
CANADA / JUDGMENT

R. v. Milne

[1992] 1 SCR 697

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Supreme Court of Canada

DECIDED

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R. v. Milne

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Report

[1992] 1 SCR 697

Case number

22161

Judges

Sopinka, John; Gonthier, Charles Doherty; Cory, Peter deCarteret; McLachlin, Beverley;
Iacobucci, Frank

On appeal from

Alberta

Subjects

Criminal law

Notes

SCC Case Information: 22161

Decision Content

R. v. Milne, [1992] 1 S.C.R. 697

Her Majesty The Queen Appellant

v.

Robert Fitzsimons Milne Respondent

Indexed as: R. v. Milne

File No.: 22161.

1991: November 4; 1992: March 26.

Present: Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

on appeal from the court of appeal for alberta

Criminal law -- Theft -- Conversion -- Accused's company paid twice for same services -- Accused aware that second cheque issued by mistake -- Accused depositing second cheque in company's account and writing cheques to himself -- Whether accused guilty of theft -- Criminal Code, R.S.C., 1985, c. C-46, s. 322(1) .

The accused, through his company, supplied goods and services to H.B. Co., which paid for them by sending the company a cheque. A month later, owing to an error by H.B. Co., a second cheque was issued to the accused's company. Like the first one, the second cheque was deposited by the accused in his company's account. The accused then appropriated the money by writing company cheques in his own favour, reducing the balance of the account to practically nil. Despite leaving repeated messages, a security officer for the H.B. Co. was unable to contact the accused concerning the mistaken payment. The accused was later charged with theft under s. 322(1) of the Criminal Code and convicted. A majority of the Court of Appeal set aside the conviction. This appeal is to determine whether, in some circumstances, a transferee may commit theft in respect of property for which the transferor has a right of recovery because of a mistake known to the transferee.

Held: The appeal should be allowed.

Where a transferor mistakenly transfers property to a recipient, and the recipient knows of the mistake, property does not pass for the purpose of the criminal law if under the law of property the original transfer is void or voidable and the transferor has a right of recovery. The distinction between void and voidable transfers has no purpose in the context of the criminal law. In either case, where the law of property provides at least a right of recovery, property does not pass for the purpose of the criminal law. If the recipient then converts the property to his own use, fraudulently and without colour of right, and with intent to deprive the transferor of the property, he is guilty of theft.

In the present case, the conviction should be restored. The trial judge found that the accused was aware that the second cheque had been issued to his company by mistake. Therefore, property in the cheque did not pass to his company for the purpose of the criminal law. The trial judge also found that the accused's actions in depositing the second cheque in his company's account and then withdrawing the money amounted to converting that money to his own use with intent to

deprive the H.B. Co. of its property. This conversion was done fraudulently and without colour of right, since the accused was aware that the cheque had been issued by mistake.

Cases Cited

Overruled: R. v. Dawood, [1976] 1 W.W.R. 262; referred to: R. v. Stewart, [1988] 1 S.C.R. 963; Brochu v. The King (1950), 10 C.R. 183; R. v. Johnson, [1978] 6 W.W.R. 97.

Statutes and Regulations Cited

Criminal Code, R.S.C., 1985, c. C-46, s. 322(1) .

APPEAL from a judgment of the Alberta Court of Appeal (1990), 109 A.R. 268, 77 Alta. L.R. (2d) 1, [1991] 1 W.W.R. 385, 59 C.C.C. (3d) 372, allowing the accused's appeal from his conviction on a theft charge. Appeal allowed.

Paul C. Bourque, for the appellant.

Larry L. Ross, for the respondent.

//Gonthier J.//

The judgment of the Court was delivered by

Gonthier J. -- This case concerns the application of the principles of the law of property to the law of theft, specifically, whether in some circumstances a transferee may commit theft in respect of property for which the transferor has a right of recovery because of a mistake known to the transferee.

I -- Facts and Procedural History

Mr. Milne, through his company National Electronics Security Inc., supplied goods and services to the Hudson's Bay Co. An account for \$16,981 was paid by the Hudson's Bay Co., by sending the company a cheque in that amount which Mr. Milne deposited into his company's account. A month later, due to an error by the Hudson's Bay Co., a second cheque for \$16,981 was received and deposited by Mr. Milne into his company's account. Mr. Milne then appropriated the money by writing company cheques in his own favour. These cheques were certified by Mr. Milne, and reduced the balance of his company's account to practically nil. Mr. Milne had sole signing authority for the company account. A security officer for the Hudson's Bay Co. was unable to contact Mr. Milne concerning the mistaken payment, despite leaving repeated messages.

The question of whether a theft occurred in this case is governed by s. 322(1) of the Criminal Code, R.S.C., 1985, c. C-46 , which states:

322. (1) Every one 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;
- (b) to pledge it or deposit it as security;
- (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
- (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.

The trial judge concluded that Mr. Milne knew that the second cheque had been issued to his company by mistake, and given this knowledge, his actions in depositing it and then withdrawing the money constituted a conversion.

It seems to me that the only inference to be drawn from these circumstances is that [Mr. Milne] knew that the money received by the issuing of the second cheque had been paid in error, and that the funds should not have been deposited to this account. In my view the actions of [Mr. Milne] who had knowledge of these circumstances in writing cheques on the numbered account which contained funds that should not have been in that account constituted theft.

Further, he held that Mr. Milne had performed this conversion fraudulently, and without colour of right, with the result that he was guilty of theft.

This decision was overturned by a majority of the Court of Appeal: (1990), 77 Alta. L.R. (2d) 1, 109 A.R. 268, 59 C.C.C. (3d) 372, [1991] 1 W.W.R. 385 (hereinafter cited to Alta. L.R.). Côté J.A. observed that whatever the intent of Mr. Milne, he could not commit theft if the Hudson's Bay Co. did not retain a property interest in the money it mistakenly paid to Mr. Milne's company. He then examined the law of property with respect to payment under mistake and noted that in some cases such a payment transfers property, while in others it does not. After analyzing the cases, Côté J.A. came to the view that whether property passes despite mistake depends on the kind of mistake which has been made. If the mistake has to do with the object of the transfer, or its recipient, then property does not pass. However, if the transferor gives the intended object to the intended recipient, property does pass, even if the intention itself was based on a mistake (at p. 20):

Property passes if, and only if, the transferor gives the very object he believes and intends to the very person he believes and intends. That is so whether or not his willingness and decision to do so stem from fraud, forgetfulness, or spontaneous mistake, so long as the chattel and the recipients are the ones he intends. But if he mixes up recipients, or mixes up property, and gets the wrong chattel or wrong recipient, no property passes. That is so whatever caused his mistake, be it fraud or mishap.

Here the Hudson's Bay Co. intended to issue a cheque to National, and issued it just as intended with National as payee. They intended to deliver it to National, and got it into the hands of National. They intended National to negotiate it and keep the proceeds, and National did so. The

Hudson's Bay Co. did not confuse payees or property. The Hudson's Bay Co. succeeded: they got the property intended into the hands of the intended recipient. They knew, but forgot or overlooked, that they did not have to do so. Property passed. The Hudson's Bay Co. gained a civil cause of action for a like sum, but lost property in the cheque and its proceeds. Neither [the respondent] nor his company National did anything to induce that payment.

Since in the present case, it was the intention of the Hudson's Bay Co. to transfer property in the proceeds of the second cheque to Mr. Milne, property did in fact pass. The fact that this intention was based on the mistaken belief that the Hudson's Bay Co. owed Mr. Milne the money did not prevent the passing of money, though it created a civil cause of action for its return.

Côté J.A. noted that the nature and validity of the underlying contractual relationship were quite irrelevant to the question whether property passed through the second cheque (at p. 20):

And I agree that the test here is not whether there is operative mistake making void a contract. (No one here suggests property was to pass or not pass by contract. It was to pass or not pass by wording the payee of the cheque and by mere delivery.)

Having set out the civil law relating to property in this manner, Côté J.A. observed that it was not imperative that the civil law relating to property and the criminal law relating to theft should accord completely. However, any other result would lead to anomalies. Indeed, commercial practicality pointed in the same direction as the civil legal principles. For instance, the ongoing web of payments between two companies is often complex and overpayments and allegation of overpayment are common. Côté J.A. noted that if mistaken overpayment did not transfer property, a new kind of preference in bankruptcy would exist that had not been noticed before. Côté J.A. also noted that the most commercially practical response to the receipt of a mistakenly paid cheque may often be to deposit it and then arrange for a refund cheque to be issued. If property never passes in the first place, even this could amount to theft.

Côté J.A. rejected any application of trust principles or the law of conversion to this case (at p. 21):

In this case there is no question of a "special property". On anyone's view, all property passed to National or none of it did. Here there was no bailment, conditional sales contract, trust, or other split property, in the eyes of criminal law or civil law. The Hudson's Bay Co. did not retain any property interest of any kind: *Barclay's Bank v. Simms*, supra.

Nothing turns here on conversion. The doctrine extends the common law notion of what is a taking, and extends theft to cover those who already have possession. It does nothing to change whether property passes or does not pass. Nor does it affect who is the owner whose goods are taken or converted.

Finally, Côté J.A. noted that while Mr. Milne was certainly dishonest in his dealings with the second cheque, this particular form of dishonesty did not amount to theft, and could be dealt with in a number of other ways under the Criminal Code .

For these reasons, the majority in the Court of Appeal allowed the appeal, and set aside the conviction.

In dissent, McClung J.A. disagreed with the majority's conclusion that property in the proceeds of the second cheque had passed in law to Mr. Milne. According to him, the law of unilateral mistake intervened on behalf of the Hudson's Bay Co. and avoided the transaction. Because the Hudson's Bay Co. tendered the sum of \$16,981 for services that had been paid for earlier, it was mistaken as to a fundamental term of the transaction, and this mistake was recognized by Mr. Milne. "On those facts the contract was not merely voidable, but void, and no rights could be created by it" (p. 6). Hence no title to the funds was passed.

McClung J.A. also held that a "special property or interest" in the funds pursuant to s. 322(1)(a) of the Code had been retained by the Hudson's Bay Co. According to him, such an interest may derive from the nature of the transaction between the payer and the recipient of the funds. Applying those principles to the facts, he concluded that the funds had been entrusted to Mr. Milne, through his company, for the payment of the services earlier rendered. These services had already been paid and were known to have been paid, and therefore, the proceeds of the cheque remained impressed with a trust, freezing a beneficial and special interest in the funds in the Hudson's Bay Co.

II -- Analysis

Mr. Milne could not be convicted of theft on the basis of his having taken something from the Hudson's Bay Co. The cheque was in the possession of Mr. Milne, through his company, without any taking on his part. Therefore, Mr. Milne can only be convicted of theft if he fraudulently and without colour of right converted the money to his use with the intent to deprive the Hudson's Bay Co. of its property or "special property or interest" in it. It is the doctrine of conversion which covers a case such as this one where the initial possession of the thing in question was gained without a taking.

In determining whether Mr. Milne converted the money to his own use, the key issue is whether the Hudson's Bay Co. in fact retained an interest in the money after possession had been transferred to Mr. Milne, due to Mr. Milne's knowledge of its mistake. The majority in the Court of Appeal carefully analyse this issue on the basis of the law of property. Côté J.A. noted that there is a distinction in property cases between circumstances in which a mistake operates to void a transaction *ab initio*, so that property never passes, and other circumstances in which the mistake merely renders the transaction voidable, which entitles the grievied party to a remedy, either in damages or by way of constructive trust, but does not prevent the initial transfer of property.

As noted above, Côté J.A. held that this distinction turns on the kind of mistake made by the transferor. If the mistake relates to the identity of the object or the recipient, then the transfer is void. If the mistake instead relates to the reason for the transfer, it is voidable. In this case, since the Hudson's Bay Co.'s mistake related to the reason for the transfer, not the object or the recipient, the transfer was merely voidable.

The Crown objects to Côté J.A.'s analysis of the distinction between void and voidable transfers on the basis that such an analysis ought to focus on the owner's subjective intention, rather than his objective intention. To focus on objective intent is said to be inconsistent with the general principle of the criminal law, which is to examine subjective intent.

This is, however, a misconception of the distinction identified by Côté J.A. This distinction does not turn on the difference between objective and subjective intent. In speaking of the intent of the transferor, it is clear that Côté J.A. means subjective, not objective intent. For instance, Côté J.A. considers that when a bank mistakenly deposits money into the wrong person's account, this is a mistake which prevents property from passing. Yet the objective intent, visible to the outside observer, would be to pass property. It is the subjective intent not to do so which is relevant, according to Côté J.A.

In this case, both the subjective and objective intention of the Hudson's Bay Co. was to pass property in the cheque. What the Crown identifies as the subjective intent not to pass property relates instead, in terms of the criminal law, to the motive for the transaction. In this case, the motive of the Hudson's Bay Co. was to pay Mr. Milne's company for services rendered. Of course, this motivation was based on an error, in that payment had already been made, yet given this error the Hudson's Bay Co. fully intended for property in the second cheque to pass to Mr. Milne's company. The law of property creates a right of recovery because of the particular character of the mistaken motive in this case. However, this does not mean that the Hudson's Bay Co. did not intend property to pass.

Therefore, the nature of the distinction identified by Côté J.A. is not contrary to the general precepts of criminal law. Indeed, there is a sense in which it is consonant with those precepts, in so far as it focuses upon intent as distinguished from motive. However, assuming that the method by which Côté J.A. distinguishes between void and voidable mistaken transfers is correct, be it from the point of view of property law or criminal law, there remains the logically prior question as to whether the distinction itself is necessary or has any purpose in the context of the criminal law. As can be seen in *R. v. Stewart*, [1988] 1 S.C.R. 963, issues surrounding the law of property may look very different in the context of the criminal law than in the context of the civil law, where the purposes of these two branches of law differ.

The purpose of the distinction between void and voidable in the context of the law of property is largely (though perhaps not exclusively) to protect innocent third parties who have relied on the legitimacy of the transaction which has apparently taken place. Such a purpose has no analogue in the criminal law. The criminal law is concerned with the guilt or innocence of the accused, and to this end focuses on the actions and knowledge of the accused. The criminal law does not

affect the interests of third parties in the way that the law of property can. The fact that Mr. Milne in a case such as this may face criminal sanction for his acts would not affect the property claim of an innocent third party to whom the property had passed in the meantime.

Indeed, it would be perfectly consistent with the purposes and traditions of the criminal law to focus on the knowledge of the accused in order to determine whether property had passed. This conclusion is consistent with some of the prior cases dealing with this issue. In *Brochu v. The King* (1950), 10 C.R. 183 (Que. K.B.), the accused was overpaid by \$1,000 when cashing a cheque. When the error was pointed out to him, the accused denied that he had received the extra funds, and attempted to use those funds in a number of ways. In deciding that the accused was guilty of theft, *Marchand J.* focused on the accused's knowledge of the bank's mistake, rather than the nature of that mistake (at pp. 191-92):

[translation] I italicize the words "taking or converting to the use", the very clear meaning of which goes far beyond the discussions of the common law, and I see in them that anyone who has received, through the unilateral error of an owner, a thing to which he has no right, and decides to convert it to his own use, to keep it, when the mistake that has given it to him is pointed out to him, creates for himself a fraudulent title, takes fraudulently and without colour of right, with intent to deprive the owner, with full animus furandi, and makes himself guilty of the theft of this thing.

In the case of *R. v. Johnson*, [1978] 6 W.W.R. 97 (Man. C.A.), the majority also focuses on the accused's knowledge of the mistake, rather than the type of mistake. In that case, funds were mistakenly deposited by a bank into the accused's account, and the accused, knowing that he was not entitled to them, withdrew and spent the funds. *Monnin J.A.* found that spending the money constituted conversion, and the knowledge of the mistake was sufficient to make this theft (at p. 99):

Under the plain ordinary interpretation that would be made by any citizen and under the plain legal interpretation of s. 283 of the Criminal Code, R.S.C. 1970, c. C-34, which defines theft, even if the accused's conduct in taking something which he very well knew was not his may not by itself have amounted to theft, his conduct in then fraudulently and without colour of right converting that money to his own use certainly constituted theft. The accused was not entitled to this sum of money and he very well knew it: "I almost flipped out". In my view that is all that is required to make this conversion of the money a theft for which the accused ought to have been found guilty.

Both of these cases can be reconciled with the approach suggested by the majority in the Court of Appeal, but are more obviously consistent with a focus on the knowledge of the accused.

However, the case of *R. v. Dawood*, [1976] 1 W.W.R. 262 (Alta. S.C., App. Div.), must be overruled if the knowledge of the accused is to be the critical factor. In *Dawood*, the accused switched price tags on merchandise, and then presented the altered merchandise to a cashier for payment. The majority in the Court of Appeal saw this as an offer to purchase the merchandise for the altered price, which offer was accepted by the cashier. The transaction was therefore voidable, not void, and property had passed. In light of the accused's knowledge of the mistake made by the cashier,

property would not have passed for the purpose of the criminal law if the knowledge of the accused is the controlling factor.

In the present case, it is absolutely clear that Mr. Milne knew that he was not entitled to the proceeds of the second cheque. Since Mr. Milne knew of the mistake of the transferor, and the mistake was of a kind which by virtue of the law of property gave rise to a right of recovery, property did not pass for the purpose of criminal law.

In light of this conclusion, it is not necessary to discuss the scope of the "special property or interest" referred to in s. 322 of the Criminal Code .

III -- Conclusion

Where a transferor mistakenly transfers property to a recipient, and the recipient knows of the mistake, property does not pass for the purpose of the criminal law if the law of property creates a right of recovery, no matter whether the original transfer is said to be void or voidable. The distinction between void and voidable transfers has no purpose in the context of the criminal law. In either case, where the law of property provides at least a right of recovery, property does not pass for the purpose of the criminal law. If the recipient then converts the property to his own use, fraudulently and without colour of right, and with intent to deprive the transferor of the property, he is guilty of theft.

In this case, the trial judge found that Mr. Milne was aware that the second cheque had been issued to his company by mistake, and knew that he had been paid with a prior cheque. Therefore, property in the cheque did not pass to Mr. Milne's company for the purpose of the criminal law. The trial judge also found that when Mr. Milne wrote cheques to himself on the company's account that reduced the balance to almost nil, this amounted to converting that money to his own use with intent to deprive the Hudson's Bay Co. of its property. This conversion was done fraudulently and without colour of right, since Mr. Milne was aware that the cheque had been issued by mistake. Therefore, Mr. Milne was guilty of theft.

Other cases, such as those referred to in the judgment of Côté J.A. in the Court of Appeal, will raise different issues. For instance, a case in which the recipient only discovered after converting a cheque to his own use that it had been sent by mistake would raise a number of issues not raised in this case, as would a situation where the recipient was entitled to some but not all of the proceeds of the cheque, or where a set-off was involved, or where the recipient merely deposited the cheque without any further acts to convert it to his own use. The resolution of these issues may be left to other cases.

I would therefore allow the appeal and restore the conviction.

Appeal allowed.

Solicitor for the appellant: Paul C. Bourque, Edmonton.

Solicitor for the respondent: Larry L. Ross, Calgary.

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