

UGANDA / JUDGMENT

Rex v Robert (Criminal Appeal No. 402 of 1948.) [1948] EACA 74 (1 January 1948)

[1948] EACA 74

COURT

East African Court of Appeal

BEFORE

Bourke J, Modera J

CASE / FILE NUMBER

Criminal Appeal No. 402 of 1948.

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APPELLATE CRIMINAL

Before **BOURKE, J. and MODERA, Ag. J.****REX, Respondent (Original Prosecutor) v****DOUGLAS ROBERT s/o GORI, Appellant (Original Accused) · Criminal Appeal No. 402 of 1948.**

Criminal Law—Accused charged with theft, Penal Code, section 269—Convicted of obtaining goods by false pretences, Penal Code, section 306—Misrepresentation a necessary element—What amounts to false pretences—Obtaining credit by false pretences, Penal Code, section 309 (1)—Necessary elements to constitute offence—Criminal Procedure—When offence proved is included in offence charged—Sections 179 and 190, Criminal Procedure Code.

The accused drove his lorry to the petrol pump outside the complainant's shop and obtained 12 gallons of petrol which were poured into the tank of the lorry. On being asked for payment he inquired how much was due, and while the complainant's employee absented himself to ascertain the amount, the accused drove away. He was later charged with theft of the petrol (section 269). The Magistrate, in his judgment, held that as the complainant must have intended the ownership in the petrol to pass to the accused, and that it did in fact pass, the accused could not be convicted of theft, but purporting to act under section 187 (b) of the Criminal Procedure Code, he convicted the accused of obtaining goods by false pretences with intent to defraud, expressing the opinion that the accused's false pretence that he would pay for the petrol was a false pretence of an existing fact. The accused was sentenced to nine months' imprisonment with hard labour and to pay a fine of Sh. 50 or in default one month's imprisonment with hard labour. If the fine was paid Sh. 32/50 were to be awarded to the complainant in compensation. The

accused appealed.

Held \$(13-9-48)\$.—(1) That misrepresentation is a necessary element in the offence of obtaining goods by false pretences.

- (2) That as the appellant made no representation either as to his ability to pay or his intention, the mere asking for petrol to be supplied and the taking delivery thereof could not amount to a false pretence.
- (3) That on the facts proved the necessary elements to constitute the offence of obtaining credit by false pretences contrary to section 309 (1) of the Penal Code were present.

Conviction under section 306, Penal Code, quashed and a conviction for the minor offence contrary to section 309 (1), Penal Code, substituted. Sentence reduced to four months' I. H. L. and the sentence as to fine and order for compensation to stand.

R. v. Jones 19 Cox C. C. 87 quoted and followed; R. v. Gordon (1889) 23 Q. B. D. 354 referred to and distinguished.

A. R. Kapila for the Appellant.

Todd, Crown Counsel, for the Crown.

JUDGMENT.—The facts are that the appellant drove his lorry up to the petrol pump outside the shop of Osman Allu and Co. at Nyeri. On the instructions of the appellant's turnboy 12 gallons of petrol were put into the tank of the vehicle by an employee at the shop. The appellant was then asked for payment by this employee and he in turn inquired as to the amount due. The clerk went to the shop to ascertain the price and while he did so the appellant, without making any payment, drove the lorry away at a fast pace.

ine charge as laid was for the offence of theft but plainly on the facts, and for the reasons given by the Court below, a larceny of the petrol was not established; the appellant was, however, convicted of the offence of obtaining the fuel by false pretences contrary to section 306 of the Penal Code. The learned Magistrate sets out his finding as follows:-

- (a) That accused falsely represented that if complainants supplied the petrol he was prepared to pay for it;
- (b) that accused did so obtain 12 gallons of petrol: $\frac{1}{2}$
- (c) that accused knew that the pretence \$(a)\$ was false;
- \$(d)\$ that accused intended to defraud the complainant.

The learned Magistrate came to the conclusion that there was a false representation of an existing fact and it is as to the correctness of this conclusion that argument has proceeded upon this appeal. There is, we think, ample authority to settle the point in favour of the appellant. There can, of course, be false pretences by conduct, as in the numerous cases where cheques are given on a bank where the accused must have known of the want of funds to meet the cheque;

there is a false pretence as to an existing fact. The present case is not unlike that where a man orders a meal at a restaurant without the means to pay for the food supplied to him, such a case was *Reg. v. Jones* 19 Cox C. C. 87, where the accused ordered and consumed food and drink. He then stated that he could not pay the amount of his bill. The headnote to the case as reported is as follows:-

"Misrepresentation, either by word or conduct, is a necessary element in the offence of obtaining goods by false pretences. Evidence, therefore, that a person indicted under 24 and 25 Vict. c. 96, s. 88, for this offence, obtained goods from an intending vendor, being without the means of paying for such goods and with the intention of defrauding the owner, but without making any representation either as to his ability to pay or his intentions, is not sufficient to support a conviction for obtaining such goods by false pretences. Nor, since the owner intended to part with the property in the goods, is it sufficient to support a conviction for larceny. But such evidence is sufficient to support a conviction for obtaining credit by fraud on an indictment under the Debtors Act, 1869 (32 and 33 Vict. c. 62), s. 13.

A vendor who delivers goods on the terms that they are to be paid for immediately after they have been received gives credit to the purchaser."

In this case the appellant instructed his servant, who accompanied him, to ask for the petrol to be put into the lorry and this was accordingly done; he made no representation either as to his ability to pay or his intention. The question is whether the asking for the petrol to be supplied and the taking delivery of the commodity can amount to a false pretence; plainly it cannot. The learned Magistrate appeared to have been influenced in reaching his decision by the case of *\$R\$ v. Gordon* (1889) 23 O. B. D. 354, of which he had an inadequate report available, but in that case it was held that the false pretence by the prisoner amounted to this, that he was prepared to pay the prosecutors £100, and had the money ready for them on their signing a promissory for £100. The special circumstances in that case were altogether different.

The conviction entered clearly cannot be allowed to stand and it is not supported by the Crown. We are invited to substitute a conviction under section 309 (1). Penal Code, which we are empowered to do if there be proof of such offence having regard to the provisions of section 179 read with section 190 of the Criminal Procedure Code. Section 309 (1) of the Penal Code corresponds with section 13 (1) of the Debtors Act, 1869. In considering whether on the facts proved such offence has been made out against the appellant it will be convenient to take the same line of approach as was done by the Court in *Reg. v. Jones* (sup. p. 90). There are three elements in the offence—first, incurring a

debt or liability; secondly obtaining credit; lastly there must be fraud. There is no doubt that the appellant did incur a debt. There was clearly an implied promise to pay for the petrol. Did he obtain credit? Again we have no doubt that the reasoning in *Reg. v. Jones* equally applies in the circumstances of this case. It was open to the vendor to say that he would not furnish the fuel, or he could have asked for payment before it was supplied, but he plainly relied on the willingness and readiness of the appellant to pay in the ordinary way after the petrol had been put in the

tank. It is immaterial that the period of credit was other than very short. Finally, was there fraud? The appellant must have known that the petrol was supplied upon the expectation that it would be paid for in the ordinary way. He drives away quickly when the clerk who supplied the petrol went to ascertain the price. Before the lower Court the appellant made the case that the lorry was at another garage undergoing repairs and that he was at home about nine miles away at the time of the events complained of. This story was disbelieved by the Court below. In our judgment there is sufficient to justify the conclusion that when he ordered the petrol through his servant the appellant had no intention of paying; or, in other words, that he intended to cheat and was guilty of fraud. We quash the conviction under section 306, Penal Code, and do enter instead a conviction for the minor offence contrary to section 309 (1) of the Penal Code. The sentence of imprisonment is reduced to one of four months' imprisonment with hard labour; the sentence as to fine with imprisonment in default of payment will stand as will the order for payment of compensation.

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