

The police officer was attempting to prevent his doing so. The respondent (a friend of the European) told her to let him go. She told him to mind his own business, and to go away. He insisted that she should let the European go and pushed her away from the car and said to the European "Go," which he was then able to do, and did do, because the respondent had pushed her away. The respondent then refused to go to the police station, and a struggle ensued and another police officer had to go to the aid of the policewoman.

The principles on which an appeal court (which the Supreme Court was) will alter a sentence imposed by a lower court in the exercise of its discretion are well settled. We see nothing to suggest that the learned magistrate exercised his discretion on some wrong principle, and we think that the learned judge should have dismissed the appeal against the sentence.

C. A.
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ATT.-GEN.
v.
BEJET JOJO.
Ames Ag.P.

[COURT OF APPEAL]

Freetown
Feb. 19,
1963.
Ames Ag.P.
Benka-Coker,
C.J.,
Dove-Edwin
J.

MICHAEL ABOUD & SONS Appellants
v.
AKTIEBOLAGET JONKOPING-VULCAN Respondents

[Civil Appeal 30/62]

Trade Marks—Application for registration—Burden of proof on applicant—Likelihood of resemblance deceiving ultimate purchaser—Trade Marks Act (Cap. 244, Laws of Sierra Leone, 1960), ss. 15, 21.

Appellants were importers of "The Three Palms" matches. They applied to the Registrar of Trade Marks for registration of the mark under which the matches were sold. The registration was opposed by respondents, who were the proprietors of the registered trade mark of "The Palm Tree" matches. The ground of their opposition was that "The alleged trade mark to which the above-mentioned application relates has such a resemblance to the opponents' trade mark No. 686 . . . as to be calculated to deceive." The matter came before the Supreme Court (Bankole Jones Ag.C.J.), which found in favour of the respondents.

Appellants appealed on the ground, inter alia, "That trade mark No. 5702 does not resemble trade mark No. 686 . . . so nearly . . . as to be calculated to deceive." (See Trade Marks Act, s. 21.)

Held, dismissing the appeal, that the trial judge was correct in his conclusion that appellants' mark was "calculated to deceive" within the meaning of the Trade Marks Act.

Edward J. McCormack for the appellants.
Freddie A. Short for the respondents.

AMES AG.P. The appellants are merchants and importers of "The Three Palms" matches, which are specially made for them and have been on sale for about a year. They applied to the Registrar of Trade Marks, as proprietors of the mark under which the matches are sold, for its registration under the Trade Marks Act, Cap. 244.

C. A.

1963

MICHAEL
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v.
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VULCAN.
Ames Ag.P.

The registration was opposed by the respondents, who are, and have been for 42 years, the proprietors of a registered trade mark under which the "The Palm Tree" matches, made by them in Sweden, are sold by Paterson Zochonis Ltd., their local distributors.

The ground of their opposition was:

"The alleged trade mark to which the above-mentioned application relates has such a resemblance to the opponents' trade mark No. 686 registered with respect to the same goods or description of goods as those for which the applicant is now applying to register the same as to be calculated to deceive."

The matter came before the Supreme Court (Bankole Jones Ag.C.J.), which found in favour of the respondents and ordered that "... the applicant's trade mark be not received for registration, and if already received, that no certificate of registration do issue."

In the Supreme Court, the respondents (the opponent to the registration) began, and the appellants (the applicant for registration) followed, as if the onus was on the opponent and not on the applicant. Section 15 of the Act suggests that the onus was on the applicant for registration. There was no objection in the court below, and as the opponent was the successful party, the question is not in issue before us. I mention it in passing lest it might otherwise be assumed that this court indorsed that procedure. The question may one day require decision one way or the other.

In the court below the proceedings were quite short. The first witness was the officer in charge of the Register of Trade Marks. He produced the appellants' actual application and the register in which it has been entered (without any certificate of registration having been issued), and the register in which is the registration of the respondents' mark, and also the "Gazette" containing the publication of the application—where it is in black and white. (Both marks in the registers are coloured. The application for "The Three Palms" was for registration without limitation as to colour: and the registered "The Palm Tree" is also without limitation of colour.) The second witness was the director of Paterson Zochonis Ltd., the local distributors, who put in evidence a box of "The Palm Tree" matches and a box of "The Three Palms." He gave evidence as to resemblance or likelihood of deception.

There are seven grounds of appeal: but it is not necessary to set them out in full. They can be considered in groups.

Some complain that the witnesses give their opinions on comparison of the match-boxes instead of on comparison of what was in the registers, and that the learned judge did the same. The labels of the boxes are exactly the same as those in the registers and application form, as to design—that of the Three Palms being its small size on the box and the packet (of 10 or 12) size on the application form. The learned judge had all before him.

Other grounds complain of the learned judge's valuation of the evidence and his findings. For example, this passage in his judgment: "There is evidence, which I accept, that in the local market both types of matches, bearing each its own trade mark, are referred to as 'Palm Tree' matches." I see no reason to disagree with his valuation of the evidence.

The crux of the matter is contained in the seventh ground of appeal, which is: "(7) That trade mark No. 5702 does not resemble trade mark No. 686 and does not so nearly resemble it as to be calculated to deceive."

Appeals in this court in civil matters such as this are by way of rehearing; and we are in just as good a position to assess the likelihood of deception as was the learned judge.

What has to be considered is the likelihood of deception of the ultimate purchaser, the men and women, literate and illiterate, who need a box of matches and intend to buy the respondents' Palm Tree matches, and the circumstances in which they do so, such as without necessarily having both kinds before them (as they have in Aboud & Sons' shop in Freetown according to the evidence), without such deliberation as would be given to the purchase of a more expensive article, sometimes in shops and sometimes at wayside stalls, and so on.

Compare the two marks. For 42 years the respondents have had the name "The Palm Tree" across the top of their registered mark. It is not easy to think of another name which would look and sound as similar to "The Palm Tree" and yet not be the same as the appellants' name, "The Three Palms," which they have across the top of the mark which they wish to register. The central feature, the thing which one notices first, in the respondents' "The Palm Tree" mark is, surprisingly, not a palm-tree, but a man, a palm-wine tapper, walking to the left of the mark with a pole (with calabashes hanging from it) across his right shoulder. The central feature in the appellants' "The Three Palms" mark is not three palm-trees, but, likewise and surprisingly, a man, a labourer, walking to the left of the mark with a long-handled pickaxe across his right shoulder. The Palm Tree mark certainly has a palm-tree in the background, more than one; there are two and what looks at first sight like a third palm-tree but which on a closer look is seen not to be a third tree but a more distant group of several trees whose foliage overlaps. The Three Palms mark likewise has palm-trees in the background, which are three palm-trees.

My conclusion is the same as that of the learned judge. I think the applicants' mark is "calculated to deceive" within the meaning of the Act.

It was urged before us that The Three Palms cost 2d. a box as against the 3d. of The Palm Tree, and that the size of The Three Palms box is not exactly the size of The Palm Tree box. These matters are quite beside the point. The appellants' mark if registered could be applied to 3d. boxes of the same size as The Palm Tree boxes.

It is true that in the appellants' mark the name at the top and the words at the bottom have a red background, which is different from The Palm Tree box, and its man has yellow clothing and only black face, arms and bottom of his legs, while the palm-wine tapper has a pair of short white pants, a black body and legs and his calabashes are yellow, and he stands on a yellow patch. The appellants' application, however, is for registration without limitation as to colour. So the present-day colouring is not an important matter.

I would dismiss the appeal.

C. A.

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