BITWELL ROBINSON KUWANI v THE PEOPLE (1980) Z.R. 112 (S.C.)

SUPREME COURT
SILUNGWE, C.J., GARDNER, AG. D.C.J. AND BRUCE-LYLE, J.S.
18TH MARCH AND 14TH MAY, 1980
S.C.Z. JUDGMENT NO. 13 OF 1980

Flynote
Criminal law and Procedure - Receiving Property stolen or unlawfully obtained - Penal Code, Gap. 146, s. 318 (1) and (2) - Distinction between sub-ss. (1) and (2)

Headnote
The appellant had been charged in the subordinate court on three counts of receiving stolen property but was convicted under s. 318 of the Penal Code of retaining it. On appeal to the High Court the appeal against retaining stolen property under s. 318 (1) was allowed. However, the judges substituted a conviction under s. 318 (2) of the Penal Code for retaining property having reason to believe the same to have been unlawfully obtained. The appellant appealed to the Supreme Court on the ground that it was not competent for the court to convict him of retaining under s. 318 (2).

Held:
(i) Subsection (1) relates to property acquired in felonious circumstances whereas sub-s. (2) concerns property the acquisition of which amounts to misdemeanour.
(ii) It is enough for the prosecution to show that an accused person knew or had reason to believe that the circumstances in which the property, the subject of the charge was acquired constituted a crime. Whether the charge is to be under sub-s. (1) or (2) will then depend on whether the acquisition of the property constituted a felony or a misdemeanour.
(iii) Since there was an abundance of evidence pointing to the commission of a felony, namely, theft, conviction under sub-s. (2) was not competent.

Case referred to :
(1) Phiri (C.) v The People (1973), Z.R. 168.

For the appellant: E. J. Shamwana, S. C., Shamwana and company.
For the respondent: K. C. V. Kamalanathan, Senior State Advocate.

Judgment
SILUNGWE, C.J.: delivered the judgment of the court.

At the conclusion of hearing this appeal we allowed it, quashed the conviction and set aside the sentence; we said then that we would later give our reasons for the decision which we now do.

The appellant had been charged in the subordinate court of the first class on three counts of

receiving stolen property but was convicted under s. 318 of the Penal Code of retaining it. On appeal to a High Court Bench of two judges the appeal against conviction for retaining stolen property

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was allowed on the grounds that s. 318 (1) creates two separate and distinct offences of receiving and retaining. Under the provisions of s. 181 (1) of the Criminal Procedure Code, a person charged with receiving cannot be convicted of retaining because the latter - being a felony and carrying as it does the same maximum punishment - is not a minor offence (*see Phiri (C.) v The People* (1)). We agree with this finding and the appeal was properly allowed. However, the appellate judges substituted a conviction under s. 318 (2) of the Penal Code for retaining property having reason to believe the same to have been unlawfully obtained. The appellant has now appealed to this court on a number of grounds - the main ones being: (a) that it was not competent for the court to convict him of retaining under s. 318 (2) of the Penal Code; and (b) that the court erred in relying on assumptions to reach its findings.
The first ground turns on a construction of s. 318 which reads as follows:

> "318 (1) Any person who receives or retains any chattel, money, valuable security or other property whatsoever, knowing or having reason to believe the same to have been feloniously stolen, taken, extorted, obtained or disposed of, is guilty of a felony and is liable to imprisonment for seven years.
> (2) Any person who receives or retains any chattel, money, valuable security or other property whatsoever, knowing or having reason to believe the same to have been unlawfully taken, obtained, converted or disposed of in a manner which constitutes a misdemeanour, is guilty of a misdemeanour and is liable to the same punishment as the offender by whom the property was unlawfully obtained, converted or disposed of."

Plainly sub-s. (1) relates to property acquired in felonious circumstances whereas sub-s. (2) concerns property the acquisition of which amounts to a misdemeanour. Mr Kamalanathan argued that it matters not how the relevant property was acquired since the critical point is the accused's knowledge or belief as to its acquisition and that, in the circumstances, the applicable test is a subjective one. The upshot of this argument is that if the accused's knowledge or belief is falsely based, for instance, if on a charge under sub-s. (1) he honestly, but mistakenly, believes that the property in question was acquired in circumstances amounting to a misdemeanour, he cannot be convicted under that subsection even though there is overwhelming prosecution evidence to prove the commission, not of a misdemeanour, but of a felony. This would be an absurdity and, as Mr Kamalanathan agreed, could not have been the intention of the legislature. In any event, an absurd result is to be avoided when construing a statute. It is enough, in our view, for the prosecution to show that an accused person knew or had reason to believe that the circumstances in which the property - the subject of the charge - was acquired, constituted a crime. Whether the charge is to be under sub-s. (1) or (2) will then depend on whether the acquisition of the property constituted a felony or a misdemeanour. In the circumstances Mr Kamalanathan retracted the State's support for conviction.

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As this is a case in which there clearly was an abundance of evidence pointing to the commission of a felony, namely, theft, conviction under sub-s (2) was not competent.

In any event, it is common ground that there was no evidence to link the appellant with the offence of retaining. The evidence relied upon by the prosecution and accepted by the trial court, and later by the appellate judges came from two police officers who had visited the appellant's residence on 1st May, 1978. One of these officers testified that when he informed the appellant that there was stolen property on his premises the latter expressed shock; but the evidence of the other police officer who was also present at the material time indicates that the appellant expressed no surprise at the news. We are unable to appreciate why it was that, in the face of this conflicting evidence, the learned trial magistrate doubted whether the appellant's expression of shock had been genuine and so found in favour of the prosecution; we are firmly of the view that in these circumstances he ought to have given to the appellant the benefit of doubt.

Mr Kamalanathan agreed that assumptions as to the guilt of the appellant based on dates prior to 1st May, 1978 would be indefensible and that as the remainder of the evidence concerning events on 1st May could not be relied upon to found the appellant's conviction, there was no evidence to justify conviction.

For the foregoing reasons we allowed the appeal, quashed the conviction and set aside the sentence.

Appeal allowed

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THE ATTORNEY-GENERAL *v*