DIRECTOR OF PUBLIC PROSECUTIONS v CHIRWA (1968) ZR 28 (CA)
COURT OF APPEAL
DOYLE AG CJ, WHELAN J AND SCOTT AGJ
20th MAY 1968

Flynote and Headnote

[1] **Criminal law - Possession or conveyance of properly reasonably suspected of being stolen, satisfactory explanation by accused - Section 287 of Penal Code construed.**
The burden of establishing a satisfactory account of the possession of stolen goods under section 287 of the Penal Code is met if the accused gives an account which, even if it does not show innocence, leaves the court in reasonable doubt as to guilt or innocence.

[2] **Criminal law - Possession or conveyance of property reasonably suspected of being stolen - Section 287 of Penal Code construed.**
The words "possession or conveying" in section 287 of the Penal Code must be read constructively.

[3] **Jurisprudence - Reception of English law - Section 4 of the Penal Code construed.**
The effect of similar English statute and case law should be considered as a guide when interpreting the Zambia Penal Code unless there are indications to the contrary; but section 4 of the Penal Code does not require Zambian courts to accept the interpretation of English courts without first examining the English decisions to see if they have been correctly decided.

[4] **Statutes - Interpretation of statutes - Effect of re-enactment of words used in prior statute.**
Where the words of an old statute are incorporated in a new statute, it is understood that this is done with the intention of adopting any legal interpretation which has been put on such words by the courts.

Cases cited:

(1) *Mandavu v R* (1962) R & N 298.

(2) *George s/o Lerai v R* (1952), 1 TLR 366.

(3) *Hamisi v Republic* (1963) EA 209.

(4) *Ismail Abdulrahman v R* (1953) 20 EACA 246.

(5) *Hadley v Perks* (1866) LR 1 QB 44.

(6) *Chitenje v The People* (1966) ZR 37.

(7) *Mawji v R* [1957] AC 126; [1957] 1 All ER 385.

(8) *Felix v Thomas* [1966] 3 All ER 21.

(9) *Juma v Republic* (1967) EA 432.

Statute construed:
Penal Code (1965, Cap. 6), ss. 4, 287.
Chuula, Director of Public Prosecutions, for the appellant
Daley, Director of Legal Aid, for the respondent

Judgment

Doyle Ag CJ: The appellant was charged with theft by a servant of various articles which were found in his house after a search by the police. At the close of the prosecution case, the trial magistrate held that there was no *prima facie* case on this charge but substituted a charge of unlawful possession contrary to section 287 of the Penal Code. The appellant gave evidence and admitted possession of the articles but explained that he had bought them from a hawker and had not received a receipt. In the event appellant was convicted in respect of twelve hypodermic needles, two syringes, and what is described as two procaine penicillin. Whether the latter refers to two tablets, bottles, phials, ampoules, or

what, is unknown. He was sentenced to one-month imprisonment with hard labour and appealed to the High Court.

The learned High Court judge held that the trial magistrate had misdirected himself on the burden of proof and allowed the appeal on that ground. He also held that the magistrate had misdirected himself in holding that the words "possession or conveying" in section 287 were disjunctive and created two offences. He held that the words were conjunctive and also allowed the appeal on that ground.

The Director of Public Prosecutions appealed to this court on the following grounds:

(1) that the learned judge misdirected himself in law in holding that the word "or" in section 287 (possession or conveying) was conjunctive having regard to *Mandavu*'s case;

(2) that the learned judge misdirected himself in law in holding that under section 287 an accused person is entitled to be acquitted notwithstanding that the accused has not been able to allay the suspicion in the mind of the court. Section 287 of the Penal Code reads as follows:

> "287. Any person who shall be brought before a court charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such court of how he came by the same, is guilty of a misdemeanour."

We will deal with the second ground of appeal first. In dealing with this the learned magistrate early in his judgment stated that the accused shouldered a burden directed at either:

(i) rebutting the allegation of possession; or

(ii) admitting the possession but giving an explanation showing that such possession was innocent or raising a doubt whether it was innocent or guilty.

Later in his judgment, while repeating paragraph (ii) above, he referred to the accused's duty to "allay that suspicion". These words clearly daring from the words of Conroy, CJ, in *Mandavu v R* [1].

[1] In dealing with the matter the learned judge disapproved of the passage from the judgment in *Mandavu's* case [1] when Conroy, CJ, said at page 304: "The burden then shifts to the accused of allaying this suspicion in the mind of the court by giving an account of his possession to the satisfaction of the court." He preferred the view of Sinclair, Ag CJ, in *George s/o Lerai v R* [2] where, when dealing with the equivalent Tanganyika section, he said: "Where he gives an account which might reasonably be true and which is consistent with innocent possession, he is, in my view, entitled to be acquitted. We consider that he is so entitled notwithstanding that the said suspicion remains in the mind of the Court."

The learned judge then discounted the view that the appellant must prove a probability and agreed with and approved the reasoning of Spry, J, in *Hamisi v Republic* [3], where he said (at page 217):

> "All these statutes used the word 'prove' or cognate words, and this, I think, constitutes the distinction. If the legislature had intended to impose that burden of proof in relation to s.312, the word 'prove' would surely have been used. In using the words 'give an account' the legislature must be regarded as having imposed a lesser burden, and if the court is satisfied that the accused's explanation is reasonably probable in the circumstances, the accused is entitled to acquittal, even though the alternative explanation may be slightly more probable."

It seems plain that the learned judge regarded both Conroy, CJ, and the learned magistrate, where they used the words "allay this suspicion", as requiring a higher standard of proof than that laid down in the *Tanganyika* cases. In our view he was mistaken in this.

The words "allay this suspicion" by themselves could and probably would mean remove that suspicion. If that were the sense intended by Conroy, CJ, or the learned magistrate, this would clearly be a misdirection as it imposes too great a burden on the accused. It would indeed be strange if the burden placed on a person accused of possession of goods reasonably suspected of being stolen was higher than the burden of explanation, if it may

be described as such, which is on a person who is found in possession of goods proved to be recently stolen.
In *Mandavu*'s case [1], Conroy, CJ, had quoted extensively with approval from the judgment in *Ismail Abdulrahman v R* [4]. There the court laid down the *onus* in these terms (at page 248):

"The defence therefore may be directed (a) to rebutting the allegation of possession, or (b) to giving an explanation of possession. As to (b), if an explanation is put forward which may reasonably be true having regard to all the circumstances, the Magistrate must, of course, direct himself that if it either satisfies him that the possession was innocent or leaves him in doubt whether it was innocent or guilty, he should acquit."

Conroy, C.J., having, *inter alia*, quoted this passage, then added:
"In my view the same principles apply in relation to s. 287 of the Penal Code of Northern Rhodesia."
If one is only left with a reasonable doubt as to guilt or innocence, clearly all suspicion is not removed from one's mind. It is plain therefore that Conroy, C.J., was not using the words "allay the suspicion" in the sense understood by the learned judge. Nor indeed does it appear that the learned magistrate was doing so. Twice in his judgment he stated the burden in the terms laid down by the East African Court of Appeal and approved and adopted by Conroy, C.J. We do not consider that these differ from the criteria required by the other cases cited by the learned judge. We consider that the burden where possession is found is at most only to give an account which, even if it does not show innocence, leaves the court in reasonable doubt as to guilt or innocence.
We consider therefore that the learned magistrate did not misdirect himself in law on the burden of proof. The learned judge, however, on the facts, went on to point out certain matters which he considered should have satisfied the magistrate sufficiently to warrant an acquittal. We are not disposed to disagree with him and therefore are satisfied that the appeal was correctly allowed on the facts on this branch.
The other ground of appeal raises a more difficult issue.
[2] The learned magistrate followed the judgment of Conroy, C.J., in *Mandavu*'s case, where he held that section 287 of the Penal Code constituted two offences and differed from the finding in *Hadley v Perks* [5]. Conroy, CJ, had not in his judgment adverted to the effect of section 4 of the Penal Code, but the learned magistrate did so and considered the effect of the case of *Chitenje v The People* [6]. He held that as the law was not *in pari materia*, it was inconsistent to interpret section 287 in accordance with English law. On appeal the learned judge took a different view and saw no inconsistency in following the English decisions which interpreted similar words in the Metropolitan Police Courts Act of 1839. He held that *Chitenje's* case had undermined the reasoning of Conroy, C.J., and that it was binding upon him. He held that the words "possession or conveying" were conjunctive.
The learned Director of Public Prosecutions has argued that the learned magistrate was correct in holding that *Chitenje*'s case did not require him in this instance to follow the English decisions. He may indeed also have been arguing that *Chitenje*'s case was wrongly decided, though this was not entirely clear to us. He argued that the Zambian courts could not by virtue of section 4 abdicate their powers of decision and follow blindly English law. We do not resile from the decision in *Chitenje*'s case [6], though we think on further consideration that it may have stated the law in words which were unduly broad. Section 4 does not of course require the Zambian courts to accept the interpretation of English courts holusbolus and without critical appraisal. It is only correct English interpretation which, if consistent and not expressly provided against, must be used in interpreting the Penal Code. The Zambian courts can and must examine the English decisions to see whether they have been correctly decided before using them to help in interpreting the law of Zambia.
[3] The Penal Code is in fact a codification of a considerable portion of the criminal law of England for application to Zambia. It does not follow that in all cases the legislature intended entirely to follow the English law, both statute and case, but substantially it clearly did so intend. It is not therefore strange that a section such as section 4 of the Penal Code was introduced. It was in the nature of a slip rule to cover the fallibility of draftsmen. The full extent of the section is not easy to define as is stated in the Privy Council case

of *Mawji v R* [7], page 385, where it was held that a section in the Tanganyika Penal Code equivalent to our section 4 introduced into the Tanganyika Penal Code law of conspiracy the English concept that a man and his wife were one in law and therefore could not conspire together. But as a general rule it is a guide and an injunction to consider the effect of similar English statute law and of English case law when interpreting the Penal Code, unless there are indications to the contrary.

The question is whether one should follow the natural meaning of the words in section 287 which, *prima facie*, are disjunctive or whether one should, by reason of section 4 of the Code, introduce the interpretation given in England to similar words used in an English statute.

In the absence of section 4 we would consider Conroy, CJ's, reasoning in *Mandavu*'s case [1] impeccable. Similar reasoning was used in the Privy Council case of *Felix v Thomas* [8], a decision on the meaning of the words "in any place", in a statute of Trinidad. In Trinidad there is no equivalent of our section 4.

[4] It is commonplace that where the words of an old statute are incorporated in a new statute, this is understood to be done with the object of adopting any legal interpretation which has been put on them by the courts, though not necessarily all the reasons for that interpretation (see Maxwell's Interpretation of Statutes, 11th ed., at page 303).

[2] *Hadley v Perks* is a decision of considerable antiquity. It has been followed in the courts of many territories which had adopted similar words in their statutes (*see, for instance, Juma v Republic* [9]), when Sardi, J, in dealing with the equivalent section of the Tanganyika Code (at page 433), said: "It has been repeatedly held by this court that 'possession' within the meaning of section 312 of the Penal Code is to be read, *ejusdem generis,* with 'conveying' . . ."

We see the force of Conroy, C.J.'s, argument that, the definition of possession in the Penal Code being much wider than mere physical possession, implies that the legislature intended a different construction of section 287 than that given in English law.

On the other hand, if the legislature were intending this wider construction, why was the word "conveying" used at all? Conveying requires physical possession. If the interpretation of "possession" ousts the effect of section 4, the use of the word "conveying" in section 287 is unnecessary. One must assume that the legislature used the expression with intent.

On the whole, and bearing in mind that the provision is penal, we are of opinion that it was not the intention of the legislature to differ from the English law when enacting section 287 and we consider that the learned High Court judge was correct when be held that section 287 must he read conjunctively.

The appeal is therefore dismissed.

Appeal dismissed.