1974 *Present :* **Tennekoon, C.J., Udalagama, J., and Sharvananda, J.**

H. KARUNAPALA and 2 others, Appellants, *and* THE STATE, Respondent

S. C. 421-423/71—M. M. C. Colombo, 74446

Hire-purchase agreement—Bona fide *retaking possession of the article sold—Charge of robbery based on such seizure—Absence of* mens rea—*Effect—Penal Code, ss. 21, 22, 51, 72, 366, 379, 380, 386—Clause enabling parate execution—Whether it is valid in law.*

The owner of a motor vehicle, which was the subject-matter of a hire-purchase agreement, caused the vehicle to be seized by the accused-appellants while the vehicle was on a test run by a repairer. At the time of the seizure the hirer of the vehicle had defaulted in the payment of some instalments due in respect of the purchase price. The evidence established that the owner and his agents, the appellants, acted *bona fide* and in the honest belief that they were entitled to exercise the right of parate execution which the hire-purchase agreement purported to vest in the owner of the vehicle.

Held, that the existence of a *bona fide* claim of right in pursuance of which the possession of the vehicle was retaken by the owner was sufficient to negative or at least put in serious doubt the *mens rea* that the prosecution must establish before the accused could be convicted of theft or robbery.

Per TENNEKOON, C.J., and SHARVANANDA, J.—In the present case relating only to the conviction of the appellants for robbery it is not necessary to consider whether a provision for parate execution could have been validly incorporated in the hire-purchase agreement.

Per UDALAGAMA, J.—" A Hire Purchase Agreement entered freely between contracting parties, giving one of the parties the right to take possession of the property on a breach of a clause in the agreement without the intervention of the Court, and subject to the implied condition that he uses no more force than is reasonably necessary for that purpose, is valid and not obnoxious to the Roman Dutch Law. I am in agreement with the *ratio decidendi* laid down in *de Silva v. Kuruppu* 42 N. L. R. 539."

APPEAL from a judgment of the Municipal Magistrate's Court, Colombo. The facts are stated in the judgment of Udalagama, J.

N. Samarakoon, with *Chula de Silva,* for the accused-appellants.

G. E. Chitty, with *Mervyn Fernando* and *K. N. Choksy,* as *Amicus Curiae.*

Shiva Pasupati, Solicitor-General, with *F. Mustapha,* Senior State Counsel, and *D. C. Jayasinga,* State Counsel, for the Attorney-General.

Cur. adv. vult.

1*—A 10583—8,000 (74/11)

July 2, 1974. TENNEKOON, C.J.—

I agree to the order proposed to be made in this case by my brother Udalagama, J. I would however like to add that I base my conclusion only on the absence of proof of that element in the offence of theft which is contained in the words "intending to take dishonestly" which occur in the definition of theft in section 366 of the Penal Code. I agree with my brother that the existence of a *bona fide* claim of right in pursuance of which the "taking" was done, is sufficient to negative or at least put in serious doubt the *mens rea* that the prosecution must establish before a conviction for theft can be had. In the Penal Code, under the definition of "theft" (section 366) and under the definition of "criminal misappropriation" (section 386), these two illustrations appear :—

(i) A in good faith believing property belonging to Z to be A's own property takes that property out of B's possession. Here as A does not take dishonestly, he does not commit theft.

(ii) A takes property belonging to Z out of Z's possession in good faith believing at the time when he takes that the property belongs to himself, A is not guilty of theft ; but if A after discovering his mistake dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

These illustrations are in themselves a sufficient answer to the question whether proof that he was acting under a *bona fide* claim of right affords a sufficient ground of acquittal for a person accused of theft.

In the present case the Finance & Investment Company were at the time of the alleged offence not only the owners of the lorry which is the subject of the charge, but were also, under the agreement, entitled to possession of the lorry. There can therefore be no question that the Finance Company was acting in the belief that they were owners entitled on the date of the alleged offence to possession of the vehicle and that the hirer has no right to possession. The result might have been different if there was anything to suggest that the Insurance Company without due care and attention came to the conclusion that the hirer was in breach of his agreement ; having regard to section 51 of the Penal Code which says "nothing is said to be done or believed in good faith which is done or believed without due care and attention", a defence based on a *bona fide* claim of right would in those circumstances fail. The accused appellants were the agents of the Company and their state of mind was no different from that of their principal.

On the question of " consent " I should like to say that section 366 of the Penal Code contemplates absence of consent on the part of the person *out of whose possession* the property is taken. In the present case the property was taken out of the possession of Soorasinghe, the repairer and not out of the possession of the hirer. It seems to me that the consent which the hirer had expressed in the hire-purchase agreement to the Finance & Investment Company taking possession of the vehicle upon a breach of the agreement cannot be regarded as a consent given by Soorasinghe. This however does not affect the conclusion I have reached that the accused must be acquitted for want of proof of the *mens rea.*

Lastly I would like to make some observations on the question whether the owner under a hire purchase agreement may exercise such reasonable force as may be necessary to retake possession of vehicle let under the hire-purchase agreement. This question is best considered in relation to a case where the owner or his agents have used criminal force in retaking possession of the vehicle. If the prosecution in such a case established the ingredients of the offence of criminal force would it be a defence for the accused to show that although the offence is made out, he used only reasonable force in the exercise of a right of parate execution ? The accused will thus necessarily have to rely on the general exception contained in section 72 of the Penal Code which enacts that " nothing is an offence which is done by any person who is *justified by law* or by reason of a mistake of fact and not by reason of mistake of law in good faith believes himself to be justified by law in doing it ". The question whether a person charged with using criminal force is justified by law in using force would depend on the question whether a provision for parate execution can be validly incorporated in an agreement such as is under consideration in this case. I do not think that in this appeal where we are concerned only with the offence of theft, it is necessary to pronounce upon this question. I would myself like to reserve it for some future occasion, as this appeal can be disposed of without finding the answer to that question.

UDALAGAMA, J.—

The accused in this case were charged with committing robbery of a Morris Commercial Lorry bearing No. 33 Sri 5052 valued at Rs. 20,000 from the possession of D. W. Soorasinghe of Ratnam Motors and thereby committed an offence punishable under Section 380 of the Penal Code. The learned Magistrate, who was also Additional District Judge, assumed jurisdiction under Section 152 (3) of the Criminal Procedure Code, as

Additional District Judge, and after trial, found the 2nd, 3rd and 4th accused guilty of the charge and acquitted the 1st accused. The 2nd, 3rd and 4th accused were each sentenced to three months rigorous imprisonment and a fine of Rs. 500, in default to a further 6 months rigorous imprisonment. The 2nd, 3rd and 4th accused have appealed against the conviction and sentence of the learned Additional District Judge.

Shortly the facts leading to the accused being charged are as follows : One D. D. S. Yapa had on a Hire Purchase Agreement (D1) with an option to purchase, hired out Morris Commercial Lorry bearing No. 33 Sri 5052 from the Finance and Investments Company of 15/1, Guildford Crescent, Colombo 7 at a monthly rental of Rs. 460, payable on or before the 20th of each month, commencing in the month of June 1969. On the hirer paying the aggregate sum of Rs. 21,900, he was to have the option of getting a transfer of the absolute ownership of the vehicle. On the 21st of February 1970 the Finance & Investments Company, through their agent the 1st accused, seized the vehicle while it was being run out on a test run by D. W. Soorasinghe of Ratnam Motors, Rajagiriya. The actual seizure of the vehicle was done by the 2nd, 3rd and 4th accused on instructions from the 1st accused. After the vehicle was seized by the 2nd, 3rd and 4th accused an entry was made at the Cinnamon Gardens Police Station and the vehicle was garaged at Albion Garage, where the cars seized on behalf of the Finance & Investment Company are kept. In the meantime Yapa was informed of the seizure and he took immediate steps to inform the police, who made inquiries and filed the present action. The defence of the accused was that they acted in the bona fide belief that they had a right under the Hire Purchase agreement to seize the vehicle and there was no dishonest intention on their part to take the vehicle out of the possession of Soorasinghe or Yapa.

Section 379 of the Penal Code defines robbery as follows :—

> "In all robbery there is either theft or extortion. Theft is "robbery" if, in order to the committing of the theft, or in committing theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint or fear of instant death or of instant hurt or of instant wrongful restraint."

It will be seen from the above definition that theft is one of the principal ingredients of the offence of robbery.

Section 366 defines theft as follows :—

> " Whoever intending to take dishonestly any movable property out of the possession of any person *without that person's consent* moves that property in order to such taking, is said to commit theft. "

Two of the essential ingredients of theft are that there should be a removal of the property from the person in possession, " without his consent ", and " an intention to take dishonestly ". According to Section 22 whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another, is said to do that thing ' dishonestly '. According to Section 21, " Wrongful gain " is gain by unlawful means of property to which the person gaining is not legally entitled and " Wrongful loss " is the loss by unlawful means of property to which the person losing it, is legally entitled to.

The argument of the learned Solicitor-General was that the Finance & Investment Company was not legally entitled to retake the vehicle inasmuch as Clause 8 subsection 5, and clause 9 of the agreement D1 was against public policy and so bad in law. That being so, when the vehicle was seized, wrongful loss was caused to Yapa in depriving him of the vehicle to which he was legally entitled to. In any event it was submitted that the Finance & Investment Company had failed to give notice of the termination of the contract D1 to Yapa and call upon him to deliver the vehicle to the Finance & Investment Company. It was argued that their failure to do so rendered the seizure illegal under the agreement, resulting in a dishonest intention on the part of the Finance & Investment Company to take the vehicle from the possession of Yapa.

Adverting to the submission that the clause relating to the right to terminate the contract on a breach of one of the conditions of the contract and retake possession of the vehicle, the learned Solicitor-General submitted that the law applicable to the case was the Roman Dutch Law, which did not recognise parate-executie in the case of movables except in the case of pledges. In support of the proposition the learned Solicitor-General relied on Wille's Principles of South African Law (4th Edition) pages 237 and 245 and Lee's Introduction to the Roman Dutch Law (5th Edition) page 200. It was argued that the case of *Silva v. Kuruppu* [1] 42 N. L. R. 539 was wrongly decided and invited the Court to review the *ratio decidendi* laid down in that case.

[1] *(1941) 42 N. L. R. 539.*

Contracts of Hire Purchase were not known to the Roman Dutch Law. The nearest we have to the relationship between Owner and Hirer is the contract between lessor and lessee and mortgagor and mortgagee. Wille at page 237 states:

> "A clause allowing the mortgagee to sell the property without having recourse to the courts, a procedure known as parate-executie is valid in the case of movables pledged and in possession of the creditor, provided that the latter in effecting the sale does not prejudice the rights of the debtor."

Lee in his Introduction to the Roman Dutch Law (5th Edition) page 200 states:

> "The mortgaged property may be sold without an order of Court, with the consent of the debtor, but according to Voet, an agreement for extra judicial sale contained in the mortgage deed will not be enforced, if the debtor afterwards objects or if a private sale would be prejudicial to other hypothecary creditors."

Two questions arise on the submissions made by the learned Solicitor-General, namely whether the Roman Dutch Law applies in the case of Hire Purchase Agreements and if so, whether parate-executie was disallowed in all circumstances. As neither Chapter 79 nor 84 of the Legislative Enactments lets in the English Law on the subject of Hire Purchase Agreements, it would appear that the Roman Dutch Law would apply. One is then left with the problem whether parate-executie applies in the case of Hire Purchase agreements. The learned Solicitor-General submitted that if, parate-execute is recognized in the case of Hire Purchase Agreements, it would be against public policy and will lead to undesirable results, where a free licence would be given to parties, to take the law into their own hands. Under the English Law there is no doubt that where there is an agreement to retake possession of the property by the owner, on the failure of the hirer to pay the instalments, the owner in the exercise of the agreement is entitled to retake possession of the property—Volume 16 Halsbury's Laws of England (Hailsham Edition) para. 783, *Hewison v. Ricketts*[1] (1894), 63 L.R.Q.B. 711 and *Brooks v. Bernstein*[2] (1909) 1 K. B. page 98. Also see *Moorgate Mercantile Co. Ltd. v. Finch and another*[3] (1962) 2 A.E.R. 467. The Roman

[1] *(1894) L. R. Q. B. 711.*
[2] *(1909) 1 K. B. 98.*
[3] *(1962) 2 A. E. R. 467.*

Dutch authorities on this point do not seem to be quite so definitive either way. Howard C. J. in *de Silva v. Kuruppu*[1] 42 N.L.R. 539 observed that :

> "Hire Purchase Agreement is a contract of modern development. Hence the treatment of the subject in the Roman Dutch text books........is somewhat scanty."

What could be gleaned from the Roman Dutch authorities is in relation to leases and mortgages both of which in the main deal with immovable property. Here too, while the better opinion seems to be, that a clause permitting parate-executie in a mortgage of immovable is not enforceable, in the case of movables pledged and in possession of the creditor where the mortgagee is allowed to sell the property without having recourse to the Courts, the sale is valid. Howard, C. J. with whom Soertsz, J. agreed, was of the view, that he could not find any authority for the proposition, that the law with regard to Hire Purchase of movables differed from the English Law and where a clause is inserted in a contract of Hire Purchase providing for the retaking of possession by the owner after the default by the hirer in paying instalments, is contrary to public policy. Tambiah, J.'s observation in 68 N.L.R. 519 that the remedy of a lessor against an over-holding lessee is to ask for damages and ejectment in a court of law would be in respect of immovable property. His observation that in the case of movable property, the owner's remedy against a hirer, who overholds, is to ask for damages and return of the movables, is not supported by any authority. On the other hand Wessels on the Law of Contract in South Africa, Volume I page 456 has the following passage :—

> "Parties are free to make any contract they like *provided it* is not illegal, and if they agree that a thing is to be let by the one to the other until a future event occurs, and then to be regarded as having been sold by the former to the latter, there is nothing to prevent them from doing so."

Villiers, C. J. in *Henderson v. Hanekom*[2] 20 S.C. at page 519 states :

> "All modern commercial dealings proceed upon the assumption that binding contracts will be enforced by law. However anxious the Court may be to maintain the Roman Dutch Law in all its integrity, there must in the ordinary course be a progressive development of the law, keeping pace with modern requirements."

[1] *(1941) 42 N. L. R. 539.*

[2] *20 S. C. at 519.*

In *Osry v. Hirsch, Loubser & Co.*[1] 1922 C.P.D. at page 247 Kotze J. states :

> " The conclusion at which I have arrived is that an agreement for the sale, by means of parate-executie of movables delivered to a creditor by his debtor is valid in law. It is, however, open to the debtor to seek the protection of the Court if, upon any just ground, he can show that, in carrying out the agreement and effecting a sale, the creditor has acted in a manner which has prejudiced him in his rights."

In *Paruk v. Glendale Estate Company*[2] 1924 N.P.D. 1 Tatham, J. found no distinction between movables and immovables. In *Hongkong and Shanghai Bank v. Krishnapillai*[3] 33 N.L.R. 249 the view was expressed that the right of a pledgee to sell his security without recourse to a Court of law is peculiar to the England Law of Pledge, and the Roman Dutch Law in the matter of rights of mortgage and pledge does not give place to the English Law when the mortgagee or pledgee is a *Bank*. In *de Silva v. Kuruppu*[4] 42 N.L.R. 539 it was held that :

> " the owner of a thing let on a Hire Purchase Agreement is entitled to exercise his right to retake possession given to him under the agreement without the intervention of Court provided he uses no more force than is reasonably necessary for the purpose ."

In *Mercantile Credit Ltd. v. B. H. Silva and two others*[5], 76 N. L. R. 193 it was held :

> " When there is a valid agreement of Hire Purchase and the hirer is in default in payment of the monthly rentals, the owner is in law entitled to retake possession of the article let and dispose of it as he pleases. "

The learned Solicitor-General also cited to us *H. J. Ransom v. Trilok Nath & others*[6] Volume 43 (1942) Criminal Law Journal page 578 where the Oudh Chief Court held that :

> " Where a motor lorry is given by a Company to a person on a Hire Purchase system under an agreement, entitling the Company to retake possession of the lorry in case of default of payment of hire by the purchaser, the Company or its agent are not entitled *without the consent of the purchaser* himself, to retake possession of the lorry by force or by its removal from the hands of his servants who have no express or implied authority to give any consent on behalf of the purchaser. "

[1] *1922 C. P. D. at 247.*
[2] *1924 N. P. D. 1.*
[3] *(1932) 33 N. L. R. 249.*
[4] *(1941) 42 N. L. R. 539.*
[5] *(1970) 76 N. L. R. 193.*
[6] *Vol. 43 Criminal Law Journal 578.*

The present case could be distinguished from this case in that here the hirer has consented to the owner retaking possession of the vehicle without giving notice of the termination of the contract.

In Volume 35 (1934) Criminal Law Journal page 761 the Calcutta High Court in the case of *Mohammed Abdul Khoyer v. Asgar Khan and another*[1] held that:

> " Where under an agreement of Hire Purchase the employees of a Company were justified in taking the parts of the machine supplied by them if instalments were not paid, and acting on a bona fidei impression that instalments had not been paid, removed the parts, the employees acted on a bona fide mistake of facts and that there was no dishonest intention such as is required for a case of theft. "

This case does not appear to have been cited before the Judges who heard the case reported in Volume 43 (1942) Criminal Law Journal page 578.

In the face of these authorities, in England, South Africa, India and our own Courts and the modern trend to freely permit parties to contract with each other provided such contract is not void or illegal, will it not be putting the clock back in declaring such contracts against public policy ? Inherently there does not appear to be anything wrong in it. In a free society if a hirer accepts something less than the full rights of ownership or possession, I cannot see how he could later complain about it. In regard to the criticism that it would lead to people taking the law into their own hands, I am of the view that the arm of the law in the modern State is sufficiently long and strong to look after that aspect of the matter.

Mr. Chitty, who appeared as *amicus curiae,* argued that one cannot say that a clause giving the owner the right to retake possession of the vehicle from a hirer consequent on a breach of a condition of the agreement is necessarily harsh or oppressive. In these Hire Purchase Agreements, the borrower is anxious to obtain the money quickly and without the security one has to furnish when getting a loan from an institution like a Bank or Insurance Company. Hence the facility of recovery compensates for the financial insecurity of the transaction. I agree with Mr. Chitty that the impact of the view, that parate-executie was an infringement of the right of the party in possession, has worn thin in relation to the civil law and non existent in reference to the criminal law. I am of the view that a Hire

[1] *35 Criminal Law Journal 761.*

Purchase Agreement, entered freely between contracting parties, giving one of the parties the right to take possession of the property on a breach of a clause in the agreement without the intervention of the Court, and subject to the implied condition that he uses no more force than is reasonably necessary for that purpose, is valid and not obnoxious to the Roman Dutch Law. I am in agreement with the *ratio decidendi* laid down in *de Silva v. Kuruppu*[1] 42 N.L.R. 539.

Under clause 8 (5) of the Hire Purchase Agreement D1 if the hirer failed to observe and perform all or any of the terms, conditions and stipulations contained in the agreement, the owner was "entitled at any time forthwith to determine the hiring *without giving notice* of such termination to the Hirer". Under Clause 9 upon the hiring being determined the hirer had to forthwith deliver the vehicle to the owner and in the event of his failing to do so, the owner had the right through his agents, representatives, servants and any person duly authorised to enter upon any premises, building or place where the vehicle may be, and take possession of the same.

In the instant case, according to the evidence of Mr. G. A. Don David, Accountant of the Finance & Investment Company Ltd., Yapa had to pay Rs. 460 a month in 15 monthly instalments on the Hire Purchase agreement D1 and he had failed in paying two of those instalments, namely for the months of December 1969 and January 1970. Yapa was written to of the termination of the contract and was also informed by telegram. Under clause 8(5) the hiring could be determined without notice in such an eventuality and under Section 9 possession of the vehicle retaken. A point was made both in the lower court and in appeal that on P5 dated 19.2.70 a statement on top of the receipt appearing to the effect "without prejudice to our rights to terminate our contract and take re-possession of the vehicle" proved that no notice had been given of the termination of the contract. Witness David in the course of his evidence explained how this statement came to be written in P5, viz. his instructions to the cashier were to write "without prejudice to our rights under the contract which has been terminated", but that she had written it in the way it now appears on P5. The receipt P6 dated 25.4.70 states: "without prejudice to our rights under the contract which has been terminated". Obviously, the legend on P5 is a bona fide mistake by the cashier. The letter D3 by the Finance & Investment Company to the 1st accused authorising the seizure of the vehicle is dated 12.2.70. This could only be on the basis

[1] *(1941) 42 N. L. R. 539.*

of the termination of the agreement P1. So that there appears to be no doubt that Yapa had defaulted in the payment of the instalments for December and January and under the provisions of the agreement the contract D1 was terminated with notice to him. Assuming that the Finance & Investment Company had not given notice of termination of the contract to Yapa, the question arises whether notice of the termination of the contract was a requirement of the contract D1 ? According to D1 the contract could be terminated " without giving notice of such determination to the hirer ". Don David's evidence on this point, however, was that Yapa was informed both by letter and telegram, as is usual on such occasions, that he was in arrears and that the contract was terminated. In those circumstances the Finance & Investment Company under clause 9 had the right to retake possession of the vehicle to which writing Yapa had freely given his antecedent consent. I see nothing wrong in such consent being given before hand.

The resulting position was that Yapa had given the requisite consent to the retaking of the vehicle on the occurring of certain events. Under Section 366 of the Penal Code one of the requisite ingredients of theft is the taking of the property out of the possession of another " *without that person's consent* ". As Yapa had given his consent to the retaking of the vehicle in the event of default of instalments, in my view the prosecution had failed to establish the charge, and the accused were entitled to an acquittal.

There was another ground on which the accused were entitled to an acquittal of the charge in this case. The agreement P1 being good and binding on the parties, immediately the contract was terminated, under clause 9, the Finance & Investment Company had a right to retake possession of the vehicle. At least they had every ground to think that they had such a right. Actually on this belief they issued the letter of authority D3 with instructions to inform the police, immediately after the seizure of the vehicle, the fact of the retaking of the vehicle on the agreement D1. The 1st accused to whom D3 was issued passed it on to the 4th accused with similar instructions. The 4th accused along with 2nd and 3rd accused after the seizure of the vehicle had in fact informed the Cinnamon Gardens Police of the seizure. In these circumstances one cannot help, but come to the conclusion that the 2nd, 3rd and 4th accused have acted in the honest belief that they had a right to take possession of

the vehicle. The whole test of dishonesty under Section 366 of the Penal Code is the mental element of belief and the test is subjective—Archbold Criminal Pleading, Evidence and Practice (36th Edition) Section 146. In *Rex v. Bernard*[1] (1938) 2 A E. R. 140 it was held that:

> " a claim of right exists whenever a man honestly believes that he has a lawful claim even though it may be completely unfounded in law or in fact. "

In *Rex v. Skivington*[2] (1967) 1 A. E. R. 483 Lord Parker observed,

> " that a claim of right is a defence to robbery or any aggravated form of robbery and that it is unnecessary to show that the defendant must have had an honest belief also that he was entitled to take money in the way he did. "

In the instant case I am satisfied that when the 2nd, 3rd and 4th accused seized the lorry from the possession of T. W. Soorasinghe on 21.2.70 at the Ayurvedic Hospital Junction, Borella, they were acting in the honest belief that they had a right to seize the lorry on the agreement D 1. I, however, wish to make it clear, that the right to retake possession of a movable property on a Hire Purchase Agreement, where such right is expressly reserved to a Finance Company, does not entitle the Finance Company or its agents to use more force than is reasonably necessary for the purpose. I would quash the convictions of the 2nd, 3rd and 4th accused and acquit them of the charge.

SHARVANANDA, J.—

I agree with the order proposed by my brother Udalagama J. One of the principal ingredients of the offence of theft is the intention to take dishonestly. A bona fide claim of right negatives dishonest intention. The essence of this defence is the honesty of belief entertained by the accused that he was in law entitled in the circumstances to take the article from the possession of the other. This belief must not be a mere colourable pretence to obtain possession.

Claim of right being a defence of theft is also a defence to robbery of which theft is a constituent.

[1] *(1938) 2 A. E. R. 140.*

[2] *(1967) 1 A. E. R. 483.*

In the instant case the prosecution has failed to establish that the accused took possession of the hired vehicle " dishonestly " within the meaning of the provisions of the Penal Code. The evidence on record does not disclose that the accused appellants, as agents of the Finance Company, acted otherwise than in the honest assertion or exercise of the right of parate execution which the Hire Purchase agreement purported to vest in the Company. The Finance Company claimed that it was entitled under the provisions of the Hire Purchase agreement to retake possession of the hired vehicle on default being made in the due payment of rentals by the hirer. That this claim was bona fide entertained by the Company cannot be doubted. The clause relating to parate execution was part of the agreement and was there for what it was worth. It, at least, supports the plea of bona fide claim of right to retake possession without recourse to a Court of law. The Company instructed the accused appellants to seize and take possession of the vehicle on its behalf as the hirer had admittedly made default in the regular payment of rentals and the Company had determined the hiring in accordance with the terms of the hire-purchase agreement. The accused were carrying out the instructions of the Company and consequently the intention of the Company must be attributed to the appellants and hence the appellants when they took the vehicle for and on behalf of the Finance Company were acting in the assertion or exercise of a bona fide claim or right in the Company. In view of the fact that it cannot be said that the accused appellants acted dishonestly in taking possession of the hired vehicle, the accused are entitled to an acquittal. Since there was no charge of using " criminal force " it is not necessary to consider whether the accused appellants are guilty of using criminal force.

Since this is a criminal case and, as bona fide claim of right is sufficient, whatever the merit in law of that right be, to meet the charge of theft, I do not propose to make any pronouncement on the arguments addressed to us as to what extent a clause relating to parate execution is countenanced by our law. I would reserve consideration of this vexed question for an appropriate occasion.

Appeal allowed.