



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEALS NO. 477 & 473 OF 1985 (CONSOLIDATED)

1. JOSEPH MAGESS SILUMU

2. AKBAR ALI ABDULHUSSEIN WALJI.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

We have consolidated these two appeals.

The 1st appellant is represented by Mr SM Otieno while Mr AA Lakha has argued the appeal of the 2nd appellant on behalf of Mr SS Dhanji.

Very briefly, the prosecution case is that the complainant is a dealer in scrap metal with a yard at Dandora. He knows one Otieno who is a commission agent for scrap dealers. Otieno introduced him to a person from Rwanda who showed a desire to set up a similar business in Nairobi, and he offered the complainant a 1/3rd share in the business without putting in any capital if the latter could arrange for a bank account, premises and licences. He spoke of millions of shillings which he was expecting and also of his Asian and European partners and got the complainant interested. Further meetings led to the introduction of the two appellants as partners of that Rwandese, and there were more discussions mentioning large sums of money. At one of the meetings, the 2nd appellant tested something red in bottle which the Rwandese had, and was satisfied that it contained red mercury which was stated to be a very precious thing, and after negotiations, he agreed to buy it from the Rwandese for Shs 4,000,000 and to effect payment later. In the meanwhile the 2nd appellant told the complainant that if the Rwandese, Otieno or the last appellant wanted money, the complainant should not hesitate to pay it to them and any such advances could be deducted when he paid for the mercury.

The complainant first paid Shs 10,000 to the two Rwandese and Otieno then Shs 50,000 to the 1st appellant, again Shs 40,000, yet again Shs 60,000 and finally Shs 9,000 to Otieno for scrap metal, making a total of Shs 169,000. Later, he became suspicious and reported to the police. The bottle allegedly containing red mercury was found to be of no value.

Under cross-examination, the complainant stated the he did not participate in the discussions about the red mercury but only two appellants, the Rwandese and Otieno did. The 2nd appellant was allegedly carrying a brief case containing Shs 800,000 in cash but the complainant did not verify its contents to ensure if the money was genuine or not and nor did he touch it. At that stage, his only concern was the spare parts business, and he was not really interested in the mercury. He parted with his money because

he had confidence in the appellants and their colleagues that they were going to get a large sum of money for coffee and also for the mercury. He also had confidence in the 2nd appellant because of the large sum of money had had seen in his brief case. And he continued, in answer to questions put to him that in business one has to influence the other party so he was also influencing them that they could just work, that there was no time that any of the appellants asked him to pay for the mercury and he never directly stood to gain by the mercury but that the amount of mercury involved convinced him that the appellants were very wealthy businessmen with whom he could deal but he never discussed prices of the mercury with any of those persons and the money was not obtained from him on the strength that he was buying mercury, but the mercury did influence his mind and if he had not seen the bottle of mercury and if the appellants had not told him that it was a very expensive item, may be he would not have given the money but then added that if he was sure he would not have given the money.

The particulars of the charge against the appellants are that:

“On diverse days between 2nd March 1984 and 5th March 1984 at Nairobi within the Nairobi Area, with others not before the court and with intent to defraud obtained a sum of Ksh 169,000 from Mr Sayeed Abdalla Kassim Ali by falsely pretending that a bottle containing some coloured liquid which they produced to the said Sayeed Abdalla Kassim Ali, contained mercury valued at Ksh 4.4 million while it contained valueless contents.”

The general law, as stated in *Archbold*, 35th Edition in paragraph 1943 is that:

“The prosecution must prove the making of the pretence, as state din the indictment; and any variance in substance between the pretence laid and that proved will be fatal.”

In *Ghulam Rasul & Another v R* [1954] 21 EACA 229, it was held that where there is a substantial variation between the false pretence alleged in the charge sheet and the facts late reproved a conviction cannot be sustained.

In our view this is such a case. At no time was the so-called mercury offered to the complainant or its value discussed directly with him or he was being asked to purchase it or to pay for it. He appeared to have assumed that the appellants and their colleagues were wealthy businessmen with whom he could do business, and, in his own words, he advanced moneys to them in order to influence them in business, and more especially the sum of Shs 9,000 was given to Otieno towards purchase of scrap metal. With respect to Mr Gathaara we think that there is no answer in law to the forceful submissions put forward by Mr Otieno for the 1st appellant, and on this ground alone these convictions cannot be sustained. It seems to us that the officers of the Parklands Police Station did not err in inviting the parties concerned to treat this as a civil dispute.

Mr Lakha for the 2nd appellant, while fully associating himself with the submissions of Mr Otieno, further argues that that the charge is also bad in law for duplicity because varying sums of money were given on different dates and at different times so that each of these partings of money should have formed a separate count which should have indicated what actually was inducing the complainant to part with that particular sum of money. However, the learned state counsel, is of the view that since the various sums were obtained from a continuing pretence, the charge was valid as it stood. We are inclined to agree with Mr Gathaaca on this score but it is not now necessary for us to give any specific ruling since, in the net result, we allow the appeals on both the appellants, quash their convictions and set aside the sentences passed upon them because the false pretence as laid has not been established.

Dated and Delivered in Nairobi this 17th day of April 1986.

S.K.SACHDEVA

JUDGE

V.V.PATEL

JUDGE