[COURT OF APPEAL]

Freetown
Nov. 6,
1961

JAMES GRANT AND OTHERS . . . . . *Appellants*

v.

REGINA . . . . . *Respondent*

Ames Ag.P.
Benka-Coker
and Wiseham
C.JJ.

[Cr. App. 20–22/61]

Criminal law—Trial—Statements by one accused implicating second accused left to jury without direction from judge cautioning jury concerning their true effect—Misdirection of jury by judge—Whether misdirection resulted in miscarriage of justice.

The three appellants were found guilty of receiving stolen goods and sentenced to imprisonment. The goods were 400,000 High Life cigarettes stolen from the Aureol Tobacco Company store between May 13 and May 15, 1961. Each carton of cigarettes was marked with the number "119."

The case against the second accused was that he had been seen on May 15 accepting money from the sixth accused for High Life cigarettes which the second accused had brought to the house of the sixth accused. Also, the sixth accused made two statements to the police implicating the second accused, and the fourth accused made one such statement. At the trial, the judge failed to direct the jury that these statements, which had been admitted in evidence, were not evidence of the facts therein contained.

The case against the fifth and sixth accused was that they were both found in possession of some of the stolen cigarettes. At the trial, each accused made an explanation as to how he had obtained possession of the cigarettes. The judge, in his summing-up, failed to instruct the jury that, even if they disbelieved the explanation of each accused, they should still acquit if they were left with a reasonable doubt as to guilt.

Held, (1) regarding the second accused, that the judge erred in failing to instruct the jury that the statements made by the 4th and 6th accused were not evidence of the facts contained therein;

(2) that it was not possible to say that the jury would have convicted the second accused if the judge had given the proper instruction; and

(3) that the judge misdirected the jury in his summing-up regarding the fifth and sixth accused, but that such misdirection did not result in a miscarriage of justice.

Cases referred to: *D.P.P.* v. *Christie* (1914) 10 Cr.App.R. 141; *Rex* v. *Gunewardene* [1951] 2 All E.R. 290.

Solomon A. J. Pratt and *Cyrus Rogers-Wright* for the appellants.
Nicholas E. Browne-Marke (Senior Crown Counsel) for the respondent.

WISEHAM C.J. The three appellants are referred to in this judgment as the 2nd, 5th and 6th accused. Each of them was found guilty of receiving stolen goods and sentenced to five, two-and-a-half and five years' imprisonment respectively.

Between two stocktakings on the afternoon of Saturday, May 13, and the morning of Monday, May 15, 1961, the Aureol Tobacco Company discovered a theft of 400,000 High Life cigarettes from their store. Each carton of newly manufactured cigarettes was marked with its distinguishing number—119. The value was £1,445.

The case against the 2nd accused was that he had been seen on May 15 accepting money from 6th accused for High Life cigarettes which 2nd accused had brought to the 6th accused's house. The cigarettes were in Beck Beer cases. On May 19 the 6th accused was found in possession of beer cases in his room at Sefadu. They contained High Life cigarettes marked 119.

Implicating the 2nd accused were two statements made by the 6th accused to the police—both in the absence of the 2nd accused. Also implicating the second accused was a statement to the police by the 4th accused—which the 2nd accused denied in his presence.

The short point now taken on appeal is that these statements, admitted in evidence, should not have been left to the jury without a direction from the judge cautioning the jury concerning their true effect, namely, that the statements were not evidence of the facts therein stated (*D.P.P.* v. *Christie* (1914) 10 Cr.App.R. 141). It was pointed out in *Rex* v. *Gunewardene* [1951] 2 All E.R. 290 at p. 295, that in joint trials of several accused, though the statement of one accused implicating a co-accused may have been admitted, the jury should be impressed to disregard the statements as prejudicial.

The learned judge in this case did not give that requisite warning. The test as to miscarriage of justice is whether the jury would have come to the same conclusion if the evidence had been properly excluded. It is insufficient to say that they might have done so. The evidence left against the 2nd accused is that he sold some High Life cigarettes to 6th accused on May 15. They were not identified as No. 119. On May 19, the 6th accused was found in possession of High Life cigarettes marked No. 119. We are unable to say emphatically that the jury would have bridged the gap of identification and drawn a presumption and come to the conclusion of guilt against the 2nd accused.

For these reasons the appeal of the 2nd accused is allowed, the conviction quashed and the sentence set aside.

The 5th accused was found in possession of the stolen High Life cigarettes. The ground of appeal against his conviction is that the learned judge directed the jury that if this accused had bought the cigarettes for a cheaper price than the usual price they were bound to convict this accused. This is not correct. The judge mentioned it as one of the ingredients. The evidence against him, before the jury, and in the summing-up were that he bought the cigarettes on a Sunday, they were not marked on his card as was usually done by the clerk when purchased from the Tobacco Company, and bought at a cheaper price from a Limba man. In dealing generally with the offence of receiving the learned judge did say, " if he gives an explanation which you think is reasonably true, then you should acquit him." Although the learned judge did not direct that even if the explanation was not true the jury should still acquit if there was reasonable doubt, we say that on the evidence before the jury they would have come to the same finding of guilty.

In respect of the 6th accused, the appeal was again argued on the question of misdirection. The learned judge directed that the jury should be satisfied with this accused's explanation of his possession and receipt of a large quantity of the stolen cigarettes. He also omitted to deal with the question of reasonable doubt that the explanation might cause. Both the direction and the omission are apparent in the learned judge's summing-up. It was further argued that the subsequent acts of this accused did not prove that at the time he received the goods he knew they were stolen. The fact that he begged to be

let off when arrested should not be a factor against him, it was submitted. We agree with this last submission, but in many cases of receiving it is the subsequent conduct of the receiver—hiding of the goods—denial of possession—that indicates his guilty knowledge. In this case the cigarettes were found in Beck Beer cases and the accused denied he had any more than a few cigarettes until the cases were all opened up.

On the evidence before the jury, we say that they would not have come to any other conclusion than that of the guilt of the 6th accused in spite of the misdirection or omission submitted to us.

Both the 5th and 6th accused received severe sentences. We do not however, propose to interfere with the sentences.

The appeals of the 5th and 6th accused are dismissed.

[COURT OF APPEAL]

Freetown
Nov. 7,
1961
Ames Ag.P.
Benka-Coker
and Wiseham
C.JJ.

SHELL CO. OF WEST AFRICA LIMITED . . *Plaintiff/Respondent*

v.

MOHAMMED AHMED AND AHMED MOHAMED
(Trading under the name of Ahmed Bros.) . . *Defendants/Appellants*

[Civ. App. 7/61]

Sale of goods—Action for goods sold and delivered—Effect of delivery and acceptance and subsequent sale to customers of petrol over and above amount specified in contract.

Respondent (Shell) entered into an agreement with its agent, G. B. Ollivant and Co. Ltd. (Ollivant) and appellants (Ahmed Bros.) whereby Shell agreed to sell petrol to Ahmed Bros.. who were tenants of a filling station owned by Shell. Ollivant and Ahmed Bros. agreed that Ahmed Bros. would requisition and pay cash for the amounts of petrol which they wanted. Whenever they did so, Ollivant sent the necessary papers to Shell, who then made delivery to Ahmed Bros. At the filling station, Ahmed Bros. had an employee, one Osman. whose duty it was to receive the deliveries and supervise the sales.

As the result of an error, Shell delivered 22,400 more gallons of petrol than had been requisitioned by Ahmed Bros. This extra petrol, worth £4,003 8s. 0d., was accepted by Osman and was sold to customers of Ahmed Bros. in the usual course of business. Ahmed Bros., however, refused to pay for the petrol on the ground that Osman was not their agent for the purpose of making a contract of purchase and sale and pledging their credit. The Supreme Court held that Ahmed Bros. was bound to pay for the petrol. From this decision they appealed.

Held, dismissing the appeal, that, since Ahmed Bros.' agent had accepted the petrol and sold it to their customers, they were obligated to pay for it.

Miss Frances Wright for the appellants.
Ken O. During for the respondent.

AMES AG. P. This is an appeal by defendants against a judgment for £4,003 8s. 0d. obtained by the plaintiff in an action for goods sold and delivered.

The appellants were tenants at a nominal rent of property of the respondents, on which was a petrol filling station. There was a written