1945
May 1

SALIH ERTOGRUL v. REX.

The evidence that he did, apart from these letters, was the evidence of the accomplice. In order to entitle the Court to receive that evidence, it had to be corroborated to a certain extent. We have already dealt with that point and, in our opinion, the corroboration provided by the independent evidence of the meeting of these three persons on the 9th April, notwithstanding that it was seven months before the date of the alleged conspiracy, was sufficient corroboration to entitle the Court to believe that part of the evidence of Rifat which implicated the accused. That being so, there was, in our opinion, sufficient presumption of the appellant's complicity in this conspiracy, established by other evidence, to entitle these letters to be admitted against him.

1945
May 12

[JACKSON, C.J., AND HALID, J.]

(May 2, 3 and 12, 1945)

CHRYSANTHOS IOANNOU, *Appellant*,

v.

THE POLICE, *Respondents*.

(*Criminal Appeal No.* 1801.)

Criminal Law—Theft—Attempting to steal—Passing of property—Specific appropriation from bulk—Increase of sentence.

The appellant, as secretary of a co-operative society, took delivery from the Government store at Ktima of 4,000 okes of wheat in bulk for distribution among a considerable number of farmers including the two complainants. He obtained that quantity on presentation of the Agricultural Officer's list of approved applications for seed. More than two-thirds of the wheat delivered to the appellant was bought with the co-operative society's money and the rest with various sums of money collected from persons who wanted seed.

In the case of the first complainant the appellant, before going to take delivery of the seed at Ktima, collected from him the sum of two pounds being the price of 60 okes of wheat, namely the quantity which the complainant was entitled to receive in accordance with the Agricultural Officer's list of allocations. When the complainant went to collect the seed allotted to him, he himself put wheat into his sack from the quantity of wheat delivered to the appellant and the latter after weighing the sack told complainant that it contained more than 60 okes. Thereupon, at the instance of the appellant, wheat was taken out of the sack until, when about six okes had been removed, the appellant told the complainant that the weight was correct. This was subsequently found to be 56 okes instead of 60.

The second complainant's name appeared in the Agricultural Officer's list as having been allotted 50 okes of wheat, but no money had been collected from him before the appellant went to take delivery of the seed, and there was no evidence of any

agreement between these two persons that the appellant should collect the seed on complainant's behalf. The appellant delivered 48 okes of wheat to this complainant declaring that the quantity delivered was 50 okes, and the complainant paid him the price of 50 okes.

Held: (i) When the bulk quantity of wheat was delivered to the appellant at Ktima the first complainant, who had paid two pounds to the appellant to collect 60 okes of wheat for him, had an undivided interest in the bulk of 4,000 okes to that extent, but as there was no specific appropriation to him of any particular 60 okes from the bulk, the property in any particular 60 okes had not passed to him. *A fortiori*, in the case of the second complainant, who had paid nothing to the appellant at that time and who, according to the evidence, had not even asked the appellant to collect any wheat for him, the property in any particular parcel of wheat had not passed to him.

(ii) The property in the 60 okes of wheat that the first complainant was entitled to receive passed to him when it had been separated from the bulk and put into his sack and weighed. Accordingly, when the appellant removed from the sack four okes out of the 60 that the complainant was entitled to receive and had in fact received, there was a fraudulent taking and carrying away of four okes of wheat the property of the complainant with an intent on the part of the appellant to deprive the complainant permanently of that quantity, and the appellant was rightly convicted of larceny.

(iii) In the case of the second complainant the quantity of wheat separated from the bulk and put into his sack at no time exceeded 48 okes and nothing occurred that would justify the conclusion that the property in the remaining two okes passed to him at any time, and the appellant could not therefore be convicted of attempted larceny.

Appeal from a conviction and sentence by the District Court of Paphos (Case No. 4359/44).

J. Clerides for the appellant.

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

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

JACKSON, C.J.: In this case the appellant was convicted by the District Court of Paphos on two counts. The first charged him with stealing four okes of wheat the property of a named complainant. The second charged him with attempting to steal two okes of wheat the property of another complainant. On the first of these charges he was sentenced to six months' imprisonment and on the second to a fine of £50. He appeals both against conviction and sentence.

1945
May 12

CHRYSANTHOS IOANNOU
v.
THE POLICE.

The facts, so far as they are material to the question before us, are as follows: At some time prior to 14th of November last the Agricultural Department invited the farmers of Anarita to apply to the department for wheat to be issued to them for seed at a price of 6*p*. an oke. On receipt of the farmers' applications the department prepared a list giving the names of 67 applicants and the quantity of wheat allotted to each. The total of the quantities so allotted was 4,550 okes. A copy of the list was sent to the Mukhtar of Anarita with a covering letter from the Agricultural Officer at Paphos. The letter asked the Mukhtar to inform the persons named in the list and to request them to take delivery of the quantity allotted to them from the Government store at Ktima. The letter also asked that, in order to simplify the process of delivery, farmers should be urged to take delivery through their co-operative society or some other organization. It appears that in consequence of this request the co-operative society of Anarita authorized their secretary, who is the appellant, to take delivery of the wheat, and the list prepared by the Agricultural Officer, showing the amount of seed allotted to each person, was given to the appellant to take action upon it. In order to pay for the wheat the appellant took £90, the amount of cash which the co-operative society had at the time, and collected various sums of money amounting to £43. 6*s*. 6*p*. from various farmers who wanted seed. The amounts that he collected from these persons did not in every instance correspond with the particulars given in the Agricultural Officer's list of allocations of seed. In one case mentioned in the evidence money was collected from a person who was not on the list. In another case it appears that a person to whom a particular quantity had been allotted by the Agricultural Officer informed the appellant that he wanted a larger quantity and consequently a sum sufficient to pay for that larger quantity was collected from him. Moreover the appellant in his evidence stated that a number of persons mentioned in the Agricultural Officer's list informed him that, for one reason or another, they no longer required the seed which had been allotted to them.

On the 14th of November the appellant presented himself at the Government store at Ktima with the Agricultural Officer's list, the £90 belonging to the co-operative society and the sum of £43. 6*s*. 6*p*. which he had collected from various persons as already mentioned. He paid over these sums, totalling £133. 6*s*. 6*p*.,'at the Government store and received 4,000 okes of wheat, being the amount for which £133. 6*s*. 6*p*. was sufficient to pay at the price of 6*p*. per oke.

He was also given a receipt for that sum as having been received from the co-operative society of Anarita. The wheat was loaded into two lorries which the appellant had taken to Ktima for the purpose and was transported to the co-operative society's store at Anarita for distribution. It is to be noted here that the total quantity shown in the Agricultural Officer's list of allocations of seed was 4,550 okes and that the quantity received by the appellant was 550 okes less. On the following day, the 15th of November, those persons requiring seed presented themselves at the co-operative society's store at Anarita in order to receive from the appellant the seed to which they were entitled.

It appears from the evidence that on arrival at Anarita the seed, which had been brought from Ktima in sacks, was emptied from the sacks into a heap on the floor of the co-operative society's store. When, on the 15th of November, the applicants came to take their seed, the quantity which each was to receive was separated from the heap, in some cases at any rate by the applicants themselves, and put into sacks which the applicants had brought. The appellant himself weighed the sack of each applicant and declared to the applicant the quantity that it contained. When he said that the quantity was correct the applicant removed the seed. Those applicants from whom the appellant had not already collected the price of their seed were required to pay the price to the appellant before removing the seed and every applicant who received seed paid to the appellant a sum, in addition to the actual price of the seed, representing the cost of transport from Ktima and an addition as compensation for the services of the appellant and an assistant. The applicants who gave evidence stated that they did not themselves check the weights declared by the appellant but took his word that the weights were correct.

It appears that on that day, the 15th of November, the appellant delivered seed to 26 applicants and separated, from the heap in the store, a quantity ready for issue to another person.

One of the applicants to whom the appellant had delivered a quantity of seed, the amount of which he had declared after weighing it, had the sack weighed again immediately after removing it from the store and found that the weight was less than the weight declared by the appellant. This applicant complained to the police and in consequence, on the 16th of November, 18 different lots of seed delivered by the appellant on the previous day were weighed by an Agricultural Officer in the appellant's presence. Seventeen out of these eighteen lots were found to be less in weight than the weight declared by the appellant

1945
May 12

CHRYSANTHOS IOANNOU v. THE POLICE.

when they were delivered to the applicants. According to records kept by the appellant, showing deliveries of seed on the 15th of November, the quantity which he had delivered to 26 persons on that day, together with the quantity which he had separated from the main heap ready for delivery to another person, was 3,408 out of the 4,000 okes that he had received from the Government store at Ktima. The quantity of seed remaining in bulk in his store was checked with these figures and it was found that there was a surplus of 103 okes. The steelyard which he had used for weighing the seed delivered to various applicants was also tested and found to be correct.

Following on the discovery of the 17 instances in which the appellant had been found to have delivered less than the proper quantity of wheat, 34 charges were brought against him, two in respect of each case. The first charge alleged that he had stolen from the particular person named the quantity of wheat by which the delivery to that person had been found to be short. The second charge alleged, in the alternative, an attempt to steal the same quantity. At the trial evidence was tendered in respect of five out of these seventeen cases. In three out of these five cases the appellant was acquitted and it is from his conviction on two charges arising out of the remaining two cases that he has now appealed.

The particular facts relating to the first of these two charges, namely, the charge of stealing four okes of wheat from a named complainant were as follows. This complainant is mentioned in the Agricultural Officer's list of allocations as entitled to receive 60 okes of seed and, when the appellant was collecting various sums of money from applicants before going to take delivery of the seed at Ktima, he collected from this complainant the price of 60 okes at 6*p*. per oke, that is to say, £2. On the 15th of November this complainant went with other applicants to the co-operative store at Anarita to collect the seed allotted to him. He took an empty sack with him and into this he himself put wheat which he took from the heap on the floor of the store. When he had done so the appellant weighed the sack and told the complainant that it contained more than 60 okes. Thereupon, according to the evidence of this complainant, wheat was taken out of the sack until, when about six okes had been removed, the appellant told the complainant that the weight was correct. It is not clear from the evidence whether the six okes removed from the sack were taken out by the complainant on the instructions of the appellant, or by the appellant, or by both the complainant and the appellant together. It is clear,

however, that it was at the instance of the appellant that the wheat was taken out of the sack. The complainant did not himself check the weight but took the word of the appellant. The complainant then paid to the appellant, at his request, an additional sum of 12*p.* for transport and other charges and removed his wheat. He did not himself suspect that the amount delivered to him was less than he should have received but, in the course of the check carried out on the following day, the weight of the wheat in his sack was found to be 56 okes instead of 60. On these facts he was convicted by the District Court of the larceny of the four okes of wheat, the property of the complainant.

The facts in the case of the second complainant are not, in some respects, the same. This man's name appears in the Agricultural Officer's list as having been allotted 50 okes of wheat. On the 15th of November he went to the co-operative store, with his own sack, to take delivery of his seed from the appellant. It is not clear from the evidence who put the wheat from the heap into this complainant's sack but when a certain quantity had been put into it the appellant weighed the sack and said that the quantity of wheat in it was 48 okes. The appellant then took two more okes from the heap, weighed it on scales, and put it into the complainant's sack which he then declared to contain 50 okes, namely the amount that the complainant was entitled to receive. No money had been collected from this complainant before the appellant went to take delivery of the seed at Ktima and there is no evidence of any agreement between these two persons that the appellant should collect the seed at Ktima on the complainant's behalf. When, on the 15th of November, the appellant told the complainant that he had 50 okes of wheat in his sack, the complainant paid to the appellant 33*s.* 3*p.*, being the price of 50 okes of wheat at 6*p.* per oke, and 1*s.* 1*p.* for transport and other charges. This complainant, like the first, accepted the appellant's word that the weight of wheat in his sack was correct but, immediately after removing his wheat from the co-operative store, he had it weighed again on a steelyard in a neighbouring coffee-shop and found that the net weight of wheat in his sack was 48 okes. He accordingly complained to the police and it was through this complaint that the checking of the weight of the 18 lots of wheat delivered by the appellant came about. The weight of the wheat in this complainant's sack was again checked by the Agricultural Officer and was found to be 48 okes. On these facts the District Judge convicted the appellant of an attempt to steal two okes of wheat, the property of this complainant.

1945
May 12

CHRYSANTHOS IOANNOU
v.
THE POLICE.

We turn now to the legal considerations to which these two convictions give rise. There can be no doubt that in each of the five cases about which evidence was heard and in which short deliveries had been made by the appellant, he had made them with a fraudulent intent. His defence to all the charges was that the weight of wheat which he had delivered to all the complainants was correct and that it was in consequence of malice on the part of the complainants that they had complained of short weight. At no time did the appellant attempt to give any explanation of the surplus of 103 okes of wheat found in the store in his control. Nevertheless, in order to support either of the two convictions against the appellant, one for larceny and the other for attempted larceny, it is necessary to show that in each case the wheat which was the subject of the charge, four okes in one case and two okes in the other, was the property of the complainant concerned. If we have followed correctly the District Judge's reasoning in his elaborate judgment, it appears that he found that the property in the wheat which was the subject of the two charges with which we are concerned had passed to the two complainants on delivery of the bulk of 4,000 okes of wheat to the appellant at Ktima. He refers to the appellant as having received particular quantities of wheat for particular persons as the bailee of those quantities for those persons. He did not find that the property in the wheat passed by reason of delivery to the complainants and, in the case of the second complainant, he clearly could not have done so since the two okes of wheat which were the subject of the charge in his case had not been delivered to him. Moreover, in referring to a third charge, relating to a different complaint, upon which the appellant was acquitted, the District Judge remarked that since that complainant's name was not on the Agricultural Officer's list delivery to her was necessary in order to pass the property to her and that "delivery was not complete until the weighing was finished." It is clear therefore that the Judge relied solely on the delivery to the appellant of the bulk of 4,000 okes of wheat at Ktima as sufficient to pass to the two complainants with whom we are concerned the property in the particular parcels of wheat which were the subject of the charges upon which the appellant was convicted.

The delivery to the appellant at Ktima was a delivery of 4,000 okes of wheat in bulk. Although he obtained that quantity on presentation of the Agricultural Officer's list of approved applications for seed, the quantity that he obtained was not the total quantity shown on the Agricultural Officer's list but a smaller quantity represented by the sum of money that he tendered in payment. It is

clear moreover that there had been substantial departures from the figures given in the Agricultural Officer's list since it was prepared. An unknown number of persons had withdrawn their applications and others, not named in the list, had told the appellant that they wanted seed. It is also clear that there was, at the time of delivery of the bulk, no specific appropriation of particular parcels of seed to particular purchasers.

The District Judge seems to have relied upon the case of *Regina* v. *Bunkall* (English Reports, Vol. 169, p. 1436) to support his conclusion that the property in particular parcels of wheat passed to the complainants on delivery of the bulk of 4,000 okes to the appellant at Ktima. That was a case in which the accused, who owned a horse and a cart, was given money by the prosecutor who asked him to buy a load of coals for the prosecutor and deliver it to him. The prisoner bought the coals with the prosecutor's money but in his own name, fraudulently disposed of part of the load to other people and delivered short weight to the prosecutor. He was convicted of larceny as a bailee and his conviction was unanimously affirmed by five judges in the Court for Crown Cases Reserved. There was a difference of opinion among the five judges as to whether a bailment had been created by the mere delivery to the prisoner of the coals bought with the prosecutor's money or whether some specific appropriation of the coals by the prisoner to the prosecutor was necessary to constitute a bailment and to vest the property in the coals in the prosecutor. That case accordingly provides no authority for saying that in the case before us the property in the wheat which was the subject of the charges passed to the complainants on delivery of the bulk of wheat to the appellant at Ktima. Moreover, in the case of the second complainant, no wheat had been bought with his money and there was no evidence of any request on his part that the appellant should collect any wheat on his behalf. But there is another and more important difference between the case of *Regina* v. *Bunkall* and the case before us. In *Regina* v. *Bunkall* the coal obtained by the prisoner at the prosecutor's request, and with his money, was the particular quantity which the prosecutor had ordered and no more. In this case the wheat obtained by the appellant at Ktima was a bulk of 4,000 okes to be distributed among a considerable number of persons. This number included the two complainants but it also included a number of others and it is not even certain that the identity of all of them, or the quantity to be delivered to each individual, was known even to the appellant when he collected the wheat.

1945
May 12

CHRYSANTHOS IOANNOU v. THE POLICE.

Some of the persons to whom wheat was actually delivered were not in the Agricultural Officer's list and the appellant stated in his evidence that he thought he could sell to whom he liked. More than two-thirds of the wheat delivered to the appellant at Ktima was bought with the co-operative society's money and some persons to whom the appellant delivered wheat had not previously paid him for it. These facts distinguish the case before us fundamentally from the case of *Regina* v. *Bunkall.*

In so far as concerns the question of the passing of the property in the wheat by delivery to the appellant at Ktima, this case more nearly resembles the case of *Healy* v. *Howlett & Sons* (1917 K.B.D., Vol. 1, p. 337) which was cited to us by Mr. Clerides on the appellant's behalf. In that case 190 boxes of fish, identical in quality and kind, were despatched by the seller, by ship and rail, from a port in Ireland for delivery to four purchasers in London. Twenty of the 190 boxes were to be delivered to the defendants in the case and the remaining 170 to three other purchasers. At a particular point on the journey the number of boxes that each purchaser was to receive were separated from the bulk and marked with the particular purchaser's name. Before this appropriation occurred the fish which was afterwards appropriated to the defendant had deteriorated and on its delivery to him he claimed the right to reject it. The question before the Court, as expressed by Avory, J., was whether the 20 boxes of fish became the property of the buyer when they were put on rail in Ireland. The learned Judge went on to say that the answer to that question depended on whether there was an appropriation of the 20 boxes at that time to the defendants, and he observed that at that time it was impossible to tell which 20 boxes out of the 190 belonged to the defendants and which belonged to the other purchasers. He accordingly held that the property in the 20 boxes of fish delivered to the defendants had not passed to them at the time when deterioration occurred, or, in other words, that the property in these 20 boxes had not passed to the defendants when those boxes with 170 others were put on rail in Ireland for delivery to the four purchasers. Ridley, J., in the same case, held that an appropriation of the particular boxes which the defendants were to receive was necessary to vest the property in them and that there had been no such appropriation.

In the case before us it seems clear to us that when the bulk quantity of 4,000 okes of wheat was delivered to the appellant at Ktima, the first complainant, at any rate, who had paid £2 to the appellant to collect 60 okes of wheat

for him, had an undivided interest in the bulk of 4,000 okes to that extent but, in our opinion, as there was then no specific appropriation to him of any particular 60 okes from the bulk, the property in any particular 60 okes had not passed to him. In the case of the second complainant, who had paid nothing to the appellant at that time and who, according to the evidence, had not even asked the appellant to collect any wheat for him, a similar conclusion is even more obvious.

Having thus formed the view that no property in any particular parcel of wheat passed to either of the complainants by delivery of the bulk to the appellant at Ktima, it is necessary to consider whether by reason of anything that occurred at the time of the delivery to them it can be said that there was an appropriation of a particular quantity to each of them so as to pass to them the property in those quantities.

In the case of the second complainant the quantity of wheat separated from the bulk and put into his sack at no time exceeded 48 okes and in our opinion nothing occurred that would justify the conclusion that the property in the remaining two okes, which were the subject of the charge, passed to him at any time. What we have said about his case is sufficient to show that in our opinion the conviction of the appellant for an attempt to steal two okes of wheat, the property of this complainant, cannot stand.

In the case of the first complainant a quantity of wheat, which appears from the evidence to have been about 62 okes, was separated from the bulk by the complainant himself at the time of delivery, and put into his sack. Mr. Clerides argued, for the appellant, that because the quantity put into the complainant's sack was more than 60 okes and because the weighing was not complete there was not a sufficient appropriation to the complainant to pass to him the property in the four okes which were afterwards removed from his sack. As to the necessity for the completion of weighing, it was by the appellant's weighing that a quantity slightly in excess of 60 okes was shown to be in the complainant's sack, and it is clear that the appellant would never have completed the weighing by a true declaration of weight, for it was his intention to defraud the complainant by a false declaration. It is equally clear that 60 okes of wheat, the quantity that he was entitled to receive, was separated from the bulk and put into his sack and it seems to us to be much too narrow a construction to say that because two okes too much, as determined by the appellant's weighing, were put into the complainant's

1945
May 12

CHRYSANTHOS IOANNOU
v.
THE POLICE.

sack, this fact prevented the passing to him, by specific appropriation from the bulk, of the 60 okes that he was entitled to receive and had in fact received. We think that the property in the 60 okes of wheat that this complainant was entitled to receive passed to him when it had been separated from the bulk and put into his sack and weighed. Accordingly we hold that when the appellant, or the complainant at his instigation, removed from the sack four okes out of the 60 that the complainant was entitled to receive and had in fact received, there was a fraudulent taking and carrying away of four okes of wheat the property of the complainant with an intent on the part of the appellant to deprive the complainant permanently of that quantity. In our opinion, therefore, the conviction was right though the reasons upon which the District Judge based it were wrong.

Since it was clear from the evidence that in the case of the second complainant, in which we have been compelled to quash the appellant's conviction, the latter committed a deliberate fraud, we asked the counsel for the Crown whether he could indicate to us any section of the Criminal Code upon which it would be open to us to exercise the powers conferred upon this Court by section 40 (1) (*k*) of the Courts of Justice Law, 1935, and to convict the appellant of any other offence which would have been triable by the District Court. The Crown Counsel stated that while there were sections of the Criminal Code upon which the appellant might be convicted on the evidence adduced, none of these offences would have been triable by the District Court.

The appellant has appealed to this Court, not only on points of law against his conviction on the two charges, but also against the sentence imposed on him on each. The sentence of £50 fine on one charge will of course be quashed with the conviction on that charge. The sentence on the charge on which we have confirmed the conviction was six months imprisonment and, in passing it, the District Judge observed that the appellant, using a position of trust which he held as secretary of the co-operative society in his village, put into execution "a plan of fraud." There can be no doubt, from the evidence given at the trial, that the particular theft for which the appellant was convicted did not stand alone and, though small in itself, was part of a substantial fraud against a considerable number of people who trusted him and whose trust he flagrantly abused. We are strongly of opinion that the sentence of six months' imprisonment on him was too lenient and we accordingly increase it to an imprisonment for a year.