

UGANDA / JUDGMENT

Chohan v The Queen (Criminal Appeal No. 165 of 1956) [1956]

EACA 15 (1 January 1956)

[1956] EACA 15

COURT

East African Court of Appeal

BEFORE

Forbes J, Rudd J

CASE / FILE NUMBER

Criminal Appeal No. 165 of 1956

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APPELLATE CRIMINAL

Before RUDD and FORBES, JJ.

KARSANBHAI RAMJI CHOCHAN, Appellant

THE QUEEN, Respondent

Criminal Appeal No. 165 of 1956

Theft—Penal Code, section 263—Wrong change given—Intent to defraud.

The accused, a shopkeeper, was handed a Sh. 100 note by a customer who expected to receive goods and change to that value. The accused with intent to defraud gave change for Sh. 10 only claiming he had only been handed a note for the smaller sum.

Held (29-8-56).—(1) That the prosecutor did not intend to part with his property in the note without receiving his proper change, and the accused having the intent to defraud was guilty of theft under the definition in section 263 of the Penal Code.

Reg. v. Ashwell, 16 Q. B. D. 190 distinguished; Reg. v. McKale, 1 Cr. C. R. 125 followed.

Salter, O. C., and D. V. Kapila for appellant.

Brookes, Crown Counsel, for respondent.

Reported by: R. O'Connor, Esq., Resident Magistrate, Nairobi.

JUDGMENT.—The appellant appeals from a conviction of theft of a Sh. 100 note contrary to section 270 of the Penal Code and from sentence of 12 months' imprisonment with hard labour in respect of the said conviction.

He was a partner in a retail shop in River Road, Nairobi, and had been in business since March, 1951. No previous complaint had been made against him. The case for the Crown depended on the evidence of a single witness, the African complainant who said that at 11.30 a.m. on 7th July, 1956, he went to the shop and having bought from the appellant some baby powder for Sh. 2/50 and some hair cream for Sh. \$3/50\$ he gave the appellant a note of Sh. 100 and received back in change Sh. 4 only from the appellant instead of Sh. 94. The African claimed that he had tendered a note of Sh. 100 but the appellant maintained that it was a note of Sh. 10 only. The African left the shop and reported the matter to the police.

At 12.45 p.m. the inspector of police went with the complainant and interviewed the appellant in his shop. The course of this interview is undisputed and is common case. The inspector asked the appellant if he had seen the complainant before and the appellant said that he had just been in to complain of wrong change.

The inspector then told the appellant that he had received a complaint against him that he had received a Sh. 100 note and had given change for a Sh. 10 note only. He asked the appellant if he had any Sh. 100 notes and the appellant took out a bundle of notes and handed two notes of Sh. 100 each to the inspector. One of these notes bore a number which was written in a notebook which the complainant had given to the inspector. This notebook was an interesting document. It may be described as a home-made article of which the back or cover appeared to have been originally part of a large orange-coloured

envelope. Inside there are what appear to be four single pages torn from a cheap exercise book and folded so as to make eight pages. The book is bound by a single staple. The only writing in the book is on the centre two pages on which the numbers of 17 notes and their individual value is written. One note of Sh. 5, seven notes of Sh. 10, four notes of Sh. 20 and five notes of Sh. 100 each.

The complainant said that the book contains the numbers of notes which he received in the preceding three months, yet the pages in the book and the entries are clean and do not look at all as if the entries had been written in from time to time. The writing of each entry is clean and similar. The entries are made with an indelible pencil which appears to have had a similar point for each entry. In our opinion these entries could all have been made at one time without resharpening the pencil.

The appellant's case was that the complainant came to his shop with another African who bought a watch strap for Sh. 10 which he paid for with the Sh. 100 note in question and that both Africans left the shop after receiving in change a Sh. 10 note and four notes of Sh. 20 each. That the complainant subsequently returned and bought the hair cream for Sh. 3/50 paying for it with a Sh. 10 note and receiving in change a Sh. 5 note and Sh. \$1/50\$ in cash. That the complainant then bought the baby powder for Sh. 2/50 paying for it with the Sh. 5 note and receiving Sh.

\$2/50\$ in change. That the complainant then claimed to have paid Sh. 100 note instead of the Sh. 10 note for the hair cream and that when the appellant denied this allegation the complainant left the shop. The police searched the complainant and found that the only money he had in his possession at that time was three shilling coins and two 50-cent coins.

If we were to disregard the effect of the credibility of the witnesses we would think that on the inherent probabilities the evidence of the appellant is more probable than that of the complainant. It would, however, be most improper not to have regard to the credibility of the witness. In a case such as this the credibility of the witnesses is all important. The learned trial magistrate is in a better position than we are to assess the credibility of the witness and he believed the evidence of the complainant and did not believe the evidence of the appellant. He did not misdirect himself and the evidence of the complainant, if believed, was sufficient to support the findings. In those circumstances we must uphold the findings of the lower court.

It was argued that the findings did not constitute the offence of theft in as much as the complainant had parted with the note voluntarily and consequently there was no taking or trespass.

In support of this argument the appellant relied on the judgment of **Smith*, J. in Regina v. Ashwell* 16 Q. B. D. 190. That was a case in which the prisoner asked the prosecutor to lend him a shilling and the prosecutor gave him a sovereign believing it to be a shilling. The prisoner took the coin under the same belief but when sometime later he discovered that the coin was a sovereign he then and there appropriated it to his own use. The full Court held that the prisoner was not guilty of larceny by a bailee but it was equally divided as to whether the prisoner had been guilty of larceny at common law. The conviction, therefore, stood. The instant case is clearly distinguishable. In Ashwell's case the sovereign was delivered to the prisoner under a mutual mistake of both parties as to its substance. Each at that time believed it to be a shilling. But in the instant case there was no mistake. There was a definite intent to defraud on the part of one or other of the parties and the lower court found that this intent existed on the part of the appellant and not on the part of the complainant.

In our opinion the instant case is more in line with **Regina v. McKale**, 1 Cr. (CR. 125) which was a case of ringing the changes. In that case the prisoner and

a companion entered the prosecutor's shop where the prisoner bought a pennyworth of sweets and put down a florin to pay for it. The shopkeeper took the florin and put down \$1/- and 11d in change which the prisoner took up. The prisoner's companion said "you need not have changed" and put a 1d on the counter which the prisoner took up. The prisoner then put down a 6d piece and 6d in copper and asked for a \$1/- in exchange. The prosecutor put down a \$1/\$ and the prisoner then said "you may as well give me the 2/- piece and take it all. The prosecutor put down the florin expecting to be paid another 1/- but the prisoner took up the florin and he and his companion left the shop without paying the other \$1/- . The jury was directed as follows:—

- 1. The prosecutor was defrauded of a shilling in value.

- 2. That, although the prosecutor put down the florin intending to part with it in exchange for \$2/- yet, if the jury believed that the prosecutor intended only to part with it in exchange for \$2/- of the prisoner's money the parting with it under the circumstances stated would not be parting with the property in it if the jury believed those circumstances to have been fraudulently contrived by the prisoner and his companion.

It was left to the jury to say whether the taking away of the florin under the circumstances was an error or mistake unintentional on the part of the prisoner or whether they believed that the prisoner and his companion went into the shop intending to defraud and that they did obtain the florin by fraud meaning to steal a \$1/- in value, and that if the jury should be of the latter opinion they were directed that it was larceny. The prisoner was convicted and the Court for Crown Cases Reserved upheld the conviction. The question before the Court for Crown Cases Reserved was whether the direction was right or wrong and whether the facts proved amounted to larceny. It was held that the facts did amount to larceny. That the question was whether or not the prosecutor intended to part with the florin unconditionally or conditionally and it was held that the prosecutor did not intend to part with the property in the florin as well as her possession in it until she had received its full value.

Applying that decision to the facts of the present case as found by the lower court, it is clear that the prosecutor did not intend to part with his property in the note without receiving his proper change. He did not give the note to the appellant unconditionally and out and out. He gave it expecting to receive back his proper change and when he did not get his proper change he queried the matter and reported it to the police. We have no doubt that the transaction was not completed, that on the findings the prosecutor did not intend to part with the property in the note unconditionally. The giving of the note to the appellant was only a step in the intended transaction and it was on condition that the appellant would give the proper change. At the very best from the appellant's point of view, he was only a part owner of the note which was given to him as he well knew with the intention that he would then and there give the proper change.

The definition of theft in section 263 of the Penal Code in our opinion makes it quite clear that the facts are capable of constituting theft within the meaning of the definition. We are further of the opinion that the facts as found constitute larceny at common law and that the decision in McKale's case is applicable. In our opinion the facts as found constitute theft of the Sh. 100 note, thereby defrauding the complainant of Sh. 90 value. The appeal in so far as it is against conviction must be dismissed.

We consider the sentence of 12 months imprisonment with hard labour to be on the high side. The offence was certainly a mean and despicable offence but the appellant had previously been in business for years and no complaint has been made against him. It is unlikely that he could have made a practice of committing such frauds or he would lose the confidence of his customers. There is nothing in the remarks of the prosecutor, after conviction, to suggest that such frauds are a common practice or that complaints of them are at all frequent.

The appellant was previously of good character. In the circumstances we consider that a fine of Sh. 1,000 will satisfy the ends of justice in this case. The appeal against conviction is dismissed. The appeal against sentence is allowed to the extent that the sentence is altered to a sentence of a fine of Sh. 1,000 or six months' imprisonment in default.

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