



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO 126 OF 1976**

**BENNALT OINAMO..... APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was convicted of unlawfully obtaining credit by false pretences *contra* section 316(a) of the Penal Code and sentenced to twelve months' imprisonment.

The appellant stayed at the Impala Hotel, parklands, between 13th August 1974 and 24th August 1974 occupying a room, and receiving board. He had telephone facilities. At the end of the period he left without paying Shs 1430/30, which included Shs 355/50 for telephone charges. He was not seen until over one year later, on 28th December 1975 when he was found to be lodging in the Hotel Ambassadeur and then arrested. Arising out of this situation, it was the case for the prosecution that the appellant had unlawfully obtained credit by false pretences *contra* section 316(a) of the Penal Code. The particulars given to support the charge were that between 13th and 23rd August 1974 at the Impala Hotel, the appellant incurred a debt or liability to Samwel Njama Karanja, and obtained credit to the amount of Shs 1430/30 from Mr Karanja, by falsely pretending that he would pay Shs 1430/30 thereby causing Mr Karanja, the manager of the Impala Hotel, to believe him and accorded him all the facilities at the Impala Hotel for which the appellant did not pay.

The magistrate found this charge proved; his reasoning being set out very shortly and possibly putting the onus of proof on the defence. The appellant's appeal concerns discrepancies in the evidence and, in a sense, the nature of the charge. He complains that he was allowed to negotiate payment, but was still punished when the debt was paid. We have had to consider the fundamental nature of the charge. Section 316(a) of the Penal Code reads as follows:

Any person who (a) in incurring any debt or liability, obtains credit by any false pretence or by means of any other fraud;... is guilty of a misdemeanour and is liable to imprisonment for one year.

There is no great amount of recorded authority in the reports in this country as to the meaning of these phrases. Perhaps we have not successfully located all of them. Section 316(a) is a provision stemming from section 13(1) of the Debtors Act, 1869 in England. There are a number of well known decisions in that country to which we propose to refer, as we understand that they have been received generally with approval in East Africa.

First of all, the words “obtains credit” refer to the obtaining of credit in connection with a debt or liability to be liquidated by the payment or repayment of money only; and that, by the accused himself. The principle has not been extended (for instance) to the receipt of money on a promise to render services or deliver goods in the future: *Fisher v Raven* [1963] 2 All ER 389; an opinion of the House of Lords. Here, the appellant was alleged to have promised to pay money, and a credit was obtained as will be explained later.

Secondly, if the credit be obtained by a false pretence, then it must be a pretence about an existing fact that is false. So the House of Lords in the above case approving the remarks in *R v Dent* [1955] 2 All ER 806 observed as follows (per Viscount Dilhorne LC, [1963] 2 All ER at page 395):

In *R v Dent* it was held by the Court of Criminal Appeal that a statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law.

It must be a statement about an existing fact which is false, as a result of which deception credit is obtained.

In the present case, the false pretence alleged is that the appellant would pay Shs 1430/30 whereupon Mr Karanja gave him the run of the facilities of the hotel. That is clearly a promise to do something in the future whether or not it was then, as a matter of fact, his intention to do so. It is not clear, as a matter of fact, that the appellant made any such promise. Such evidence as there is suggests that no promise was made certainly of the final sum of Shs 1430/30 which sum was not known at the beginning of the appellant’s stay in the hotel; or even during his stay, since part of the sum was disputed. Here the appellant simply booked a room signing a form giving his personal particulars and passport number. This document is not one of those, which record whether the customer himself or his company employing him will pay. Of course, he was not being invited to stay there free. But the point made here, is that the appellant did not make any direct representation as to how payment would be made, and from such entries as he made in the document which he signed if he were travelling on business for his employer, as he seems to have indicated, it might be concluded that either himself, or his company would pay in the first place. His conduct was ambiguous in the beginning. We would observe that the fact that the appellant gave a false address is not relevant to the false pretence charge. Much stress was laid on this fact. The pretence charged must be substantially proved as laid. In *R v Jones* [1898] 1 QB 119 the facts were that the accused person went into an eating-house and ordered food which he ate but did not pay for. Lord Russell of Killowen CJ questioned whether the appellant would be guilty of obtaining goods by false pretences and remarked (at pages 123, 124):

We do not desire to say anything which can weaken the authority of the decisions which say that there can be a false pretence by conduct; for example the case of *R v Barnard*, 7 C & P 784. Nor do we in any way dispute the authority of another class of cases; that is when a man gives a cheque on a bank when he either has no account or has no sufficient means to meet the cheque, or must have known that he had not sufficient means. In the present case the defendant did nothing beyond what I have already stated: no inquiry was made of him, and no statement was made by him. Under the circumstances, we do not think that the case could properly be left to the jury on the first count; there was no evidence that the defendant had obtained these articles by false pretences.

This illustrates, we think, very clearly the reasoning to be adopted with regard to the way in which false pretences may arise, by a direct statement or by conduct implying a false statement. It is conceded, however, that in *R v Jones* the question was whether the food itself was obtained by the false pretence allegedly implied from Jones’s conduct. Here the charge concerns credit. But there is no difference in principle as to what constitutes a false pretence with regard to goods and with regard to credit. There was no overt statement of a false pretence and there was none by conduct. The third aspect is then the meaning of the words “obtains credit ... by means of any other fraud”. In *R v Jones* Lord Russell CJ (at pages 124, 125) continued:

No one can doubt that the defendant did incur a debt or liability; he ordered goods under circumstances

which implied a promise to pay for them. Then did he obtain credit? We are of the opinion that he did. The prosecutor might have said that he would not furnish him with the goods until he paid the price, or he might have insisted on payment in actual exchange for each article as it was supplied, but he did neither; he furnished the goods under circumstances which passed the possession and property in them, relying on the readiness and ability of the defendant to pay. It does not seem to matter that the period of credit was a short period; he trusted the defendant, and parted with his goods without insisting on prepayment or upon interchangeable payment. We think therefore that credit was obtained.

That illustrates what is credit.

Lord Russell CJ then went on to deal with fraud. Jones was convicted of obtaining credit by means of other fraud, because he was found to have had no intention of paying, but rather that he intended to cheat. This case established a line of authority, which could well have informed the prosecution in the present case. Food and services were dispensed on the alleged basis that the appellant would pay. He would be guilty of gaining credit by means of other fraud if he never intended to pay his debt. In *R v Wyatt* [1904] KB 188 the defendant hired furnished apartments from the prosecutrix and occupied them for three days, when he left without paying for them, or for the food supplied to him. It was held that he had incurred a debt, and that he obtained credit by means of fraud. That was the basis of the conviction if certain evidence of previous conduct was admitted. It was so admitted and it negated accident. So Wyatt was convicted.

That is a case very much in point in considering the present case. One of the interesting aspects of the case is that there were two counts; one of obtaining credit by false pretences, and one of obtaining credit by means of other fraud. It was under the later count that Wyatt was convicted. We think that this would have been the right approach in the present case. This leads to the fourth question. How should the charge be framed if the prosecution is in doubt whether it is obtaining credit by false pretences or by means of fraud other than by false pretences? We would not commend *R v Perry* (1945) 31 Cr App Rep 16, where both types of fraud were allowed to be put in one charge. We prefer the view taken in *R v Holmes* [1958] Crim LR 394 per Salmon J at page 395 that it is undesirable to have the double allegation of false pretences and fraud other than a false pretence in one count. It is much better that separate alternative counts should be put on an indictment alleging in the first count obtaining credit by false pretences and in the second count obtaining credit by fraud other than a false pretence. The reason given was that it would make it easier to consider the case. We think that there are two separate offences in any event, and if they are separated it is certainly easier to consider the case. In the present case we are faced with the position that a false pretence was charged which, if proved, was not in itself a false pretence in law.

There was evidence that might have supported obtaining credit by means of fraud other than false pretences. That aspect was not charged. The Criminal Procedure Code does not authorise an alternative conviction under that part of section 316(a) of the Penal Code, with which the appellant was not charged. Moreover, it would be unfair to the appellant. He ought to have known what charge he was facing. He explained in his defence that payment in future was provided for.

Therefore we are obliged to quash the conviction, set aside the sentence and order the appellant to be set at liberty forthwith unless held for any other lawful cause. We are gratified, however, to find that the appellant has repaid the Impala Hotel the full sum of Shs 1430/30 though he denied part of the telephone charges. No doubt his period of imprisonment which would have been richly deserved if the charge had been properly drafted, will cause him to reflect on the inadvisability of hotel-hopping.

*Appeal allowed*

*Conviction quashed.*

Dated at Nairobi this 22<sup>nd</sup> day of June 1976

**H.G. PLATT**

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**JUDGE**

**S.K. SACHDEVA**

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**JUDGE**