

GILBERT CHILEYA v THE PEOPLE (1981) Z.R. 33 (S.C.)

SUPREME COURT
GARDNER, AG. D.C.J., MUWO, AG. J.S. AND CULLINAN, AG. J.S.
15TH JULY, 1980
(S.C.Z. JUDGMENT NO. 30 OF 1980)

Flynote

Evidence - Police evidence - Failure to carry out technical test - Dereliction of duty by police - Effect of.

Evidence- Witnesses- Non-expert witness - Nature of his evidence.

Headnote

The applicant was convicted of theft of a motor vehicle. A number of prosecution witnesses gave evidence that, because of certain identifying marks and peculiarities of the vehicle, the one found in the possession of the applicant was identical to the one stolen from the complainants. The applicant claimed that he had purchased the vehicle from a Mr Chulu who had himself purchased that vehicle from Messrs Husa and Company. Further evidence was adduced from a dealer in Toyota vehicles to the effect that the chassis of the vehicle purchased by the applicant from Husa and Company was a different model from that on the car claimed by the complainants.

The learned counsel for the applicant argued inter alia, that when the chassis number of the vehicle was examined and alleged to have been tampered with, the police should have tested it with a chemical which would have indicated what was the correct number; and also that the evidence of the witness who referred to the make of the chassis and body was not that of an expert.

Held:

- (i) Dereliction of duty in failing to make a test which could conclusively prove one way or another the claims of the contending parties would result in a presumption, *albeit* a rebuttable one in favour of the applicant.
- (ii) If the evidence, without the technical evidence which the investigating authorities should normally provide is sufficient to support a conviction although there is an apparent dereliction of duty by the police that is of no avail to the defence.
- (iii) The averment by a non-expert witness that he had been dealing with Toyota vehicles for a number of years and was familiar with their different makes is sufficient to qualify such witness to give relevant evidence.

Case referred to:

(1) Banda (K) v The People (1977) Z.R. 169.

For the applicant: R. C. Sikazwe; Chigaga & Co.

For the respondents: K. C. V. Kamalanathan, Senior State Advocate.

Judgment

GARDNER, AG. D.C.J.: delivered the judgment of the court: The applicant was convicted of theft of a motor vehicle; the particulars of the charge being that on the 6th of June, 1977, at Lusaka, he stole a motor vehicle the property of the American Embassy.

The prosecution evidence in support of the conviction was that a vehicle similar to the one which had been stolen from the Embassy was seen by Embassy staff being driven. It was followed and was found parked near a similar vehicle, which was derelict, in the premises belonging to the applicant. A number of prosecution witnesses gave evidence that, because of certain identifying marks and peculiarities of the vehicle, the one found in the possession of the applicant was identical to the one stolen from the complainants.

The applicant's defence was that he had purchased the vehicle from a Mr Chulu who had himself purchased that vehicle from Messrs Hussa & Company, and that it was this vehicle which was alleged by the complainants to be theirs.

Mr Sikazwe, on behalf of the applicant, argued a number of grounds of appeal relating to the identification of the vehicle. He argued that when the chassis number of the vehicle was examined and alleged to have been tampered with, the police should have tested it with a chemical which would have indicated what was the correct number.

The court is aware that there are such techniques available to the police in this country, and if the police were in dereliction of their duty in failing to make a test which could conclusively prove one way or another the claims of the contending parties, the result of such dereliction of duty would be that there would be a presumption, *albeit* a rebuttable one, in favour of the applicant. We cannot agree that this is a case where such a test was appropriate and that failure to carry it out was a dereliction of duty. We must emphasize, as we did in the case of *Banda (K) v The People (1)* at page 174, that, if the evidence, without the technical evidence which the investigating authorities should normally provide, is sufficient to support a conviction, although there is an apparent dereliction of duty, that is of no avail to the defence. In any event, it can never be an irrebuttable argument in favour of the defence that not every test within the ingenuity of modern science has been carried out.

As has been pointed out by Mr Kamalanathan, for the State, there was an abundance of evidence that the vehicle belonged to the complainants, and failure to apply a specialised test was not, in the face of such evidence, a dereliction of duty. Furthermore, there was evidence that the chassis number, of which an attempt had been made at erasures, was still partly visible in its previous form, and indicated that the last digit of the proper number was a 'one', which digit coincided with the number of the complainants' vehicle

There was evidence from a dealer in Toyota vehicles to the effect that the chassis of the vehicle purchased by the applicant from Hussa & Company was a different model from that on the car claimed by the

complainants. Mr Sikazwe has argued that the evidence of the witness who referred to the make of the chassis and body was not that of an expert witness because the witness referred to himself as a General Manager of a Company dealing in motor cars, and indicated that his job concerned accountancy. We note from the evidence of this witness however, that he averred that he had been dealing with Toyota vehicles for a number of years and was familiar with their different makes. In the circumstances this qualified the witness to give the relevant evidence and the positive evidence that the particular chassis differed was properly accepted by the trial magistrate.

Mr Sikazwe further argued that the identifying features would be common to many vehicles in Zambia today. This is a valid argument; so far as each individual feature is concerned; however, when they are taken as a whole, the finding of all the individual characteristics together were sufficient for a positive identification to be accepted by the court.

In this case the magistrate carefully examined the evidence before him and did not misdirect himself in any way. There is no prospect of success in an appeal. The application to appeal against conviction is refused.

The applicant was sentenced to three years imprisonment with hard labour, which does not come to us with a sense of shock, nor is it wrong in principle. The application in relation to the sentence is also refused.

Application rejected
