

JALEEL AND ANOTHER
v.
OFFICER-IN-CHARGE, POLICE STATION, KEGALLE

COURT OF APPEAL.
DR. GUNAWARDENA, J.
CA NO. 210-211/88
MC KEGALLE CASE NO. 37740
OCTOBER 17TH, 1994.

Code of Intellectual Property Act No. 52 of 1979, Sections 152(2) and 152(4) – Charge of selling or exposing for sale tins of paint with forged mark – Defence available.

The two accused were charged in the Magistrate Court, for selling or exposing for sale tins of paint with the forged mark Pentalite, an offence punishable under section 152(4) read with section 152(2) of the Code of Intellectual Property Act. The accused had withdrawn the said tins of paint from the display racks, which tins were found in a backroom of the shop. Upon inquiry by the police officer, the accused stated that Pentalite paint was not available for sale. The receipt for the purchase of the said tins of paint were produced by the accused, and the particulars of the firm from which the said paint tins were purchased, were also disclosed to the police.

Held:

(1) That in light of the evidence, (i) that the said paint tins were withdrawn from the display racks and were kept in a back room of the shop. (ii) the reply given to the police officer upon inquiry, by the accused that, Pentalite paint was not available for sale, the prosecution has failed to prove an ingredient of the offence that the said paint tins were for sale or were exposed for sale.

(2) There are three defences available when charged with an offence under Section 152(2):-

- (a) that the accused had taken all reasonable precautions and that he believed the mark or trade description to be genuine.
- (b) that the accused furnished to the prosecutor on demand by him, all the information within the knowledge of the accused, in respect of the person from whom the accused obtained the goods.
- (c) that the accused acted innocently.

The facts proved in this case, entitled the accused to the benefit of all three defences enumerated above.

APPEAL from judgment of the Magistrate's Court of Kegalle

P. A. L. Fernando for 1st and 2nd appellants *M. Wijesundera S.C.* for the A.G.

Cur adv vult.

October 17th, 1994.

DR. GUNAWARDENA, J.

The two accused in this case were charged in the Magistrate's Court of Kegalle, for selling or exposing for sale, paint tins with forged mark of Pentalite, an offence punishable under section 152(4) read with section 152(2) of the Code of Intellectual Property Act, No. 52 of 1979. After trial, both accused were convicted of the said charge and a fine of Rs. 10,000/- was imposed, on each of them. This appeal is from the said conviction and sentence.

According to the prosecution witness Illangakoon, who was a Manager of the C.I.C. Paint Company, he visited the paint shop belonging to the accused on 04.05.1982, and found tins of paint with the forged mark of Pentalite. The said paint tins were on display in the racks. Thereafter, on 16.6.1982 he had made a complaint to the Kegalle police, and gone with S.I. Edirisinghe, to the shop belonging to the accused. The police officer had asked the 2nd accused, who was in charge of the shop, at that time, whether they have Pentalite paint tins for sale. The 2nd accused had replied that they do not have Pentalite paint tins. Then the police officer had gone inside the shop, and found some paint tins in a back room of the shop. The police officer had taken charge of 10 four litre paint tins with the forged mark of Pentalite. They were produced marked P1 to P10 at the trial. On being questioned by the police officer, the 2nd accused had produced a receipt for 45 tins of four litre, and 45 tins of one litre paint tins totalling to Rs. 9177/-. The receipt had been issued by Band Industries, from whose Agent, the accused have bought the paint tins with the forged mark of Pentalite. The said evidence of Illangakoon was corroborated by the evidence of S.I. Edirisinghe.

The said 10 tins of paint with the forged mark, along with the four sample paint tins taken from C.I.C. Limited, have been sent to the Government Analyst for report. The government Analyst's report which was produced marked P15 stated that, the paints in P1 to P10

were different from the paints found in sample paint tins, marked P11 to P14.

The 2nd accused has given evidence and stated that the shop was owned by his father and he got the tins of paint with the forged mark, in 1982. On 16.6.82 a person from C.I.C. Limited came with a Police officer and inquired from him whether they had Pentalite paint for sale. He had replied that they do not have. According to him he produced the receipt upon which they bought the paint, which was taken away by the Police. He stated further that, he received a complaint from one of the workmen who used this paint, about the poor quality of the paint. Therefore he withdrew the paint from the display racks and kept the paint in a back room of the shop. He had informed the Agent from whom they bought the paint, that he wanted to return the paint, as the paint was not of good quality. He stated that the said Agent came and took away two tins and the balance of those tins were found in the back room of the shop, by the police. He asserted that the paint was not for sale.

It is clear from the evidence of the witnesses for the prosecution that the paint was found in a back room in the shop. Thus the prosecution evidence corroborates the accused's position that the paint was in the back room of the shop and not in the racks. This indicates that the paint was not displayed for sale. Further, when the accused was asked by the police officer for Pentalite paint, the reply he received from the accused was that he did not have Pentalite paint for sale. This position is corroborated by the fact that the paint was withdrawn and had been kept in a back room of the shop, although on 4.5.1982 witness Illangakoon had seen the paint tins with the forged mark on the racks. Thus the evidence led for prosecution falls short of the proof that the tins of paint, with the forged mark, were for sale. Thereby the prosecution has failed to prove an ingredient of the offence.

It is to be observed that three defences are available to an accused person charged with an offence under Section 152(2) of the said Act. Firstly he can show that all reasonable precautions were taken and he had no reason to suspect the genuineness of the mark. By the production of the receipt the accused in this have proved that

they bought the paint for valuable consideration from a known trade Agency. Secondly it is a defence to show that on demand made by a prosecutor, he gave all the information in his power, with respect to the person from whom he obtained such goods. This has also been done by the accused by producing the receipt and disclosing the name and address of the trade Agency, from which they bought the said paint. The third defence is to show that he acted innocently. Therefore this Court is of the view that the charge against the accused should fail, because the facts proved in this case show that the accused are entitled to the benefit of all the three defences enumerated above.

This Court is of the view that for the aforesaid reasons the conviction of the accused-appellants cannot stand. The learned Magistrate has failed to take all these matters into consideration when he convicted the accused-appellants of the said offence. Therefore the conviction and sentence of both the accused-appellants are hereby set aside, and both accused-appellants are acquitted. The appeals are allowed.

Appeal allowed.
