IN THE HIGH COURT OF NEW ZEALAND M 236/84
CHRISTCHURCH REGISTRY

BETWEEN DIXON

Appellant

AND THE POLICE

Respondent

Appeal against conviction

Hearing: 28 August 1984

Counsel: W G G A Young for appellant
A M McIntosh for respondent

Judgment: 7/11/84

JUDGMENT OF O'REGAN J

The appellant faced two charges in the Court below. Each had its genesis in a transaction between Mr G F Kendal (who trades as Park Lane Motor Company) and the appellant, in respect of a Dixon sports car bearing chassis number 012 and registered number K O 6500, which the Crown alleged was a sale. In the first charge it was alleged that contrary to s 246 (2) of the Crimes Act 1961, appellant obtained $7,583 from the Park Lane Motor Company between 1 November 1981 and 15 March 1982 by means of a false pretence, namely by representing that the car was his own unencumbered property. The second charge was preferred pursuant to s 58 of the Chattels Transfer Act 1924 and it was alleged that the appellant, having granted an instrument by way of security over the vehicle, sold it without the grantee's consent and thereby defrauded it of its security.

He was convicted on the first charge and this appeal is against such conviction. The learned Judge took the view that the second charge was, as he put it, "in the nature of an alternative charge", and having convicted the appellant on the first charge, dismissed it.

At the hearing before me it was not contended that the vehicle in question was not subject to an instrument by way of security in favour of Broadlands Finance Limited ("Broadlands") at all times material to the case. Over a period of some ten months prior to 1 November 1981 the appellant had executed several successive such instruments in favour of Broadlands in which several of his cars in the course of manufacture as well as the subject vehicle were the security. When first questioned by the police concerning the complaint the appellant said that the subject vehicle was separate from those over which he had given security to Broadlands. The learned Judge found that the vehicle was subject to a valid instrument by way of security to Broadlands executed on 1 October 1981 and there is no reason why that finding should be disturbed.

Before discussing the transaction between Kendal and the appellant it is well that I record the relevant background material.

Kendall was a motor vehicle dealer trading as Park Lane Motor Company from premises situated at 85 Moorhouse Avenue, Christchurch portion of which he sublet to the appellant in mid 1981. Both the appellant and Kendal were interested in sports cars and the appellant manufactured such on the premises just referred to

There was no written agreement of sale and purchase. Kendal's evidence was that in late October or early November 1981 the agreement was entered into. He stated that at the time it was made the car "had not in fact been constructed". I observe, however, that it had earlier been and then was the subject matter of a specific security in the instrument by way of security to Broadlands and I think that the colloquial language used by the witness tended to disguise the fact that the agreement was in respect of that specific property and contained provisions as to work to be thereafter done to it by the appellant. The price was $12,000 and the other terms had to do with the setting off of rent against purchase money, progress payments and the nature and extent of the work yet to be done. He said that "he took possession of the car on 12 March 1982". On that date the appellant signed two documents, the first of which was an invoice in respect of the vehicle which shewed the price to be $12,000 and which bears an endorsement "paid" duly signed by the appellant. The second reads :

"Make of car DIXON TURBO 1.6 Year 1982 Registered No K O 6500 Colour B R G
Received from Park Lane Motor Company the sum of $12,000 being full and final settlement for the above car which is my property to sell. The car has no encumbrances financial or otherwise, and has not been in any major accident.
Mileage is guaranteed at WOF expires
Work done
No of owners Nil
With thanks
Date 12/3/82."
The document is signed:
Dixon Automotive
D M Dixon
P O Box 8313
CHRISTCHURCH

The learned Judge did not hold that the representation as to ownership of the car contained in the document to which I have just referred was the representation referred to in the information but, in considering a submission from counsel for the appellant proferred on the assumption that it was had this to say:

"Counsel for the defendant submitted that there was in fact no false pretence because Mr Kendal had paid all the money apart from the last two cheques for $450 before the representation was made by Mr Dixon on that date and that as a consequence there was nothing criminal in Mr Dixon's actions. I accept that all payments apart from the last two payments were paid before the statement containing

> the representation was signed by Mr Dixon on the 12th March, but I am of the view that this situation is covered by Section 245 (1) (b) which refers to a future event. ..."

In that passage unfortunately there is a factual error. The evidence was not, as the learned Judge said, that all the purchase money "apart from the last two cheques for $450" was paid before the document of 12 March 1982, containing the representation, was signed. The evidence on the topic was that of Mr Kendal himself and it was elicited in the cross-examination. The transcript reads:

> "Q And it may be that you are not the right person to ask this question but the last two cheques for wages, the two cheques that amount to $500 were handed over at the same time as the indemnity was signed, is that right.
> A No
> Q. You say they were handed over earlier.
> A. I think they would have been. I am not sure if it was a simultaneous action. It certainly was not one for the other."

I interpolate that the reference to $500 seems to have been a slip on counsel's part. However there is no doubt that he was referring to the last two payments made pursuant to the contract.

The evidence thus does not establish that those payments were made subsequent to the representation. It points either to them being paid before or simultaneously with the execution of the document containing the representation. Indeed, in the context of a criminal trial, it is more correct to say that it was not proved beyond reasonable doubt that the last $450 of the purchase price was paid subsequent to the signing of the document containing the representation. And it was common ground that the rest of the purchase price was paid prior to the signing of such document. In these circumstances it follows that if indeed the prosecution case was founded on the representation, contained in the document of 12 March 1982, it was not established that the purchase money was "obtained" by means of such representation because it was not proved to requisite standard that the purchase money - or indeed any part of it - was "obtained" after the representation was made.

In this Court, Mr Young made submissions concerning the conditions to be implied in contracts of sale by virtue of s 14 of the Sale of Goods Act 1908. The relevant parts of that section read:

> "In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is -
> (a) An implied condition on the part of the seller that in the case of a sale he has the right to sell the goods and that in the case of an agreement to

> sell he will have a right to sell the goods at the time when the property will pass -
> (b)...
> (c) An implied warranty that the goods are free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made."

As a base for his substantive submissions Mr Young submitted that the contract was for the construction of a motor car and thus "future goods" within the terms of s 7 of the Sale of Goods Act, and that consequently by virtue of subsection 3 of that section the contract of sale was an agreement to sell the goods. By virtue of s 2 (1) of the Act " 'contract of sale' includes an agreement to sell as well as a sale".

For reasons I have earlier given, I am of the opinion that the contract was not for the sale of "future goods". I think that the learned Judge was correct when he held that it was the intention of the parties that property was to pass when the work agreed to be done on the chassis was in fact done and that accordingly property passed on 12 March 1982. (Section 19 and Rule 2 of s 20).

The learned Judge did not base his judgment upon s 14 (c) of the Act. No doubt to provide against my doing so Mr Young advanced detailed submissions in support of the proposition that the paragraph was inapplicable. He drew my attention to the fact that the predecessor of the provision in

the Sale of Goods Act 1895 provided that in a contract of sale there is an implied warranty that the goods "shall be free from any charge"....and that the corresponding provision in the English Sale of Goods Act 1893 (s 12 (3)) provided likewise. He submitted that it is difficult to resist the conclusion that there had been a drafting slip in s 14 of the 1908 Act. In passing I note that in the English Sale of Goods Act 1979 the corresponding provision provides that the implied warranty is that "the goods are free and will remain free until the time when the property is to pass from any encumbrance...".

In my view it would be quite illogical for the Legislature to have intended that there be an implied covenant in an agreement to sell that the subject goods are free of encumbrance at the time the contract was made and not to so provide at the time the property is to pass and completion effected. The provision makes sense if it is read as applying only to a sale and indeed the use of the present tense confirms that construction.

All in all, I conclude that s 14 (c) did not avail the prosecution.

Section 14 (a), however, at a first reading appears to be applicable. It provides an implied condition that in the case of an agreement to sell, the seller will have at the time property is to pass the right to sell the goods.

Mr Young, however, referred me to Karlshamns v. Oljefabriker v Eastport Navigation Corp(1982) 1 All ER 208 at p 215 in which Mustill J considered s 12 (1) of the 1979 English Act which corresponds with our s 14 (a) and said:

> "Section 12 creates an implied condition that the seller 'will have a right to sell the goods'. This involves no promise about the seller's own proprietary rights, only that he will be able to create the appropriate rights in the buyer. A contract of sale can perfectly well be performed by a seller who never has title at any time by causing a third party to transfer it directly to the buyer."

In my view that statement of the law is inapplicable to the present case. First and foremost the learned Judge was considering a sale of unascertained goods. Here we are concerned with a specific chattel the ownership of which had been assigned to a third party, and which in the very nature of things could not be acquired through a third party. In my view the implied condition in s 14 (a) was of application. By the very act of entering into the contract to sell that chattel he is deemed to have promised that he would have the right to sell at the time property was intended to pass. But that was not a promise or a representation,made prior to his obtaining the purchase money,that the car was his own property which is the situation encompassed by the charge. There is no evidence of any

representation either expressly made or arising from statutory implication that prior to obtaining the purchase money he made any representation such as is alleged. The allegation is that the representation was made between 1 November 1981 and 15 March 1982. To sustain the allegation it was necessary that the prosecution establish the making of such before any of the consideration passed. The evidence shews that the initial payment was made on 30 November 1982. There is no evidence of such a representation prior to that date and accordingly the charge was not made out.

The proven facts point to a breach of s 58 of the Chattels Transfer Act upon which section the second charge was founded. That charge has been dismissed and accordingly there is no scope for this Court exercising the powers contained in s 132 of the Summary Proceedings Act 1957. In that circumstance there is no alternative but to allow the appeal and it is allowed accordingly.

Solicitors for the appellant: Young Hunter & Co Christchurch

Solicitors for the respondent: Raymond Donnelly & Co Christchurch.