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1965 *Present :* **Tambiah, J., and Alles, J.**

C. ALMEIDA and 3 others, Appellants, and **D. C. DE ZOYSA (**S.I. Police, Crimes**),** Respondent

S. C. 89-9211964-D. C. (Grim.) Kegalle, 2854'M. C. 43360

Hire-purchase agreement-Parate executie-Unlawful seizure of property by owner or his agent-Use of force-Robbery.

Where the agreement does not contain an express provision for re-taking possession, the possessor or hirer of a movable who has agreed to pay its price by instalments cannot be deprived, without the intervention of Court, of its use and enjoyment if he defaults in making payment of an instalment. If the owner or his agent unlawfully re-takes possession, using violence, he is liable to be convicted of robbery.

APPEAL from a judgment of the District Court, Kegalle.

G. E. Chitty, Q.C., with Elmo Vannitamby, H. Mohideen, and M. V. K. Nalliah, for accused-appellants.

P. Colin-Thome, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

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April 5, 1965. **TAMBIAH, J.-**

I had the benefit of reading the judgment of my brother Alles J. and I am of the view that this appeal should be dismissed. Both on the documentary and oral evidence led in this case, it is clearly established that the possession of the car, which was forcibly taken away by the accused, was with Senanayake.

It is significant that in the hire-purchase agreement PI, Senanayake is referred to as the purchaser and there is no provision for the re-taking of possession after termination of the agreement.

Mr. Chitty contended that under the contract entered into in PI, Chandrasena was the owner of the car and when Senanayake defaulted to pay the instalment due, the former could take possession of the car either by himself or by his agent and sufficient force could be used for this purpose.

The transaction evidenced by document PI is in fact a hire-purchase agreement which is governed by the Roman Dutch Law. Hahlo and Ellison Kahn aptly describe the hire-purchase agreement as follows (vide The British Commonwealth-The Development of its Laws and Constitutions, Vol. 5, p. 686):

" Hire-purchase transactions are notoriously protean in form, appearing now as sales with the reservation of ownership, now as loans, now as resolute sales, now as leases with an option of purchase. But their substance is always the same, namely, the immediate transfer of possession followed by periodical payments culminating in the acquisition of full title."

The agreement PI has not been terminated. Therefore possession of the car, whichwas taken forcibly, was with Senanayake. In the absence of special agreement, the Roman Dutch Law never encouraged a person to take the law into his own hands. A sale by a creditor of property belonging to his debtor without the assistance or intervention of legal authority (parate executie) was never permitted (vide Wille on Mortgage and Pledge in South Africa, p. 176). Attempts to introduce into Ceylon, parate executie, through the medium of English Law, to sell shares pledged to a Bank, were not successful (vide Mitchel v. Fernando [1(1945) 4.6N.L.R. 265.
]; Krishnapillai v. Hong Kong and Shanghai Sank Corporation[' (1932) 33 N. L. R. 249.]).

Mr. Chitty relied on the ruling in de Silva v. Kuruppu [" (1941) 42 N. L. R.639.], in which it was held that the owner of a movable, which was the subject matter of a hire-purchase agreement, was entitled to re-taks possession given to him under the agreement provided he used no more force than was reasonably necessary for the purpose. The ruling in this case has no application to the instant case in view of the fact that PI contained no agreement to re-take possession of the car and the contract of hire had not been terminated.

In de Silva v. Kuruppu[1 Ibid] Howard C.J. (with whom Soertsz J. agreed) relied on English cases for the principle he enunciated and took the view that there was no difference between the English and the Roman Dutch Law on this matter. The hire-purchase agreementcontained in PI is either a hire or an agreement to sell with the resolutive condition that the ownership of the property should vest in Senanayake on payment of all instalments under the agreement. A hire-purchase agreement is usually a sale or a hire (vide Institutes of South African Law by Maasdorp, Vol. Ill, 4th Edition, pp. 233 and 272). If it is regarded as a hire of movables, as contended by Mr. Chitty, then there is no distinction in Roman Dutch Law on the general principles applicable to the hire of movables and immovables, (vide an Introduction to Roman Dutch Law by R. W. Lee, 5th Edition, p. 299). The Roman Dutch Law rules relating to the lease of movables and hire of services correspond closely to the principles of Roman Law (Vide An Introductionto Roman Dutch Law by Lee, ibid).

The remedy of a lessor against an overholding lessee is to ask for damages and ejectment in a court of law (vide South African Law of Obligations by Lee andHonore, p. 105 ; Voet XIX.2.18; Silva v. Dis-sanayake [2 (1898) 3 N. L. R.248.]; Perera v. Perera [3 (1907) 10 N. L. R. 230.]). In the case of a movable the owner's remedy against a hirer who over holds is to ask for damages and return of the movable which was let.

The Roman Dutch authorities never allowed parate executie by which a personcould take the law into his own hands. This principle has been consistently applied to all transactions. The same principle has been applied to leases or hire of movables. I am unable to find any Roman Dutch authority in support of the proposition laid down in de Silva v. Kuruppu. For these reasons I am unable to agree with the proposition of law laid down in that case. That decision should be carefully considered when the occasion arises.

Therefore the contention of Mr. Chitty that the offence of theft has not beenmade out because Senanayake only had the detention and not possession, is not entitled to succeed. Mr. Chitty also contended that no wrongful loss has been caused to Mr. Senanayake as it was not his property. Under the agreement Senanayake was entitled to possess this car and he has been deprived of the use of this car by illegal means. Therefore wrongful loss has been caused to him and dishonest intention has been proved even on the assumption that the accused acted on the orders of

Chandrasena.

I do not wish to interfere with the finding of facts of the learned District Judge in this case. The act of the accused is a high handed one. No submissions were made for the reduction in the sentence. I affirm the sentence passed on the accused and dismiss the appeal.

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ALLES, J.-

The four accused were jointly charged on an indictment with having, on 3rd August, 1962, committed the offence of robbery of Morris car No. 2 Sri 1619 valued at Rs. 10.450/- from the possession of Dinadasa Senanayake of Kurunegala. After trial they were convicted and sentenced to a term of one year's rigorous imprisonment each.

The evidence that has been accepted by the trial Judge is to the following effect:

The absolute owners of the car were the Transport and General Finance Co. Ltd.but the registered owner was Kumarasinghe Walter Perera. According to the hire-purchase agreement which Walter Perera had entered into with the Finance Co. he had paid Rs. 4,500/- to the Company and obtained a loan of Rs. 4,600/- from them which he undertook to repay in eighteen monthly instalments. On his failure to pay a single instalment, the Company was entitled to retake possession of the car. The guarantor on the hire-purchase agreement was one D.L.B. Chandresena, the proprietor of the Tropicana Hotel at Weweldeniya who resided at Kegalle. In June, 1962, Senanayake, who was a clerk in the Food Control Department at Kurunegala was anxious to purchase a car and contacted two brokers, Suwaris and Sunil. Sunil introduced Senanayake to Chandrasena. On 23.6.62, Sunil took Senanayake to inspect the car 2 Sri 1619 which was then in the possession of Chandrasena and Senanayake agreed to purchase the vehicle for Rs. 10,450/-. According to Senanayake, he understood that Walter Perera had authorised Chandrasena to sell the car. Senanayake paid a sum of Rs. 4,000/- to Chandrasena on 24.6.62 and entered into an agreement with Chandrasena to take over the finance payable to the Finance Co. and to pay the balance Rs. 1,850/-to him in a month's time. Two documents, in identical terms were executed in respect of the transaction-PI and P5 - one by Senanayake and the other by Chandrasena. The document PI is in the following terms :-

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"24.6.62.

I, D. L. E. Chandrasena of Kegalle having agreed to sell the Morris Minor vehicle bearing No. 2 Sri 1619 belonging to me on a receipt to Mr. D. Senanayake of Kurunegala for the sum of Rs. 10,450/- received today as an advance a sum of Rs. 4,000/-. Of the balance sum of Rs. 6.450/- a sum of Rs. 4,600/- to be paid to the Transport General Finance Company Limited by the said purchaser Mr. D. Senanayake and the remaining balance of Rs. 1,850/- Mr. D. Senanayake shall pay to me D. L. E. Chandrasena within one month from today (24.6.62) and get all rights and claims to same transferred in his favour. The vehicle was handed to him to be used in good condition."

On the execution of the two documents, Senanayake was permitted to use the car and it was in his physical possession at Kurunegala thereafter until 3.8.62. Senanayake says he was unable to pay the balance

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gum of Rs. 1,850/- and on 24.7.62 he obtained further time from Chandrasena to pay it. Chandrasena agreed to give him further time.

According to the evidence of Senanayake, his wife and Sunil they came to Kegallein the car on 3rd August with the object of paying Rs. l.000/- to Chandrasena and to ask him for further time to pay the balance Rs. 850/- on a later date. They reached Chandrasena's house at Kegalle at about 8.30 p.m. and while Senanayake and his wife remained in the car, Sunil went to the house to meet Chandrasena. Then a car driven by the 4th accused came and halted in front oftheir car and the four accused alighted from it. The 1st and 2nd accused who were armed with knives pulled Senanayake from the driving seat while the third accused pulled Mrs. Senanayake from the rear seat tearing her saree in the process. The fourth accused then got into the driving seat and the car was taken away by the accused driven by the fourth accused. Sunil, on hearing cries, came from Chandrasena's house and found Senanayake and his wife stranded on the road. They then engaged another car and as Mrs. Senanayake was in a very distressed state of mind, they decided to return to Kurunegala and contact Chandrasena the following day. Senanayake was anxious to settle the matter without having recourse to litigation, so he returned to Kegalle the following day and tried to contact Chandrasena but failed. Finally he went to the Kegalle Police Stationand made a complaint to the Police. When he was at the Police Station he saw thecar driven by the fourth accused proceeding along the road. He informed the Police who gave chase and ultimately recovered the car. Senanayake accompanied the Police to the Tropicana Hotel where he identified the four accused. The incidents of the 3rd August have been spoken to by Senanayake, and his evidence has been corroborated by Mrs. Senanayake and Sunil. His evidence as to what transpired on the following day is supported by the Police.

The 4th accused who gave an address in the Pettah in Colombo but describedhimself as a driver of Chandrasena, gave evidence at the trial and stated that he was requested by Chandrasena to meet Senanayake at Chandrasena's house on the night of 3rd August and ask him to either hand over the car or pay the balance money. He denies that the other three accused were in his company. He says that when he made the request from Senanayake he peaceably handed over the car to him and told him that he would pay the balance the following day. As to how Senanayake knew that the 4th accused had the authority of Chandrasena to take the car from him remains a mystery. The Judge has quite justifiably rejected the evidence of the 4th accused.

Counsel for the appellants submitted that even assuming that violence was used to recover the car from Senanayake, no prima facie case of robbery has been established since the evidence did not disclose that Senanayake was in possession of the car on 3rd August. He also urged that there was no evidence that the accused intended to cause wrongful loss to Senanayake by depriving him of the use of the car. Counsel's first submission is based entirely on the evidence of Senanayake at the

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trial that he had promised to pay the balance to Chandrasena within a week of 24th July and since he defaulted in this payment, Counsel submitted that he had only a hope that Chandrasena would enter into a fresh agreement on 3rd August to pay the balance. It is not clear on the evidence whether the balance had to be paid on 3rd August or before that date. Counsel who prepared at the trial apparently accepted the position that the due date was 3rd August and proved the deposition of Senanayake in the Magistrate's Court where he had stated that the due date for the payment of the balance was 3rd August. The broker Sunil in the course of his evidence at the trial fixed the date for the payment of the balance as 3rd August. It is also significant that Chandrasena obviously knew that Senanayake was coming to Kegalle from Kurunegala on Sri August as otherwise he could not have made arrangements for the soizure of the car on that date. But even assuming that Senanayake has defaulted in not paying the balance earlier than 3rd August, the car was admittedly in Senanayake's possession at the time of the ssizure. He had paid Rs. 4,000/- to Chandrasena earlier, he had the use of the car up to 3rd August and he had paid an instalment to

the Finance Company on behalf of Walter Perera by that date, which sum the Finance Company had accepted. According to the evidence of the representative of the Finance Company, no occasion arose for them to seize the car since the instalments on behalf of Walter Perera had been paid on the due date by Senanayake. According to Sunil there was no understanding between Chandrasena and Senanayake that the car could be seizsd for non-payment of the balance payable on the due date and it is not open to the defence to introduce such a term into the agreement PI in the absence of any specific reference to that matter. According to Mr. Chitty, Senanayake had lost all rights to the possession of the car when he defaulted in paying the balance sum of 1,850/- on the due date and therefore on 3rd August all rights in the car passed to Chandrasena, who himself or through his agents were lawfully entitled to take possession of the car from Senanayake using such reasonable force as was necessary. I am unable to agree with such a startling proposition. There is no common law right by which such a seizure can be effected by the owner of a movable. If this was the law it would mean that the possessor or hirer of a movable, who has agreed to pay its price by instalments could be deprived of its use and enjoyment if he defaulted in making payment of a single instalment, even if he has paid almost the entirety of the consiedration, on the footing that on a single default all legal rights had vested in the owner. Such a situation would only encourage persons to take the law into their own hands instead of seeking their redress in the courts of law. Counsel for the appellants sought to support his submission by citing the decision of Howard C.J. in de Silva v. Kuruppu [1(1941) 42 N. L. R. 539.] where it was held that the owner of a lorry let on a hire-purchase agreement was entitled to exercise his right to re-take possession of the lorry without the intervention of Court, provided he uses no more force than was reasonably necessary for the purpose. Undoubtedly, where the parties have agreed in writing that the owner is entitled to re-take possession of an

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article on the non-payment of an instalment, such a right is available to the owner, but even such a right is subject to the use of reasonable force and after due notice is given to the hirer of the intention of the owner to re-take possession of the article. The representative of the Finance Company who gave evidence has detailed the procedure adopted by them in such an event. On the failure of the hirer to pay any instalment due on the vehicle, the Finance Company informs the hirer by letter and gives him notice of the day of the intended seizure. After the seizure is effected the Police are informed of this fact and an entry is made in the Police Station accordingly. These are salutary steps and intended to protect the owner's rights without a fear of a breach of the peace. The Malayan Courts in P. N. Pillay & Co. Ltd. v. Kali Motor Co., Ltd.[1 (7965) 31 Malayan Law Journal 47.], following the dictum of Asquith L.J. in North Central Wagon and Finance Co., Ltd. v. Graham[2 (7950) 7 A. E, R. 780.], held that in the case ofhire-purchase the owner cannot repossess until he has terminated the hiring. " There must be therefore some independent act indicating that the hiring has been terminated e.g. by the issue of notice to the hirer. " Otherwise the seizure would be unlawful, entitling the hirer to sue the owner for damages. If these precautions have to be taken in the case of an hire-purchase agreement where the parties have made provision for the seizure of the hired article, it necessarily follows that where no such provision is made in the agreement as in this case, and where there was not even an oral agreement to that effect, a seizure under such circumstances and aggravated by the use of violence is unlawful. I am therefore of the view that the seizure of the car from Senanayake's possession on 3rd August was unlawful. If the seizure was unlawful the accused obviously intended to cause wrongful loss to Senanayake. It was urged by Counsel for the appellants that the accused, who were nominees of Chandrasena, did not intend to cause wrongful loss to Senanayake. He submitted that there was admissible evidence to prove that the 1st, 2nd and 3rd accused were only acting on the instructions of Chandrasena. He relied on the evidence given by Senanayake in cross-examination that the accused told him, when they came up to the car, that' they intended to remove the car from his possession because he had defaulted in paying the balance money to Chandrasena. If it is sought to rely on the truth of the statements that are alleged to have been made to Senanayake that the accused were acting on behalf of Chandrasena it was necessary that the 1st, 2nd and 3rd accused should have given evidence. Even though these

statements may relate to the details of the alleged criminal transaction and form part of theresgestae, I do not agree that they are admissible in evidence as proof of their truth. There is therefore no admissible evidence that the 1st, 2nd and 3rd accused were acting as agents of Chandrasena and their action in seizing the car from the possession of Senanayake was clearly unlawful and intended to cause wrongful loss to him. The fourth accused's evidence has been disbelievsd by the trial Judge. The submissions of Counsel therefore; that no prima facie case of robbery has been established, are not tenable and the essential ingredients of the offence have been made out.

This is a most high-handed act and indicates that the accused intended to take the law into their own hands and deprive Senanayake of the use of his car. If Chandrasena thought he had a right in law to re-take possession of the car, he should have had recourse to the courts instead of sending his minions, armed with knives to intimidate Senanayake and his wife and rob the car from their possession. The appeals are therefore dismissed and the convictions and sentences affirmed.

Appeals dismissed.

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