GEORGE NSWANA v THE PEOPLE (1988 - 1989) Z.R. 174 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND SAKALA, J.J.S.
13TH JUNE AND 27TH JULY, 1989
(S.C.Z. JUDGMENT NO. 14 OF 1989)

Flynote

Criminal Law and Procedure - Possession of property recently stolen - Retaining possible - Inference of guilt to be drawn.
Criminal Law and Procedure - Receiving and retaining stolen property - Distinction between.

Headnote

The application was found in possession of a car two days after it was stolen. The correct car number was etched on its windows and appeared on the licence disc but the vehicle carried a false number plate. When the applicant was apprehended he produced a blue book which bore a false name of the purported owner. At his trial he said he was in possession of the car as a driver of his employer who had asked him to drive it. In an earlier explanation to the police he said he had borrowed the car from the person he said in evidence was his employer. The trial magistrate found that as a prudent driver the applicant must have noticed the suspicious features surrounding the car and, that coupled with recent possession and that the applicant's explanation was not true, convicted him.

In the Supreme Court he argued that the telling of lies does not necessarily indicate guilt and the magistrate's finding that the applicant did not obtain possession from another person should be rejected.

Held:

(i) The inference of guilt based on recent possession, particularly where no explanation is offered which might reasonably be true, rests on the absence of any reasonable likelihood that the goods might have changed hands in the meantime and the consequent high degree of probability that the person in recent possession himself obtained them and committed the offence. Where suspicious features surround the case that indicate that the applicant cannot reasonably claim to have been in innocent possession, the question remains whether the applicant, not being in innocent possession, was the thief or a guilty receiver or retainer.

(ii) The distinction is that a receiver receives with guilty knowledge at the time of receipt while the offence of retaining involves guilty knowledge of theft but acquired after the receipt of the property.

Cases referred to:

(1) Kape v The People (1977) Z.R. 192
(2) Yotam Manda v The People (1988-89) Z.R. 129
(3) Solomon v R. (1957) R & N 600
(4) R. v Titus Chimweleh 1 H.R.L.R. 53

For the applicant: M. Chitabo, Chitabo Chiinga and Company.

For the respondent: K. Lwali, State Advocate.

Judgment

NGULUBE, D.C.J.: delivered the judgment of the Court.

The applicant was sentenced to undergo three years imprisonment with

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hard labour for theft of a motor vehicle. The particulars of the offence were to the effect that he and another, on 6th March,1986, at Kitwe, stole the complainant's Datsun Bluebird, registration No. AAF 2945. The facts not in dispute were that the car was stolen on the said 6th March,1986, after 17:00 hours between 20:00 to 22:00 hours. Two days later on 8th March, the applicant was apprehended in Mwinilunga where he was in possession of this car and was looking for pineapples and goats. According to the applicant himself, he had received possession of this car in Chingola from one Mbavu on 7th March,1986, the very next day after the theft, and he had driven overnight to Mwinilunga, having been sent to go and buy some goats by Mbavu whose car he thought it was. It was not in dispute that the correct car number was etched on the windows and appeared on the licence disc while the number plates then on the car read AAF 4265, which was a false number. When the police asked the applicant to produce a blue book he produced a forged one which bore the names of Mbavu, the false registration number and false engine and chassis numbers which closely resembled those on the stolen car. There was evidence from the Central Motor Registry which showed that the false registration numbers, and blue book related to a Toyota Vannette belonging to Messrs Data Cars Limited of Lusaka.

The applicant's explanation in court was that he came to be in possession because Mbavu employed him to drive this stolen car to Mwinilunga to buy goats. Evidence from the prosecution showed that he had informed PW2, an acquaintance to whom the applicant had offered a lift at Mwinilunga, that the car belonged to the elder brother of one of the other passengers in the vehicle. The explanation given to the police, especially to PW3, who apprehended him, was that he had just borrowed the car from Mbavu. There was evidence from PW5 that the applicant led the police to Chingola to look for Mbavu who was not found. The learned trial magistrate found that, because the false blue book showed that Mbavu resided in Lusaka, he could not have been resident in Chingola where the police failed to trace him and was therefore a non-existent person. The Court further held that a prudent driver must have noticed the various suspicious features surrounding the car and the blue book to which we have already referred. From all this, coupled with the very recent possession of this stolen car and the finding that the explanation advanced by the applicant was not true, the learned trial magistrate concluded that the applicant was guilty of the theft charged.

On behalf of the applicant Mr *Chitabo* argued that guilt of theft was not the only inference which it would be reasonable to draw from the facts of this case. he relied on a number of our previous decisions, including that in *Kape v The People* (1) which underlined the need for a trial court to discuss and consider other possible inferences and which also affirmed the principle that the telling of lies by an accused person does not necessarily indicate guilt. Mr *Chitabo* pointed out that the applicant consistently explained that it was not his car but that it belonged to Mbavu. He argued that the reasons given by the learned trial magistrate for finding that Mbavu did not exist should be rejected and that the applicant found to have been in innocent possession. Mr *Lwaili* countered

these submissions by arguing that the suspicious features hereinbefore set out all indicated

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that the applicant could not have been in innocent possession and that he was properly convicted of the theft.

We have given anxious consideration to all the arguments in this case where the very recent possession of the stolen car by the applicant occupies a central position, there being little else to connect the applicant with the offence. We affirm the principle that where a finding of guilt is dependent upon the drawing of an inference from the possession of recently stolen property, the inference will not be drawn unless it is the only one reasonably open on the facts of the particular case. In this regard, any explanation offered by the accused must be considered and where one is offered, or that which is offered turns out to be a lie or one which could not reasonably be true, the court is still obliged to consider what other inferences, if any, can reasonably be drawn, taking care that the court does not in the process indulge in insupportable speculation. If the facts would justify the drawing of two or more equally reasonable inferences, it is customary in a criminal case to adopt that which is more favourable or less disadvantageous to the accused: see *Yotam Manda v The Attorney-General* (2). Of course, there must be something in the facts themselves to support the alternative inferences if they are to be reasonably held to be available and this has been the case in a number of cases where the facts were consistent with either an inference of guilt on a major charge or guilt on a lesser charge or even complete innocence. By the same token, guilt will be inferred if there are in fact features or circumstances in a case which rule out those other possible explanations for the recent possession. The inference of guilt based on recent possession, particularly where no explanation is offered which might reasonably be true, rests, we believe on the absence of any reasonable likelihood that the goods might have changed hands in the meantime and the consequent high degree of probability that the person in recent possession himself obtained them and committed the offence during which they were criminally obtained. In this case, there was indeed very recent possession; but the applicant gave an explanation; some reasons for the very rejection of which by the learned trial magistrate were patently defective, such as the argument that the owner of a car registered in one town cannot thereafter reside in another. There were, however, the suspicious features surrounding the car and the false blue book used by the applicant which must be considered and which to us indicate that the applicant cannot reasonably claim to have been in innocent possession when there were glaring discrepancies which would have deterred an innocent person from driving this stolen car. The question which remains, however, is whether the applicant, not being in innocent possession, was therefore a guilty receiver or retainer.

On the facts of this case and having regard to the explanation which the applicant consistently advanced, even to the civilian PW2, and applying the principles hereinbefore discussed, it is apparent that guilt of theft was not the only inference which could be drawn. The circumstances, however, including the applicant's own account and the suspicious features already referred to, established guilty possession and the choice is between receiving or retaining stolen property, contrary to section 3(1) of the Penal Code, both of which are offences minor to that of theft of a motor vehicle. We have had occasion to consider the remarks of Somerhough J,

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in *Solomon v R* (3) which approved the dicta in *R. v Titus Chiweleh* (4) and which cases discussed the distinction between the offences of receiving and retaining under the equivalent section of the old edition of the Penal Code. Basically, the distinction is that a receiver receives with guilty knowledge at the time of receipt while the offence of retaining involves guilty knowledge of theft, but acquired after the receipt of the property. Furthermore, in the absence of misappropriation or conversion of the property to his own use, the guilty possessor is a retainer rather than a receiver of the stolen property. The facts of the present case amply justify a conviction for retaining. In sum, we set aside the conviction for theft of a motor vehicle and the sentence imposed in respect thereof. In its place, we substitute a conviction for retaining stolen property contrary to section 318(1) of the Penal Code, the particulars of which will relate to the applicant's guilty retention of the stolen car. The conviction which we have substituted attracts a maximum of seven years imprisonment with hard labour. In the circumstances of this case we impose a sentence of three years imprisonment with hard labour and direct that the applicant, who has been on bail, does not serve the balance of this sentence, after taking into account the portion of the earlier similar sentence already served. To the extent that we have merely substituted the conviction, the application is unsuccessful and it is refused.

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