

1952
July 25
AHMED
HALIL
v.
POLICE.

[HALLINAN, C.J., AND ZEKIA, AG. J.]

(July 25, 1952.)

AHMED HALIL, *Appellant,*

v.

THE POLICE, *Respondents.*

(*Criminal Appeal No. 1915.*)

Stealing—Section 249 of the Criminal Code—Proof of taking—Intent at the time of taking.

Accused sold his house to V. and received £438, which by V's mistake was £100 over the agreed price. Next day V. told accused of the mistake; accused replied "No, I have received the amount which was due to me £338;" Later £550 was found in accused's house. On these facts the accused was convicted of stealing £100.

Held: (i) The trial Court had applied the correct principle of law; under section 249 of the Criminal Code the prosecution must establish the guilty intent of the accused at the time of taking the property alleged to be stolen.

(ii) From the statement of the accused to V. that he had received only £338, the trial Court could not have inferred that the accused had formed the intent to steal when he received £438 on the previous day.

Appeal allowed.

Appeal by the accused from the judgment of the District Court of Larnaca (Case No. 1262/52).

J. Clerides, Q.C., with *I. V. Avni*, for the appellant.

P. N. Paschalis, Crown Counsel, for the respondents.

The facts of the case are set out in the judgment of the Court which was delivered by:

HALLINAN, C.J.: In this case the appellant has been convicted of stealing £100 from Mr. Voniatis of Larnaca. Mr. Voniatis was in the month of February in the process of buying a house from the appellant and after the buyer had made a deposit and had paid off a mortgage debt of £211.17.4½, the amount due to the appellant was £338.2.7.

By an error in his calculations the buyer thought that he owed £438.2.7 and directed an employee of his company, Mr. Andreas Stavrou, to pay over this sum to the appellant. Mr. Stavrou accordingly on the 27th February met the appellant at the office of the appellant's lawyer for the purpose of handing over the money. However, the appellant said he was busy and left for the market where he was a butcher, but before going he noted on a piece of paper that the sum of £438.2.7 was due and he instructed the lawyer's clerk, Mr. Elias Antoniou, to receive that money on his behalf. This was done and later in the day Mr. Elias Antoniou paid over the sum of £438.2.7 to the appellant.

On the following day in the afternoon the buyer, Mr. Voniatis, discovered his mistake and called the appellant to his office and informed him of what had occurred. The appellant then said, "No, I have received the amount which was due to me, £338.2.7." Mr. Voniatis sent his driver, Sofocles Kyriacou, with the appellant to the appellant's house where the sum of £550 was found but the appellant insisted that he had received no surplus. He said that he would check his account books at the market, but when facilities were given to him for doing this, he did nothing.

Mr. Voniatis reported the matter to the police and a constable who searched the appellant's house found the sum of £550 under a pillow on his bed.

On these facts the trial Judge held that at the time that the appellant received the £438 from Mr. Antoniou he knew that the buyer had made a mistake and he thereupon formed the intention to convert the £100 to his own use; the Court accordingly convicted the appellant for stealing. This finding as to the appellant's knowledge of Mr. Voniatis' mistake and of the time when the intent to steal was formed is necessary in order that there should be a "taking" and "stealing" within the definition of stealing contained in section 249 of the Criminal Code. If the appellant received the £438 innocently, not knowing of Mr. Voniatis' mistake, his subsequent discovery of the mistake and his conversion of the money to his own use would not be stealing.

The trial Judge in our view correctly stated the principle of the law involved in this case. Counsel for the respondent has cited to us the case of *Rex v. Ashwell* 16 Q.B.D. p. 190 as an authority that this matter is still in doubt. But Ashwell's case turned on facts which are not applicable to the present case. In Ashwell's case the point on which the Judges divided was whether the accused in law "took" the sovereign which he received at the time he received it (when he thought it was only a shilling) or that the "taking" only occurred when he became aware later that it was a sovereign. In the present case there was ample evidence for the trial Court to find that the appellant knew that he was receiving £438 when Mr. Antoniou gave him the money and the sole question for the Court to decide was whether he received it innocently without knowledge of Mr. Voniatis' mistake or not.

The reason given by the trial Judge for his finding that the appellant knew of the lawyer's mistake and formed the intention to steal at the time at which he received the money is that the appellant said to Mr. Voniatis when told of the mistake "No, I received the amount which was due to me, £338." The trial Judge drew from this the inference that the appellant knew at the time he received £438.2.7 that he should have received only £338.2.7.

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There is however another possibility which was not considered by the learned Judge, namely, that the appellant may have only learned of his fortune in receiving a surplus of £100 when informed by Mr. Voniatis in the afternoon of the 28th February, and he thereupon formed the intention to try and retain this £100 by pretending that he had only received £338. If that is what happened then the appellant's intention fraudulently to appropriate the £100 was formed subsequent to his taking it, and he is in law not guilty of stealing.

As there does not appear any reason why the Court should draw one inference rather than the other and since one inference is consistent with guilt and the other with innocence, the appellant must be given the benefit of doubt.

This appeal must therefore be allowed and the conviction and sentence set aside.

As to the money we consider that it should remain in Court pending the determination of this claim by the complainant or appellant who will have to take civil proceedings.