

UGANDA / JUDGMENT

Jamal v Reginam (Criminal Appeal No. 154 of .1955) [1955] EACA 352 (1 January 1955)

[1955] EACA 352

COURT

East African Court of Appeal

BEFORE

Holmes, J (Kenya), Nihill P, Worley VP

CASE / FILE NUMBER

Criminal Appeal No. 154 of .1955

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COURT OF APPEAL FOR EASTERN AFRICA.

Before : SIR BARCLAY NIHILL (President); SIR NEWNHAM WORLEY (Vice-President) and Holmes, J. (Kenya)

ABDULMALEK AHMED JAMAL, Appellant (Original Accused) v.

REGINAM, Respondent Criminal Appeal No. 154 of 1955

(Appeal from the decision of H. M. High Court of Tanganyika, Abernethy, J.)

Obtaining goods, viz. Bills' of Lading, by false pretence—Seller's lien—Penal Code, section 302.

The appellant was charged with obtaining goods, namely bills of lading, by: a false pretence that two cheques passed by him in payment thereof were good and valid payment and would be met by the bank upon which they were drawn.

Upon the close of the prosecution case, the trial magistrate found that there was no case for the appellant to answer because the goods the subject matter of the bills of lading having been appropriated to the contract, the property therein had passed to the appellant; and, the complainants having reserved no rights of disposal thereover; they had no property in or rights over either the goods or the bills of lading.

Upon case stated, the High Court reversed the trial magistrate's decision and remitted the case to him for the trial to proceed on the basis that there was a case to answer.

The trial magistrate then found that in writing the first of the two cheques, the appellant knew that it would not be met and that the complainants had a lien on the bills of lading as unpaid sellers, and he convicted the appellant accordingly. On the first appeal the conviction was upheld...

**Held* (8-7-55):*—Even if the goods, the subject matter of the bills of lading, may have passed to the accused; the complainants had, as unpaid sellers, a right of lien over the bills of lading for the purchase money of the goods comprised in the photograph of the goods which in the photograph of the scheme even where property passes to buyers upon shipment, it remains subject to the seller's lien, so that, if the accused person had

Appeal allowed.

Cases referred to: *Barber v. Meyerstein*, (1870) L. R. 4 H. L. 317; *Sanders Bros. v. MacLean & Co.*, (1883) 11 Q. B. D. 341; *The Parchim*, (1918) A. C. 157; *London Joint Stock Bank v. British Amsterdam Maritime Agency Ltd.*, (1911)

Sáyani-for appellant.

Sir James Henry, Acting Attorney-General (Tanganyika) for respondent.

JUDGMENT (prepared by Nihill (President)).—This is a second appeal from a conviction of obtaining goods by false pretences entered against the appellant by the District Court of Dar es Salaam. On appeal to the High Court the conviction was upheld and the appellant is serving a sentence of nine months' imprisonment with hard labour. The proceedings against the appellant have a somewhat chequered history because; on his first appearance in the District Court in July, 1954, the learned resident magistrate held that there was no case to answer and

discharged the appellant. Subsequently, at the request of the Crown, a case was stated which came on for determination in the High Court in November before Mr. Justice Crawshaw. This Judge held that the District Court had erred in law in the view taken that the bill of lading when in the possession of the complainants Ghavi & Co., gave the company no property in or rights over the goods or the documents, and the case was sent back to the District Court with a direction that the defence be called on. The learned magistrate, after hearing the evidence of the appellant and the evidence of the bank manager, Mr. Gilbey, whom he allowed the prosecution to call in rebuttal, found—

- (a) that Ghavi & Co. had a lien on the documents as unpaid vendors, and
- (b) that in writing the first cheque described in the particulars of the charge he had done so knowing that it would not be met.

He accordingly convicted.

Since it was a ground of appeal in the court below and has been argued also to some extent before us that Mr. Justice Crawshaw was wrong in his view of the law applicable to the facts of this case, it is as well that we should say at once that in our opinion he was right. Even if the goods, the subject matter of the bill of lading, may have passed to the appellant's company, it is clear beyond doubt that Ghavi & Co. as unpaid vendors had a right of lien over the bill of lading. In fact, we are content to adopt the language used by the learned Judge who put it like this: \$-\$

"Whatever capacity it was that the complainants made out the bill of lading, it was surely as unpaid vendors that they retained them. In other words, they exercised a lien (a lien recognized by the contract) on the bills of lading for the purchase money, in the same way as a shipowner may exercise a lien over the goods for his freight."

Although not cited by Crawshaw, J., an authority for the correctness of the above passage can be found in the English case of *The London Joint Stock Bank Ltd. v. British Amsterdam Maritime Agency Ltd.* 104 (1911) L. T. R. 143. This was a case decided on first instance by Mr. Justice Channell and a study of his judgment reveals some facts very similar to the present ones. There, too, as in the instant case, the bill of lading had been made out to buyer's order but retained by the sellers against payment according to contract. Without deciding definitely whether on shipment the property in the goods passed to the buyers, Mr. Justice Channell had no doubt at all that they were not in law entitled to possession of them until they had paid the draft attached to the bill of lading. We cite the following passage from the judgment:-

"The arrangement then was that although the bill of lading was to be taken in Palmers's name as shippers, yet the vendors were to retain the physical possession of that bill of lading until the draft was paid. The object of doing that, and the meaning of it, was that Palmers would not be able to get possession of the goods because they were not to have possession of the bill of lading until they had paid for them. Therefore the effect would, be if the property had passed that, notwithstanding the passing of the property, the vendors were to have a lien upon oil which they could give effect to by seeking not the possession of the goods, but the possession of the bill of lading which they were to have a lien upon for their purchase money. The general result, therefore, was upon those facts that when Palmers got the oil in London, they were not entitled to have it because they were not entitled to have possession of that oil as between themselves and the vendors. or as between themselves and the foreign banker who had bought their draft; they were not entitled to have possession of that oil until they had paid the draft."

Parchim's case (1918) A. C. (P. C.) 157 also, which is reviewed by Benjamin on Sale (8th Edition 382) is Privy Council authority for the principle that even when property passes to buyers on shipment it remains subject to seller's lien. There can be no doubt, therefore, in the instant case that if on the evidence the learned magistrate could be satisfied that in passing the cheque the appellant had a fraudulent intent then the offence with which he was charged was made out.

Before leaving the law we feel constrained to observe that much of the legal argument carried on in both the courts below seems to have been beside the point and based on a wrong conception of the nature of the charge. Thus Abernethy, J., in his judgment said that the charge against the

appellant was that he had fraudulently obtained the cashew nuts represented by the bill of lading by a false pretence in that he knew the cheque he gave for the bill of lading would not be met. Quite evidently also the learned magistrate in his first decision was under the same misapprehension, for we agree with Sir James Henry that the charge as framed with the particulars in fact alleged that he had obtained possession of the bill of lading by a false pretence. It was doubtless because of this misunderstanding that a good deal of judicial time was wasted in considering the really immaterial point as to whether the property in the goods had passed to the appellant's company.

We come, then, to the crux of this appeal, which is whether, in fact, there was evidence on which the magistrate could reasonably come to the conclusion that the appellant could not honestly have believed that the cheque made out by him would be met. On this issue we have experienced the same difficulty that was noted by the appellate court below in that the evidence of the all-important witness, the bank manager, certainly presented a most confused picture. Whether this is due to the way in which it was recorded by the magistrate or to the fact that Mr. Gilbey was examined by a police officer and not by a trained Crown counsel we do not know. But whatever the cause his evidence as recorded is by no means easy to dissect. The learned Judge in the court below did his best to do so but, in fact, he committed at least one serious misdirection to which we will presently refer. As regards the judgment of the learned magistrate we feel bound to say that it leaves much to be desired because it contains really no critical examination of the evidence. It may be, of course, that the mind of the magistrate was confused by the way in which Mr. Gilbey had given his evidence, but, if this was the case, that was a deficiency in the prosecution, of which the appellant should have had the advantage.

This is not a simple case where the drawer of a cheque knows full well that there is nothing in his account at the bank if he has one at all to meet his cheque and that no credit will be given to him. On the contrary, extended credit had been given to the appellant's firm by the bank so that the question arises, did the prosecution prove beyond reasonable doubt that on 9th February, 1954, the appellant, being fully conversant of the terms on which that credit had been given, knew full well that his firm's credit had been exceeded. Without going into the facts in too much detail, the position as revealed in the evidence seems to have been this: \$-\$

- (a) The Highlands Commercial Union Ltd, was permitted, generally, to overdraw up to a ceiling of \$£3,000\$.
- (b) Towards the end of December, 1953, or early in January, 1954, the bank raised the overdraft ceiling to \$£10,000\$ in view of three contemplated shipments of produce to purchasers overseas.
- (c) In January, 1954, there was in existence a guarantee of the company's account with the bank given by one Mr. D. J. Bhatia. This gentleman was not called either by the prosecution or the defence and much of the

difficulty in this case arises from this fact, because nothing is known as $\frac{1}{2}$ to any conditions attaching to this guarantee. Probably the bank regarded it as a collateral security, but this is by no means clear.

f(d) What is clear is, that on 29th January the bank wrote to the appellant's firm the letter (exhibit P), which we think we had better quote in full: -

"The Directors.

Highlands Commercial Union Ltd.,

P. O. Box 630,

Dar es Salaam.

[:] Dear Sirs.

We have to remind you that Mr. Dhanji J. Bhatia has given notice to terminate his guarantee of your company's banking facilities on 31st January, 1954. It is, therefore, imperative that the overdraft in our books should be reduced, in accordance with present arrangements, to Sh. 60,000 by the close of business to-morrow, Saturday, 30th January, 1954. Failure to effect this reduction will necessitate our determining the guarantee and calling upon all the guarantors for repayment of the total indebtedness of your company to this bank.

Yours faithfully,

(Sd.) MANAGER.

- (e) As a result of this letter Mr. D. J. Bhatia renewed his guarantee to the 31st of March, 1954. The essence of the appellant's defence is that in view of this renewal he honestly thought from the terms of exhibit P that the bank's threat to reduce the overdraft ceiling to \$ £3,000 was on the assumption that the guarantee would not be renewed. Prima facie, looking at exhibit P alone, the appellant's assertion seems to us clearly to be a reasonable one.
- (f) Mr. Gilbey's answer is, that in his mind at any rate, the raising of the ceiling from £3,000 to £10,000 had nothing to do with any guarantee but was against shipments of produce, and that he believed that the applicant understood this well.
- (g) In point of fact, however, the bank, during the first few days of February $\frac{1}{2}$ did allow the firm to overdraw considerably beyond £3,000 without shipping documents, but this is said to have been in anticipation that they would be received.

Sir James Henry has pointed out quite fairly that when the appellant presented the bill of lading and the letter of credit to the bank on 9th February and so reduced his firm's overdraft to a little over £3,000, he knew that no further shipment of produce overseas was in contemplation. Indeed, we think this fact might have been conclusive against the appellant had the prosecution clearly established that the appellant knew that even with the guarantee no credit beyond £3,000 would be given unless covered by shipping documents.

As a court of second appeal, we appreciate that we cannot reverse the judgment of the court below unless we are satisfied that it was based on some error in law.

This brings us to the misdirection made by the learned Judge in his review of the evidence to which we have already referred.

In the course of his judgment occurs this passage: -

"Appellant admits he received exhibit \$P\$, a letter reducing the overdraft to Sh. 60,000 before 31st January, and he does not deny that he was present

when Alibhai Bhatia, who was not called as a witness, and Gilbey discussed the matter of renewing the guarantee. I find it hard to believe that this being so appellant did not understand the position."

The passage occurs at the end of the learned Judge's review of the evidence and it is evident from the wording used that it was on his belief that it had been proved that after the letter exhibit P had been written a discussion took place between Alibhai Bhatia at which the appellant was present on the matter of renewing the guarantee, that the Judge based his conclusion that the latter must have understood that the guarantee did not extend the overdraft ceiling beyond \$ £3,000\$ in the absence of shipping documents. In fact, however, from the evidence of Mr. Gilbey it is clear that no such discussion ever took place, for at p. 33 of the record of his evidence the magistrate wrote this:-

"I never discussed the guarantee with Highlands Commercial Union. Accused had never been given indication of amount he could overdraw on guarantee."

What we think the learned Judge had in mind was the evidence of a meeting between Mr. Gilbey, Alibhai Bhatia and the appellant when the raising of the overdraft ceiling to £10,000 was discussed and to have thought erroneously that this took place at a date subsequent to 29th January, 1954, whereas in fact this meeting took place early in January. The significance of this mistake can now be clearly seen because even if it be conceded that the appellant was present with his co-director at the meeting in early January and should have understood the arrangement about the extension of the overdraft ceiling although he took no active part in the discussion, there remains the fact that the letter exhibit P makes no mention of shipping documents and, on the contrary, as we have already observed, might have conveyed the impression that if the guarantee was renewed 'the overdraft ceiling would not descend as low as £3,000. Accordingly, in our opinion, this misdirection on the part of the learned Judge is a very serious and material one,

and as we can by no means be sure that had it not been made he would have dismissed the appeal, we feel constrained to allow the appeal broadly on the grounds set out in the paragraphs 4, 5 and 6 of the memorandum of appeal.

Before concluding, we feel bound to add this, that the history of this case shows clearly the inadvisability in matters involving commercial fraud of entrusting the prosecution of the case to an unqualified police officer however senior and experienced. We are sure that in this instance the Police Superintendent did his very best, and it is not his fault if the examination of the all-important witness left a picture of vagueness and confusion. It is unfortunate, however, that much judicial time and some public money has been wasted.

The appeal is allowed. The conviction quashed and the sentence set aside. The appellant to be set at liberty forthwith.

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