

STEPHEN MANDA v THE PEOPLE (1980) Z.R. 116 (H.C.)

HIGH COURT
CULLINAN,
25TH
HPA/3/1980

JANUARY,

1980

J.

Flynote

Criminal law and procedure - Possession - Possession of goods reasonably suspected to have been stolen or unlawfully obtained - Consideration of possession under s. 319 (a) of Penal Code.

Evidence - Burden of proof - Possession of goods reasonably suspected of having been stolen - Burden of proof before prima facie case can be established.

Criminal law and procedure - Possession - Possession of goods reasonably suspected to have been stolen or unlawfully obtained, - Person found in possession to be regarded as accomplice until the contrary is found.

Headnote

The appellant, a Customs and Excise Officer in a distillery was charged with the theft of a bottle of whisky which he sold to the manager of a bar. The magistrate found that there was no evidence of the corpus delicti or any evidence that the particular bottle and its content had been stolen from the distillery. He acquitted the appellant of that charge and convicted him of the offence of being in possession of goods reasonably suspected of having been stolen or unlawfully obtained.

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C.J.

On appeal s. 319 (a) of the Penal Code, on possession was examined and it was found that a prima facie case under that section was not made out. It was also pointed out that the manager not the appellant was found in possession of the bottle of whisky.

Held:

- (i) Where a person is found in possession of stolen property or in possession of goods reasonably suspected of having been stolen or unlawfully obtained, he must be regarded as an accomplice unless on the whole of the evidence, the court finds as a fact that he is not an accomplice.
- (ii) Section 319 (a) of the Penal Code does not relate to goods which at some time have been in person's possession but in respect of which the suspicion only arises after they have left their possession. The suspicion must arise at a time when the person is found still in possession of the goods.
- (iii) The burden is on the prosecution on a charge under s. 319 (a) of the Penal Code to establish that the goods are reasonably suspected of having been stolen or unlawfully obtained before a prima facie case can be made out and before the statutory burden of explanation falls upon the accused.

Cases referred to :

- (1) Machobane v The People (1972) Z.R. 110.
- (2) Whiteson Chilufya v The People 1970 S.J.Z. 210.
- (3) R. v John 1961 R. & N. 452.
- (4) Phiri and Ors v The People (1978) Z.R. 79.
- (5) Kalonga v The People (1976) Z.R. 124.
- (6) Hahuti v The People (1974) Z.R. 154.
- (7) Bwalya v The People (1975) Z.R. 227.
- (8) Turnbull & Ors v The People [1976] All E.R. 549.
- (9) Mwamba v The People (1974) Z.R. 187.

Legislation referred to:

Penal Code, Cap. 146, s. 319 (a).

For the appellant: In person.
For the respondent: F. Bruce - Lyle Esq., State Advocate.

Judgment

CULLINAN, J.:

The appellant was a Customs and Excise Officer employed in that capacity in a distillery: he was charged with the theft of a bottle of whiskey therefrom. The learned trial magistrate found that there was no evidence of the *corpus delicti*, that is, there was no evidence of any deficiency in the stocks of the distillery or any evidence that the particular bottle and its contents had been stolen from the distillery. The learned trial magistrate acquitted the appellant of the charge as laid but in delivering judgment convicted him of the offence of being in possession of goods reasonably suspected of having been stolen or unlawfully obtained. The learned State Advocate Mr Bruce - Lyle has indicated that the State does not support the conviction.

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It was the evidence of the manager of a bar that the appellant had sold the bottle and contents to him for K5, the latter saying that he received a bottle of whisky every Friday, and explaining that he had lost the receipt for the bottle sold. The appellant in his evidence denied all knowledge of this transaction. The learned trial magistrate accepted the bar manager's evidence. In delivering judgment he observed:

"There is no substance in what the accused is saying. PW1 (the bar manager) is an old decent man. He did not impress me as a person who would maliciously implicate the accused. I believe PW1's evidence that accused was the person who sold him the bottle of whisky".

and again

"the evidence clearly shows that the accused did not get this bottle by lawful means. The accused's total denial of knowledge of the bottle when evidence is clear that he sold it to PW1 showing beyond doubt that the accused had guilty knowledge about the bottle".

In *Machobane v The People* (1) at pp. 102/103 Baron, J.P., (as he then was) in delivering the judgment of the Court of Appeal observed:

"It has been held by this court in *Whiteson Chilufya v The People* (2) citing *R. v John* (3) that where a witness is found in possession of stolen property he must be regarded' as an accomplice' unless, on the whole of the evidence, the court finds as a fact that he is not an accomplice. The same principle applies where for any reason a witness may have an interest to exculpate himself."

It seems to me that the same can be said of a witness who is found in possession of goods reasonably suspected of having been stolen or unlawfully obtained - the anomaly of the actual possessor of the goods featuring as a witness for the prosecution in the case of an offence under s. 319 (a) of the Penal Code will subsequently appear. The learned trial magistrate did not direct his mind to this question, nor to the aspect as to whether the bar manager's evidence was corroborated, or whether in the absence of corroboration there was something more in the evidence which indicated that the danger of false implication had been excluded-see *Phiri and Ors v The People* (4) at pp. 106/107. As the Supreme Court (per Baron, D.C.J.) observed in *Phiri* at p. 107, a court must record the reasons for its conclusion and

"as a matter of law, those reasons must consist in something more than a belief in the truth of the evidence of the accomplices based simply on their demeanour and the plausibility of their evidence - considerations which apply to any witness."

The only other relevant evidence was that the appellant was in a position to obtain whisky during the course of his employment. The learned trial magistrate considered that such evidence did not necessarily raise the inference that the bottle and its contents were the property of the

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distillery. He quite rightly decided not to rely on such aspect in acquitting the appellant of theft from the distillery. I do not see therefore that such aspect could have assisted the prosecution on the alternative offence, the basis of which was that the source of the whisky was unknown. Further, the fact that whisky is sold by an individual to a buyer in an odd bottle, for an apparently low price, does not as I see it necessarily establish that the whisky is reasonably suspected of having been stolen or unlawfully obtained. It is incumbent upon the prosecution on a charge under s. 319 (a) of the Penal Code to establish such fact before a prima facie case can be made out and before the statutory "burden of explanation" falls upon the accused - see *Kalonga v The People* (5) at p. 125. I do not see that a prima facie case under s. 319 (a) was made out, and had the appellant been charged thereunder initially he could not have been put on his defence - see the case of *Hahuti v The People* (6) at p. 154. In the result it cannot be said that had the appellant been charged with the alternative offence his defence would not have been any different. In any event the appellant's denial of the transaction with the bar manager, if false, does not as I see it, necessarily establish guilty knowledge of any unlawful source of the whisky, as an innocent person may well seek to exculpate himself on a false basis: see *Bwalya v The People* (7) at p. 232 and *Turnbull & Ors v The People* (8) at p.553 at

h.

Finally, the bar manager and not the appellant was found in possession of the bottle of Shipley. In a case dealing with s. 319 of the Penal Code, *Mwamba v The People* (9) at pp. 187/188 Doyle, C.J., in delivering the judgment of the Supreme Court observed:

"In our opinion this section cannot be invoked in relation to such facts. It does not relate to goods which at some time have been in a person's possession but in respect of which the suspicion only arises after they have left their possession. The suspicion must arise at a time when the person is found still in possession of the goods. One cannot go tracing goods back through half a dozen hands for the purpose of showing each person is guilty of an offence unless he can account satisfactorily for this possession. The offence is having in his possession such goods not having had in his possession such goods."

In all the circumstances the appeal is allowed. The finding and sentence of the court below are set aside and the appellant is acquitted.

Appeal allowed