

UGANDA / JUDGMENT

Rex v Nurbhai (Criminal Appeal No. 201 OF 1938) [1939] EACA 110 (1 January 1939)

[1939] EACA 110

COURT

East African Court of Appeal

BEFORE

Dalton, C.J(Tanganyika), Sheridan, (C.J. Kenya),
Whitley CJ

CASE / FILE NUMBER

Criminal Appeal No. 201 OF 1938

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COURT OF APPEAL FOR EASTERN AFRICA

BEFORE SIR JOSEPH SHERIDAN, C. J. (KENYA), WHITLEY, C. J. (UGANDA) AND SIR LLEWELYN DALTON, C. J. (TANGANYIKA)

REX, Respondent (Original Prosecutor)

versus

BHAIJI NURBHAI, Appellant (Original Accused) CRIMINAL APPEAL No. 201 OF 1938

(Appeal from decision of H. M. High Court of Tanganyika)

Criminal law—Second Appeal—Receiving property knowing it to have been stolen—Guilty knowledge—Mens rea—Reasonable doubt—Accomplice—Evidence of thief—Corroboration—Penal Code (Tanganyika), section 295(1).

$\frac{1}{2}$ Appellant was convicted in the magistrate's court of receiving property knowing it to have been stolen or unlawfully obtained and appealed to the High Court of Tanganyika which dismissed the appeal. Appellant appealed further,

A quantity of planks which was stolen from a timber dump was discovered, two days after the theft, in a store belonging to the appellant and situate at the back of the appellant's house. The keys of the store were kept on a nail in appellant's house but they were accessible to the appellant's brothers and others without the knowledge or connivance of the appellant. It was established that after the theft the timber was first brought to the veranda of the appellant's brother's house and thence it was conveyed to the store. There was evidence that on the day of the theft and on the preceding day the appellant had been seen to interview the thief at the dump

but this was denied by the thief. The thief gave evidence that on the day the timber was recovered he was summoned to the appellant's house where in the presence of the appellant another Indian told him that they had been to discuss the matter with the true owner's clerk who wanted the thief, a fellow servant, to go and put down the number -of the planks stating that they had been bought by the appellant and that an invoice would be issued the next day. There was no corroboration of this alleged conversation which in fact was denied by the appellant and the other Indian alleged to have been present. The magistrate had directed himself to the necessity of the corroboration of the thief but nevertheless in finding guilty knowledge on the part of the appellant accepted the evidence of the thief as to the alleged interview on the day the timber was recovered which was entirely uncorroborated and rejected the evidence of the thief in favour of the appellant which contradicted the evidence of the witnesses as to the alleged suspicious interviews at the dump.

Held (23-2-39).—That the magistrate should not have accepted the thief's evidence against the appellant without corroboration in the absence of special or exceptional circumstances. (Rex v. Haji Mohamed (15 K. L. R. 109) and Rex v. Ali bin Fazal (2 E. A. L. R. 55) applied.)

Appellant, absent, unrepresented.

Dennison, Crown Counsel (Kenya), for the Crown.

JUDGMENT (delivered by Whitley, C. J.).—This is a difficult case. The appellant was charged with receiving 25 planks of camphor wood having reason to believe them to be stolen. The facts are so fully and accurately set out in the judgments of the Courts below that it is unnecessary to recapitulate them. This being a second appeal section 314 of the Criminal Procedure Code provides that we can only entertain it if it is on a matter of law. That being so it is only necessary to consider so much of the evidence as bears upon that point.

The timber was stolen on Saturday the 9th July, 1937, from the timber dump of Van Dyk, Limited, at Tanga Customs Wharf by Hatibu, a clerk employed by the firm. He was convicted of the theft before the trial of the present appellant on the receiving charge.

The appellant who is 60 years of age carries on a transport business with the two younger brothers Rajbhai and Jiwaji. The evidence of these brothers for the defence was to the effect that they are the active partners and that the appellant is more or less retired. Each brother lives in a separate house close to one another. Behind the appellant's house is a store in which are kept a variety of articles which are not required for immediate use. The key of this store is kept on a nail in the appellant's house and any employee or member of the family who wished to enter the store could take the key without the permission of the appellant and without his knowledge if he happened to be out.

The prosecution evidence established that the planks were taken from the dump first to the veranda of Jiwaji's house and later to the store where they were found on Monday the 11th July, two days after the theft.

The learned magistrate who tried the case with exemplary care found possession and guilty knowledge established against the appellant on the following grounds. He found that, in spite of the evidence of the brothers as to the conduct of the business, the appellant is in fact the principal and has complete control and is and always has been in possession of the store. That is a finding of fact and there is evidence to support it so that we as an appellate court must be reluctant to interfere with it even though we may entertain doubts as to whether on the evidence we should have been prepared to come to such a definite conclusion. He next found that there is independent testimony which connects the appellant with the offence in (1) his interviews and (2) his instructions given to Hatibu after the receiving had taken place. As this finding is in our opinion the crux of the case in so far as the appeal is concerned it is necessary to refer in detail to the evidence upon which it is founded. The interviews referred to are described by four labourers Jumbe bin Halfani, Kubo and Musa and Juma who say that they saw the appellant speaking to Hatibu at the dump on the day on which the timber was stolen and also on the previous day. They did not hear what was said but the suggestion of the prosecution was that the appellant was arranging with Hatibu for the committing of the theft and the subsequent disposal of the planks. Hatibu called by the prosecution denied that any such interviews took place.

The instructions given to Hatibu after the receiving had taken place are referred to in Hatibu's evidence. He described how on Monday the 11th July after the stolen planks had been recovered from the store he was summoned to the appellant's house where in the presence of the appellant another Indian told him that they had been to discuss the matter with Van Dyk's clerk who wanted him (Hatibu) to go and put down the number of the planks stating that they had been bought by the appellant and that an invoice would be issued next day. There was no corroboration of this alleged conversation. It was, in fact, denied by the appellant and another Indian alleged to have been present. It has been laid down in the cases of *R. v. Haji Mohamed Saleh Mohamed* (15 K. L. R. 109) (a case of receiving stolen property) following *R. v. Ali bin Fazal* (2 E. A. L. R. 55) that it is unsafe to convict on the uncorroborated evidence of an accomplice and that in the absence of special or exceptional circumstances a conviction before a judge or magistrate sitting alone, resting on such evidence is so dangerous that it should not be held. Hatibu the thief was clearly an accomplice of the receiver, whoever he was, and the learned magistrate appreciated the necessity of corroboration of his evidence but he went on to say in his judgment "although Hatibu must be considered an accomplice I must take notice of his evidence regarding the interview he had with accused on the night of the 11th July and I am not prepared to believe the witness Nazarali or the accused himself when they deny knowledge of this interview."

It would thus appear that whilst accepting the evidence of the accomplice as to this interview on the 11th which was entirely uncorroborated he rejected the evidence of the accomplice in favour of the appellant which contradicted the evidence of the four labourers as to alleged suspicious interviews between Hatibu and the appellant at the dump on the 8th and 9th. He may thus be said to have both approbated and reprobated which in our opinion is dangerous in any criminal case and particularly so in a case of receiving stolen property such as this when it is so difficult to establish guilty knowledge.

It seems to us that the learned magistrate properly directed himself as to the law by appreciating the necessity for corroboration but then proceeded to misapply it by accepting the accomplice's evidence without corroboration in the absence of any special or exceptional circumstances such as were contemplated in the Haji Mohamed case and that consequently the appeal raises a matter of law which is of vital importance to the appellant inasmuch as the finding of guilty knowledge is founded almost entirely upon these two findings of fact which appear to be of doubtful propriety.

The question which then arises is whether apart from these findings the magistrate must necessarily have come to the same conclusion as to proof of guilty knowledge. We are not satisfied that he must. There is undoubtedly a strong case of suspicion but that is not sufficient. It seems doubtful whether, if the appellant was really conspiring with Hatibu to steal the timber he would have openly gone to the dump and discussed the matter there in sight of all the labourers. Why if he were in fact instigating Hatibu to steal the timber should he have it first deposited on the veranda

of his brother's house, open to the public eye, and not in the privacy of his store. And even if some such discussion as Hatibu suggests did take place after the stolen timber had been discovered in the store that does not necessarily point to guilty knowledge. It might be equally consistent with the behaviour of an innocent man who realized that stolen property had been found on his premises, under circumstances which might implicate him, seeking some method to regularize what had happened in order to avert trouble.

Reviewing the evidence as a whole we feel that this is a most difficult case in which it was unsafe to convict. We find it impossible to exclude the possibility that one of the younger brothers may have been the real culprit. They had unrestricted access to the key of the store and the stolen timber was only in the store over the week end when it seems quite reasonable to suppose that the appellant would have no occasion to visit the store and may well have been ignorant of what had been put there. Furthermore it is significant that the convicted thief has said nothing which directly fixes the appellant with knowledge of the theft. We concede that he was an unsatisfactory witness but one cannot read into his evidence anything which he did not explicitly say. On the whole the conclusion to which we find ourselves irresistably driven is that this is a case in which the appellant should have been given the benefit of the doubt and we allow the appeal. The conviction is quashed and the appellant acquitted and discharged.

Note.—This judgment was signed by Sir Joseph Sheridan, C. J. and Whitley, C. J.

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