CHISHA v THE PEOPLE (1968) ZR 26 (HC)
HIGH COURT
WHELAN J
17th MAY 1968

Flynote and Headnote

[1] **Criminal law - Housebreaking - Elements of offence - Entry.**
An allegation of entry is an essential ingredient of a charge of housebreaking.

[2] **Evidence - Burden of proof - Theft - Possession of stolen property by accused shortly after theft.**
In a charge of theft, a showing by the prosecution that the accused was in possession of stolen property shortly after its theft does not shift the burden of proof to the defence to make a satisfactory explanation of the possession; the burden of proving all the elements of theft remains on the prosecution.

Cases cited:

(1) *R v Banda* (1958) R & N 87.

(2) *R v Schama and Abromovitch* (1914) 11 Cr. App. R 45.

Statute construed:
Penal Code (1965, Cap. 6), s. 271 (1).
Appellant in person.
Heron, State Advocate, for the respondent

Judgment

Whelan J: On the 22nd February, 1968, the appellant appeared before the subordinate court of the first class for the Kitwe District charged as follows:
Statement of Offence: Housebreaking and theft, contrary to section 271 (1) and 243 of the Penal Code, Cap. 6.
Particulars of Offence: Abel Chisha, on the 17th February, 1968, at Kitwe in the Kitwe District of the Western Province of the Republic of Zambia, with intent to steal, broke into the dwelling house of Mary Jameson and stole therein six dresses, one suit, one jacket, one shopping bag, one pair of boots, one jersey, one pair of short trousers and a shirt, to a total of K190, the property of the said Mary Jameson.
He pleaded not guilty to the charge and after a trial was convicted of "Housebreaking and theft contrary to sections 271 (1) and 243, Cap. 6." He appeals to this court against his conviction.
[1] The particulars of the offence contained no reference to an entry of the dwelling house in question and, as was said by this court in *R v Banda* [1], an allegation of entry is an essential ingredient of a charge of housebreaking and the omission of such an allegation from a charge renders that charge bad.
I would have been minded to allow this appeal and order a retrial but for two other matters. The magistrate found the accused guilty of housebreaking and theft contrary to sections 271 (1) and 243 (Cap. 6). He did not state what property he found the accused guilty of stealing, not even by using the words "as charged". In this case, although in his judgment the magistrate stated that the complainant found the property mentioned in the charge missing from the house, the complainant had in fact given evidence that she had found missing from her house considerably less property than that set out in the charge.
[2] The second point is this. There was evidence before the magistrate that the appellant was found in possession of certain property, very shortly after its theft. The appellant at his trial denied being in possession but, having considered the evidence of those witnesses who had identified the appellant, the magistrate said: "I consider this to be very strong evidence against the accused who has been clearly identified by all these witnesses. It was then upon the accused to explain satisfactorily how he came to be in possession of this stolen property. The accused has not made any such explanation." This was a misdirection in that it clearly shifted the *onus* of proof on to the accused. I consider that I can do no better than to quote the words of Reading, L.C.J., in *R v Schama and Abromovitch* [2]:

"When the prosecution has proved the possession by the prisoner, and that the goods had been recently stolen, the jury should be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the jury to say on the whole evidence whether the accused is guilty or not; that is to say, if the jury think that the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal, because the Crown has not discharged the *onus* of proof imposed upon it of satisfying the jury beyond reasonable doubt of the prisoner's guilt. That *onus* never changes; it always rests on the prosecution. That is the law; the court is not pronouncing new law, but is merely re-stating it.

This appeal is allowed, the conviction of the appellant is quashed, and the sentence of fifteen months' imprisonment with hard labour imposed in respect of it is set aside.

Appeal allowed.