IN THE PROVINCIAL COURT

R

vs.

KARL MICHAEL CALLAGHAN
(Cite as R v. Callaghan 2002 NSPC 15)

D E C I S I O N

The Honourable Judge C.H.F. Williams, JPC
Delivered orally April 22, 2002
Counsel: Mr. D. MacRury, Crown Attorney
: Mr. P. Duncan, Defence Attorney

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R v. Karl Michael Callaghan

Introduction

Sears Department Store at 7001 Mumford Road, Halifax Regional Municipality, employed Sandra Marson and Donna Sperry as store security personnel. On January 18, 2001, the accused, Karl Michael Callaghan, a member of the Halifax Regional Municipality Police Force, entered the store to effect a lawful exchange of clothing and received a fleece pants and a dark blue shirt. He put the fleece pants in a red bag while the store clerk put the shirt into a white bag.

Evidence

Essentially, the Crown's case was that after he made this exchange, the store security personnel observed him, personally and by closed circuit television, for forty-five minutes, walking around the store, with the two bags. Finally, he selected other shirts, including a black one, and entered a fitting room with them. They also saw him leave the fitting room, put two shirts on a shelf and left the store with the bags one of which, they believed, contained the black shirt that he had not purchased. When they stopped and confronted him, outside the store, concerning the black shirt, he denied taking it and insisted that he owned all the merchandise in his possession. He also refused to allow them to secure the bags or to verify their contents. In any event, the security personnel detained and arrested him for theft and awaited the arrival of the police. Upon arrival and after investigation, the police removed from one bag the black shirt, the property of Sears and for which the accused had not paid. As a result, they charged him with theft and possession of stolen property.

On the other hand, the accused testified that he entered the store at 1100 hours to effect an exchange and, as a result, received a dark blue ski shirt and a fleece pant. After he completed that task at 1130 hours, he wandered around the store to see what was on sale. Forty-five minutes later, because he also intended to shop for his son, as they wore about the same size shirts, he returned to the men's wear department. There, he picked up the black shirt, "sized it up" and walked around looking for sale prices. He then selected two blue shirts for his son and, for privacy, took all three items into a fitting room to measure them against himself. The black shirt was too big so he folded it up and put it on a table in the fitting room. He now also removed the dark blue shirt from his bag and, for the first time since he received it an hour ago, held it up to see whether it would fit him. He left the fitting room with nothing in his hand and went to select another shirt for his son. Again he entered the fitting room, held up the shirt and determined that his son would not wear it so he decided not to purchase it. Realizing that he had spent too much time at the store, he put his blue shirt back into his bag and put two blue shirts on a shelf and left the store. Inadvertently, he must have also put the black shirt into his bag.

When he was in his vehicle, two store security personnel accosted him and told him that he had taken items from the store. He responded, "No. I am a policeman. I do not steal." One security personnel entered the rear of his vehicle and held up a shirt. Thinking that it was the blue shirt that he had exchanged he said, "That's my shirt." The other security personnel read him his ***Charter*** rights. He requested the security personnel who had taken his bag to return it to him and she did. In the security office they allowed him to call his lawyer but the office door was partially opened and the security personnel were standing a few feet away from it. Although he did not feel that he had privacy, he nevertheless spoke to his lawyer but in a low tone. However, at trial he testified, in cross-examination, that he was not now complaining of lack of privacy. It was only when the investigating police officer took the shirt from the bag that he realized that it did contain the black Sears' shirt and not the dark blue shirt that he had exchanged. He also asserted that before the investigator had removed the shirt from the bag, although he did not know what shirt was in it, he informed the investigator that it was his shirt. Nonetheless, at trial, he admitted that the black shirt was Sears' property but he had no intention to take or to steal it.

The accused suggested that their prior viewing of the security video tape, **Exhibit 1**, may have influenced the testimonies of the security personnel before they prepared their individual reports of the incident. However, on the evidence, I do not find any support for this contention. He, however, took no issue with the impartial video tape. This video surveillance tape shows that at 11:14.43 hours the accused had a single red semi-transparent bag in his possession at a sales counter. He took a bulky unwrapped item of clothing from this bag and gave it to the sales clerk. She placed it aside. At 11:15 hours, he placed a blue bulky item unwrapped, and still in its cover, into the red bag. Following this, he walked around the men's wear department, selected a blue ski shirt, folded that not in a cover, and returned, at 11.30 hours, to the same customer service counter. At 11:32.16 hours the sales clerk placed this item, the blue shirt, into a white bag embossed with a Sears logo. He now had two bags, one red and the other white, each containing items of clothing. With these bags in hand he is seen walking around the store.

At 12:24.47 hours the surveillance video shows the accused taking a black shirt and unfolding it. He kept this shirt in his left hand with the bags and walked around looking at other merchandise. Selecting two blue shirts, one at 12:26.47 hours and the other at 12:27.06 hours, he is seen leaving this area with a shirt in his hand. Next, at 12:28:10 hours he is seen leaving a fitting room that he reentered at 12:28:25 hours with a shirt in his hand. At 12:30:45 hours he is seen leaving the fitting room, pausing by a display shelf and exiting the store with the bags in his hand.

Finding of Facts

After hearing the evidence and on my assessment of the witnesses as they testified, I find the relevant facts to be as follows:

1. The accused, a member of the Halifax Regional Municipality Police Force, entered the Sears Department Store on January 18, 2001 at 1100 hours to exchange merchandise he had earlier purchased. He had in his hand a red bag embossed with Sears logo.

2. The accused received in exchange a blue shirt and a fleece pants. He placed the fleece pants in the red bag, **Exhibit 3** (sample) while the store clerk put the blue shirt in a white bag, **Exhibit 4** (sample).

3. After the exchange and with the two bags in his hand, the accused walked around the store for about forty-five minutes. He returned to the men's wear department. There, he selected one black shirt, **Exhibit 2**, and two blue shirts, **Exhibits 5 and 6**, and entered a fitting room with all these items.

4. After a short period, he exited the fitting room holding the black shirt, **Exhibit 2**, in his hand. He then selected another blue shirt, **Exhibit 7**, and reentered the fitting room with the black shirt and the blue shirt and remained inside for about two minutes.

5. Next, the accused exited the fitting room placed two shirts, **Exhibits 5 and 6**, on a shelf and hurriedly left the store without paying for any merchandise.

6. Store security, who had him under continuous surveillance both by close circuit television and personal observations, immediately checked the vacated fitting room, before any other customer entered, and discovered inside one blue shirt, **Exhibit 7**, still unwrapped.

7. Store security intercepted the accused outside the store as he was seated in his vehicle, and informed him that he had unlawfully taken a black shirt from the store. He denied taking anything unlawfully from the store, asserting that whatever he had in his possession and in his bags was his lawful personal property. He refused to allow them to take the bags or to check their contents. He kept the bags continuously under his control.

8. Store security personnel detained the accused, advised him that he was under arrest for theft and that he had the right to consult with a lawyer. Before the police arrived, he called his lawyer but the door to the room was not fully closed. However, the store security personnel who were outside the room could not hear the communication between him and his lawyer.

9. When the police arrived the investigating officer recovered from a bag belonging to the accused the black shirt, **Exhibit 2**, that was Sears' property. The accused had not paid for the shirt nor did he have permission to remove it from the store.

10. The accused then did not explain his possession of the black shirt. Rather, he spontaneously stated when the officer exposed the black shirt, " That's my shirt."

Issues

At trial, the accused admitted that the black shirt, **Exhibit 2**, belonged to Sears. However, he submitted that he did not intentionally take it but had accidentally put it in his bag with his other exchanged merchandise. He submitted further that store security violated his **Charter** rights in that they did not inform him of his right to counsel and they did not accord him any privacy when speaking to his lawyer.

The ***Charter*** submission was essentially that the security personnel did not give him the full informational component of his right to counsel. Thus, anything he said to them ought to be excluded as conscripted evidence. Moreover, as he did not waive his right to counsel, the partially opened door deprived him of his right to privacy when consulting with his lawyer. Likewise, although the video evidence was reliable, those of the security personnel were not as they did not take notes of the events.

Consequently, the essential issues that I must decide are:

1. Did the store security personnel violate the rights of the accused that are protected under the ***Canadian Charter of Rights and Freedoms***, s.10(b) and, if so, is there a remedy under s 24?

2. Did the accused total conduct, as found, support an honest and reasonable belief, as asserted by him, that he accidentally and without intent took the black shirt which, if true, would make the act charged against him innocent?

Relevant Legislation

The **Canadian Charter of Rights and Freedoms,** s.10(b) states:

> Everyone has the right on arrest or detention
> (b) to retain and instruct counsel without delay and to be informed of that right;

The **Criminal Code** s.322 states:

> (1) Everyone commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything whether animate or inanimate, with intent,
>
> (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
>
> (2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or be moved, or begins to cause

it to become movable.

Analysis

On the first issue, the real contentions are that the accused did not receive the full informational components of his right to counsel and that he had no privacy when he exercised that right. Authorities such as ***R.v. Brydges***, [1990] 1 S.C.R. 190, ***R.v. Pozniak***, [1994] 3 S.C.R. 310, and ***R.v. Bartle,*** [1994] 3 S.C.R.173 are clear that an accused person when detained or under arrest must be advised of the availability of legal aid and a system of duty counsel, if available. I accept that in the case at bar, store security did not inform him of the availability of duty counsel. However, defence counsel also submitted that, because of his occupation as a police officer, he did understand his right to counsel, did not waive that right and, did exercise that right.

Thus, the question is: Was the breach, in the circumstances of this case, a mere technicality that I can resolve under s.24(2)? Additionally, it seems to me that the issue may also be resolved by considering whether the breach prejudiced the accused in that he did or said anything, following the breach, that conscripted himself. First, I find that his statements were spontaneous and not prompted by any questioning by the security personnel. Secondly, his own defence relied upon the statements to support his contention of innocent and inadvertent taking, or the absence of *mens rea*. Thirdly, the statements were not self-incriminatory, in response to any questioning, but exculpatory. Therefore, it seems to me that here the breach was a technicality that can be resolved under s.24(2).

In applying the approach articulated in ***R.v. Collins***, [1987] 1 S.C.R.265, reaffirmed and clarified in ***R.v.Stillman***, [1997] 1 S.C.R.607, I conclude that although the store security personnel did not state the full informational components as required by the above authorities, the accused was relying on the same statements for his defence and to support his creditworthiness. The accused, nonetheless, understood his right to counsel and exercised that right. Therefore, a technical conundrum exists which affects the reasonableness of the accused submission concerning the violation. He cannot have it both ways. On the one hand he cannot claim that his spontaneous non-incriminating statements violated his **Charter** rights and on the other hand submit that it is in order for him to use them to support his defence and creditworthiness. To accede to that view would, I think, render the trial unfair if the statements were admissible as evidence only to support the accused position. However, the statements, in my view, in and of themselves were not the result of a **Charter** breach. Even if the converse were true, it seems to me that, on balance, in the case at bar, as the seriousness of the breach was minor and the statements non-constrictive their exclusion would, I think, bring the administration of justice into disrepute. The impugned statements are therefore admissible.

I now refer to the submission, on his behalf, that he lacked privacy when talking with his lawyer. ***R.v. Dempsey*** (1987), 77 N.S.R.(2d) 284 (C.A.), established the right to privacy. However, here, the accused has testified, in cross-examination, that although the door was slightly ajar he was not now pursuing a claim that they violated his right to privacy. Further, he spoke in a low tone and the

store security personnel did not hear whatever he said. Those factors, in my view, has nullified the pre-planned submission concerning privacy and has rendered the **Charter** analysis on that point unnecessary. See, also: ***Dempsey**, supra*.

On the second issue, the accused submitted, in argument, that because of the time he spent wandering around the store he had to leave in a hurry to attend to other commitments. This, he submitted, accounted for his quick exit from the store. It was not to effect any criminal intent, rather he had run out of time. Additionally, it was consistent with being in a hurry with innocent intent. He further submitted that to the extent that he said anything outside the store, he was consistently under the impression that the shirt in the bag was the one that he had received on exchange .

On the other hand, the Crown submitted, in argument, that this case turns upon the Court's acceptance of the accused testimonial credit. The Crown's theory was that I can reasonably infer his state of mind from his spontaneous utterances when confronted by the store security and his subsequent conduct. He knew that security was concerned about the black shirt because they specifically told him, at first contact, that it was their interest. Therefore, he has deliberately constructed his testimony to diminish any dishonest allusions. But, it was not only internally inconsistent but it was also inconsistent with that of other witnesses. For example, he had placed the bags on the front passenger seat and the store security personnel, in the back of his vehicle, never looked into one bag nor took anything out of it to show him.

Further, he was uncompromising in his opinion that what he had in his possession was his and that no one was going to check his bags. Further, when the police investigator exposed the black shirt to the accused, he, the accused, never offered an explanation of how it got into his bag. Additionally, he had entered the store to exchange two bulky items and had two small bags but left the store with three items in two bags. A reasonable man, with his knowledge of what he did inside the store was lawful, and in his position, could readily see from the bulging bags that something was amiss and would have at least checked to find out the facts.

Thus, on this theory, his whole conduct was not consistent with the proposition that the black shirt was in his bag because of an innocent mistake. Therefore, all these factors, according to the Crown, invalidated his proclamation of innocence. In short, he intended to steal and was caught red-handed. Then, he was attempting to hide behind his accepted professional societal status of trustworthiness. Now, he declares that it was all an honest and innocent mistake. That, according to the Crown, given the total evidence, is not credible.

First, as this court stated in ***R. v. McIsaac*** [1999] N.S.J. No. 137 at para. 6:

> The principle of the presumption of innocence always applies. In short, the Crown must prove beyond a reasonable doubt the existence of all the essential elements of [theft]. Reasonable doubt may arise from the evidence, a conflict in the evidence or lack of evidence. Further, a criminal trial is not a credibility contest. After I have considered all the evidence, reasonable doubt is also applied to the

> issue of credibility of the witnesses. In other words, it is not an either/ or choice between the versions of facts. In addition, I am entitled to believe all the testimony of a witness, some of it, or none of it. After hearing all the evidence, I am entitled to reject a witness' testimony if I consider it inconsistent and unreasonable in all the circumstances of the case. Further, if I believe the accused, I must acquit. If I do not believe the accused but I am left in doubt by his testimony, I must also acquit. Even if I do not believe the testimony of the accused, I must still ask myself on the evidence that I accept, whether I am convinced beyond a reasonable doubt of the existence of all the essential elements of the offence. (See also: **R.v. W.D**. [1991] 1 S.C.R. 742).

Here, credibility is the paramount issue. This Court observed in ***R. v. C.R.B.*** [1999] N.S.J. No. 217 at para. 11:

> Overall, it seems to me that a witness' testimony is considered true until there is some particular reason to doubt it. Doubts may arise from the inherent unreasonableness of the testimony itself. Doubts may also arise from the cross-examination of the witness. Such cross-examination may show that a fact is incredulous because of commonsensical inaccuracies that reveal obvious errors. In addition, extraneous evidence, or lack of it, may point to errors or inaccuracies in a witness' testimony and if never corrected to rehabilitate the credit of the witness that testimony would have little or no probative value. (See also, **R v. W.D.** [1991] 1 S.C.R. 742).

Also on the point and very applicable to assessment of credibility here is ***Faryna v. Chorny*** [1952] 2 D.L.R. 354 (B.C.C.A.) where O'Halloran J.A. stated at p. 357:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of a quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth.

In essence the accused submitted that he lacked the required *mens rea* to constitute the crime of theft. As was put by Sir Richard Couch in ***Bank of New South Wales v. Piper*** [1897] A.C. 383, at pp. 389-390:

> ...the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts, if true, would make the act charged against him innocent.

Further, as put by Laskin J.A. in ***R.v. Howson***, [1966] 2 O.R. 63, “the test for the determination of the presence of an honest belief is a subjective rather than an objective one.” That case, however, and the authorities cited and relied upon, appear to have dealt with circumstances where the accused consciously took or did something honestly believing that he had a right, however mistaken, to do what he did. In the case at bar, the accused is not saying that he consciously took the black shirt honestly believing that it was his. Rather, he is saying that he did not know that he took the shirt that belonged to Sears. Because he did not consciously take the shirt, under any colour of right to do so, it came into his possession, he believed unknowingly, by his inadvertent but innocent act. He acknowledged that the shirt was Sears property and that he moved it. Nevertheless, as he did not move it with any intent to deprive Sears of its property in it, he ought not to be convicted of theft.

He, therefore, is not claiming a colour of right to the property to justify the challenged taking. Rather, he presents as his defence, his lack of intention to steal. He also presents a mistaken factual act, that is, putting the Sears shirt along with his into his bag, although, on the evidence, he is not clear how he accomplished that. Consequently, the inquiry depends upon different considerations and the critical questions are: Was his belief in the inadvertent taking and possession of the shirt honest and reasonable in all the circumstances? Or, put another way: What would a reasonable man, in the position of the accused, who honestly believed that he had not stolen any merchandise but is accused of doing so, have done? Thus, it seems to me that in these set of circumstances, as presented, the test to decide the honesty of his belief would be whether such a belief was based upon bona fide reasonable grounds.

It seems to me that a reasonable man who honestly believed in a set of facts, as did the accused, and where there was a difference of opinion, would have, if possible, adopted a conciliatory course of action. I think, a reasonable man, in the position of the accused, if he had reasonable grounds to believe that he had made an honest mistake would have taken the reasonable steps to rectify it. With the security intercept the accused, as a reasonable man, must have realized that store security suspected that he had store property in his possession. He was then presently aware that they had monitored his conduct inside the store that was then being called into question. Therefore, should he as a reasonable man, who honestly believed that he had done nothing wrong, cooperate fully with security and establish that, if at all, there had been an inadvertent but honest mistake? Or, should

he, self-conscious of his own conduct, its true intention and its significance, bluff his way out of a very serious predicament that had potential devastating consequences? On the latter proposition, should he admit that, with dishonest intent, he had taken the black shirt and risked ending his career as a police officer?

Consequently, in my opinion, the course of action that he took was demonstrative of his true state of mind. First, he denied taking any shirts stating that he left them in the fitting room. This suggested his knowledge that there now existed a dishonest imputation concerning the shirts he had handled inside the store. I find that, in fact, he had left an unopened shirt, **Exhibit 7**, in the fitting room and placed two blue shirts, **Exhibits 5 and 6**, on a table outside the fitting room. Thus, his first reaction established his knowledge that store security was aware of the circumstances of the taking. Further, his reaction also suggested that he felt that it was impossible for him to compromise. There was no golden mean.

Secondly, he quickly added, when he realized that they detained him for theft, "You cannot do this to me. I am a police officer. It will affect my job." Or " I am a policeman. I do not steal." This can be considered in two lights. One, it can be considered as a reprimand of the security personnel who dared to suggest that a person of his moral character would steal from the store. Or, it can be considered that this was a strong intimation that he was attempting to shelter behind his badge of honour, integrity and social deference. Further, it could have been a desperate attempt to diffuse and deflect a tense and embarrassing situation. In any event, given the total evidence, I conclude that it inferred a state of mind fully aware of the consequences of an unlawful act. Further, he was aware that Sears had a pecuniary interest in the shirt and knowingly he had placed that interest at risk. His fear, through his knowledge, was therefore not the circumstances of the event but its consequences.

Thirdly, he insisted emphatically that the merchandise in the bags that he had were his but, when requested to do so, refused emphatically to empty them. I find that, in fact, the security personnel informed him that he had a black shirt that he had not purchased. He knew that he had not exchanged a black shirt but had selected and had in his possession a black shirt when in the store. He knew that he had entered a fitting room with the black shirt and, as it could not fit him, had folded it and put it on a shelf inside the same room. There was no logical honest reason for him still to have it with him. Accordingly, it seems to me, that as a reasonable and prudent person, whose honesty and integrity are impugned and, a person of his experience and training in law enforcement, dispelling any suspicions or misunderstanding by simply opening and checking the bags would have been very easy. Further, the allegation that he had taken the shirt was enough reason for him to suspect the possibility that he, in fact, had another shirt in his bag. However, he wilfully closed his mind to that possibility and did nothing to check it out. Thus, from the standard of a reasonable man, it would be too refined a ground of judgement to say that he was continuously under any innocent misapprehension of the facts.

Fourthly, he not only refused to empty the bags but also refused to relinquish actual physical control over them. In short, he kept the bags in his actual possession, even when detained and under arrest. This inferred, in my opinion, that he was asserting an exclusive possessory or proprietary claim constituting a colour of right in the bags and their contents. However, given his knowledge that he might have in his possession Sears property, he would know that his control over that property would be morally and legally wrong. Thus, even if he had an honest belief that whatever were in the bags belonged to him, he has eroded the reasonableness of that belief by his determination and refusal, in light of his assertion of innocence and the possibility of an honest mistake, not to confirm for himself or to allow security to verify the contents of the bags.

By this action, in my opinion, he had seriously undermined whatever reasonable grounds he might have had to support his assertion of honest belief and an inadvertent taking going toward buttressing his defence of lack of dishonest intent, which he never rehabilitated. He has admitted that he had no colour of right in the black shirt that was in his bag. The Sears property was not his legally to possess but he was not prepared to resolve the dispute or to admit a wrong. Therefore, his action was not only morally wrong it was also insincere and, in the circumstances, unreasonable. Accordingly, I can reasonably interpret it to be that he fraudulently and without colour of right intended to deprive Sears, temporarily or absolutely, of its property. See, for example: ***R.v. Howson*** [1966] 3 C.C.C. 348, 2 O.R. 63 (C.A.), ***R.v. McAuslane*** [1968] 1 O.R. 209 (C.A.).

Fifthly, when eventually the investigating police officer retrieved the black shirt from the bag, the accused spontaneously uttered "That's my shirt." ***R.v. Kowlyk,*** [1988] 2 S.C.R. 59 enunciated some principles concerning the "doctrine of recent possession." Generally, no adverse inference is drawn against an accused from the fact of possession alone, unless it was recent. In addition, a pre-trial contemporaneous explanation of such possession that could reasonably be true also does not attract an adverse inference. Further, without such explanation, recent possession alone is quite sufficient to raise a factual inference of theft. Here, there was no contemporaneous explanation for the possession. I find that, in fact, the accused asserted and maintained a right of ownership. I accept that he told the investigator that it was his shirt when he displayed **Exhibit 2**, to him and not before as was his testimony. Recall that, in the store, his blue shirt that he received in exchange was placed in the white bag by the store clerk. He put one item, the unopened fleece pants into the red bag. The investigating officer retrieved the questioned black shirt from the red bag.

Consequently, it seems to me that, overall, each of his activity, taken in isolation, is considered like the lost piece of a jigsaw puzzle. By themselves, they are innocuous and had little meaning or significance. However, when they are combined and examined as a whole system of relationships they become like the constructed puzzle and are found to be a picture. When fully considered they establish a pattern and have meaning. It is that pattern that has helped in establishing his mental state and to decide whether indeed he had an honest and reasonable belief in an honest inadvertent taking of the black shirt, as he ultimately presented it.

There is no doubt that the accused would have a good defence if his belief in the inadvertent taking and possession of the black shirt was a bona fide honest belief based upon reasonable grounds that would make his taking the black shirt an innocent act. ***McAuslane,*** *supra;* ***Bank of New South Wales***, *supra*. However, in my view, that defence is not available to the accused, because he has not established that he had any reasonable grounds for believing that the bags, in his possession, did not contain Sears property.

I say that because as I observed him as he testified and assessed his testimony with the total evidence and, on the above analysis, I conclude that he knew that he took the black shirt, the property of Sears, into the fitting room where he decided that he did not want it. On his own testimony, he folded it and set it aside inside the room. He left the room to select another blue shirt and, even if I were to accept his evidence on this point, he apparently left the black shirt in the fitting room. But, why would he leave it behind to get another shirt when, again on his own testimony, he had no interest in it or the other two blue shirts? Likewise, he knew that he had also removed his own shirt, apparently from his white bag, also in the fitting room. However, into which bag did he replace his blue shirt?

For example, we know from the video tape evidence, **Exhibit 1**, that the store clerk had put the blue shirt in the white bag and he put the fleece pants into the red bag. They retrieved the black shirt from the red bag. Therefore, even if he were in a hurry and replaced his blue shirt in the same bag, the white one, logically, on his testimony, the black shirt would also be in the white bag. There is no suggestion that he took anything, the fleece pants, from the red bag. But, if he put his blue shirt and the black shirt into the red bag then logically everything would be in the red bag and the white one would be empty. If, however, he did not place everything into the red bag then it would point circumstantially to the fact that the discovery of the black shirt in the red bag was consistent with the fact that he consciously and intentionally separated the items and placed them into different bags and this would be inconsistent with the proposition that he made an honest mistake when he put the clothing back into the bags. The evidence is however, unclear on what else, if any thing, was found in the red bag or what piece of clothing was found in the white bag.

Nonetheless, the accused knew that he had put items back into his bags and left the store with them. Also, he knew that although he had taken three blue shirts into the fitting room he placed only two blue shirts on a table after he left the fitting room on his way out of the store. The third blue shirt was found still in its wrapper, on a shelf inside the fitting room although he testified that he checked all the shirts against him for size and he decided not to purchase any of them. Furthermore, there was no suggestion that, when challenged, he even entertained the idea of looking into the bags to confirm their contents or that he took any steps to find out if, in fact, he had made an inadvertent mistake by taking the black shirt with him. Thus, the picture that emerges from his various perambulations around the store and his subsequent conduct, when combined, is that of an individual knowingly setting a plan into motion with the intent to fraudulently and without any honest belief that he had the right to take Sears' property did so with the dishonest intention to deprive Sears absolutely of its property. He had knowledge of taking the shirt and that knowledge

was sufficient to make him aware that he could still possibly have it in his possession. Likewise, his wilful failure and refusal to check the contents of the bag, in the circumstances, was sufficient to constitute the requisite *mens rea*.

Conclusion

First, the **Charter** challenge, for the reasons stated, did not pass muster. It short, it has failed.

Secondly, on the analysis that I have made, I am not satisfied, on the evidence that I accept, that the accused conduct, as found, supports the proposition that he had an honest and reasonable belief that he did not know he had Sears' property in his possession. In my opinion, his testimony was not only inconsistent but it was also inconsistent with that of the other witnesses. Further, it was not in "harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions." His conduct, when carefully considered constructed a picture of the accused entertaining a dishonest intention to take and to keep the black shirt with full knowledge of what he was doing. In short, his testimony, now shrewdly reconstructed, did not raise in my mind a reasonable doubt.

In the result, I am satisfied that the Crown has proved beyond a reasonable doubt all the essential elements of the offence and I find the accused guilty of the offences as charged. However, applying the principles enunciated in ***R.v. Kienapple***, [1975] 1 S.C.R. 729 (the **Kienapple Rule**), I will enter a conviction on the offence of theft and a conditional stay with respect to the possession offence. Conviction for theft entered accordingly.