

IN THE SUPREME COURT )  
OF WESTERN AUSTRALIA )

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COURT OF CRIMINAL APPEAL

CORAM: LAVAN S.P.J., WICKHAM J., JONES J.

C.C.A. NO. 66 of 1977

B E T W E E N:

ROBERT WILLIAM CLEMESHA

Appellant

- and -

THE QUEEN

Respondent

Mr. B.J. Singleton appeared for the appellant,  
instructed by B.J. Singleton.

Mr. K.H. Parker Q.C., with him Mr. L.B. Robbins,  
appeared for the respondent, instructed by State  
Crown Solicitor.

Howard: Australian Criminal Law 23rd Ed. 206  
R. v. Lurie (1951) 2 All E.R. 704  
R. v. Ball (1951) 2 K.B. 109  
R. v. Smalley (1963) Qld. R. 508  
Sailer v. Q. April 1975 W.A. Full Court  
Cardener v. Fudge 1954 Criminal Law Rev.  
Halsbury, 3rd Ed. Vol. 10, p.771 and 824  
R. v. Sutton (1966) 50 Cr. App. R. p. 114  
See also 1966 Crim. Law Rev. p.165  
R. v. Caslin (1951) 1 A.E.R. 246  
Vol. 43 Aust. Law Journal p.23  
1964 Criminal Law Rev. p.190  
The Theft Act - The Law of Theft 2nd Ed. J.C. Smith pp.14,12.  
N.B. R. v. Sullivan (1965) Tas. S.R. (N.C.) 5  
See also R. v. Fisher 1975 Criminal L.R. 162  
R. v. Miller (1955) NZLR 1038  
R. v. Cox (1923) NZLR 596  
R. v. Springer (1962) Tas. SR 149  
R. v. O'Sullivan (1925) VLR 514  
R.v. Crowley (1963) 82 WN (PT.1) (N.S.W.) 238, C.C.A.  
R. v. Campbell (1967) 62 DLR (2d) 188  
R. v. Hemingway (1955) 1 DLR (2d) 34  
R. v. Kilham (1870) LR 1 CCR 261, 11 Cox CC 561  
'Obtaining by a False Pretence' (1969) 43 ALJ 23.

LAVAN S.P.J.

On the 21st December 1976 the appellant, a contractor  
associated with the building trade, contacted one Paul Van Kleef  
who was by occupation a hirer of machinery and indicated his  
wish to hire for a short period a piece of equipment known as a  
plate compactor. After some discussion Van Kleef agreed

to hire the machine to the appellant, who thereupon entered into a written contract whereby in consideration of the sum of \$15.00 he agreed to take the compactor on hire until 8.00 a.m. on the following day, subject to the condition that for every additional day or part of a day he retained the compactor he would pay Van Kleef an additional hiring fee of \$15.00. Having signed the agreement, the appellant took possession of the compactor but when after three days he had not returned it, Van Kleef instituted enquiries and found that the appellant had not only signed the agreement using an assumed name, but that the address of the building site nominated as that at which the compactor was to be used was non-existent. The matter was reported to the Police who several days later recovered the compactor from a locked shed where it had been stored by the appellant. At the time the appellant took possession of the compactor, it had been clearly marked with the name of the hirer and when recovered it was obvious that no attempt had been made to alter its identification. On being interrogated by the detectives, the appellant is said to have given varying accounts of what he intended to do with the compactor, none of which indicated an intention on his part to return it to the owner.

The appellant was charged on indictment that in breach of the provisions of s.409 of the Criminal Code "by falsely pretending to one Paul Van Kleef that he was hiring a plate compactor, he obtained from the said Paul Van Kleef a plate compactor with intent thereby then to defraud". The appellant pleaded not guilty to the charge, but was convicted after trial and now appeals against that conviction.

The single ground of appeal was based on the proposition that the learned trial Judge erred in neglecting to direct the jury, that in order to sustain a charge under s.409 of the Criminal Code, it was necessary for the Crown to prove that as a result of a false pretence made to him by the accused, the

owner had parted not only with the possession of the compactor but also with the property therein. This submission is founded on a number of English decisions notably: R. v. Kilham (1870) L.R. 1 C.C.R. 26; R. v. Lurie (1951) c.c. App. Cas. 113 and R. v. Ball (1951) 2 K.B. 109 in which s.16 of the Larceny Act which was couched in similar terms to s.409 of the Criminal Code, was considered. The conclusion reached in these cases that the offence was not committed if the accused person obtained merely the possession of the article in question, was followed in The Queen v. Smalley (1963) Q.S.R. 508. In order to reach its conclusion the Court of Criminal Appeal felt compelled to depart from the normal rule of statutory interpretation of a code formulated in Bank of England v. Vagliano Bros. (1891) A.C. 107 and to apply to the word "obtains" appearing in s.409, the meaning "obtains possession of" and does not require that the person making the pretence should obtain the property in the article. The same question was argued in Western Australia before the Court of Criminal Appeal in Seilor v. The Queen (App. No. 70 of 1974 unreported); although the Court did not find it necessary to make a specific finding on the point, Virtue J. who delivered the Judgment of the Court seriously doubted the validity of the conclusion reached in The Queen v. Smalley, but preferred to leave the question open for future determination should it arise. I respectfully share the doubt expressed in Seilor v. The Queen but again it is unnecessary to determine the issue owing to the addition during the course of argument of a second ground of appeal alleging an error on the part of the learned trial Judge in failing to direct the jury that the appellant had entered into a hiring agreement with the owner, whereby he hired the compactor and in so doing did not acquire the compactor by a false pretence. When the evidence said to support the allegation of a false pretence is considered against the false pretence alleged in the indictment, it will be seen that the conviction of the appellant cannot be sustained. The false pretence alleged against the appellant is that he falsely pretended to Van Kleef that he was hiring a plate

compactor, and as the Crown now concedes, there is simply no basis upon which it can be claimed that there was not a hiring. On the contrary, everything points to the fact that when Van Kleef actually gave possession of the compactor to the appellant, he did so not by reason of any false representation made to him by the appellant - but because of the fact that the appellant had entered into a hiring agreement, even if in doing so he had been guilty of serious irregularities.

That, however, does not conclude the matter. In the submission of the Crown this Court should invoke the provisions of s.693(2) of the Criminal Code and substitute for the verdict of guilty of obtaining goods by false pretence, a verdict of guilty of stealing.

In terms of s.599 of the Criminal Code relative to charges of stealing, false pretences and cheating, upon an indictment charging a person with obtaining any property by a false pretence with intent to defraud, he may be convicted of any other of such offences committed with respect to the same property if such other offence is established by the evidence. In terms of s.693(2) the Court may instead of allowing or dismissing the appeal substitute for the verdict found by the jury, a verdict (in this case) of guilty of stealing if it considers:

"that the jury must have been satisfied of facts which proved him guilty of that other offence."

I have had the advantage of reading the very careful judgment of Wickham J. on the subject, and for the reasons which he has expressed I consider that it would not be safe to assume that on the evidence as presented at the trial, the jury properly directed would have convicted the appellant of stealing. I further agree with his conclusion that to direct a new trial would in the circumstances be inappropriate and that the indictment should be quashed.



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Mr. K.H. Parker Q.C. and Mr. L.B. Robbins appeared for the respondent (instructed by the State Crown Solicitor).

Authorities Cited

Seilor v. R. (1974) C.C.A. W.A. unreported appeal 60 of 1974.  
R. v. Miller (1955) NZLR 1038.  
R. v. Cox (1923) NZLR 596.  
R. v. Springer (1962) Tas SR 149.  
R. v. O'Sullivan (1925) VLR 514.  
R. v. Crowley (1963) 82 WN (Pt.1) (NSW) 238, CCA.  
R. v. Campbell (1967) 62 DLR (2d) 188.  
R. v. Hemingway (1955) 1 DLR (2d) 34.  
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R. v. Lurie (1951) Cr. App. R. 113, 2 All E.R. 704.  
R. v. Ball (1951) 2 KB 109.  
'Obtaining by a False Pretence' (1969) 43 ALJ 23.  
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Gardiner v. Fudge 1954 Crim. Law Rev.  
Halsbury 3rd Ed. Vol. 10 p.771 and 824.  
R. v. Sutton (1966) 50 Cr. App. R. p.114. Crim.Law Rev.p.165 1966.  
1964 Crim. Law Rev. p.190.  
The Theft Act - The Law of Theft 2nd Ed. J.C. Smith pp.14, 29.  
R. v. Sullivan (1965) Tas. S.R. (N.C.) 5.  
R. v. Fisher (1975) Crim. L.R. 162.  
R. v. Caslin (1951) 1 A.E.R. 246.

WICKHAM J.

The appellant was convicted after trial by jury in the District Court upon an indictment informing the Court that he "by falsely pretending to one Paul Van Kleef that he was hiring a plate compactor, obtained from the said Paul Van Kleef a plate compactor with intent thereby then to defraud".

The indictment was laid under s.409 of the Criminal Code. By the provisions of s.599 the appellant could have been

convicted of the offence of stealing, if such "other" offence had been established by the evidence. It is also the case that under the provisions of s.693(2) the appellant, if the jury could on the indictment have found him guilty of some other offence, "on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the Court may instead of allowing or dismissing the appeal substitute for the verdict found by the jury, a verdict of guilty of that other offence. "

The appellant was a self-employed contractor. Van Kleef conducted the business of hiring out machinery. On 21st December 1976, the appellant interviewed Van Kleef at his depot ostensibly for the purpose of hiring a plate compactor. The appellant signed Van Kleef's hiring document, giving his name as J.L. Walker and an address and he signed it in the name of Walker. The document sets out the rate of hire, it contains a number of provisions including an agreement by the purported hirer that "the equipment is received in good order and is hired subject to the above conditions". The appellant did not pay the day's hire in advance. He took delivery of the machine and when after three days it had not been returned, Van Kleef called at the address given and found that there was no such address.

Ultimately, the machine was recovered. No attempt had been made to alter its identity in any way. The appellant was alleged to have made statements to the police, which with other evidence, if believed, would leave it open to a jury to conclude that at the time when the appellant took delivery of the machine he then had the intent not to return it, but to misappropriate it in one way or another and without paying any hire either on the first day or from day to day.

The written hiring docket is complete and regular on the face of it. There is no pretence about the contract as a contract and there is nothing false about it except that the

appellant did not use his own name. Although this last in retrospect suggests the possibility of dishonesty (although there might be another explanation) it in no way induced Van Kleef to enter into the hiring agreement.

The central ground of appeal against conviction was that s.409 of the Code is only applicable where the property in the goods has passed to the accused, but a question was raised in argument as to whether in regard to the contract of hire, there was any evidence to support the verdict that the appellant had obtained the machine from Van Kleef by falsely pretending to Van Kleef that he was hiring it. It was submitted for the Crown that the fraudulent intent of the accused, as it must have been found by the jury, in some way vitiated the hiring agreement so that the agreement itself became a false or a pretended agreement so as not to be an agreement at all. Put another way, it was said that the fraud of the accused caused Van Kleef to be under a fundamental mistake as to the nature of the agreement in the sense that what he believed to be an hiring agreement was as known to the accused not an hiring agreement at all. This, I think, is to mix up anomalous common law ideas relating to larceny by a trick with the crime of false pretences. Larceny by a trick and larceny by mistake were different in essentials from false pretences: see the discussion by Mr. Roy Stuart of the then proposed English Theft Act in Modern Law Review Vol. 30 1967 p. 609 et seq.

To call a contract which is binding upon the face of it a "sham" is not to dissolve it.

"....once a contract has been made, this is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was

a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake. "

Solle v. Butcher (1950) 1 K.B. 671 per Denning L.J. cited with approval in McRae v. The Commonwealth 84 C.L.R. 377 at 407 and Svanosio v. McNamara 96 C.L.R. 186 at 195.

It is apparent that the conviction for false pretences cannot stand, as in the way in which it was pleaded, there was no evidence to support it.

The question arises as to whether this Court should substitute for the verdict found by the jury, a verdict of guilty of stealing, or should quash the conviction and order a new trial on the indictment, or should quash the conviction and direct a judgment and verdict of acquittal to be entered. This decision involves the consideration of a number of important points which counsel before us did not have the opportunity to fully argue. It is desirable therefore to try to avoid making any binding statements of principle in respect of the construction of the Criminal Code, although in order to demonstrate why I consider that in this case neither a substitute verdict nor a new trial should be ordered, it is necessary to touch upon some of these matters.

As to substitute verdict: in leaving the case of false pretences to the jury, his Honour the trial Judge, posed the question in these terms:

"did he intend, when he obtained the compactor, to hire it for a short period and then return it or did he not?"

The jury, by its verdict of guilty, must have answered this question to the effect that the accused did not intend to hire the machine for a short period when he obtained it and did not intend to return it. This is a case where the property in the machine did not pass and at first sight appears to be a case of stealing. The reason for that is that under the common law the owner's consent to possession by the accused was vitiated by his fraudulent intent with the result that an apparent transaction



is seen to be only a pretended transaction. The matter is explained by Jordan C.J. in R. v. Ward, 38 S.R.N.S.W. 308 at 312 in the following passage:

" In the ordinary civil law, if one person by fraud induces another to express his consent to a transaction, the transaction is generally merely voidable as between the parties. It is not void, as contrasted with voidable, unless the deception practised has been such as to lead the other party to mistake the transaction for one different in kind from that which it in fact is. In the latter case, the purported transaction is void because the mind of the apparently consenting party was never directed to the relevant transaction at all.

In the criminal law, the question of consent in relation to larceny is approached from a somewhat different point of view. If a person, not intending to enter into any real transaction with the owner of a chattel at all, fraudulently induces him to enter into a pretended transaction pursuant to which the owner consents to his taking possession, but not acquiring ownership of it, and he takes possession of it ostensibly for the purposes of the transaction but really with the intention of treating it as his own, then, for the purposes of the criminal law, larceny is regarded as being committed notwithstanding the owner's consent. That consent is regarded as being, for this purpose, void, by reason of the fraud which induced it, irrespectively of whether the bailment would be civilly void: Lake v. Simmons (1); Pollock and Wright on Possession, pp.218-9. "

It is seen however that the Chief Justice is there speaking of the common law crime of larceny by a trick. This was a conceptual device created for the purpose of applying legal sanctions to the fraudulent bailee prior to the time when fraudulent conversion was equated by statute with stealing : see R. v. Pear (1779) 1 Leach 212 (T.A.C.) and see Kenny: Outlines of Criminal Law 19th Ed. at 272. As the author remarks, the real reason why under the original common law rule the bailee could not commit larceny, was because he had received the thing with the consent of the owner and not because he was



a bailee. The Judges disregarded the civil law of contract and ruled that if a man who having from the beginning the intent to misappropriate another's chattel, induces that other to pass the possession of it to him under an agreement for its bailment and then proceeds to make away with it, this is larceny. The reason given was that the secret fraudulent intention on one side negatived any real and bona fide contract, so that there was no bailment and that therefore there was a taking against the will of the owner. This view is similar to the submissions made to us to support the conviction for false pretences based on the proposition that the hiring agreement in this case was false and pretended only. The idea formed the basis of the concept of larceny by a trick but it is an anomaly in law and has been vigorously criticised. Russell describes the idea as an invention (which indeed it is) and also points out that the term "larceny by a trick" is in this context inapt: see Russell on Crime 12th Ed. p.926. Although this fiction served the common law well until it was largely superseded in 1857 by the legislation (adopted here by 29 Vic.5) which rendered it a felony for a bailee to misappropriate the object bailed, there seems to be no occasion for importing it silently into a Criminal Code. There does not appear to be any trace of such an idea in s.371 of the Code and that section copes with the dishonest bailee by equating fraudulent conversion with fraudulent taking for the purposes of stealing. Obtaining property by means of a fraudulent trick or device is made the subject of a separate misdemeanour under s.411. As to that section, Sir Samuel Griffith's note on the Draft Code is as follows:

" It is said at Common Law it is not an offence to do any of the acts mentioned in the text, unless they are of such a nature as to affect the public at large. In many cases the operation of this rule has been avoided or evaded by holding the misconduct to amount to larceny. It is submitted that the rule expressed in this section ought to be, if it is not, the law. "

Crown counsel submitted that it is irrelevant under s.371 of the Code that the bailee came into possession of the property with the consent of the owner, and that providing fraudulent intent and the possession coincide at the moment of possession, then this is stealing, not necessarily by fraudulent conversion but by fraudulent taking. The submission was that "takes" as used in the section does not connote "takes without consent" and this is said to be so because of the ordinary colloquial meaning of the word and also because in any event it did not have that connotation at common law. It was said that the "invito domino" of the common law was found in the indictment in the word "feloniously" and not in the word "takes". It would also be said, I think, that the word "fraudulently" in the Code has the precise defined meaning given to it in s.371(2) and that that word does not connote "without consent" either. I rather doubt the submission as to the common law connotation of "takes", Holdsworth thought that the word "feloniously" embraced the reference to the necessary intention of the taker: see History Volume 3 p.361. Russell op. cit. 908 explains it this way:

"It is clear that Bracton's words, "invito illo domino" applied to the word "contrectatio" and therefore covered both the "cepit" and the "asportavit," as can be seen from the difficulty presented in early times by the case of the dishonest servant and of the bailee. They do not "take" without the owner's consent, for they "receive" the chattel from him with his consent. "

and see also Hales Pleas of the Crown Vol. 1 p.508.

The developed common law of theft is conveniently consolidated in the Larceny Act 1916 as follows:

" Section 1. For the purposes of this Act -

(1) a person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof:

Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner:

(2) - (i) the expression 'takes' includes obtaining the possession -

- (a) by any trick;
- (b) by intimidation;
- (c) under a mistake on the part of the owner with the knowledge on the part of the taker that possession has been so obtained;
- (d) by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps; "

Even so, the taking still had to be without consent of the owner in the common law sense.

There is, of course, something to be said for the literal mode of construction of the Code by looking simply at the colloquial meaning of the word "takes" and pointing to the absence of the use of the words "without consent" in the section. Unless, however, the idea contained in those latter words is connoted in some way by the term "fraudulently takes", a person who takes (or obtains or receives) with one of the intents described in sub-s.(2), not all of which imply dishonesty, would be guilty of theft unless a rather awkward use is made of the second paragraph of s.22 which relieves from criminal responsibility for an act done or omitted in respect to property in the exercise of an honest claim of right and without intention to defraud. In this case it might be said that the Crown need only prove the absence of an honest claim of right or the presence of intention to defraud when the appellant took possession. Assuming that a sound legal claim under the hiring agreement must be honest (even though the motive might be dishonest) the accused would nevertheless be guilty if intention to defraud could be shown. This is returning very close to the anomalous idea of larceny by a trick, which as we have seen was carried into the English Larceny Act of 1916 but abandoned

in favour of a more global treatment in the Theft Act of 1968, and is given separate treatment in the Code.

Another possibility is that the accused might have committed the offence of stealing by fraudulent conversion at the very moment when he took possession. As Kenny remarks op cit. at 274:

"If the accused had been fraudulent from the very beginning then he commits (the crime of stealing by fraudulent conversion) so soon as he succeeds in inducing the owner to pass the thing into his hands, for he thereby both becomes bailee and converts to his own use. "

It is added, however, that this is difficult to prove and can generally only be proved by subsequent conduct. In the case before us, such a contention could be met by pointing to the hiring agreement and arguing that any admissions of intention by the accused must have related only to a future intention. An interesting reference to the problem at common law will be found in the letter from Pollock to Holmes of May 29th 1896: see Letters edited by Howe page 69. There is also the illuminating discussion by the Court of Appeal of New Zealand in, a case remarkably similar to this, R. v. Russell 1977 2 N.Z.L.R. 20 at 24 per Richmond J.

Enough has been said to indicate that it would be very dangerous to enter a verdict of guilty of stealing in this case.

As to whether there should be a re-trial on the indictment: his Honour left to the jury a possible case of stealing by fraudulent conversion subsequent to initial possession, while indicating that it was not a strong case as there was very little in the way of overt acts by the appellant to support this view of the matter. It was suggested that the indictment might be amended to allege instead of a false pretence a wilfully false promise. That, however, would I think, be carrying the exceptions to the doctrine of double jeopardy rather too far. One of the criteria for a re-trial is where the facts proved at the trial would have been sufficient



to support the conviction if the jury had been properly directed, Peacock v. R. 13 C.L.R. 619, and there are other considerations, and I am inclined to think that where a trial has miscarried for some reason found not in the verdict, but in the manner in which that verdict had been obtained, then if the result is probable there may be a case for conducting the trial again in a proper manner. This, however, is not a case where there was anything wrong with the trial itself. Any error which arose came from the way in which the indictment was laid and the case which was made by the Prosecution. His Honour directed in accordance with the issues as joined and as pleaded. The only "error" was that the facts did not support the indictment. It may be said by those who worship at the altar of pure reason that the trial took a wrong turning from the beginning and that another beginning should be made, but "the life of the law is not logic but experience" and in our criminal law there is a deep seated aversion to catch-as-catch-can, particularly when it is exemplified by putting a man on trial more than once for breaking a rule of the community because the community itself made a mistake the first time. I adopt the words of the Full Court of the Supreme Court of South Australia in R. v. Bailey (1956) S.A.S.R. 153 at 161 as follows:

"The governing consideration is, of course, that justice should be administered according to law, but we are not disposed to say that the interests of justice would be served by laying down the rule that a new trial will be ordered, as a matter of course, where there was evidence upon which the jury could have convicted on an adequate direction. A second trial is seldom an entirely satisfactory solution, and we think that it would be inadvisable to give any encouragement to the idea that a new trial will be allowed, however the case is presented at the first trial. When justice has once miscarried we think that there is some risk that "truth, like all other good things, may be loved unwisely - may be pursued too keenly - may cost too much." "

I would quash the conviction and direct a judgment and verdict of acquittal to be entered.



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Heard: 2nd November, 1977  
Delivered: 22-12-77

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Respondent

Mr. B. J. Singleton appeared for the appellant.

Mr. K. H. Parker, Q.C., and Mr. L. B. Robbins  
 appeared for the respondent.

JONES J.

The appellant was convicted in the District Court, after trial, on an indictment charging that he, by falsely pretending to X that he was hiring a Plate Compactor, obtained from the said X a Plate Compactor, with intent thereby then to defraud. He appeals against that conviction.

The facts are sufficiently set out in the judgments of the other members of the Court, and it is not necessary for me to repeat them.

Originally the single ground of appeal was that -

"The learned trial judge erred in failing to direct the jury that before the appellant could be found guilty of the offence as charged it was necessary for the Crown to prove that there must be a disposition of property in the compactor obtained from the owner."

During the argument however Mr. Singleton for the appellant, at the invitation of the Court, added a further ground which he formulated as follows:

"The learned trial judge erred in that he should have directed the jury that the appellant had entered into a hire agreement with the owner whereby he hired the compactor and, in so doing, he did not acquire the compactor by a false pretence."

The adding of the latter ground makes a detailed consideration of the first ground unnecessary, but I may say in passing that in my opinion it would not have succeeded. In my opinion the submissions of Mr. Parker for the Crown in that respect were correct - namely (in summary) that the word "obtains" in s. 409 of the Code should be given its ordinary natural meaning of "gets possession of", and does not connote the passing of the property in, as distinct from the possession of, the thing obtained. That was plainly enough the opinion of Virtue S.P.J., with whom the other members of the Court agreed, in Sellor v. The Queen (Appeal No. 90 of 1974, unreported), in which the correctness of the decision in R. v. Smalley (/1963/ Qd.R. 508) to the contrary was doubted. In that case however the Court found it unnecessary to decide the point, nor is it necessary to do so here, for the second ground in my opinion must succeed.

With hindsight, a few moments' reflection will show that when the appellant proposed to X that he should hire a compactor he was not pretending anything, falsely or otherwise. He was simply proposing to hire the compactor. And when X handed over possession of that article to the appellant he did so not being induced thereto by any false pretence - any false representation of any matter of fact - but simply because the appellant had signed (albeit in a false name) the appropriate hiring agreement. The signing of the false name certainly could be regarded as a representation of a matter of fact which was false, but that was not an inducing factor; it was a matter of indifference to X whether the name of his supposed hirer was "Y" or "Z". Also, the appellant could be said to have impliedly made a wilfully false promise - namely, to return the compactor in accordance with the conditions of the hiring - but that was not a particular of the indictment. Finally, it is true that on an indictment for false pretences a verdict of stealing can be returned, and the trial judge did in fact direct the jury on that matter. He did so however - and in my opinion correctly - in such terms that they could not seriously have considered returning that verdict;



as the learned judge put it, after dealing with certain aspects of the evidence, "perhaps the possibility of a verdict of stealing is not one which is a very real possibility". In fact, in my opinion, on the evidence no reasonable jury properly directed could have found a verdict of stealing.

What then should be the decision of this Court? Clearly the verdict of guilty as found must be quashed. A retrial on the same indictment would simply result in a verdict of acquittal by direction. I cannot for myself see any permissible amendment of the indictment which the evidence would support; but in any case, in my opinion, in the circumstances here a retrial on an amended indictment would be unfair to the accused. The decision of this Court therefore should be, I think, simply that the appeal be allowed, the conviction quashed and judgment and verdict of acquittal entered.