POTAMIANOS v THE PEOPLE (1968) ZR 176 (CA)
COURT OF APPEAL
BLAGDEN CJ, DOYLE JA AND MAGNUS J
17th DECEMBER 1968

Flynote and Headnote

[1] **Criminal procedure - Appeal against conviction - Grounds for Appeal to Court of Appeal and High Court.**
The argument that the conviction was not supported by the weight of evidence is not a ground of appeal to the Court of Appeal though it may be to the High Court.

[2] **Criminal law - Counselling or Procuring the commission of an offence defined - Tacit acquiescence not sufficient - Section 21 of Penal Code interpreted.**
Tacit acquiescence to an offence does not constitute counselling or procuring that offence.

[3] **Criminal law - Counselling or procuring the commission of an offence defined - Encouragement and limited knowledge not sufficient - Section 21 of Penal Code interpreted.**
Mere encouragement, even coupled with limited knowledge, may not be sufficient to constitute counselling or procuring the commission of an offence within the meaning of section 21 of the Penal Code.

Cases cited:
(1) *Aladesuru v R* [1956] AC 49.

(2) *Namalcoma v R* 1960, R & N 177.

Statutes construed
Penal Code (1965, Cap. 6), ss. 286 (2), 21.
Criminal Procedure Code (1965, Cap. 7), ss. 174, 21.

Houstoun - Barnes, for the appellant.
Williams, State Advocate, for the respondent.

Judgment

Doyle JA: The appellant was charged in the subordinate court of the first class at Kitwe, on five counts of receiving property fraudulently obtained, contrary to section 286 (2) of the Penal Code. He was convicted on four of them and sentenced to varying terms of imprisonment which amounted to a term of eighteen months' imprisonment. He was also recommended for deportation. He appealed to the High Court against both conviction and sentence, and his appeal was dismissed. The recommendation for deportation was disapproved. He now appeals to this court against conviction.

The prosecution case was as follows. In the month of October, 1967, the appellant kept a store in Kitwe known as "Nick's Store". He spoke to a man named Wilson Kalakuta whilst the latter was drinking beer in his store. He told Kalakuta that he was in the market for cheap goods, especially soap, cooking oil, torch batteries and vanishing cream. Kalakuta said he thought he could get him some. No mention was made at this time of how or where these goods were to be obtained, though it was mutually understood that cheap goods meant dishonestly obtained goods.

In consequence of this conversation, Kalakuta stole two books of order forms, one from Standard Trading and one from Economy Stores. Either on 17th or 18th October, 1967, he told the appellant that he had these order forms, and that he intended to obtain goods by them. The appellant made no comment at this time though at some time subsequently he agreed to pay half the invoice price on goods which he bought from Kalakuta.

On 18th October, 1967, Kalakuta made out an order on an Economy Stores form for 100 cartons of Surf and 100 cartons of Reward soap. He took these to Lever Bros, who accepted the order. He went in a Land - Rover and, as it was small, he first took fifty cartons of Surf. He took these to Nick's Store, where he found the appellant, and the carton was unloaded by the appellant's employees. Kalakuta showed the appellant the invoice

and after a discussion about price the appellant said he would pay half the price on the invoice. Kalakuta then returned to collect the remainder of the order. He brought another fifty cartons of Surf to Nick's Store, and the appellant told him to follow him to Jim's Garage in the second - class trading area of Kitwe. He did so. At Jim's Garage the appellant's employees had left. Kalakuta and the appellant unloaded the goods into a store.

Next day Kalakuta went to Lever Bros and collected the 100 carbons of Reward, which he took to Nick's Store. The appellant told him to bring them to Jim's Garage and they were there unloaded by the appellant's employees.

Also on the 19th Kalakuta made out an order to Standard Trading for fifty cartons of Olivine. He took these to Nick's Store where the goods were unloaded by the appellant's employees. Kalakuta showed the appellant invoices for £363 and the appellant paid him £180. The appellant told Kalakuta that he wanted some torch batteries.

Kalakuta then made out an order on a Standard Trading form to Lafferty and Co. for ten cartons of torch batteries. He obtained the cartons from Lafferty and Co. and took them to Nick's Store, where they were unloaded by the appellant's employees. The appellant paid him £90, having been shown the invoice for £173.

Kalakuta was subsequently charged and convicted on five counts of obtaining goods by false pretences. In consequence, D./I. Hurst made enquiries from the appellant. In the course of these inquiries he went to Nick's Store where he saw quantities of Reward, Surf, Olivine and batteries. He spoke to the appellant who said that he did not know Kalakuta and had never bought goods from him. Hurst asked the appellant for invoices for the goods and the appellant said that they were in Luanshya. Later Kalakuta was brought to Nick's Store and the appellant then said he knew him but had never bought goods from him. The appellant was again asked for invoices and this time he said they were locked in his house. Hurst then asked the appellant if there was any other store in Kitwe where he kept goods, and the appellant said there was not. He was then confronted with Kalakuta and told that Kalakuta had said he had made deliveries at another store in the second - class trading area of Kitwe. The appellant then shrugged his shoulders and said that he would point out the store. He later took the police to the store and it turned out to be the store at Jim's Garage. When he was at Jim's Garage he obtained keys from a person he said was his brother. He was then asked if he had also obtained the key of the house and he said, "Yes". He and the police went to the house where the appellant produced a box file containing invoices, but could not find the invoices relating to the Reward, Surf, Olivine and batteries. Subsequently he was again asked about the purchase of goods from Kalakuta, and he then said he could not remember.

The appellant did not give evidence. He called one witness whose evidence was directed at showing that the appellant was elsewhere at the times he was supposed to be with Kalakuta.

The learned senior resident magistrate considered the evidence. He accepted the fact that Kalakuta was an accomplice and he warned himself on the danger of convicting on his uncorroborated evidence. He found that there was no corroboration in respect of some of the counts and that the corroborative evidence in the other counts came from a witness who admitted having been beaten by the police in the course of inquiries, and whose evidence in part conflicted with that of Kalakuta.

Considering the evidence as a whole, he had some doubts as to whether the appellant had received the Olivine, which was the subject of the fourth count. In respect of the other counts he was fully satisfied with the evidence of the prosecution, despite the matters already mentioned. In the result he dismissed the fourth count and convicted the appellant on the other four.

[1] The first ground of appeal was that the conviction was not supported by the weight of evidence. The court has on other occasions pointed out that this is not a ground of appeal to the Court of Appeal (*see Aladesuru v R* [1]), though it may be to the High Court (see *Namakoma v R* [2]). The court allowed this ground to be amended to comply with section 14 of the Court of Appeal for Zambia Ordinance, namely, that the judgment was unreasonable and could not be supported having regard to the evidence. The third, fifth and sixth grounds were merely particular matters covered by the first ground of appeal,

namely, that the learned magistrate should not have accepted evidence from certain witnesses. The fourth ground was that the learned magistrate had incorrectly directed himself on the law relating to the evidence of an accomplice and the corroboration thereof. It is difficult to see why the fourth ground was ever put forward as it is plain that a the magistrate correctly directed himself. In support of the other grounds counsel has produced a long list of alleged discrepancies and conflicts which have been obtained by an assiduous sifting of the evidence, and in particular the evidence of Kalakuta in the course of cross - examination lasting for five and a half hours. Examination of these shows that they refer in the main to unimportant details which are explainable by differences in observation and by the conflicts which almost invariably are found in any exhaustive cross - examination. The learned magistrate carefully considered the evidence. He directed himself correctly on the approach which he should adopt in evaluating the evidence. He came to the conclusion that it was acceptable beyond reasonable doubt on the material points despite the differences and defects. I am fully satisfied that he was entitled on the evidence so to do, and to come to the conclusion that he did. In. consequence I consider that the appeal in respect of these grounds must be dismissed.
The remaining ground of appeal is as follows:

"That the learned judge was wrong in dismissing the appellant counsel's argument, with regard to section 21 of the Penal Code in that he gave no reason or reasons in his judgment for so doing."

This is a somewhat unusually worded ground of appeal, since the effect of it can only be found by examining the record. In fact, it is not a real ground, in that the learned judge's finding with regard to counsel's argument might still be correct even had he given no reasons or no adequate reasons for doing so. We have, however, treated it as a ground, submitting that the appellant could not be convicted as a receiver of goods because on the evidence he was a principal in the offence of obtaining the same goods by false pretences. This submission was raised by the defence both at the trial and at the appeal in the High Court. In each case it was rejected without reasons given.
[2] This submission is based on the wording of section 21 of the Criminal Procedure Code. The relative parts of that section provide that a person who counsels or procures any other person to commit an offence is, if the offence is committed, deemed to have taken part in the commission of it and be guilty of it. The preliminary question is, therefore, whether in this case the appellant did counsel or procure Kalakuta to commit the offence of obtaining the goods by false pretences. What constitutes procurement is dealt with in Archbold, *Criminal Pleading Evidence and Practice*, 36th ed., paragraph 4142. This sets out as follows:

"The procurement may be direct, by hire, counsel, command, or conspiracy; or indirect, by evincing an express liking, approbation, or assent to another's felonious design of committing an offence: 2 Hawk. c. 29, s. 16; but the bare concealment of a felony contemplated by another will not make the party concealing it an accessory before the fact: 2 Hawk. c. 29, s. 23; nor will a tacit acquiescence, or words which amount to a bare permission, be sufficient to constitute this offence: 1 Hale 616."

In this case when the appellant first approached Kalakuta, he held himself out to be a receiver of any goods of a specific kind which might be obtained cheaply and probably dishonestly; whether they were to be stolen by Kalakuta, obtained by false pretences by Kalakuta, or received by Kalakuta from other offenders was immaterial and was not expressly discussed. At this stage, therefore, the appellant was merely holding himself out as a receiver, and this did not constitute the appellant as a counsellor or procurer. After Kalakuta had made up his mind as to how he was going to obtain the goods he did inform the appellant of his proposed *modus operandi*, and at this time the appellant made no further comment. Subsequently when Kalakuta had obtained the first lot of goods he showed the appellant an invoice, and the appellant agreed to pay half the invoice price of any goods which were to be brought by Kalakuta. Having given careful consideration to these facts, I do not consider that they amount to action which would make the appellant a counsellor or procurer of the offences which Kalakuta in fact committed. Kalakuta determined where and what offences were to be committed and the manner in which they

would be committed. There was merely a tacit acquiescence in general by the appellant. It is, therefore, unnecessary to consider whether a person who counsels or procures goods to be obtained by false pretences and who subsequently receives those goods can be convicted of receipting them. I would dismiss this appeal.

Judgment

Magnus J: concurred.

Judgment

Blagden CJ: I am instructed by Mr Justice Magnus to say that he agrees with the judgment which has been delivered by my brother, the learned justice of appeal. I also agree, and have only a few words to add.

The only argument of substance which has been advanced on this appeal - and that somewhat obliquely - has been to the effect that on the facts as found by the learned trial magistrate the offences (if any) which the appellant committed were not offences of receiving, but rather of obtaining goods by false pretences. The argument, as I understand it, is that what the appellant did, constituted him a "principal offender" within the meaning of section 21 of the Penal Code, in the offences of obtaining goods by false pretences committed by the witness Kalakuta. Consequently, the appellant should never have been convicted of receiving for, as has been pointed out on countless occasions, a man cannot be convicted of receiving from himself.

[3] There was certainly some evidence suggesting that the appellant had encouraged Kalakuta to obtain goods for him by dishonest means and that he knew something of the methods which were being employed to achieve that end. But in my view, mere encouragement, even coupled with such knowledge, is not necessarily sufficient to constitute either counselling or procuring the commission of an offence within the meaning of section 21 of the Penal Code. The matter in this case may be tested in this way: suppose the appellant here had been charged with obtaining these goods by false pretences, would he have been convicted of that offence on the evidence which the learned trial magistrate accepted? To my mind he would not have been, or at the very least the learned trial magistrate must have entertained some doubt. The most likely result, had the appellant been so charged, would have been his conviction for receiving under the powers conferred on the court by section 174 of the Criminal Procedure Code.

In my view the appellant was rightly charged and rightly convicted, and I agree that this appeal must be dismissed.

Appeal dismissed.