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**IN THE YOUTH COURT
AT PAKAKURA**

**CRI-2018-255-000018
[2018] NZYC 489**

NEW ZEALAND POLICE
Prosecutor

v

[MC]
Young Person

Hearing: 9 August 2018

Appearances: M Regan for the Prosecutor
G Earley for the Young Person

Judgment: 10 August 2018

**ORAL JUDGMENT OF
PRINCIPAL YOUTH COURT JUDGE JOHN WALKER**

[1] In this case [MC], a young person, faces a charge of aggravated robbery. The onus of proving that charge and each element of the charge rests on the prosecution, and the standard of proof that has to be attained is proof beyond reasonable doubt.

[2] Yesterday, the hearing process in terms of evidence was on the basis of written statements from all of the witnesses with the exception of the officer in charge of the case, who gave evidence, effectively producing photographs and the closed-circuit television footage from inside the scene of the robbery as alleged.

[3] I am delivering an oral judgment today having regard to the need to progress this matter and having regard to other matters which need to proceed to family group conference, and so I need to reserve the ability to add headings to this judgment, add additional references and correct any grammatical errors or matters that are unclear.

[4] By way of background, two young people entered a liquor store with their hoodies up and headed for the spirits display. They are asked by staff to remove the hoods and to provide identification. The requests are ignored and the young people take bottles of alcohol from the shelf and head towards the door in order to leave without paying. Three of the staff try to block their exit. The young people try to fight their way through, and at least two of the staff are assaulted.

[5] The young people succeed in escaping. Events occurred in the course of that escape outside the shop which I do not need to consider. It is unclear how many bottles survived the mêlée, but at least one bottle was broken and its contents spilled onto the footpath.

[6] These facts are not in dispute, nor is it in dispute that [MC] was one of the young people. The identity of his accomplice is not known.

[7] The issue is whether these facts support a finding that there was a robbery. If it was a robbery then it was an aggravated one, because two people were involved.

[8] Robbery is defined in s 234 Crimes Act 1961 in the following terms:

Robbery is theft accompanied by violence or threats of violence, to any person or property, used to extort the property stolen or to prevent or overcome resistance to it being stolen.

[9] The issue is whether it is proved beyond reasonable doubt that the theft was accompanied by violence to persons, used to overcome resistance to the property being stolen.

[10] The defence position is that any violence occurred after the offence of theft had been committed, and so the definition of robbery is not satisfied. Mr Earley submits that the facts support a finding of theft and an aggravated assault: that is, an assault to facilitate flight after an offence of theft had been committed. The police position is that the theft was an act that continued until [MC] and his accomplice were outside the shop, and that the taking of the alcohol was not complete as soon as the bottles were moved from the shelf.

[11] The starting point is the definition of theft. Section 219 Crimes Act 1961 defines theft or stealing as the act of dishonestly and without claim of right taking any property with intent to deprive any owner permanently of that property.

[12] I am satisfied beyond reasonable doubt that [MC] and his accomplice intended to take the alcohol for their own consumption without paying for it. Their actions in entering the shop, securing the hoods, ignoring the staff, and their action in taking the alcohol and trying to leave with it, leads me to conclude that that intention is the only available inference. That intention continued from the time of entry to the shop and prior to entering until they had left, and the carriage of the alcohol out of the shop was in furtherance of that intention. The question is whether the intention and the taking crystallised at the moment the bottles were removed from the shelf, making the offence of theft complete at that point.

[13] There is no requirement in law that the property be removed or carried off before theft can be established. The old concept of taking and carrying away no longer applies. Section 219(4) Crimes Act 1961 makes it clear in relation to tangible property which is taken rather than converted that theft is committed by a taking when the offender moves the property. At the point property is moved by a person who has the

requisite criminal intent, theft is committed. It is well established that a shoplifter in a supermarket who takes goods from a shelf and hides them as they head to the check-out, establishing the requisite criminal intention, is guilty of theft notwithstanding that they have not left the supermarket.

[14] On this basis, the offence of theft had been committed by [MC] and his accomplice when the alcohol was removed from the shelf.

[15] There was no violence used to overcome any resistance to the bottles being removed from the shelf and carried towards the door. It was at the door that this occurred. If the alcohol had already been stolen by the time they got to the door the violence has not been, to quote the words of the section, “used to prevent or overcome resistance to it being stolen”. Violence has been used to facilitate escape. It does not matter that the short time involved means that the theft was still accompanied by violence. There must be more than an accompaniment. The violence has to be used to prevent or overcome resistance to the theft itself occurring.

[16] The armed hold-up, the threat of violence before or actual violence as goods are being moved, the waving of a weapon, force of numbers, threatening behaviour to underline a demand for property: these are clearly within the definition of robbery. I consider the English Court of Appeal decision in *R v Hale*, which held that theft can be an ongoing process.¹ In England, the definition of theft differs from the New Zealand definition. Theft in England is “dishonest appropriation of property with the intention of permanently depriving the owner of it”. Appropriation is defined in the English Theft Act 1968 as “any assumption by a person of the rights of an owner”.

[17] The English Court of Appeal said at page 418:

An assumption of the rights of an owner describes the conduct of a person towards a particular article. It is conduct which usurps the rights of the owner. To say that the conduct is over and done with as soon as he lays hands on the property, or when he first manifests an intention to deal with it as his, is contrary to common sense and to the natural meaning of the words.

¹ *R v Hale* (1978) 68 Cr App R 415.

[18] This approach is similar to the New Zealand Court of Appeal approach in *R v Maihi*, where the Court was dealing with theft by conversion rather than theft by taking.² Conversion was characterised as requiring a use or dealing with property or conduct in relation to it inconsistent with the rights of the owner. The Court of Appeal said that this could be instantaneous or continuing. The Court said:

The act of conversion itself may not have ceased, and if, as a matter of common sense, the jury found that the accused was still in the process of stealing the item when the violence or threat of violence was employed, they would be entitled to find that the robbery had been completed at that point.

[19] And so, both *R v Hale* and *R v Maihi* are dealing with theft in ways which can be continuing acts: that is, appropriation in the English situation, and conversion.

[20] In my view, those cases are distinguishable from what we have here, which is theft by taking. This distinction was recognised by Potter J in *R v Hita*, which involved an assault after a theft had been committed by the taking of a wallet.³ While the temporal connection in *R v Hita* is more tenuous than here, the point that found favour with Potter J was that the theft had taken place with the taking of the wallet.

[21] I have also considered the Canadian case of *Newell v R*, a decision of the Supreme Court of Newfoundland and Labrador Court of Appeal, which contains a useful survey of the issues arising in this case.⁴ That case involved a shoplifting and then violence against a security guard who confronted the offender outside. The applicable Criminal Code in Canada defined robbery much as the Crimes Act 1961 defines it, but importantly, included a further definition. Section 343(b) of the Canadian Criminal Code provided that:

Everyone commits robbery who steals from any person, and at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person.

The addition of this provision amounted to an extension of the law to cover the position of violence to aid escape after theft.

² *R v Maihi* [1993] 2 NZLR 139.

³ *R v Hita* HC Auckland, CRI-2006-055-1076, 1 May 2007.

⁴ *Newell v R*, 2007 NLCA 9.

[22] The defendant in the *Newell v R* case was not charged under that particular provision, because he threatened with a knife but did not actually strike anybody. The Court of Appeal found that there was no robbery under the usual definition because the theft had already occurred. The Court in that case found support in a passage in an academic writing called *The Law of Robbery*, with the citation referred to in that judgment, and I include that quote because it is instructive:

It may be observed that the views above regarding the non-applicability of section 343(a) [which I interpolate as a reference to the ordinary definition of robbery] to cases where violence is used in order to escape following the surreptitious theft of property, finds support in the position taken by the English Criminal Law Revision Committee, which stated that force used only to get away after committing a theft does not seem naturally to be regarded as robbery, although it could be charged as a separate offence in addition to the stealing. As Williams put it, using force to escape with the proceeds of a crime after committing a theft is not sufficient for robbery because "... this is used after the theft and ... it is used in order to escape and not 'in order to steal'." Similarly, Archbold posits that once a person has committed theft it will thereafter be impossible for him to commit the offence of robbery in relation to the property stolen as long as he retains such property. In *R v Haniyas*, the accused's conviction for robbery was quashed where the only violence offered to the victim was after her purse had been taken and she was endeavouring to recapture it.

[23] Within that quote are a number of references which can be easily applied to this current case.

[24] Another Canadian case referred to me in argument is *McKay v R*, a decision of the Court of Appeal of Saskatchewan.⁵ In that case alcohol was stolen and the offenders ran from the shop. They were pursued. One drew a knife and threatened the pursuer. He was convicted of robbery, the trial Judge concluding that it was all part of a continuous act. The Court of Appeal disagreed, finding that the theft was complete when the appellant took the liquor from the counter without paying.

[25] The extensive survey of the Canadian authorities in *McKay v R* and in *Newell v R* show that the preponderance of authority in Canada is against the police proposition in this case. I have come to the conclusion that in relation to a theft by taking the offence is complete when the item of property is moved with the requisite criminal intention. Violence or threat of violence after the offence is completed cannot

⁵ *McKay v R*, 2014 SKCA 19.

elevate the theft to robbery. The violence or threat must be prior to or at the time of the theft before it has been achieved. In this case, the theft was complete when the defendant walked towards the door. The violence was used to effect escape.

[26] Counsel are agreed that if I come to that conclusion that an amendment to the charge is appropriate. The two offences which do arise on the facts are the offence of theft of the alcohol and aggravated assault under s 192(1)(c) Crimes Act 1961.

[27] Under s 136 Criminal Procedure Act 2011, I am certainly enabled to amend a charge during the course of trial, which includes up to the time of decision, by substituting a charge which fits with the proof. The question I have is that the sections allowing for amendment do not appear to allow for the substitution of charges, and so while I can amend the charge of robbery to perhaps aggravated assault, I cannot see a basis for adding a charge of theft, and it may be something that needs to be the subject of a separate charging document. So I pose that procedural question to deal with now.

(Discussion with counsel)

[28] So, I will amend the charge to being an assault to facilitate flight under s 192(1)(c) Crimes Act 1961, and not denied in that amended form, and direct a family group conference.

[29] [MC], the next step is a family group conference, and that will take place between [content removed]. So, [content removed], with your bail to continue.

John Walker
Principal Youth Court Judge