[SUPREME COURT]

Freetown
Jan. 24,
1961

Bankole
Jones J.

DAIMBA ALLIE . . . . . *Appellant*

v.

ATTORNEY-GENERAL . . . . . *Respondent*

[Magistrate Appeal 51/60]

Criminal Law—Receiving—Burden of proof—Criminal Procedure Ordinance (Cap. 39, Laws of Sierra Leone, 1960) s. 75 (3).

Appellant, together with two other men, was charged before a magistrate with stealing two automobile headlights. The other two men were discharged, but appellant was found guilty of receiving pursuant to section 71 (3) of the Criminal Procedure Ordinance (Cap. 52, Laws of Sierra Leone, 1946). He appealed.

The prosecution's case was that complainant's headlights were stolen during the night and that, the next day, he was introduced to appellant, who took him to his house and produced two headlights which complainant recognised as his own. He paid £6 for them and then informed the police. Appellant claimed that he had obtained the headlights from one Olames and did not know they had been stolen.

In his judgment, the magistrate said, inter alia: "As regards evidence of stealing, the name of one Olames came out in the evidence of the accused as the person who gave the lamps to the accused and who is probably the thief—counsel rightly pointed out that this Olames was not before the court. But it was for the defence to produce this Olames and not for the prosecution to do so. He who affirms must prove, is a principle of the law of evidence. . . ."

Appellant's first ground of appeal was as follows: "That the learned trial magistrate was wrong in law in holding that there was a burden on the accused to produce the actual felon and thereby to establish his innocence."

Held, allowing the appeal, that the fact that the magistrate appeared to shift the burden of proof, however slightly, onto appellant required that the conviction be quashed.

Cases referred to: *Regina* v. *Wilson* (1857) Dears. & B. 157, 169 E.R. 958; *Rex* v. *Barnes and Richards* [1940] 2 All E.R. 229; *Regina* v. *Oliva*, "The Times," November 23, 1960.

W. S. Marcus-Jones for the appellant.

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

BANKOLE JONES J. The appellant together with two other men were charged with stealing two Peugeot headlights contrary to section 12 of Cap. 225 of The Laws of Sierra Leone. Before the prosecution closed their case, the prosecuting police officer, at different stages, withdrew the charge against the two other men and offered no further evidence against them. Both men were accordingly discharged by the court. The appellant was subsequently found guilty of receiving by the learned magistrate in accordance with section 71 (3) of the Criminal Procedure Ordinance (Cap. 52) which reads as follows:

"When a person is charged with stealing any chattel, money or valuable

security, and it is proved that he received the thing knowing it to have been stolen, he may be convicted of receiving although he was not charged with that offence."

The appellant was sentenced to six months' imprisonment with hard labour. It is against this conviction and sentence that the appellant has appealed to the court.

The prosecution's case was that the complainant arrived in Freetown from Conakry on the evening of October 9, 1960, by car and stayed in a house at Circular Road. Before he went to bed that night, he locked all the doors of the car and parked it in front of this house. Next morning he discovered that his two headlights had been stolen. He made a report to the police. Later that day, he was introduced to the appellant who took him to his house and produced two headlights which he recognised as his own. He paid the sum of £6 for them and then informed the police about the transaction. I think it ought to be mentioned as part of the prosecution's case that a witness swore that at about 11.30 p.m. on October 9, 1960, the day complainant arrived in Freetown, someone—a man called Olames, took two Peugeot headlights to him and asked him to keep them. He refused to do so. Nevertheless, on the next day, the same person took the same headlights to him and told him to take them to the appellant. He and one of the discharged accused persons took them to the appellant. The appellant was not at home and he left the headlights with the other man—the discharged accused person. The appellant was subsequently arrested, but before he was so arrested he was questioned by the police and he admitted that he had sold the lights but said he had obtained them from somebody else. The appellant's case from the witness box was that he merely acted as a go-between for the sale of the headlights. He said that the man called Olames owned the lights and that he, the appellant, only used his influence with Olames to get the price reduced from £8 to £6. The complainant paid the sum of £6 in two instalments of £3 each. The first instalment was handed to the appellant who then saw Olames paid. The second instalment was paid by the complainant himself to one Abdullai (2nd accused) who was Olames' agent. Abdullai then handed the lights to the complainant. All the appellant said he received was the sum of £1 which represented reasonable transport fare for trips made on behalf of the complainant in assisting him to buy the lights. He said he did not know that the lights were stolen.

In a statement made to the police before the appellant was charged—Exh. C1, he stated that he paid the sum of £6 himself in two instalments of £3 each to a man who had the lights for sale. He said he took the lights to his house and subsequently sold them to the complainant for the sum of £6. When he was formally charged, he made another statement—Exh. C—in which he stated that he relied on his former statement—Exh. C1.

There are ten grounds of appeal including a ground as to the excessiveness of the sentence. Counsel abandoned this ground. Of the remaining grounds, there are only three in my opinion which call for consideration. As to the others I find no substance in them.

Ground 1 reads as follows: "That the learned trial magistrate was wrong in law in holding that there was a burden on the accused to produce the actual felon and thereby to establish his innocence."

Ground 4. "That the learned trial magistrate was wrong in law in holding that the evidence led by the prosecution had established the ingredients required for the offence of receiving."

Ground 9. "That the learned magistrate was wrong in law in requiring as he did, such a high standard of proof of the accused in establishing his defence."

All three grounds raise questions relating to burden of proof, and can be conveniently dealt with together.

Counsel referred the court to the following passage in the learned magistrate's judgment:

> "As regards evidence of stealing, the name of one Olames came out in the evidence of the accused as the person who gave the lamps to the accused and who is probably the thief—counsel rightly pointed out that this Olames was not before the court. But it was for the defence to produce this Olames and not for the prosecution to do so. He who affirms must prove, is a principle of the law of evidence—it is not incumbent on the prosecution to call Olames in the circumstances of this case. See also *Regina* v. *Wilson* (1857) Dears. & B. 157; 169 E.R. 958, noted in section 1149 at p. 431 of Archbold, 34th ed. There is no doubt that wherever the thief might be, it was the accused who sold the lamps to the complainant. Accused himself said so in his statement to Chief Inspector Brown and A.S.P. Wray who arrested accused. I agree with counsel that the evidence given in this case proves the offence of receiving rather than stealing. I consider that there is sufficient evidence that accused had possession of these lamps."

Counsel submitted that when the learned magistrate said: "It was for the defence to produce this Olames and not for the prosecution to do so. He who affirms must prove, is a principle of the law of evidence," he erred in law because he was casting the burden of proof on the defence, namely, that it was the duty of the appellant to produce the thief if he wanted to establish his innocence. Learned Acting Solicitor-General conceded that the expression "he who affirms must prove" is an unfortunate one to have been used by the learned magistrate in a criminal trial. He, however, argued that the learned magistrate, in the context in which the expression was used, was not laying down a general principle of the law regarding the onus of proof in this particular case. All the learned magistrate meant was in effect this: "If the appellant says that he got the lights from Olames, then he should produce him to say so. It is not incumbent on the prosecution to call Olames in the circumstances of this case."

Now, whilst it may be true that it was not incumbent on the prosecution to call Olames as their witness, was not the magistrate in effect saying to himself that if the appellant had called Olames as his witness, he (Olames) might have helped him out, because Olames might have given evidence that the appellant knew nothing of the theft and therefore had no guilty knowledge at the time he dealt with the goods or came into possession of them? This proposition of the law, to my mind, is a dangerous one because it is inimical to the interest of an accused person. As I understand it, in receiving cases, the onus of proving guilty knowledge always remains upon the prosecution. It is not for an accused person to establish that he had no guilty knowledge.

Again the learned magistrate in another passage in his judgment said:

"It only remains for me to mention that counsel intended to call as witness one of the men originally charged with the accused. Counsel, however, later decided not to call this man when the court hinted that the evidence of this man might be regarded in the light of evidence by an accomplice and might require corroboration by an independent witness."

Whilst it is true that the witness whom the defence wanted to call was in fact not called, yet this passage, in my view, clearly indicated the manner in which the learned magistrate's mind was working. I think he was saying to himself that if the defence called as a witness one of the accused persons recently discharged, the evidence of such a witness would have needed corroboration because he would have regarded him as an accomplice on whose evidence he would not have acted without confirmation in material particulars from an independent witness. Here again it seems that the learned magistrate was casting the burden of proving his innocence on the appellant. With respect, I think the learned magistrate was wrong. The case of *Rex* v. *Barnes and Richards* [1940] 2 All E.R. 229, decided that the necessity for corroboration of the evidence of an accomplice applies only in the case of evidence called by the prosecution. In the present case although the witness who was to have been called by the defence was not called, yet the point is, that the learned magistrate felt that if he had been called his evidence would have required corroboration in order to be accepted.

In a recent case, *Regina* v. *Oliva*, reported in "The Times," of November 23, 1960, Lord Justice Parker, the Lord Chief Justice, giving the decision of the Court of Appeal said inter alia:

> "Nevertheless this court feels that it is a cardinal principle of our law that the burden of proof is on the prosecution. It has become almost a rule of law. . . . It would be better for that principle to be re-asserted than that anything we say should be thought in any way to whittle down that principle."

This was a case in which the appellant had been sentenced to two years' imprisonment for causing bodily harm to a club customer. The trial judge in his summing up, although he told the jury that they must be sure that the accused had committed the offence, nevertheless had not used words to show that it was for the prosecution to prove their case or that the burden of proof was on the prosecution. The appellant had been involved in six cases of violence in connection with Soho Clubs. The Appeal Court described him as a "lucky man," but they felt that a cardinal principle of the law had been infringed.

It may be true that the present case has all the ingredients essential for a conviction yet the fact that the learned magistrate appeared to shift the burden of proof, even however slightly, onto the appellant, turns the scales in his favour, and in the circumstances I must allow the appeal and order the sentence passed on appellant to be quashed and that he be acquitted and discharged.