Theft

Hinks [2001] 2 AC 241 (HL); [2000] 4 All ER 833; [2000] 3 WLR 1590; [2001] Crim LR 162.

Disappointingly, the House of Lords has affirmed the Court of Appeal's decision in *Hinks* [2000] 1 Cr App R 1. For a full discussion of the decision, readers are referred to Sir John Smith's note of the case in [2001] Crim LR 162 (Feb). In substance, the decision does not change the analysis in the text of *Simester and Sullivan*. *Gomez* remains the leading case on appropriation, supplemented by *Hinks*, which is now settled authority that the acquisition of outright ownership by receipt of gift is, in itself, an appropriation. By parity of reasoning, the acquisition of ownership by any means is an appropriation.

In defence of the decision, it did not require their Lordships to hold that, for the purposes of s. 3, acquiring title to property *is* exercising one of the rights of the owner—which would be absurd. This is because the definition of appropriation in s. 3 of the Theft Act 1968 only includes, and is not limited to, "any assumption of the rights of an owner" [see S&S § 13.6]. Further, as was observed in *Gomez*, the language of s. 3 nowhere mentions any such word as "unauthorised". So it was possible, on a very literal reading of the section, to come to the conclusion reached in *Hinks*.

Possible, but no more than that. As Lord Lowry demonstrated, in his dissenting judgment in *Gomez* [1993] AC 442, it is clear from the Parliamentary and drafting history that Parliament intended "appropriation" to mean a conversion, i.e. an unauthorised or usurpatory assumption of the owner's rights. The point was ignored by the majority in *Gomez*, and again by Lord Steyn in giving the majority judgment in *Hinks*. So much for consistency in approaches to statutory interpretation and respect for the intention of Parliamentary.

What about the merits? The main problem with the decision is that it turns the very rationale of property offences on its head. Theft is not a crime in thin air. It is designed to protect and reinforce property rights. That is the whole point of theft. Since the offence has no other *raison d'être*, it is inherently derivative upon the civil law of property. If I have no property right in D's car, which is sitting on the road beside my house, I cannot complain when D drives it away. Neither am I allowed to drive it away myself without D's permission. All this is because, at civil law, *the car belongs to D*. Without that crucial piece of initial information, we have no way of deciding whether anything wrong has occurred, any sort of property wrong that requires the attention of the criminal law. Unless there is a violation of someone's property rights, where (as Mill and Feinberg would ask) is the harm? The law of theft cannot dispense with the requirement for violation of a property right because its whole purpose is dependent upon and secondary to the allocation of rights through property law.

Hinks, alas, cuts property offences adrift from the law of property rights. There can be a crime without either a wrong or a harm: the cart is now before the horse. Lord Hobhouse sees this in his dissent, when he observes that "There is no law against appropriating your own property" (at 856C; see generally 854-856; also 865B). Lord Steyn sees this too, albeit without any real concern (at 843). But consider the four examples set out by Lord Steyn at 842, of which we reproduce one here:

> "P sees D's painting and, thinking he is getting a bargain, offers D £100,000 for it. D realises that P thinks the painting is a Constable, but knows that it was painted by his sister and is worth no more than £100. He accepts P's offer. D has made an enforceable contract and is entitled to recover and retain the purchase price."

"My Lords, at first glance these are telling examples," comments Lord Steyn. Yes indeed: it surely cannot be the case that D is entitled to the purchase price and yet, if found to have stayed silent dishonestly, be guilty of stealing it. [Cf. S&S § 13.6(ii)(c); also Sir John Smith at [2001] Crim LR 165.] Thus the reader waits with bated breath to find the devastating riposte that Lord Steyn will deliver—to discover what it is that the rest of us have all been missing. But Lord Steyn doesn't give a counterargument. He simply moves right on, dismissively remarking only that "I am quite unpersuaded that the House [in *Gomez*] overlooked the consequences of its decision." Yet *Gomez* did not decide the issue in *Hinks*. The point simply did not arise in that case.

So far as the merits are concerned, the final proposition upon which his Lordship relies is even more worrying. He expressly states (at 844):

> "My Lords, for my part the position would have been different if I had any lurking doubt about the guilt of the appellant on the charges for which she was convicted. In the light of a fair and balanced summing up and a very strong prosecution case, the jury accepted the prosecution case and rejected the appellant's account as untruthful. They found that she had acted dishonestly by systematically raiding the savings in a building society account of a vulnerable person who trusted her."

So: the defendant was dishonest. No doubt she *deserved* to be convicted. But that is not the point. What counts is whether she was guilty under the law: *nullum crimen sine lege* [S&S § 2.1]. It is wrong, a profound violation of the Rule of Law, to reinterpret the law in order to convict a particular defendant who deserves the label of criminal.

Given the expansiveness of this decision, a point of limitation should be stressed. *Hinks* deals with the scenario where the act of acquiring title is charged as theft. The case does not decide that once D has acquired valid title to property, any *subsequent* dishonest appropriation of that property by D will amount to theft.

In dissent, the lucid and persuasive judgment of Lord Hobhouse is a recommended read. Lord Hutton's dissent is less persuasive in that, unlike Lord Hobhouse, he agrees with the majority that acquisition of outright ownership can be an appropriation. His dissent focuses on the troublesome issue of dishonesty. Lord Hutton observes that s. 2(1)(a) of the Theft Act 1968 provides that a person's appropriation is not to be regarded as dishonest if he appropriates property in the belief that he has, in law, the right to deprive the other of it. He considers it paradoxical to distinguish between persons with a *belief* in a claim of right and persons, like Karen Hinks, who *have* a claim of right. Accordingly, his Lordship concludes that there can be no finding of dishonesty where the gift is valid.

Prima facie, Lord Hutton offers a plausible argument. However, it was implicitly rejected by the majority. The exploitative conduct by Karen Hinks *was* dishonest: everyone, and most importantly the jury, agreed on this. Nonetheless, on different facts, there may be room to invoke Lord Hutton's reasoning. If we reconsider the four examples mentioned by Lord Steyn at 842, perhaps in each case, were D charged with theft, he might answer: "I know it was sharp practise, but I also knew it was permissible within the (civil) law, otherwise I would not have done it. I sought throughout to abide by the law and made all the disclosures that the law required of me in order for the transaction to be valid." In such a scenario it is arguable that, by virtue of s. 2(1)(a), D could not in law be considered dishonest.