

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 1073 OF 1996

THE REPUBLIC

VERSUS

DAVIDE LASTON NJEWA

From the 4th Grade Magistrate's Court sitting at Milonde/Mulanje
Criminal case No. 12 of 1996

CORAM: MWAUNGULU, J

Chimwaza, State Advocate for the State

Accused, present and unrepresented

Mangison, Official Interpreter

Mangwana, Recording Officer

Mwaungulu, J

JUDGMENT

This case was set down by the Honourable Mr. Justice Tambala to consider the conviction. The defendant, Davide Laston Njewa, was convicted by the 4th Grade Magistrate at Mulanje of the offence of theft contrary to section 278 of the Penal Code. He was sentenced to a fine of K45.00 in default one month public work. The sentence is not in issue. It is the conviction which is.

The defendant was convicted for stealing the complainant's door. The way the door was taken by the defendant is in the following manner. The defendant employed the complainant to work in his garden. He paid him before hand. The defendant also gave the complainant a hoe to use.

The complainant never worked in the defendant's garden. He did not return the money and the hoe. On several occasions the defendant requested the complainant to return the hoe and the money. The complainant did not. On the day in question the defendant went to complainant's house and demanded the money and the hoe. The complainant would not give the same. The defendant, therefore, took the door to his house. This is all there is to this case. These are the facts on which the conviction was based.

The defendant was charged of theft contrary to section 278 of the Penal Code. Theft is defined in section 271 of the Penal Code:

“A person who fraudulently and without claim of right takes anything capable of being stolen or fraudulently converts to the use of any person other than the general or special order thereof anything capable of being stolen, is said to steal that thing.”

For purposes of this case, two elements called for consideration. It must be shown that the defendant acted fraudulently and without claim of right. The facts of this case disclose none of these elements. It clearly is on the Prosecution to show that the defendant took the door without claim of right. Where the defendant shows that he believes that in law he had the right to deprive the other of his property, there is no theft. **R v Bernhard** 26 Cr. App. R. 137; **R v Wade** 1819 11 Cox 549 and **Haris v Harison** (M) 63 Cr. Law Rev. 497). Where there is a claim of right it is immaterial that there exists no basis in law for such belief. (**R v Turner** No. 2)55 Cr. App. R. 336). In **Bernhard** the Court of Criminal Appeal in England approved this passage in Stevens, History of the Criminal Law of England. “Fraud is inconsistent with a claim of right made in good faith to do the act complained of. A man who takes possession of property which he really believes to be his own does not take it fraudulently however unfounded his claim may be. This may be the only case in which ignorance of the law affects the legal character of acts done under its influence.” In fairness to the defendant here, he must have been acting on the premise that, since his hoe and money had not been brought, he was entitled to seize goods belonging to the complainant. In that sense he would not have been acting without a claim of right.

On the second aspect, the Court below had to be satisfied on the facts that the defendant was acting fraudulently. In **R v Ghost** 75 Cr. App. Rep. 154, the Criminal Court of Appeal in England was considering the meaning of the words “dishonestly” under section 2 of the Theft Act, 1968. The word “dishonestly” replaced the earlier requirement under English Statutes that the offender should take the property “fraudulently and without claim of right.” The words “dishonestly” was intended to replace in England are words in our Statute. Section 3 of the Penal Code provides that this Code shall be interpreted according to the principles of legal interpretation obtaining in England and expressions used in it shall be presumed so far as it is consistent with their context and except as may be in English Criminal Law and shall be construed in accordance therewith.

The replacement of the words “fraudulently” and “without claim of right” with “dishonestly” in

the Theft Act of 1968 did not substantially alter the definition of theft both at common law and statute. The definition of “dishonestly” in **Gosh’s Case**, therefore, is relevant in determining the mental element of the offence of theft under our Penal Code. In the **Ghost** case Lord Lane, the Chief Justice, said:

“In determining whether the Prosecution has proved that the defendant was acting dishonestly a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest that is the standard that is the end of the matter and the prosecution fails.

If it was dishonest by those standards then the jury must consider whether he himself must have realized that what he was doing was by those standards dishonest. In most cases where the actions are obviously dishonest by ordinary standards there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It was dishonest for the defendant to act in a way ordinary people consider to be dishonest.”

I have my grave doubts whether what the defendant did here was fraudulent. According to the definition here, even if what the defendant did was fraudulent, I have my doubt whether the defendant realized that he was acting fraudulently.

The best that could have happened here was to enter a plea of not guilty and let the matter proceed to trial. The conviction is unsafe and is set aside, so is the sentence.

Made in open Court this 8th day of May 1997 at Blantyre.

D.F. Mwaungulu
JUDGE