

WILSON MAKASA KAPASA v THE PEOPLE (1980) Z.R. 114 (S.C.)

SUPREME COURT  
GARDNER, AG. D.C.J., MUWO AG. J.S. AND CULLIGAN, AG. J.S.  
6TH MAY, 1980  
S.C.Z. JUDGMENT NO. 12 OF 1980

Flynote

Criminal law and procedure - Obtaining by false Pretences - Proof that thing stolen - Person to be convicted of stealing.

Criminal law and procedure - Theft - Obtaining by false pretences - Evidence showing that thing stolen - Person to be convicted of stealing.

Headnote

The appellant was convicted on two counts of obtaining money by false pretences. The appellant with another, pretended to two different complainants that they were able by means of magic to inform them of the people who intended to do them harm. For this purpose the appellant obtained sums of money which he promised to return after performing **40** the magic. He failed to return the money.

**Held:**

- (i) Under s. 188 (2) of the Criminal Procedure Code it is specifically provided that, when a person is charged with obtaining anything capable of being stolen by false pretences with intent to defraud

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SILUNGWE,

C.J.

and it is proved that he stole the thing, he may be convicted of the offence of stealing even though he was not charged with it.

- (ii) The charge of false pretences does not apply in this case and it is necessary therefore for this court to set aside the conviction for obtaining money by false pretences and substitute therefore convictions for theft on each count under s. 265 of the Penal Code.

**Legislation referred to:**  
Criminal Procedure Code, Cap. 160, s. 188 (2).  
Penal Code, Cap. 146, s. 265.

For the appellant: In person.  
For the respondent: K. C. V. Kamalanathan, Senior State Advocate.

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Judgment

**GARDNER, AG. D.C.J.:** delivered the judgment of the court.

The appellant was convicted on two counts of obtaining money by false pretences. The particulars of the first count were that he obtained K10 by falsely pretending that he could show someone the person who wanted to kill him when in fact he was not so able, and the particulars of the second count were that he obtained K30 in cash in similar circumstances.

The prosecution evidence was that the appellant, with another, pretended to two different complainants that they were able by means of magic to inform them of people who intended to do them harm. For this purpose the appellant obtained the sums mentioned in the charges from the two complainants with a promise that the money would be returned to them after he had performed his

magic. In the event he pretended to return the money, but instead, after concealing the money on one occasion in a piece of cloth and, on another, under a plate, he substituted worthless pieces of paper and left before the substitution could be discovered. He was sentenced to twelve months' imprisonment on the first count and eighteen months' imprisonment on the second count, both sentences to run consecutively, making a total of thirty months.

The appellant now appeals against both conviction and sentence, and before this court his principal appeal has been against sentence.

We have no hesitation in finding that there was ample evidence to show that the appellant was guilty of the conduct alleged against him. However, as it is quite clear that the complainants did not intend to part with the ownership of the two sums of money it follows that the taking of the money by the appellant was theft. This is what was found by the trial magistrate. In his judgment the trial magistrate said that all there was to it really was stealing through a devised trick which the accused had executed. He found however, that he could not substitute such an offence for one of false pretences, and convicted the appellant of the original charge of obtaining money by false pretences. In this the magistrate misdirected himself. Under s. 188 (2) of the Criminal Procedure

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AG.

D.C.J.

Code it is specifically provided that, when a person is charged with obtaining anything capable of being stolen by false pretences with intent to defraud and it is proved that he stole the thing, he may be convicted of the offence of stealing even though he was not charged with it. The charge of false pretences does not apply in this case and it is necessary therefore for this court to set aside the conviction for obtaining money by false pretences and substitute therefore convictions for theft on each count under s. 265 of the Penal Code. Apart from this amendment the appeal against conviction is dismissed.

The appellant in his appeal against sentence pointed out that he has had a deprived childhood, that he already has thirteen previous convictions and none of his former imprisonment has reformed him in any way. He asks therefore that this court should release him so that he may start a new life. In our view the conduct of the appellant in carrying out two deliberate acts of theft against two separate people cannot go unpunished. In view of the appellant's age - he is twenty-four years - there is still an opportunity for him to reform, but it is the duty of the courts in this country to protect the public from swindlers such as the appellant. The sentence of a total of thirty months' imprisonment with hard labour does not come to this court with a sense of shock, nor is it wrong in principle. The appeal against sentence is dismissed.

Appeal dismissed