



**IN THE COURT OF APPEAL**

**AT KISUMU**

**( Coram: Hancox JA, Chesoni & Platt Ag JJA )**

**CRIMINAL APPEAL NO. 130 OF 1983**

**BETWEEN**

**OMBOKO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was charged together with another employee of the Customs & Excise Department at Kisumu, and with another person who was acquitted, on three separate counts and one alternative count of fraudulent false accounting relating to the theft of 15,133 spark plugs or the proceeds thereof, contrary to section 280 of the Penal Code. The appellant was at the material time employed within the public service as an examining officer and was the warehouse-keeper at Kisumu, and the third accused was the cashier at the cash office, which is situated within the Post Office. Each was convicted and received eighteen months' imprisonment.

When goods are seized by the customs authority, it is their practice to sell them by auction from time to time, if the importers to whom they are said to belong do not show cause against the seizure, after due notification in the Kenya Official Gazette. A register of the goods seized was kept (Ex 11), and there was acceptable evidence that the appellant's duties included the auctioning of those goods and then entering their manner of disposal in that register. The procedure on sale of items to purchasers of auctioned goods was described by the Chief Accountant, Mr Gichimu (PW 6). It involved the issue of the receipt by the cashier to the purchasers, who would hand it and its duplicate to the warehouse man. He would retain the duplicate, entering its particulars in the register, and give the original of the receipt and the item or items bought to the purchaser. On the evidence in the case, over sixteen thousand spark plugs, most of which were in cartons, were seized by the authorities in the latter half of July, 1981, for which the appellant signed when he took over the warehouse, in October of that year. These goods were officially advertised for auction to be held on April 19, 1982. The auction sale was, however, cancelled on the instructions of the Deputy Commissioner of Customs and, in July, 1982, a check was made and 1,132 of the original total found to be missing. As a result of a physical count by the Acting Principal Collector in Kisumu Olando (whom the appellant tried to implicate in the theft that subsequently took place) and by Kamunyu, there were found to be 15,134 spark plugs in the warehouse on July 8, 1982.

On July 10, a Saturday, the evidence disclosed that the appellant probably was working in

conjunction with, *inter alia*, the boat crewman, Okumu, PW 1 (whom the trial magistrate in effect treated as an accomplice) hired a Nissan pick-up from Adhianga (PW 4) for Kshs 180 and, with the turnboy went to the warehouse, or store, at about 2.00 pm, maybe in broad daylight as the appellant urged in his ground of appeal, but nonetheless on a Saturday afternoon. There, under the appellant's direction, a number of cartons containing spark plugs were removed and loaded on to the pick-up, which was then driven past the premises of Pankaj Harshadbhai Patel, PW 13, in Kisumu, with whom it was said the appellant and the second accused person (who was acquitted) had made a prior arrangement for the sale of fifteen thousand spark plugs for Kshs 15 each (as opposed to the market price of Kshs 20) making a total of Kshs 225,000. Kavashik Panchaimajia, PW 10, was also in the shop and was a party to the arrangement. Both these witnesses were originally prosecuted for handling the plugs but the case was withdrawn. They too were treated, and correctly treated, by the trial magistrate as accomplices.

These two witnesses followed in another pick-up as far as the area known as Kibuye, overtook the first vehicle and stopped it. The two vehicles were then backed up to each other and the spark plugs were transferred to the second vehicle. Patel gave Kshs 150,000 to the second accused, who passed some of it to the appellant, and got in return an unofficial receipt in the name of the second accused with a promise of an official receipt the following Monday. There had been financial transactions between the parties to this arrangement and it was not precisely clear how much money, if any, of the agreed Kshs 225,000 was then paid, but at all events, on the Tuesday, the second accused returned and gave an official receipt to Patel for only Kshs 75,670. This was queried and a further receipt was promised. It did not materialise, Patel and Panchalmajia, having insisted that they must throughout have official receipts to make what they were doing legal, went to Olando on July 20. He evinced surprise that these gentlemen were in possession of the spark plugs.

Olando once more enlisted the aid of Kamunyu, and together they went to Patel's house where they made another physical count and found there were 15,134 spark plugs in his store, the exact number which had been in the warehouse on July 8. In these circumstances it is perhaps not surprising that the magistrate, who also admitted in evidence the appellant's confession, after holding a trial within a trial, rejected the appellant's denial of the charge and his defence. This further consisted of an allegation that he and Olando were jointly selling the plugs by private treaty on Olando's authority to the two Asians, who, he said, (as he did in his grounds of appeal) were Olando's close friends.

The magistrate then went on to convict the third accused of theft of the cash reflected in the receipt Exhibit 11, demonstrating by close analysis of his account books and cash registers that he had appropriated cheques previously received for the amount, that he had not banked the cash he had in hand of Kshs 80,029 (we think this may be a misprint for Kshs 83,029) on the July 14, 1982, but only Kshs 378.25, the rest being the cheques which he had also appropriated, and that the entry in Exhibit 4 showing a Standard Bank cheque paid in on that day was a false one. Consequently he was enabled to steal the Kshs 75,670 and still balance his books. However, in his appeal to the High Court (which was not consolidated with the appellant's first appeal) the learned judges saw it fit to allow the appeal on the basis that the third accused had managed in some way to account for the Kshs 75,670.

These subsequent matters did not directly affect the case against the appellant and the facts which the magistrate found as against him which led to his conviction were upheld by the learned judge of the High Court on his first appeal. They described the case as overwhelming against the appellant. There were thus concurrent findings of fact by both the courts below and we should be slow to interfere with those findings had the matter rested there.

However, as the appellant emphasised in his submissions to us on the second appeal (though this did not form part of his petition of appeal) four days after the dismissal of the first appeal, on August 16,

this year, there was an application before the trial magistrate and in the same case, for the release of the spark plugs to Pankaj Harshadbhai Patel, an application which was, we note, unopposed by State Counsel. The magistrate acceded to the application, holding that the spark plugs had been paid for and therefore purchased by Pankaj Harshadbhai Patel, even if only Kshs 75,670 had been paid for them. The further question we have to determine, therefore, is whether this development affects the findings of fact, made against, and therefore the conviction of the appellant.

Section 25(1) of the Sale of Goods Act (cap 31) provides that where goods have been stolen and the offender prosecuted to conviction, the property in these goods reverts to the person who was the owner of the goods,

“notwithstanding any intermediate dealing with them, whether by sale or otherwise”.

Section 178(1) of the Criminal Procedure Code (cap 75) makes a similar provision in respect of a person prosecuted by or on behalf of the owner of the goods, but does not contain the words underlined above. This was presumably the vehicle by which Mr Somaia made the application on Patel's behalf. Subsection (3) and section 178 provides that if it appears that the offender has sold the stolen property to any person, and that person has no knowledge that it was stolen, any moneys taken from the offender on apprehension may be ordered to be paid to the purchaser of the goods to the extent of the proceeds of sale. That subsection clearly envisages the situation where a subsequent innocent purchaser has had to restore the property to the original owner: he may be compensated to the extent of his loss. Otherwise if he was permitted to retain the goods, it would clearly be unjust that he should receive any moneys in addition. Finally, subsection (4) provides for suspension of any order until the time for an appeal has expired or such appeal has been determined. Thus both these provisions in our judgment revert or permit the restitution of the goods to their original owner and not to the person who has purchased them. Though the validity of the magistrate's order is not directly before us in this appeal, we are bound to say that the release of these goods to Patel was incorrect in view of these statutory provisions.

So far as the appellant is concerned, the question remains as to whether there being a specific finding that the spark plugs were paid for by Patel, and that an official receipt for Kshs 75,670 was issued, the appellant could yet be guilty of having stolen the 15,134 spark plugs.

In our judgment, the subsequent events, including the application to the magistrate of August 16, can have no effect on the position of the appellant. The property has, under the statutory provisions mentioned above, remained in the Government throughout. There was no power under the Customs & Excise Act (cap 472) to arrange a sale by private treaty, as the appellant must very well have known. Section 34 of that Act permits a sale by auction after due notice, but a sale by private treaty under the proviso is permitted only subject to two conditions:

- (a) that the goods are of a perishable nature, or animals; and
- (b) it is done with the authority of the Commissioner of Customs.

Neither of these conditions was satisfied in the case.

Moreover, most of the entries in the disposal column of the Seizure Register show that disposals were made by public auction, or else there is a clear indication as to the lot of which the goods for disposal formed part, and the authorisation is specified if the goods are returned to the owner that is so stated. There are no such entries relating to these spark plugs even though the appellant, who controlled the register, was not arrested for at least ten days after he had delivered the goods to Patel.

After full consideration of all these matters, we are satisfied that the appellant's actions on that Saturday are only consistent with his having stolen the spark plugs, and that they had come into his possession by virtue of his employment. We are satisfied that we should not disturb the concurrent findings of fact of the two lower courts, that the appellant was rightly convicted and his first appeal rightly dismissed. The length of the sentence is not a matter for us on a second appeal.

For the foregoing reasons, this appeal is dismissed.

**Dated and Delivered at Kisumu this 9th day of December 1983.**

**A.R.W.HANCOX**

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**JUDGE OF APPEAL**

**Z.R.CHESONI**

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**AG.JUDGE OF APPEAL**

**H.G.PLATT**

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**AG.JUDGE OF APPEAL**

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