FELIX SILUNGWE AND SHADRECK BANDA v THE PEOPLE (1981) Z.R. 286 (S.C.)

SUPREME COURT
BRUCE-LYLE, CULLINAN, JJ.S. AND MUWO, AG. J.S.
18TH NOVEMBER, 1980 AND 8TH APRIL, 1981
(S.C.Z. JUDGMENT NO. 7 OF 1981)

Flynote

Sentence - Previous bad record - Effect on sentence.
Criminal law and procedure - Possession - Possession of stolen property - Failure to take fingerprints - Whether dereliction of duty by police.
Evidence - Fingerprints - Failure to lift - Effect.

Headnote

The appellants were convicted of aggravated robbery and were each sentenced to thirty years imprisonment with hard labour. The prosecution case rested on the issue of identification of the appellants by PW7 (owner of the car) as those who stole his car after using violence on him; and recent possession of the Fiat car by the two appellants based on the evidence of PWs1 and 2 who testified that the appellants were found in possession a few hours after the robbery. However, no fingerprints were lifted by the police.

The learned counsel for the appellants contended, inter alia, that the police should have lifted fingerprints from the car and the screw driver and that, that failure to do so was a dereliction of duty which was favourable to the appellants that they had never been in possession of the car. On appeal:

Held:

(i) Where the circumstances are such that there is no doubt that a defendant has been in possession of the vehicle or of an article, the failure to take fingerprints from the vehicle or from the article

p287

could not be a dereliction of duty and the absence of finger prints cannot raise the presumption that the defendant's fingerprints could not have been on the vehicle or on the article.

(ii) A bad record must not be the basis for imposing heavier sentence than the offence itself warrants.

Cases referred to:

(1) Kunda and Anor v The People, S.C.Z. judgment No. 18 of 1980.
(2) Banda (K) v The People (1977) Z.R. 169.
(3) Nasilele v The People (1972) Z.R. 197.

(4) Chileshe v The People (1977) Z.R. 176.
(5) Andreas Obonyo, [1962] E.A. 542.
(6) Banda v The People C.A. Judgment No. 27 of 1966.
(7) Kape v The People (1977) Z.R. 192.
(8) Bwalya v The People (1975) Z.R. 227.
(9) R. v Turnbull [1976] 3 All E.R. 549.
(10) Maseka v The People (1972) Z.R. 9.

For the appellants: M.A.P. Sigera, Legal Aid Counsel.
For the respondent: L.S. Mwaba, State Advocate.

Judgment

BRUCE-LYLE, J.S.: The appellants were convicted of aggravated robbery and each has appealed against his conviction and sentence.

On the 4th March, 1979, PW7 was driving his 124 Fiat motor vehicle registration No. AAB 4455 back home along the Great East Road and the time was between 1900 hours and 1915 hours when he stopped to give a lift to two persons who had waved him down. One of the men approached him and asked for a lift to town but PW7 explained that he was driving to his house in Longacres but the man insisted that it was raining and he could drive then to Longacres and then they would find their way home. This man who spoke to him sat in the front seat and the other man sat on the rear seat directly behind PW7; PW7 drove into Addis Ababa Drive and then into Brentwood Drive where he stopped and requested the two passengers to alight but the man on the front seat pleaded with him and asked if it would be possible for them to be driven to a taxi rank where they would fetch a taxi home. He then asked PW7 to drive them to Mutendere or Kabulonga. PW7 drove along Addis Ababa Drive and got to the junction with Church Road near the Pamodzi Hotel where he stopped to allow vehicles on the main Church Road to move on. PW7 stated that when he stopped at this junction, the man seated directly behind then grabbed him from behind and forced him over the top back rest of the car front seat and the car stalled; that the man on the front seat with him then held his private parts and pressed and pushed him into the back of the car while the other person pressed his neck so that he was unable to shout; that the man at the front then took over the wheel and drove the car into Church Road towards the town centre.

p288

The witness stated further that he then kicked the man who was driving the car on the head and then this man ordered the man on the rear seat to stab him and on this instruction the man who was holding him in the rear seat then produced a screw driver and pushed it into his throat and injured him below the neck; that he struggled with this man and then bit him on one of the fingers that held the screw driver; that the car drove on and passed the Central Police Station and that during all this period he still held the screw driver and that when they got on the fly-over bridge he opened the back door which was near him and throw himself out of the car on to the tarmac and the car drove on and that when he stood up he saw his car being driven into town; that he then went to the Police Station and made a report and handed the screw driver to the police. In court he identified the first appellant as the man who sat at the back of the vehicle and the second appellant as the one who sat on the front seat with him and ultimately took over the driving of the vehicle. PW7 further stated that on the 9th March, 1979, he saw his vehicle at Kasanda Police Station and at the time the

registration number was AAB 45. In his report to the police PW7 stated that he could recognise his assailants and that the one who struggled with him on the rear seat had short hair and that he could also recognise him by the bite on the finger; that he could recognise the one who sat on the front seat facially. He further stated under cross-examination that it was during the night and that during the attack he was very frightened and also that it was the first time he had seen the two men.

On the strength of an information that there was a car on the Kango'mba Road suspected to have been stolen, PWs1 and 2, police officers at Kasanda Police Station, went to the scene and found a red Fiat car registration number AAB 45. From a distance they saw the first and second appellants put what appeared to be a jerrican into the boot of the car and that when they got near they found the two appellants standing by the car with the doors opened. PW2 stated that he then asked the appellants if they had any trouble with their car whereupon the first appellant replied that they had just filled in petrol which they had bought form Kabwe and that the second appellant explained that they were proceeding to Ndola from Lusaka. PW1 stated that he then checked and found that the registration number plates originally had the digits 4455 but that the first digit 4 and the last digit 5 were missing and that when he questioned the appellants about this the second appellant explained that the digits coud have been removed by someone when they went to buy the petrol; that when the appellants were further questioned as to who the owner of the car was the first appellant stated that it belonged to the elder brother of the second appellant by the name of Daka and that there was the blue book in the car to support that and that the blue book also showed the registration number as 4455 and that if the police officers liked they could investigate and if they did that they would find that they had been sent by the elder brother of the second appellant. PW1 further stated that he told the appellants that he was in doubt and that the appellants should go into their car and drive to the police station for further inquiries whereupon the first

appellant stated that they had lost the ignition key at the place where they had bought the petrol; that he then asked them to go into the police Land - Rover and then the first and second appellants were driven in the police Land - Rover to the police station and the matter was there reported to the officer-in-charge of the station. PW1 still further stated that he and the officer-in-charge of the station then went back to the scene and searched for the ignition keys but did not find them but rather found the missing digits 4 and 5 about five metres from the spot where the car was parked and that he then forced open one of the small windows in the front and opened the door, then broke the ignition switch because the steering was then locked and then connected the wires and drove the car to the police station; that on the strength of messages sent to various stations it was reported that the vehicle in question was the subject of a robbery complaint.

PW2 corroborated the evidence of PW1 as to the finding of the car up to the time the appellants were driven to the police station PW3, the officer-in-charge of Kasanda Police Station stated that on the 5th March, 1979, PWs1 and 2 brought the first and second appellants to the station and reported that they had found the appellants in possession of a vehicle suspected to have been stolen and also handed over to him a blue book relating to the vehicle; that he questioned the appellants and the second appellant stated that the car belonged to his uncle. PW3 further stated that on examining the registration number on the vehicle and the registration number in the blue book, he became suspicious and ordered that the appellants be detained and then he went to the scene with PW1. This

witness corroborated the evidence of PW1 as to how the digits 4 and 5 were found in the bush and how the door of the car was opened and how the car was driven finally to the police station. He further stated that after he had circulated messages to other police stations and before receiving any replies, he caused the appellants to be arrested for being in possession of a vehicle reasonably suspected to have been stolen but after a day or two a message was received from Lusaka that the vehicle was the subject of a robbery complaint; that the appellants were later collected by Lusaka police and that PW7 later called at the police station and identified the vehicle as his and drove it back to Lusaka.

On the 7th March, 1979, PW4 took a warn and caption statement from the second appellant which was admitted in evidence. In that statement the second appellant admitted being with the first appellant when they were apprehended near the vehicle. PW5 recorded a warn and caution statement from the first appallant which was also admitted evidence in which the first appellant stated that he had boarded a bus from Lusaka to Kabwe and that five kilometres from Kabwe as a result of the bus losing some of its nuts on one of the wheels, the bus stopped and the passengers were asked to alight; that he and the second appellant were flagging for lifts when the Police arrived in a Land - Rover, from the direction of a Fiat car which was parked away from where they were and that when the police got to them they were told that they were those the police were looking for in connection with the Fiat car and that

p290

they were then apprehended and taken to the police station. PW6, a police officer, conducted an identification parade on the 8th March, 1979, at which PW 7 identified the first and the second appellants without any difficulty. Under cross-examination this witness stated that PW 7 told him that he could identify the suspects by their faces but that PW 7 never told them that be could identify one of the suspects by a sore on one of the fingers. He also denied that the suspect were conspicuously crossed in dirty clothes.

When put on their defence, the first appellant stated that on the 4th March, 1979, his brother-in-law had sent him to Katwe from Lusaka and that he had travelled on a Bronco bus from Kamwala and that before they got to Kabwe the bus broke down and he alighted and joined a group of persons who had also alighted and that while walking they tried to stop lifts and that he was lucky and got a lift in a green Land Rover to Kabwe. He stated that in Kabwe the Land - Rover in which he had travelled turned into Kasanda Police Station and that it was at the station he was told that he was being detained. He also stated that the second appellant was also given a lift in the same Land - Rover and that he and the second appellant were later taken to Lusaka. He stated further that while in police custody they were in handcuffs for seven days as a result of which he sustained injuries on the hands. He stated that at the identification parade he was not identified until the police officer asked them to stretchout their hands and that it was then that PW7 identified him and the second appellant because of the injuries they had on their hands.

The defence of the second appellant was that he was in Kabwe and that he had been in Kabwe for twoweeks; that on the material morning he had gone out looking for lifts to Chibombo and that before he got to the main road he saw a red Fiat car parked about seventy-five metres away and that near the car were three persons and a van; that he saw two persons get into the van and drive

away leaving the third person standing at the car and that when he walked to the car he saw the first appellant who was standing near the car who told him that he was going to Kabwe; that they were in the process of sharing a cigarette when a Land - Rover got to where they were and stopped and that police officers alighted from the Land - Rover with guns and started questioning the first appellant about the car and that when the police were not satisfied with the first appellant's answers they were ordered into the Land - Rover and taken to Kasanda Police Station. He stated that at the do identification parade PW7 was unable to identify any of them; that after walking the line twice in the front and twice again behind PW7 spoke to the police officer who then ordered them to stretch out their hands and it was then that PW7 identified him because of the injuries he had on his hands as a result of being handcuffed in cells for two days.

The prosecution case rested on the issues of identification of the appellants by PW7 as those who stole his car after using violence on him and recent possession of the Fiat car by the two appellants based on the evidence of PWs1 and 2. The issue of identification can be considered

in two lights, (a) PW7's opportunity to observe his assailants from the time they boarded the car near Kaunda Square on the Great East Road until PW7 jumped out of the car on the Church Road fly-over bridge, and (b) identification of the appellants by PW7 at the parade.

The evidence of PW 7 was that the incident happened shortly after 1900 hours and that the second appellant was the one who came to him and begged for a lift and that at that time the first appellant was behind the vehicle and that subsequently the second appellant sat with him on the front seat and they talked to each other most of the time and the first appellant was immediately behind him. PW 7 admitted that he was really frightened when the attack on him started and there was no evidence that there were street lights where the appellants got into the car and there was no evidence also that during the whole of the journey to the fly-over bridge, the light in the car was ever put on. The learned trial judge resolved the issue of identification in the following passage in his judgment:

> "For my part I have no doubt that from the point the complainant picked the two people to the fly-over bridge on Church Road where he was dropped there was considerable ample time within which he was in association with those people whom he gave a lift and subsequently robbed him. But the crux of the matter is whether he had ample time to observe the two people adequately for purposes of visual recognition to rule out any possibility of mistaken identification."

On the evidence I am in complete agreement with this finding of the learned judge. After reviewing the evidence relating to the identification parade the learned trial judge stated as follows:

> "The evidence of the identification parade raises serious doubts in my mind. Consequently on its own again I find it inadequate to rule out the possibility of an honest mistake in identification."

It is apparent from the judgment that the conviction of the appellants rested solely on the evidence of PWs1 and 2 as to the recent possession of the Fiat car belonging to PW7 by the appellants. The

evidence of PWs1 and 2 was that the appellants were found with the Fiat car a few hours after the robbery. Although the first appellant both in his statement to the police and in his defence, clearly avoided mentioning that he was ever near the Fiat car when the police Land - Rover arrived, the second appellant admitted that he had walked to the first appellant who was then standing near the car and who was the third person who had been left behind by the other two persons who had driven away in a van, and that the two of them were standing near the car sharing a cigarette when the police Land - Rover arrived. When the first appellant was questioned he stated that the second appellant had told him that the car belonged to his uncle by the name of Daka (which is PW7's name) and that the blue book in the car bore that same name. Both appellants denied that any of them ever mentioned that the car belonged to the second appellant's uncle.

p292

Mr Sigera, learned counsel for the appellant, has argued that there were conflicts in the evidence of PWs1 and 2 which created a doubt in favour of the appellants; that these conflicts were never resolved by the learned trial judge. He drew the attention of the court to these conflicts and argued that PW1 stated that he went to the scene where the car was after he had received a report in connection with a certain vehicle which was reported to be suspected stolen, while in relation to the report PW2 had stated "it was about the motor vehicle which was suspected to have been stolen". I am unable to find any conflict in the evidence of these two witnesses. Learned counsel further contended that there was a conflict in the evidence of these two witnesses in relation to the ignition key of the car; that PW1 stated that he got a surprise when the first appellant who had gone into the car and was in the driver's seat could not start the vehicle which they alleged belonged to them and that they stated that the ignition key got lost when they went to buy petrol. Counsel contended that this was in conflict with the evidence of PW2, who stated that when he asked for the ignition key the appellant stated that the key was lost and that this witness did not mention that the key got lost when they had gone to buy petrol. I find no material conflict in the evidence referred to by the learned counsel. The evidence of PWs1 and 2 that the appellants were found near the car was corroborated by the second appellant in his evidence in defence, that when the police Land - Rover came he and the first appellant were standing near the car and were sharing a cigarette. Further the evidence of the appellants' explanation to PW1 and PW2 is corroborated by the evidence of PW3.

Learned counsel has further contended that the police should have lifted fingerprints from the car and from the screw driver, and that failure to do so was a dereliction of duty which was favourable to the appellants that they had never been in possession of the car. The evidence relating to the screw driver showed that there was a struggle over this screw driver by PW 7 and one of the appellants who was on the back seat and I am of the view that the screw driver should have had traces of smudged prints on it. Although PWs1 and 2 were cross-examined as to whether or not fingerprints were lifted from the car there was no cross-examination of these witnesses as to the lifting of fingerprints on the screw driver, and on the authority of *Patrick Kunda and Anor. v The People* (1), I find there was no dereliction of duty on the part of the police, and the presumption in favour of the appellants does not therefore arise.

When the police officers were questioned about whether or not fingerprints were lifted from the car PW1 said that he did not know whether that was done, and PW3 the officer-in-charge at Kasanda Police Station also stated that no such fingerprints were lifted from the car. Was the failure to take

the fingerprints from the car a dereliction of duty on the part of the police? The evidence of PWs1 and 2 was that shortly before getting to the scene where the car was parked, they found that the two appellants had opened the boot of the car and were putting into it what appeared to be a jerrican, and that when the appellants

p293

were questioned they stated that they had just returned from Kabwe where they had bought petrol which they had put into the car. PWs 1 and 2 stated further that they found the appellants near the car with the doors already opened and that the appellants were about to get into it. When PWs1 and 2 inquired as to who was the owner of the vehicle the first appellant answered that the second appellant told him that the car belonged to his uncle whose name was Daka. The second appellant in his defence explained that the first appellant was in fact questioned as to who the owner of the car was and that it was when PWs1 and 2 were not satisfied with the answers that they were then taken to the police station. In *Banda (K) v The People* (2), this court laid down that where the circumstances are such that there is no doubt that a defendant has been in possession of the vehicle or of an article, the failure to take fingerprints from the vehicle or from the article could not be a dereliction of duty and that the abence of fingerprints cannot raise the presumption that the defendant's fingerprints could not have been on the vehicle or on the article. From the evidence of PWs1 and 2 I find that there was no need for the police to have fingerprints taken from the vehicle as the evidence in my new, showed clearly that there could have been no doubt in the minds of PWs1 and 2 that the appellants were in fact in possession of the vehicle.

The learned trial judge believed the evidence of PWs1, 2 and 3 and rejected the explanations of the appellants on the ground that the explanations could not reasonably be true. I find the findings of the learned judge overwhelmingly supported by the evidence. I would dismiss the appeals against the convition.

The appellants are first offenders and of the respective ages of twenty and twenty-two years, and each was sentenced to thirty years imprisonment with hard labour. I am bound in this particular case to reiterate what this court stated in *Nasilele v The People* (3) at page 198:

> "It is trite that a bad record must not be the basis for imposing a heavier sentence than the offence itself warrants. In other words, the first decision must always be what is the proper sentence for the offence, and ignoring at this stage the presence or absence of mitigating factors; only after deciding what is a proper sentence for the offence itself does the court proceed to consider to what degree that sentence may properly be reduced because of the presence of mitigating factors. These principles are no less applicable when the offence is one for which Parliament has prescribed a minimum sentence; by doing so Parliament has expressed the intention that all offences of the particular type be treated more seriously than previously. The effect is that for the least serious offence of stock theft, or where there are mitigating factors enabling the court to exercise maximum leniency, the minimum sentence should be imposed, while for more serious offences, and where there are insufficient miigating factors to enable the court to exercise maximum leniency, a more severe penalty should be imposed.

> The question of mitigation or the absence of it does not therefore arise unless the court regard the offence as one which intrinsically is more serious than 'the least serious offence of stock theft'."

In my view the facts of this case did not make the offence "intrinsically more serious than the least serious offence" of aggravated robbery involving the theft of a motor vehicle. Having regard to the above, that the appellants are first offenders and also having regard to their ages the sentence comes to me with a sense of shock as being excessive.

The appeals against sentence are allowed and the sentences are set aside. I would sentence each appellant to fifteen years imprisonment with hard labour with effect from 5th of March, 1979, the date of their arrest.

Judgment

CULLINAN, J.S.: I have had the advantage of reading the judgment delivered by the learned president of the court and wish to state that I agree with all that he has said, save that whilst I agree that the learned trial judge was justified in finding that the appellants' explanations of their non-association with the stolen vehicle could not, on the issue of credibility, reasonably be true, I do not agree that he was thereafter justified in finding that the only reasonable inference was the appellants' guilt of the offence charged.

The learned counsel for the appellants Mr Sigera submitted that on the evidence the court could draw an inference of receiving, or of theft subsequent to the robbery. In the case of *Chileshe v The People* (4), this court had occasion to consider the inferences which might reasonably be drawn from the possession of stolen property. The court (per Gardner, J.S.,) referred to the case of *Andreas Obonyo* (5), and went on to observe (at pages 178179):

> "In that case the Court of Appeal of East Africa in dealing with a case of murder held that it is the duty of a trial court, in cases where recent possession of stolen property may lead to the conviction of the accused, to consider whether such recent possession may be the result of the receiving of stolen property as opposed to guilt of the major crime during the commission of which the stolen property was obtained. This general principle, with which we respectfully agree, has been set out by the Court of Appeal in Zambia in the case of *Banda v The People* (6) where Blagden, C.J., said:
>
> ' When, in a case involving theft, the evidence against the accused is that he was found shortly after the theft in possession of some of the stolen property, the magistrate should give some indication in his judgment that he has given consideration to the possibility that the accused might have come into possession of the stolen property otherwise than by stealing it. In some circumstances - as, for instance, where the time elapsing between the theft and the discovery of the the property in the accused's possession is extremely short - there is hardly any need to make any reference to this since the inference that the accused is the actual thief may be quite inescapable. Nevertheless, magistrates should take care

> in these cases of 'recent possession' to show in their judgment that they have understood and correctly applied what commonly called the doctrine of recent possession.'

This dictum does not of course go so far as to say that it would be a misdirection in every such case if no indication were given in the judgment that the possibility that the property came into the accused's possession otherwise than by commission of the offence charged had been considered. This is explicit in the reference by Blagden, C.J., to circumstances where the inference that the accused is the actual thief may be inescapable. In that case the only issue was one of time but there may be other factors which preclude as a reasonable possibility that the accused is a receiver only. For instance where the articles are of such a nature that one would not expect them to be bought by a receiver. There may also, in particular cases, be other circumstances which preclude the need to look for such an explanation."

Again, in the case of *Kabwe v The People* (7), this court observed (per Gardner, J.S.) at page 194:

> "In the case of *Chileshe v The People* (4) we referred to the necessity to consider the possibility of the true explanation being that of receiving stolen property and in particular cases there may be other inferences which must be considered. "

In the present case the stolen vehicle was found the following morning some five to ten kilometres south of Kabwe, on a side road not far off the main Great North Road. In view of the relatively short time which had elapsed since the robbery and the fact that the vehicle had no petrol therein, it is reasonable to infer that the robbers had driven the stolen vehicle north from Lusaka, in which direction they headed after the robbery, and had run out of petrol en route. I do not see that it is reasonable to infer that the appellants were guilty receivers of the vehicle. Had they received it, it is unlikely that they would have taken it on the open road with insufficient fuel to reach their final destination. Again, it is likely that they would have been in possession of the keys of the vehicle. Furthermore, having received a stolen vehicle it is unlikely that they would commence to change the registration numbers on the vehicle on the open road, rather than in the presumably relative safety of the place of receipt.

There is however the inference of a subsequent theft to be considered. The translation of the first appellant's statement in the vernacular, rendered by the court interpreter, indicates that he gave some assistance to the bus staff in trying to effect repairs to the wheels of the bus. One police officer, PW1, admitted in cross-examination that there was oil on the hands of the first appellant and that the second appellant's clothes were dirty. I hardly think that such evidence is consistent with the removal of two figures from the registration plates of the stolen vehicle: at least it is more consistent with the removal of wheels from a heavy bus. Further as I have pointed out, the appellants were not in possession of the keys of the vehicle. When approached by the police they claimed that the

vehicle belonged to the second appellants elder brother named 'Daka' - having no doubt already

seen that name, that is the complainant's name, in the blue book found in the motor vehicle. As it was their story that they had lawful possession thereof it is not reasonable therefore to infer that they deliberately discarded the vehicle's keys: indeed the failure to produce the keys might point to their guilt in the matter. While it is reasonable to infer that they were the robbers in question, and had genuinely lost the keys when they went to get petrol, it is also reasonable to infer that they never possessed such keys. In other words, it is reason able to infer that when the vehicle ran out of petrol the robbers decided to abandon the vehicle, taking with them the keys thereof: thereafter the appellants, engaged in the efforts to repair the bus, chanced to observe the apparently abandoned vehicle nearby and decided to appropriate it: the act of putting petrol into the vehicle accompanied by their false story to the police constituted an act of conversion with the necessary *animus furandi*. The fact that they must have covered a return journey either on foot or by lifts from passing motorists, in order to purchase the petrol, indicates an intention which goes beyond a temporary appropriation for the purpose of transport.

It can be said of course that the appellants never raised such defence. To have done so however would have exposed them to a conviction for theft. This court (per Baron, D.C.J.) said in *Bwalya v The People* (8) at page 232:

> ". . . a man charged with an offence may well seek to exculpate himself on a dishonest basis even though he was not involved the offence."

Again in the case of *Kape* (7), the court (per Gardner, J.S.) had occasion to observe at page 194:

> "Whatever the reason, the lie told by the appellant in court does not inevitably lead to an inference of his guilt. In *R. v Turnbull* (9) at page 553 the Court of Appeal dealt with lies relating to *alibis* as follows:
>
> > ' Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an *alibi*. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an *alibi* and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, *alibi* witnesses can make genuine mistakes about dates and occasions like any other witness can. It is only when the jury are satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward, that fabrication can provide any support for identification evidence. The jury should be reminded that

p297

> > proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was.'
>
> In our view this consideration applies to any lie told by an accused where it is reasonably possible that he is lying for a motive which is consistent with his innocence."

I appreciate that the inference which I have considered points to the appellants' guilt and not their innocence: it points however to their guilt of a lesser crime and their innocence of the major crime charged.

I quite appreciate that the court cannot speculate upon the defences available to an accused person: there must be some evidence of a specific defence. In the application of the so-called doctrine of recent possession however that is merely another way of saying, as the court did in *Kape* (7) that,

> ". . . in particular cases there may be other inferences which must be considered."

Those inferences of course must be reasonable inferences, that is inferences which find some support in the evidence before the court. That approach, as I see it, does not permit of speculation. In the present case while that part of the first appellant's explanation that he, and apparently the second appellant, were passengers on the bus from Lusaka might reasonably be true, both appellants in denying association with the stolen motor vehicle in effect failed to offer any explanation for their possession thereof. In the Court of Appeal case of *Maseka v The People* (10), Baron, J.P., (as he then was) observed at page 13:

> "I would emphasise one point which is all too frequently not appreciated: even in the absence of any explanation, either at an earlier stage or during the trial, the inference of guilt cannot be drawn unless it is the only reasonable inference to be drawn from all the circumstances."

In the present case there is the evidence of the first appellant and his statement to the police, indicating that he and apparently the second appellant were passengers on the bus from Lusaka. There is the evidence of the oil on the first appellant's hands and the dirt on the clothing of the second appellant to support the first appellant's statement to the police that he and others assisted the bus staff in trying to effect repairs to that vehicle. In particular there is the odd coincidence that neither appellant possessed the keys of the stolen vehicle. That evidence to my mind is sufficient to raise a reasonable inference that both appellants subsequently appropriated the abandoned stolen vehicle. I agree that it is also reason able on the evidence to infer that both appellants robbed the complainant of the vehicle. I do not agree however that that is the only reasonable inference to be drawn. In my view the situation could be summarised by saying that the only reasonable inference to be drawn is qualified one, namely that the appellants in the least subsequently stole the vehicle.

The learned trial judge's judgment does not disclose whether he considered such inference and I can make no assumptions in the matter unfavourable to the appellants. I am not satisfied therefore that the learned trial judge did consider such inference and I am further not satisfied that had he done so he would inevitably have rejected it as being unreasonable. I consider therefore that it would be unsafe to allow the convictions, on the major offence charged, to stand. I would allow the appeals, quash the convictions and substitute therefore a conviction for the relatively minor offence of theft of the complainant's motor vehicle, in respect of each appellant.

Judgment

MUWO, AG. J.S.: Having had the advantage of reading the evidence on record and the learned trial judge's judgment, I agree with the judgment of my brother Bruce - Lyle, and I would also dismiss the appeals against conviction and allow the appeals against sentence. I would further agree

with the substituted sentence of fifteen years imprisonment with hard labour on each appellant. The sentence to take effect from 5th March, 1979, the date both appellants were taken into police custody.

ORDER

The order of the court is that the appeals against conviction are dismissed, and the appeals against sentence are allowed. The sentence imposed on each appellant in the court below is set aside and a sentence of fifteen years imprisonment with hard labour, with effect from 6th March, 1979, on each appellant, is substituted.

Appeals dismissed

_____