

**CITY COUNCIL OF NDOLA v COLCOM CO - OPERATIVE (ZAMBIA) LIMITED (1968)
ZR 182**

COURT OF SENIOR RESIDENT MAGISTRATE
BRUCE - LYLE SRM
1968

Flynote and Headnote

[1] Sale of goods - Delivery - Delivery to carrier prima facie delivery to buyer.

Under the Sale of Goods Act, 1893, delivery of goods by the seller to a carrier, who is neither seller nor buyer's agent, is *prima facie* delivery of goods to buyer in absence of contrary intention.

[2] Contract - Sale of goods - Delivery - Delivery to carrier prima facie delivery to buyer - Completion of contract.

See [1] above.

[3] Agency - Sale of goods - Delivery - Delivery to carrier - Prima facie agent of buyer.

See [1] above.

Cases cited:

(1) *Warder's (Import and Export) Co. Ltd v Norwood & Sons Ltd* [1968] 2 QB 663; [1968] 2 All ER 602.

(2) *Badische Anilin und Soda Fabrik v Basle Chemical Works* [1898] AC 200.

Statute construed:

Sale of Goods Act (England), 1893, s. 18.

Judgment

Bruce - Lyle SRM: This is a prosecution under section 79 (1) of the Public Health Ordinance, Cap.126, instituted by the City Council of Ndola against Colcom Products Co - operative (Zambia) Limited hereinafter referred to as the defendant company, the particulars of the offence being that on 8th March, 1968, the defendant company sold food, to wit, seven pork fillets, to Neumanns Butchers, Kansenji, Ndola, for human consumption and which was in an unwholesome state.

The case for the prosecution is that on 8th March, 1968, a consignment of six pork fillets of 6 lb in weight were sent to Neumann Butchers in Kansenji, Ndola, by the defendant company operating from Lusaka; the consignment was carried by Messrs Smith and Youngson, a carrier and haulage contractors in Lusaka. At Ndola where the consignment was unloaded and unpacked, the Manager of Neumanns Butchers, Mr Allen Hurst, P.W.2, found the pork fillets to be green in colour with a layer of slime on them. He also found the odour was bad and in his opinion they were unfit to be in his shop. He immediately contacted Mr Hastes, the Ndola representative of the defendant company and made a report to him and further informed him that he would report the matter to the health authorities to have the meat condemned. P.W.2 reported the matter to Mr Bradgeman, a Health Inspector, P.W.4, who went to the butchery in Kansenji, inspected the meat at 10.45 a.m. and found that the pork fillets had a most offensive odour but the visual appearance was reasonably normal. This witness formed the opinion that the pork fillets were not fit for human consumption. He then seized the fillets and took them to his office where they were examined at 11 a.m. by Dr Lockyer, the Medical Officer of Health, Ndola, P.W.1. P.W.1 found that the fillets had an offensive odour and appeared unwholesome and condemned them as unfit for human consumption, and issued a certificate, Exhibit A, to that effect.

The evidence of D.W.1, Francis Salo, is that on 7th March, 1968, he worked for the defendant company as a packer and that in the course of his duties he executed an order from Neumanns Butchers, Ndola, and packed the order. He packed the pork fillets and other items in the order in two boxes at 10 a.m. and finished packing at 10.30 a.m. and delivered the boxes to Messrs Smith and Youngson, the carriers, at 11 a.m. for onward transportation to Neumanns at Ndola. According to this witness the fillets were fresh at

the time of packing and after packing he kept the boxes in a freezer until they were handed over to Messrs Smith and Youngson, the carriers.

The evidence of Mr Hastes, D.W.2, the Ndola representative of the defendant company, is that there is no connection between the defendant company and the carriers Messrs Smith and Youngson and that he did not know how they were paid for carrying the goods from the defendant company in Lusaka to Neumanns Butchers in Ndola. He also said that Smith and Youngson carried the goods in a refrigerated truck from Lusaka to Kitwe, where the goods were unloaded and reloaded on to smaller trucks and these smaller trucks delivered the goods to the various Copperbelt stations and that some of these smaller trucks were refrigerated, while others were not but were insulated.

From the evidence in defence it is apparent that the defendant company is not contesting the facts that the pork fillets were in an unwholesome state and unfit for human consumption at the time when they were received by Neumanns Butchers in Ndola on 8th March, 1968, at about 10.30 a.m. It is, however, submitted by counsel for the defendant company that it has not been proved that the pork fillets were unwholesome and unfit for human consumption when they were sold at 11 a.m. on 7th March, 1968, to Neumanns Butchers. In other words, it is the submission of counsel that the time of delivery of the pork fillets to Smith and Youngson in Lusaka should be deemed the material time at which the pork fillets were sold to Neumanns and that at the time of such sale the pork fillets were fresh, that being the uncontroverted evidence of D.W.1. In support of such contention counsel has relied on the recent decision of the English Courts of Appeal in *Warder's (Import and Export) Co. Limited v W. Norwood & Sons Limited* [1]. In that case it was held that delivery by the seller to the carrier of unascertained goods, the property to the goods then passed to the buyers under section 18 of the Sale of Goods Act, 1893. Counsel has also relied on the case of *Badische Anilin und Soda Fabrik v Basle Chemical Works* [2], House of Lords Session - in which it was held that the delivery of goods to a post office in Switzerland for onward transmission passed the property to the defendant/respondent, the buyers.

Counsel for the prosecution has pointed out that, in these two cases relied upon by counsel for the defendant company, the carriers were the agents of the buyer, but in the present case under consideration the evidence is that the pork fillets were handed to the carriers, Smith and Youngson, by the defendant company and therefore the carriers were then agents of the seller, i.e. the defendant company and therefore the prosecution has discharged its *onus* of proving the case beyond all reasonable doubt.

In this case I hold that for the prosecution to succeed it must prove:

- (1) the sale of the goods, i.e. the pork fillets, by the defendant company to Neumanns Butchers, Ndola; and
- (2) that at the time of the sale to Neumanns Butchers the goods were unwholesome and unfit for human consumption.

On the evidence I find as a fact that the pork fillets which were seized at Neumanns Butchers in Kansengi, Ndola, on 8th March, 1968, were found unwholesome and unfit for human consumption. With this finding of fact I further hold that the most important issue to be resolved to enable this court to decide whether or not the prosecution has proved its case is this: at what stage was the sale completed and the property in the goods passed to the buyer? Was it when the pork fillets were delivered to Smith and Youngson, the carriers at Lusaka, or was it when they were delivered by Smith and Youngson to Neumanns Butchers in Ndola?

In resolving this issue, I am unable to accept the submission of counsel for the prosecution that Smith and Youngson were the agents of the defendant company simply because the pork fillets were handed to them by the defendant company. That piece of evidence is too feeble to support or suggest a contract of agency between defendant company and the carriers, Smith and Youngson. There is no evidence as to the nature of the business between these parties to enable the Court to come to conclusion that a contract of agency existed between them. I concede to counsel for the prosecution that in the two cases relied upon by the counsel for the defendant company the carriers in both cases were agents of the buyers but I hold that in cases where the carrier is neither the agent of the seller nor

of the buyer, as in the present case, the carrier is deemed in law *prima facie* agents of the buyer unless contrary intention is shown by the evidence. In *Halsbury's Laws of England*, Vol. 4, 3rd ed., page 196, on the Sale of Goods Act, 1893, and which Act is applicable here in Zambia, it is stated:

"Where in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to carrier, whether named by the buyer or not, to be carried to the buyer is *prima facie* delivery of the goods to the buyer, and unless the seller reserves the rights of disposal, he is, by such delivery to a carrier, deemed to have unconventionally appropriated the goods to the contract."

I am therefore bound to hold, on the evidence before this court, that delivery of the pork fillets to Messrs Smith and Youngson in Lusaka is delivery to the buyers Neumanns Butchers and that the contract of sale of such pork fillets was completed and the property in the goods passed to them as soon as delivery was made to Messrs Smith and Youngson in Lusaka. This brings me to the issue as to whether at the time of sale to Neumanns Butchers, i.e., at the time of delivery to Messrs Smith and Youngson in Lusaka, the pork fillets were unwholesome and unfit for human consumption. The only evidence of assistance is that of D.W.1, Francis Salo, that when he packed the delivered pork fillets to the carriers Messrs Smith and Youngson in Lusaka. they were fresh and there has been no evidence to contradict this.

In the circumstances I find that the pork fillets were sold to Neumanns Butchers at 10.30 a.m. on 7th March, 1968, and not on 8th March, and that at the time of such sale the pork fillets were fresh and the prosecution has therefore failed to prove the charges against the defendant company. I therefore find the defendant company not guilty of the charges and order an acquittal and discharge.

Accused acquitted.