

**IN THE DISTRICT COURT
AT WANGANUI**

CRI-2009-083-002490

NEW ZEALAND POLICE
Informant

v

MOLLIE MARIA SPITERI
Defendant

To Police Counsel
19/1/10

Hearing: 18 January 2010

Appearances: Sergeant S Butler for the Informant
R Leith for the Defendant

Judgment: 18 January 2010

ORAL JUDGMENT OF JUDGE M R RADFORD

[1] Mollie Maria Spiteri is charged that between 8 July 2008 and 1 August 2009 she did steal three paintings which were together valued at \$2800 the property of Michelle Kirk.

[2] The factual background to the matter is that the defendant was the proprietress or was part of the running of the Red Lion Bar and Restaurant. She came to an arrangement with the complainant Michelle Kirk whereby Ms Kirk, an artist, would hang some of her works on the wall of the restaurant. Subsequently (I will come back to the detail as to why in a moment) the restaurant failed and that, together with a number of matters personal to Ms Spiteri, meant that the business

had to be closed and goods that did not belong to the business or Ms Spiteri were, by all accounts, returned to various suppliers.

[3] When Ms Kirk learned of the imminent closure of the restaurant she was concerned for her paintings and so she contacted the defendant to seek the return of them. The exact number of the paintings that were left at the restaurant is unclear but it appears to be either eight or ten. In any event, Ms Kirk was able to retrieve a number of the paintings but was clear in her mind that there were three which had not been accounted for. By chance Ms Kirk was enabled to go through Ms Spiteri's house when it was placed on the market and as part of that inspection she observed one of the paintings which had not been returned to her. She took a photograph of that painting and the matter was then reported to the authorities.

[4] Ms Kirk says that the arrangement that she had with Ms Spiteri was that the paintings would be displayed in the restaurant and would be sold as opportunity arose and that the restaurant, or Ms Spiteri, would be entitled to receive a commission of something in the order of 30 or 40 percent. I say, "in the order of" because I am given to understand that 40 percent is the usual gallery commission rate but there is some suggestion that the arrangement was 30 percent in this case. In any event the amount of the commission does not matter for the purposes of this case.

[5] It then transpires that people in Auckland, Mr and Mrs Lovell, who are related to Ms Spiteri, were informed of or became aware of an article in the Wanganui Chronicle describing the loss of the three paintings. This article I have not seen but I gather from what I am told that the art work and the artist were identifiable and the article concerned three paintings said to be either missing or stolen. The Lovells had, on an earlier occasion, been in Wanganui and the defendant had indicated that she wished to make them a gift. She carried out her wish by giving to the Lovells two paintings which I am satisfied belong to Ms Kirk. I am also satisfied that the two paintings are from the number which were left by Ms Kirk at the restaurant and displayed for sale. In any event, the paintings were said by the Lovells to be gifts and were received by them as such but upon learning that there was some question over their provenance the Lovells immediately, if not that day the

next day, returned the paintings to Ms Kirk whom they had identified from their research as being the artist concerned.

[6] Ms Spiteri is therefore charged with theft of the three paintings, the two that she reported to give to the Lovells and the other one which remained in her home and which was identified by Ms Kirk when she managed to go through the property.

[7] That is the broad outline of the matter. Theft is described as being *the action of dishonestly and without claim of right taking property with intent to deprive the owner permanently of that property or of any interest in that property*. There is also another definition of theft in the Crimes Act which refers to the *taking with intent to deprive the owner permanently of the property after obtaining possession or control over the property in manner whatsoever*. It is important to note that there is to be, if there is a charge proved, proof that beyond reasonable doubt each of the elements of the crime has been established. I remind myself that if any one of the elements is not proved to the standard of beyond reasonable doubt then I must dismiss the charge.

[8] Turning now to the witnesses, Ms Kirk gave evidence and I accept that she gave the impression of being an honest and reliable witness. She gave her evidence in a straightforward and simple fashion and I see nothing in either her evidence or in the cross-examination of her or in comparison with any other of the witnesses, I see no reason whatsoever to disbelieve her. Her evidence is, as I have already described, that she came to this arrangement to leave the paintings at the restaurant with the idea that if they were sold a commission would be payable to the restaurant proprietor, Ms Spiteri, and that was the person with whom she made the arrangement. She was a little confused as to the number of paintings that were involved. She thought in evidence that it was ten but accepts it may have been eight. She deposed that she heard the Red Lion was closing down and she asked if she could get her paintings back. She says she telephoned Ms Spiteri to ask her about the situation and she gained the impression that Ms Spiteri was angry at the rumour that the Red Lion was closing and she said that Ms Spiteri told her that the paintings were okay.

[9] After the closure of the restaurant she said she went to the house, in the fashion that I have described already. She says that she received seven paintings from Ms Spiteri but she knew that there were some missing. The paintings came from sort of shed or room downstairs. She said that she was able to say that there were two red nude paintings and one of a nude and a statue painted in black. She says that she asked Ms Spiteri where the paintings were and received the response that Ms Spiteri did not know. Ms Spiteri told her that the liquidator might have them or some were still at the Red Lion. She made some enquiries with the landlord but again failed to get them back. Ms Spiteri also told her she did not have the paintings or any of them in the house and she did not like paintings. There was obviously some heat in the discussion towards the end. It was following all that that Ms Kirk discovered the paintings still in the house.

[10] I make the following comments about the evidence so far. Ms Spiteri plainly knew, I accept, where the paintings were. She said that she, in fact, had given two of them to her relation, the Lovells, and one of them was still in the house. I accept Ms Kirk's evidence as being truthful. It follows, therefore, that I am sceptical as to the truth of what Ms Spiteri told Ms Kirk on the visit.

[11] It was put to Ms Kirk that Ms Spiteri that paid \$300 for one of the paintings and a witness was later brought to try and establish that that was the case. Of course, there is no onus on the defence to establish any point at all but it is of interest that an attempt is made to claim ownership of the painting by the payment of some \$300. I do not believe that. I do not believe any payment was made to Ms Kirk and I do not believe that there was a careful counting out of the money, the placing of it in a white envelope as described by the witnesses, and I will come to those in a moment.

[12] Mr Sigley was a witness who is Ms Kirk's partner. He says that he was aware of the paintings being in the Red Lion. In fact, he hung them up in the restaurant area, he being a builder. He was aware of some discussion which took place between Ms Kirk and Ms Spiteri but was not aware of the precise detail of it. He again, although his evidence was marginally relevant, struck me as being an honest witness.

[13] Ms Annette Weston-Lovell gave evidence and she again struck me as a particularly truthful witness. I was most impressed by the reaction that she deposed to, which I accept, of being in a situation where there was some suspicion that the paintings that she had on a wall of her house may not have been honestly obtained and immediately ridding herself of those paintings after trying to, successfully as it happens, locate the owner of them. She struck me as an honest witness. The important point about that, of course, is that she says that Ms Spiteri purported to make a gift of the paintings to her. In my view, when somebody makes a gift of something that does not belong to them, they are demonstrating that they are intending to deprive the owner permanently of those goods. In other words, they are taking steps to transfer ownership of the goods to another person when they have no lawful authority to do so.

[14] Ms Spiteri was interviewed by a constable in charge of the case and essentially she did not give a statement. That is her right but I must say this. The interview that she had with the constable was recorded by way of a video and that has been played to the Court. Ms Spiteri's performance was I think, to be charitable, almost designed to confuse and I do not accept that she was saying anything like the truth in her video interview. She seemed to me to be evasive and did not want to answer questions. I remind myself, of course, that the fact that a defendant tells lies, which I do find here, does not mean that she is automatically guilty of the offence but I have to put that evidence to one side and decide on the basis of the remaining evidence that I do find convincing whether or not the prosecution have proved this case.

[15] For the defence, witnesses were called and they were two people, mother and daughter who knew Ms Spiteri. The daughter, Ms Osborne, said that she was aware, because she was asked to count, that some \$300 was being put aside at one stage, although we are not sure when, for a painting that Ms Spiteri was going to buy. Ms Barbara Osborne gave evidence that she attended various meetings that were associated with social functions which were being organised by her and her daughter and these meetings were held at the Red Lion. She says that she remembers on one occasion when Ms Spiteri said she was going to give something to Ms Kirk and she formed the view that the white envelope containing the money – not that she knew

that the money was there – was what was going to be given. I am gravely suspicious about that evidence. It seems to me just too pat in all of the circumstances. I also find that the mode of giving the evidence was vague and quite unsatisfactory.

[16] I find, therefore, that the evidence given by the prosecution is both convincing and in my view reliable, while that given by the defence and that recorded on the video is of less value and I consequently put it to one side.

[17] I find, however, that the actions of Ms Spiteri, taken in the round, demonstrate that she did dishonestly and without claim of right take the property of Ms Kirk. She told lies about where it was. She said that it was not in the house when it patently was. She said she did not know where it was when she patently did know where it was. Indeed, one of her witnesses said that it was hanging up in a spot that was quite visible from the door. That is not the evidence that I accept. It seems to me, frankly, that the witnesses for the defence were gilding the lily. It seems to me that by trying to hide the painting that was in the house from Ms Kirk she was intending to deprive the owner permanently of it. She had no real authority to take it to her home. She could have returned the property, if that was her intention, directly to Ms Kirk without any difficulty. As far as the two paintings in Auckland are concerned I accept the evidence that they were passed over as gifts and in my view that plainly indicates an intention to deprive the owner permanently of the property. Accordingly, I find that the charge is proved.

[18] I want to make some other observation about this matter. I have heard evidence that the painting which in fact remain~~d~~ in the house was seen by one of the defence witnesses but she had little recall of it. However, that witness was prepared to try and describe the painting. She says that she is a collector of art herself but when it came down to being asked to describe the painting she did say that it was of a single figure when patently the painting in question, which has been recovered by the police and presumably will be returned to Ms Kirk, is not of a single figure but of two figures. It is a worrying thing when you have evidence that is so unreliable.

[19] Accordingly, I find the charge proved.

[20] Ms Spiteri, you have been found guilty of a charge of theft. It is a very unfortunate situation that you are in because you have never been in trouble before. A wiser head should have prevailed and you should have recognised the situation. However, you have chosen to go through a hearing and you are not to be penalised for exercising your rights. On the other hand you forfeit any discount that you are entitled to as a result of your, really, denying in the face of overwhelming evidence the reality of the situation. However, as I say, you have not been in trouble before. You are entitled to credit for that and the paintings have, through the good offices of others, been recovered.

[21] Accordingly, you are convicted and fined the sum of \$1000 and ordered to pay witnesses expenses \$550.

[22] You have made an application for suppression of your name. I think it is vital that the principle that open justice be applied, should be applied here. I can see no reason which has been advanced and which might persuade me to suppress your name and accordingly I decline to do so. Stand down.

A handwritten signature in black ink, appearing to read 'M R Radford', written in a cursive style.

M R Radford
District Court Judge