Criminal Case No. 6 of 1977

The Republic v. Tekanibeia Tebuka Iti

12th January, 1978.

Robbery - violence at the time of stealing - whether asportation complete.

The accused was charged with robbing a Chinese woman of $500 cash. He admitted stealing the money in her house and that, having been disturbed by her while doing so, he pushed her out of the way so that he could get away. The woman gave evidence that the accused did not merely push her but punched her in order to get away and that, when she chased after him and grappled with him, he punched her several more times and then made good his escape. It was argued that the actual violence used against the woman was not used at the time of or immediately after the stealing.

Held: Asportation, which is one of the elements of stealing, may be a continuing act and, while it continues, the stealing is still taking place.

Accused convicted.

D.G. Lang for the Republic
P.H. MacSporran for the accused

Thompson C.J.:

The accused is charged with robbery and alternatively with stealing and common assault.

The prosecution case is that on the afternoon of the 7th October last year he went into the flat of a Chinese lady, Mrs. Wong Mei Kuen, while she was asleep in bed in one bedroom, entered an adjoining bedroom where Mrs. Wong had a substantial amount of money, and was in the process of taking the money when Mrs. Wong woke up and came to see what was happening. It is the prosecution case that the accused immediately put into his pockets the money he had in his hands and then punched

Mrs. Wong once so that he could escape from the bedroom, that she chased him and grappled with him in another room as he tried to leave the house and that he then punched her several more times, causing her to become dizzy and fall down.

Evidence of these events was given by Mrs. Wong. A police officer, Mr. Tannang, gave evidence that on 13th October, after he had charged and cautioned the accused, the accused made a statement, which was recorded in writing, in which he admitted entering the house, taking the money, being disturbed by the Chinese woman, then pushing her out of his way and running away. Mr. Tannang also gave evidence that afterwards he charged the accused with common assault and cautioned him and the accused made another statement, also recorded in writing, in which he admitted hitting the woman when they "struggled together in the kitchen". Evidence was given by another police office, Mr. Gioura, of the execution of a search warrant in the accused's room, of goods and money found there and of statements about those goods and that money made to him by the accused. Those statements were, however, made in response to questions asked by Mr. Gioura without caution at a time when the accused was in custody and had already been charged and made the statements to Mr. Tannang to which I have already referred. A caution should, therefore, have been given and it was unfair to the accused to question him without a caution; having previously been cautioned before being invited to make his statements to Mr. Tannang, he may have been misled by the absence of caution to believe that the questions about the property and the money were being asked "off the record". I shall,therefore,totally disregard the evidence of what the accused told Mr. Gioura.

The accused has not challenged the evidence of Mrs. Wong, except as to the amount of the money taken and the degree of violence used, or the evidence of Mr. Tannang. I accept their evidence as substantially true, although I am not convinced that a sum as large as $500 was taken by the accused; he had on only a pair of shorts, he had no money in his hands when he ran away and about $300 of the money was in $1 and $2

notes which was not put together in bundles. I find that it has been proved beyond all reasonable doubt that the accused went into Mrs. Wong's flat and stole a sum of money which was in one of the bedrooms, that he was disturbed by her as he was taking the money, that he put into his pocket the money he was holding and then pushed her violently aside so that he might make his escape, that she chased him through the flat and that, when she grappled with him in another room trying to prevent his escape, he punched her several times.

The money belonged to Mrs. Wong; the accused obviously took it fraudulently and with intent to deprive her of it permanently. Stealing, which is a necessary element of robbery and also constitutes the offence charged in the second count, has, therefore, been proved beyond all reasonable doubt. The use of violence by the accused against Mrs. Wong immediately after the time of the stealing, and again shortly after that, such violence also constituting the offence of common assault as charged in the third count, has also been proved beyond all reasonable doubt.

The only question which remains to be considered is whether the violence was used to prevent or overcome resistance to the money being stolen. Mr. MacSporran has submitted that the offence of stealing was complete when the accused removed the money from the box and the drawer where Mrs. Wong kept it. There had been sufficient asportation and, if the accused had put the money back when Mrs. Wong came, he could still have been convicted of stealing it. That being so, Mr. MacSporran's argument is that it was too late for the stealing to be resisted; it had occurred. If that argument were correct, the provision in section 409 that the crime may be committed if violence is used "immediately after the time of stealing" would be without effect.

The offence of stealing is defined in section 391 of the Criminal Code. It is substantially the same as the common law offence and thus differs basically from the offence of theft which was substituted for it in England by the Theft Act 1968 and in a number of the States of Australia by legislation

modelled substantially on that Act. An essential difference between the offences is that the element of asportation in the common law offence has been replaced by the element of appropriation. Appropriation in many, if not all, cases apparently occurs in one instant of time. By contrast, asportation may be a continuing act. Certainly the stage is soon reached at which it is sufficient to constitute the necessary element for the crime of stealing. But while it continues the offence of stealing may properly be regarded as still being committed.

So it is necessary to consider whether in this case the asportation had finished before the accused pushed Mrs. Wong. I am satisfied that it had not and that the first blow was struck to prevent Mrs. Wong resisting the stealing.

Accordingly I find that the facts established do constitute the offence of robbery and I find the accused guilty of that offence.

He is also guilty of the offence of stealing a sum of money, possibly not $500 but a substantial sum, as charged in the second count and of common assault as charged in the third count.

I convict the accused of robbery C/S 411 of the Criminal Code, the First Schedule to the Criminal Code Act 1889 of Queensland in its application to Nauru.

Chief Justice

As the offences charged in Counts 2 and 3 were charged in the alternative to that charged in Count 1, I shall record no conviction in respect of them.

Chief Justice