cannot be convicted. So the second appellant's convictions on counts 2 and 4 are therefore quashed.

He has appealed against his sentences on counts 1 and 3. He has not shown that the learned Chief Justice exercised his discretion as to sentence otherwise than properly and judicially. Indeed we think, respectfully, that it was a very suitable sentence in the circumstances and the appeal against sentence is dismissed.

In order to avoid any doubt, we feel it necessary to point out that the second appellant was not convicted on counts 1 and 3 as charged, namely, of publishing a defamatory libel knowing it to be false, but of publishing a defamatory libel, under the provisions of section 5 of the Libel Act, 1843, and we direct that the record of his conviction be amended accordingly.

[COURT OF APPEAL]

Freetown
Oct. 30,
1961

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

MOHAMED AMADU . . . . . *Appellant*

v.

REGINA . . . . . *Respondent*

[Criminal Appeal 15/61]

Criminal law—Fraudulent conversion—Larceny Act, 1916, *s.* 20 (1) (iv) (*a*)—*Conflicting evidence—Omission of certain matters of fact from judge's summing-up to assessors.*

Appellant was convicted of fraudulent conversion of £800 contrary to the Larceny Act, 1916, in a trial before a judge and assessors. He was a licensed diamond dealer, and it was alleged that the complainant asked him to buy a Land Rover for him in Freetown, that complainant gave him £800 for that purpose and that appellant failed to buy the Land Rover and failed to return the £800.

Appellant claimed that the complainant, who had no diamond licence, brought a 14 carat diamond to him which complainant said he wanted to sell for £110; that appellant sold it to the Diamond Corporation for £900, out of which he paid £110 to complainant and kept £790 himself; and that it was two months later before anything was said about £800 having been entrusted to him to buy a Land Rover.

At the trial, there was evidence that the Land Rover would have cost £1,200; that, after appellant returned from Freetown, complainant sent a message to him saying "that if he (appellant) knew that the money was his (complainant's) he should pay him, but if he thought that the money was his (appellant's) he should tell him"; and that appellant had in fact sold a diamond to the Diamond Corporation on January 4, 1961.

The judge, however, failed to mention this evidence in his summing-up to the assessors.

Held, quashing the conviction, that the trial judge erred in failing to mention certain evidence favourable to the accused in his summing-up to the assessors.

The appellant appeared in person.

John H. Smythe (Solicitor-General) for the respondent.

AMES AG. P. The appellant was convicted of fraudulent conversion of £800, in contravention of section 20 (1) (iv) (*a*) of the Larceny Act, 1916, and

sentenced to three years' I.H.L. He is a licensed diamond dealer and it was alleged that he happened to mention to the complainant that he was going to Freetown to get a renewal of his licence for 1961; that the complainant, who had known him for two years, asked him to buy a Land Rover for him while he was in Freetown; that the complainant gave him £800 for that purpose, that the appellant did not buy the Land Rover, and did not return the £800; that, when asked to pay, he said that he had £400, and was going to get £400 from the Diamond Corporation and would pay; that he did not pay, and, when arrested and charged, denied having been given £800 to buy a Land Rover for the complainant.

The appellant alleged that what happened was that the complainant, who has no licence of any sort in connection with diamond mining, took to him a diamond, which was weighed at 14 carats, and said he wanted to sell it for £110; that the appellant sold it to the Diamond Corporation for £900, out of which he paid £110 to the complainant and kept the £790 himself; that it was two months later before anything was said about £800 having been entrusted to him to buy a Land Rover for the complainant.

It will be necessary to examine the evidence for the prosecution more closely; but it may as well be said here that we are agreed that the appellant's version (which he has consistently asserted from the outset) seems to us to be very probable and more reasonable, and it may be added that the learned Solicitor-General was of the same opinion. If it was as alleged by the appellant the complainant was in an awkward position. He had no diamond licence and so should not have had the diamond; he could not, therefore, take a civil action to recover the £790 if he claimed it to be his. Consequently, if he was to take any action against the appellant, whether to recover the £790 from him, or to intimidate him into paying over some part of it, or by way of revenge, the matter had to be dressed up and put forward in some different guise.

But, to return to the case for the prosecution. It included the following several matters which, as it seems to us, made it necessary to treat it with suspicion and examine it with the utmost care:

1. The cost of the Land Rover was £1,200, or £1,450 if bought by hire-purchase. So the alleged arrangement necessitated the appellant's paying on behalf of the complainant £400 (assuming it was to be bought outright and not by hire-purchase) plus the cost of licence and insurance and getting it to Yengema. Nothing was said in evidence by any of the witnesses about this, except the complainant, and his evidence was merely: "Accused said I would pay the balance by instalments when he returned."

2. The £800 was handed over in notes of £1, one bundle of £500, and six bundles of £50. The latter were counted but the former was not. There were witnesses who alleged that they were present when payment was made.

3. No receipt was given—although one of the witnesses of the payment could write, and did write, not a receipt, however, but the complainant's name and address (and nothing more) "in order to put it on the Land Rover when bought."

4. "About two weeks later," the complainant went to the appellant, and was told that he (appellant) had bought the Land Rover and a car for himself and that the Land Rover "might arrive" the next day. Three days later the appellant sent two people to get his £800 back, and they returned without any money, but saying that the appellant had £400 and had said he would get the

other £400 from the Diamond Corporation. The next day the complainant sent one, Musa Gboso, with another message (which is referred to below) without result. The complainant then reported to the police.

5. If the matter was thus reported to the police, the lapse of time was not such as to make it difficult, much less impossible, to calculate the date of the offence. Yet the charge could only aver that it was "sometime in the month of January." The court file shows that the appellant was arrested at 11.50 a.m. on March 2.

6. The message, which was given to Musa Gboso to give to the appellant, was "that if he (appellant) knew that the money was his (complainant's) he should pay him but if he thought that the money was his (appellant's) he should tell him." This message seems to us to be a revealing "cri de coeur." If the transaction was about the Land Rover, how could the complainant possibly imagine, even for a moment, that the appellant might think that he was entitled to keep the £800. On the other hand, if it was about the sale of the diamond, there was every reason to imagine that the appellant might think himself entitled to keep the £790.

The assessors and the learned judge believed the prosecution witnesses and disbelieved the appellant, and the appellant was convicted, as has been said.

We notice, however, that the summing-up of the learned judge, while being beyond criticism as to matters of law, appears to omit mention of some matters of fact, which in our respectful opinion, should have been mentioned.

There appears to have been no reference to the cost of the Land Rover being so much above the £800, not to mention insurance and licensing, or how the difference was to be met. There was no reference to the message sent by Musa Gboso which, we think, needed to be very carefully considered. There was no reference to the proximation of the sums of money in the two versions of what happened, £800 and £790. Nor, and perhaps most important, was there any reference to the Diamond Corporation's purchase voucher, which the appellant produced and which proved it to be a fact that he had indeed sold a single diamond to the Corporation for £900 on January 4.

Of course, had these matters of fact been discussed in the summing-up, the result of the trial might have been the same. But we think it impossible to hold that it must inevitably have been the same.

Consequently we think it dangerous to allow the conviction to stand and it is quashed.

[COURT OF APPEAL]

JAMIL IBRAHIM . . . . . *Appellant*

v.

GEORGE ANTHONY . . . . . *Respondent*

[Civil Appeal 1/61]

Claim for an accounting—Submission of no case overruled by judge—Prima facie proof—Rate of commission on sale of ginger—Whether account should be taken by Master and Registrar or professional accountant.

Appellant owned a shop in Moyamba. Between September 1, 1953 and December 8, 1954, he was in Syria. Before going there, he entered into