to have been stolen, against an order by Ballay for goods. Ballay collected the goods a few days later after the shop manager, deceived by Gomez's fraudulent statements, had authorised the 'sale'. Gomez and Ballay were convicted of theft contrary to s.1(1). The argument was that, since the manager had authorised the transaction, there could not have been any appropriation. The Court of Appeal accepted this submission.    The certified question asked whether there has been an appropriation where "that which is alleged to be stolen passes to the defendant with the consent of the owner, but that has been obtained by a false representation". It therefore starts from the premise that there has been overt and directly relevant dishonesty and that the acquisition comes squarely within s.5(4) and (1). The significance of the argument would again seem to be to whether s.1 or s.15 was the relevant section, a point which had already been disposed of by *Lawrence*. The question also asked, puzzlingly in view of the premise, but obviously directed at Lord Roskill's choice of words: "Must such a passing of property necessarily involve an element of adverse [interference] with or usurpation of some right of the owner?". It might be thought that to obtain possession of another's goods by fraudulently causing him to allow you to do so would be a clear case of an adverse interference with his rights.    It was in this connection that Lord Keith of Kinkel said, at p.460:"While it is correct to say that appropriation for purposes of s.3(1) includes [an unauthorised interference], it does not necessarily follow that no other act can amount to an appropriation and in particular that no act expressly or impliedly authorised by the owner can *in any circumstances* do so. Indeed *R v Lawrence* is a clear decision to the contrary since it laid down unequivocally that an act may be an appropriation notwithstanding that it is done with the consent of the owner. It does not appear to me that any sensible distinction can be made *in this context* between consent and authorisation." (emphasis supplied)    The context is consent or authorisation induced by fraud. That was the subject matter of the primary question asked. That this is the context to which Lord Keith is referring is confirmed by his reference to *Lawrence*. Lord Keith is emphatically not saying that consent or authorisation *not* induced by fraud cannot be relevant to the question of appropriation for the purposes of the definition of theft.    This reading is further confirmed by quotations from the judgment of Parker LJ in *Dobson v General Accident Fire and Life Insurance Corporation Plc*[1990] 1 QB 274 which Lord Keith agreed with and adopted at p.463H:"Moreover, on general principles, it would in my judgment be a plain interference or usurpation of an owner's rights by the customer if he were to remove a label which the [supermarket] owner had placed on goods or put another label on. It would be a trespass to goods and it would be usurping the owner's rights, for only he would have any right to do such an act and no one could contend that there was any implied consent or authority to a customer to do any such thing. There would thus be an appropriation." (p.461-2)"I have reached the conclusion that whatever *R v Morris* did decide it cannot be regarded as having over-ruled the very plain decision in *R v Lawrence* that appropriation can occur even if the owner consents and that *R v Morris* itself makes it plain that it is no defence to say that the property passed under a voidable contract." (p.463)What Parker LJ, and through him Lord Keith, is doing is rejecting the misreading of Lord Roskill's speech. Neither is saying that consent and authorisation are irrelevant to appropriation but, rather, that they do not necessarily exclude the possibility of appropriation. The consent or authority may be limited in its scope and not cover the acts done by the defendant because the defendant has an unauthorised purpose (Parker LJ; and *Morris*) or the consent or authorisation may have been obtained by fraud (*Lawrence*; and *Gomez*). The fundamental argument which all these authorities are having to battle with is the resurrection of the former possession-based rule that consent negatived larceny, distinguishing between larceny by a trick and obtaining by false pretences. It is clear that the Theft Act declined to adopt that rule and defined theft in terms which were not dependant on it.    Lord Keith's speech includes language which is capable of giving rise to the same difficulties as that upon which I have commented in the speech of Visct. Dilhorne in *Lawrence* and it contains criticisms of the speech of Lord Roskill in *Morris* which for my part I do not consider to have been justified. But its main thrust is that consent or authorisation can be relevant to the question of appropriation though not in circumstances such as those in *Lawrence* and *Gomez*. It does not justify the decision of the Court of Appeal in the present case where *ex hypothesi* there is no fraud.    The speech of Lord Browne-Wilkinson is differently reasoned. He recognises that the Theft Act uses the composite phrase "dishonestly appropriates". But he then proceeds (it may be thought, inconsistently and with a lack of logic) from this to the adoption of a meaning of appropriate "in isolation" which is devoid of any content dependant upon the mental state of the owner or the accused. He goes further than Lord Keith. But he does not refer to any of the difficulties discussed earlier which would arise from that view nor does he consider the elaboration of the criterion 'dishonestly' which is necessary in order to preserve the contextual meaning of the composite phrase. If the criterion 'appropriates' is to become less discriminating, the criterion 'dishonestly' has to become more discriminating in order to retain the meaning of the composite phrase in its context in sections 1 to 6 of the Act.    The dissent of Lord Lowry is based upon the need in his view to preserve the same type of distinction between sections 1 and 15 of the Theft Act as formerly existed between sections 1 and 32 of the Larceny Act. If anything, that disagreement lends force to my reading of the speech of Lord Keith.    The decision of the House in *Gomez* set a new agenda. Instead of discussing what had been decided in *Morris*, the discussion now centred upon what had been decided in *Gomez*. It is to be hoped that the present appeal to your Lordships' House will not again have such an unproductive outcome, a consequence which I believe will be inevitable if this appeal is not allowed and a return made to construing sections 1 to 6 as a coherent whole.*The Later Authorities:*    In *R v Mazo* [1997] 2 Cr.App.R. 518, the defendant had worked as the maid of an 89 year-old lady. The defendant received from the old lady a series of cheques and some valuables which the defendant said were gifts but the prosecution alleged she had stolen. She was convicted of theft. There had been evidence at the trial that the old lady was not mentally competent to make such gifts and that the defendant must have realised this. However, in his summing-up the trial judge directed the jury saying:"If you are sure, first of all, that Lady S gave these cheques and the other items as a result of her reduced mental state; secondly, if you are sure that the defendant, Miss M, knew that but for that mental state those gifts would not have been made and, finally, if you are sure that by acting as she did in accepting them with that knowledge she was acting dishonestly, then in those circumstances you would be entitled to convict her."    On her appeal against her convictions, the defendant submitted that the judge had failed to deal with her defence that she had received valid gifts which she was entitled to accept: had valid gifts been made by a donor competent to make them? The Court of Appeal allowed her appeal. Pill LJ giving the judgment of the Court said, at p.521:"It is clear that a transaction may be a theft for the purpose of s.1(1) notwithstanding that it was done with the owner's consent if it was induced by fraud, deception or a false representation: see *Gomez*. It is also common ground that the receiver of a valid gift, *inter vivos*, could not be the subject of a conviction for theft. In *Gomez* reference was made to the speech of Visct. Dilhorne in *Lawrence*. In the course of his speech with which the other members of the House agreed Lord Dilhorne stated [p.632]: '*A fortiori*, a person is not to be regarded as acting dishonestly if he appropriates another's property believing that, with full knowledge of the circumstances, that other person has in fact agreed to the appropriation.' It is implicit in that statement that if in all the circumstances, there is held to be a valid gift there can be no theft."Later in the judgment Pill LJ referred to the criteria for deciding whether such a gift was valid as explained in *In re Beaney* [1978] 1 WLR 770, having regard to lack of comprehension and mental incapacity. He concluded, at p. 523 with the timely warning that the summing-up created "a danger that the jury would take a view that the appellant's conduct was not of a moral quality of which they could approve and convict her on that ground rather than on the true basis of the law of theft"    In my judgment, my Lords, the explanation of the law in the judgment in *Mazo* is correct and accurately reflects the scheme and purpose of sections 1 to 6 of the Theft Act and demonstrates a correct understanding of the speech of Lord Keith in *Gomez*.*Mazo* was distinguished and not followed in *R v Kendrick and Hopkins* [1997] 2 Cr.App.R. 524. There a residential home where a nearly blind 99 year-old lady was living took control of her affairs. They were given a power of attorney. They liquidated her assets and paid the proceeds into an account which they controlled. They drew out large sums, they said implausibly, with her consent and for her benefit. The defendants were charged with conspiracy to steal and convicted. On the basis of *Mazo*, the summing-up was criticised as not going sufficiently deeply into the question of validity. These criticisms were rightly rejected; the summing-up was not deficient. The appeal was dismissed.    However, the Court of Appeal also criticised the judgment in *Mazo* as not reflecting what was said in *Gomez* particularly by Lord Browne-Wilkinson: the concept of appropriation was distinct from the concept of dishonesty; appropriation could be looked at "in isolation"; other factors, including the incapacity of the donor and fraud only came in in relation to dishonesty; a simple *Ghosh* direction sufficed.    The Court of Appeal in the present case preferred to follow the judgment in *Kendrick and Hopkins* rather than that in *Mazo*. There was probably no conflict between the actual decisions in the two cases. The Court of Appeal in *Kendrick and Hopkins* were justified in dismissing the appeal and, on an overall assessment, rejecting the criticisms of the summing up in that case and upholding the safety of the convictions. They were in error in their adoption of Lord Browne-Wilkinson's view that appropriation should be looked at in isolation.*The Present Case - Conclusions:*    The question certified demonstrates the further step which your Lordships are being asked to take beyond that involved in answering the question in *Gomez*. Does the primary question in *Gomez* receive the same answer if one deletes the words "obtained by false representation"? The Court of Appeal in the present case held that it should. Two strands of reasoning led them to this conclusion. The first was that s.3(1) should be construed in isolation from the remainder of sections 1 to 6. In this they followed the lead given by Lord Browne-Wilkinson and the Court of Appeal judgment in *Kendrick and Hopkins*. I have already explained why I consider that this is wrong.    The second was the view that Lord Keith and Parker LJ had ruled that consent of the owner is always wholly irrelevant to what acts amount to appropriation. They achieved this position only by standing on its head what Lord Keith and Parker LJ had said. What Lord Keith and Parker LJ confirmed was that 'consent' (in the Larceny Act sense) will not necessarily negative appropriation. What Rose LJ has derived from this is that consent can never negative appropriation. (The incomplete quotation by Rose LJ at [2000] 1 Cr.App.R.1, 8 from Parker LJ is revealing.) This leads Rose LJ directly to the position that a valid gift is fully consistent with theft, a proposition which is seriously inconsistent with the scheme of sections 1 to 6 and with other parts of the Act and which is not a proposition to be derived from any of the House of Lords decisions (with the possible exception of the speech of Lord Browne-Wilkinson in *Gomez)*.    To say, as does Rose LJ at p.10, that "civil unlawfulness is not a constituent of the offence of theft" is of course true. That expression does not occur in s.1(1) and it is anyway not clear what it encompasses. But to proceed from there to the proposition that the civil law of property is irrelevant is, as I have explained earlier in this speech, a far greater error.    My Lords, if, contrary to my view, your Lordships are to travel down the route adopted by the Court of Appeal, your Lordships are faced with a choice between two options neither of which are consistent with dismissing this appeal. One option is to accept the 'Browne-Wilkinson' approach and adopt a sanitised concept of appropriation isolated from any context of or interdependence with the other parts of the definition and sections 1 to 6 (particularly sections 2 and 5) *and* then make the necessary qualifications of the concept of dishonesty when the factual issues raised by an individual case require it. The other is to revert to the law as stated by the majority in *Gomez* and by Visct. Dilhorne and, so far as still relevant, by your Lordships' House in *Morris*, and correctly understood by the Court of Appeal in *Mazo*. It is not an option to do neither as happened in the present case. The unqualified *Ghosh* approach cannot survive in conjunction with the 'Browne-Wilkinson' approach.    In my judgment the correct answer is that adopted by Pill LJ but if your Lordships are of a different opinion the least that should be done is to draw attention to and confirm the provisions of sections 2 and 5 and their implications for cases where the issue raised is whether the property alleged to have been stolen was transferred to the defendant as a gift. What must be erroneous is to treat as "belonging to another" property which at the time of the alleged appropriation belongs to the defendant in accordance with s.5(4). Similarly it must be wrong to treat as a dishonest "appropriation of property belonging to another" under s.2(1) an appropriation for which the defendant correctly knows (as opposed to mistakenly believes) he actually had (as opposed to would have had) the other's consent, the other knowing of the appropriation and the circumstances of it (as opposed to the other person only hypothetically having that knowledge).    My Lords, the relevant law is contained in sections 1 to 6 of the Act. They should be construed as a whole and applied in a manner which presents a consistent scheme both internally and with the remainder of the Act. The phrase "dishonestly appropriates" should be construed as a composite phrase. It does not include acts done in relation to the relevant property which are done in accordance with the actual wishes or actual authority of the person to whom the property belongs. This is because such acts do not involve any assumption of the rights of that person within s.3(1) or because, by necessary implication from s.2(1), they are not to be regarded as dishonest appropriations of property belonging to another.    Actual authority, wishes, consent (or similar words) mean, both as a matter of language and on the authority of the three House of Lords cases, authorisation not obtained by fraud or misrepresentation. The definition of theft therefore embraces cases where the property has come to the defendant by the mistake of the person to whom it belongs and there would be an obligation to restore it - s.5(4) - or property in which the other still has an equitable proprietary interest - s.5(1). This would also embrace property obtained by undue influence or other cases coming within the classes of invalid transfer recognised in *In re Beaney*.    In cases of alleged gift, the criteria to be applied are the same. But additional care may need to be taken to see that the transaction is properly explained to the jury. It is unlikely that a charge of theft will be brought where there is not clear evidence of at least some conduct of the defendant which includes an element of fraud or overt dishonesty or some undue influence or knowledge of the deficient capacity of the alleged donor. This was the basis upon which the prosecution of the appellant was originally brought in the present case. On this basis there is no difficulty in explaining to the jury the relevant parts of s.5 and s.2(1) and the effect of the phrase "assumption of the rights of an owner". Where the basis is less specific and the possibility is that there may have been a valid gift of the relevant article or money to the defendant, the analysis of the prosecution case will break down under sections 2 and 5 as well as s.3 and it will not suffice simply to invite the jury to convict on the basis of their disapprobation of the defendant's conduct and their attribution to him of the knowledge that he must have known that they and other ordinary and decent persons would think it dishonest. Theft is a crime of dishonesty but dishonesty is not the only element in the commission of the crime. |