

Before:
PRESIDENT OF THE QUEEN'S BENCH DIVISION

(SIR JOHN THOMAS)

MR JUSTICE WALKER

MR JUSTICE OPENSHAW

R E G I N A

v

SAMUEL MICHAEL ZEREI

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(Official Shorthand Writers to the Court)

Mr T Bowden appeared on behalf of the **Appellant**

Mr B Argyle appeared on behalf of the **Crown**

J U D G M E N T

(As Approved by the Court)

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1. **PRESIDENT OF THE QUEEN'S BENCH DIVISION:** On 13th April 2011, on the Crown's case, the appellant then aged 18 and a co-defendant approached the victim who was with a friend in a parked car in a car park on an estate in Islington, North London. The appellant knew them. The appellant told the victim that he was going to take the car. When the victim refused, there was a struggle, during which the appellant punched the victim, then pulled out a knife while the co-defendant held him. Other young men joined on a signal from the appellant. The keys were taken from the victim and the appellant drove off in the car. The vehicle was found abandoned about half-an-hour later, less than 1 km away. The defence case was a denial of the assault; the car had been taken by someone else and he had driven it for about 5 minutes.
2. The issues in the case were quite clear: first, did the jury accept the evidence of the complainant? Secondly: had the Crown made out the ingredients of the offences with which the appellant and his co-accused were charged namely, assault occasioning actual bodily harm, and robbery?
3. The appellant and his co-defendant were tried in the Crown Court at Blackfriars before His Honour Judge Blacksell QC and a jury between 4th and 7th October 2011. The co-defendant was acquitted. The appellant was convicted of assault occasioning actual bodily harm unanimously and by a majority of 10 to 2 of robbery. He was sentenced to 2 years' detention for the assault and 4 years for the robbery, both sentences concurrent with each other.
4. He appeals by leave of the single judge on one issue, namely, whether the judge correctly directed the jury in relation to the offence of robbery and in particular the ingredient of that offence, namely whether there was on the evidence adduced sufficient for the jury to be able to conclude that there was an intention permanently to deprive the victim of his car.
5. It is apparent from what we have set out that the principal issue in the case was one of credibility between the victim and the appellant and his co-defendant. It was nevertheless incumbent upon the judge to make clear what the ingredients of the offence of robbery were. No complaint is made about the summing-up save in respect of what the judge told the jury in respect of one of the ingredients of theft, namely the intention permanently to deprive.
6. The way in which the judge dealt with the issue covers about three pages of the summing-up. We shall not set it all out but summarise the key passages about which complaint is made.
7. The judge first directed the jury that they must be sure there was an intention permanently to deprive. He then read to them, paraphrasing it very slightly, section 6(1) of the Theft Act. He concluded by saying:

"...and a borrowing and a lending of it may amount to so treating. Well that is in relation, members of the jury, to theft: that is just taking. So, do you follow?"

It is important to point out that the judge when he used the words "and a borrowing and a lending of it may amount to so treating", following the reading out of section 6, did not actually paraphrase or qualify those words in the way in which the Act does. The Act says:

"... 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."

8. So the first complaint made about this summing-up is within the first page there was a material misstatement of the law by the judge.

9. The judge then went on to give an example of what an intention permanently to deprive might be. It is necessary, we think, to refer to that:

"It may be you take something from your neighbour without them knowing or someone may take a car from a drive - do you understand - without the owner knowing and it may be an issue sometimes for a jury to consider whether they have an intention permanently to deprive that person of it. I don't know how the particular circumstances might unfold. You can think of them perhaps yourselves. But here you have to keep your proverbial feet on the ground, members of the jury, you may think."

10. We pause there to add that that illustration does not assist the jury very much in deciding what circumstances to take into account in determining whether there was an intention permanently to deprive. The judge then referred to the evidence of the victim and continued as follows:

"... it is not suggested [the victim] suddenly had some amazing largess ... and thought: well I'll just give the keys and my car to some young people who have just come off the football pitch so they go and drive it around the estate for a bit. You may think that didn't happen and it is alleged here - and you would only convict either of these men if the prosecution had made you sure that it occurred in circumstances of violence. He didn't voluntarily surrender his car. And if in those circumstances, members of the jury, you treat that vehicle as your own, to do what you want to do with it, irrespective of his rights, him wanting - he had no control over the care, if this is true, members of the jury - while he was wandering around making the 999 call. It isn't suggested here that he was able to say: oh well I want my car back now or get it back; do you understand?"

11. The complaint made about that particular paragraph is that it gave the jury the impression that a forcible taking of the car might amount to an intention permanently to deprive. It is submitted on behalf of the Crown that in that particular passage, the judge was making it clear to the jury that they should not convict unless they believed the evidence of the victim. That was of course a correct position to take generally. But in this part of the summing-up the judge, in the second of the pages dealing with the issue of whether there is was an intention permanently to deprive, was dealing with the issue of whether there was an intention of permanently depriving the owner of the car. That therefore cannot be an answer to the criticism that is made.

12. It seems to us that if that passage is looked at in its entirety, again it leaves the jury with the impression that if you forcibly take a car from someone and do something that affects his rights, that amounts to an intention to permanently deprive.

13. The judge then continued to refer a little more to the evidence that was before the jury and then continued:

"Well, members of the jury, if you thought that was or may be right, he wouldn't be guilty of robbery - all right - and you should acquit him. It is only you should be considering, members of the jury, the element of robbery if you think that the version of events as given by [the victim] are correct here and you're sure about that; and then it is for you to decide on the definition as I have given you whether that then amounts to a taking, irrespective of the rights of the owner by violence - do you understand - and therefore within that context an intention permanently to deprive. The fact that you abandon it later, members of the jury, is not very probative - it doesn't show very much. We all know the police were around in the area. Whoever was driving it may have thought - it's a comment by me; it's up to you to decide, it's your common sense or experiences of life - may have decided it was not a particularly good idea to be caught in the car."

That particular passage of the summing-up is criticised on two bases. First, again, the judge does not make it clear that taking the car by violence, irrespective of the rights of the owner, is completely different to an intention permanently to deprive. Secondly, it is said that the abandonment of the car was a matter that was probative. As the judge would be bound in this part of the summing-up to draw attention to the way in which a defence might be put, namely, that this was effectively a taking for a short period of time as evidenced by the abandonment shortly thereafter, the abandonment was material. Certainly it could be said to be material to the Crown's case on the basis that as there were a lot of police, it is said, looking for the car, and the abandonment might cast light upon the state of mind of the appellant at the time the car was taken. So that is essentially what the judge said in his summing-up and the criticisms of them.

14. We do not think it necessary to review yet again the authorities on this issue. The three most important are R v Raphael [2008] EWCA Crim 1014, R v Mitchell [2008] EWCA Crim 850 and recent decision of R v Vinall [2011] EWCA Crim 6252, [2012] 1 Cr App R(S) 29. A further analysis of the law is not necessary. The question for us is a simple one: does the summing-up in the circumstances of this case spread, as it is over three pages and going into some detail, amount to a misdirection? We are satisfied that it does. Looking at the passage as a whole, it is quite clear that the judge did

not draw the necessary distinction between an intention permanently to deprive and taking of the possession which merely defeated the rights of the owner for a short period of time. Secondly, it gave the impression that a violent taking was sufficient. Thirdly, it failed to deal with the relevance of abandonment.

15. In those circumstances, a review of the authorities is not necessary. The judge could have dealt with this issue very simply in much shorter order, bearing in mind the issues in the case. We are entirely sure that the jury did, in the circumstances of this case, not receive a correct direction as to the important state of mind which they have had to find so as to be sure that a robbery had been committed.

16. In the light of the misdirection that was given, the conviction on the count of robbery cannot be safe. We therefore allow that part of the appeal and quash the conviction for robbery.

17. MR ARGYLE: My Lord, I am instructed not to ask for a retrial.

18. PRESIDENT OF THE QUEEN'S BENCH DIVISION: His sentence of 2 years stands for the offence of assault occasioning actual bodily harm.

19. MR BOWDEN: Yes.

SMITH BERNAL WORDWAVE