

THE PEOPLE v KELVIN SIWALE (1979) Z.R. 64 (H.C.)

HIGH
SIVANANDAN,
2ND FEBRUARY, 1979
HNR/16/1977

COURT
COMMISSIONER

Flynote

Criminal law and procedure - Exhibits - Disposal of in criminal proceedings where charge for which exhibit tendered in has not been proved - Criminal Procedure Code, s 355

Headnote

In a criminal case where the accused was charged with theft, a motor vehicle was tendered as an exhibit. However, the charge failed as the evidence did not support the charge and consequently the trial magistrate made an order that the vehicle be returned to Mr Mulenga, a bona fide purchaser. The case was sent to the High Court for a review of the trial magistrate's order.

Held:

- (i) Under s. 355 of the Criminal Procedure Code, the court may order that the exhibit which was tendered or put in evidence be returned at any stage of the proceedings to the person who appears to be entitled thereto subject to such conditions as the court may seem fit to impose.
- (ii) The words "to the person who appears to be entitled thereto" do not necessarily refer to the owner but if it is found that no offence has been committed in respect of the exhibit which is the subject matter of the case, then it must be returned to the person from whose possession it was taken by the investigating officer, except where that person does not make a claim or if there are circumstances which justify the court to take a different course.

Legislation referred to:

Criminal Procedure Code, Cap. 160, s. 355.

Judgment

SIVANANDAN, COMMISSSIONER: This case was sent to the High Court by the Senior Resident Magistrate, Kitwe for the purpose of review of an order of the trial magistrate dated 4th May, 1978.

The order which is the subject of review is as follows:

"The vehicle would still belong to witness Mr Mulenga since he has paid K1,000 as deposit."

This order was made after the conclusion of the trial in the above case No. 3K/1065/77 in which the accused who was charged for the offence of theft of a motor vehicle namely Bedford Truck Reg. No. EN 6260 valued at K3,500, the property of Mr Chomba was acquitted after the trial.

According to the minute of the senior resident magistrate and the judgment of the trial magistrate, the brief facts are as follows:

The vehicle in question originally belonged to Modern Joiners Limited, Kitwe whose Managing Director was Mr Chomba. It appears Mr Chomba negotiated the sale of the said vehicle for K3,500 with Mr Simfukwe of People's Security Services of which Mr Siwale the accused in this case was the General Manager. It is also in evidence that Mr Siwale the accused negotiated the sale of the said motor vehicle with Mr Mulenga who is PW1 in this case, and Mr Mulenga had paid a deposit of K1,000 as required by Mr Siwale and took possession of the said motor vehicle and from whom the motor vehicle was recovered by the police during the investigation into this case.

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According to the evidence in the case the charge of theft failed as the evidence did not support the charge and consequently the said motor vehicle was returned to Mr Mulenga PW1 by the trial magistrate as per his order referred to above.

It will be seen from the evidence that Mr Mulenga was a bona fide purchaser and besides the motor vehicle in question was not the subject of theft nor of any offence. If the criminal case has not been filed the motor vehicle would have remained in the possession of PW1 and the respective parties would have resorted to civil claim to recover the value of the said vehicle or its return.

According to s. 355 of the Criminal Procedure Code relating to disposal of exhibits, the court may order that the exhibit which was tendered or put in evidence be returned at any stage of the proceedings to the person a who appears to be entitled thereto subject to such conditions as the court **15** may seem fit to impose. The words "to the person who appears to be entitled thereto" are clear in that the person referred to need not necessarily be the owner. The guiding principle is that when it is found in any criminal proceedings that no offence has been committed in respect of the exhibit which is the subject matter of the case it must be returned to the person from whose possession it was taken by the investigating officer as otherwise people will begin to make use of the criminal courts as a forum to settle their civil disputes. This rule should only be deviated from when a person from whose possession it was taken does not make a claim or there are circumstances which justifies the courts to take a different course.

In this case, the facts are clear that there had been a sale of the motor vehicle to Mr Mulenga PW1 who is a bona fide purchaser having deposited a sum of K1,000 and the exhibit namely the motor vehicle in question was taken from his possession and he claims it. In the circumstances, I find that the order of the trial magistrate is correct. The parties must, therefore resort to civil claim for the payment of the price or for the return of the vehicle and obtain an order of court.

For the fore-going reasons, the order of the trial Magistrate is confirmed.

Order confirmed
