

ROMEO TAPFUMA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI AND MAKONESE JJ
BULAWAYO 4 JUNE 2018 AND 7 JUNE 2018

Criminal Appeal

E Mandipa for the appellant
W Mabaudhi for the respondent

MATHONSI J: The accused was convicted by a magistrate at Gweru on 11 October 2016 and sentenced in count 1, to 8 months imprisonment of which 4 months imprisonment was suspended for 5 years on condition of future good behaviour. A further 4 months was suspended on condition he completed 140 hours of community service. In count 2 he was sentenced to 4 months imprisonment wholly suspended on condition of future good behaviour.

He appealed against both conviction and sentence arguing that the state had failed to prove the commission of the offence beyond a reasonable doubt especially as his defence had not been rebutted. In fact his defence had been that he had been hired by Emmanuel Masimba, a security guard employed within the same area, to ferry his groceries from the complainant's premises in town to Mkoba 17 for a fee of \$7-00. Therefore he had not unlawfully entered the premises but did so lawfully with the authority of Masimba. He had not stolen the bags containing jumbos, zapnax, maputi, nanax and jiggies. He had been in his Honda Fit motor vehicle which had just driven into the complainant's yard through an opening made by removing rivets from the fling gate and was still in his motor vehicle while two other people in his company loaded the bags into the motor vehicle, when they were intercepted.

The state case was that the appellant, who was jointly charged with Collen Mudzviti, had hatched a plan with Mudzviti and Emmanuel Masimba, who was not accounted for, to steal from

Charles Magumise's warehouse at No. 81 Market Street Gweru. The appellant then drove his motor vehicle with the other two in tow and entered into the premises after removing rivets from a locked gate to gain access. Masimba stood guard outside as the appellant and Mudzviti loaded Shangani bags stolen from there into the motor vehicle. They had succeeded in loading two bags with one or two more still a distance away, when the complainant arrived. Mudzviti and Masimba made good their escape while the appellant was not so lucky. He was apprehended by the complainant with the aid of members of the public, mainly security guards guarding neighbouring properties.

Unlawful entry consists in the accused person entering premises belonging to the complainant without the permission or authority of the occupier. Can it be said that Masimba had authority or permission to enter which he could transfer onto the appellant? Certainly not because Masimba was a thief who also entered unlawfully. Clearly therefore entry was unlawful.

Regarding theft, two Shangani bags were in the appellant's motor vehicle when he was arrested. The vehicle was his. He was therefore in possession of stolen property at the time and cannot run away from that. By virtue of the doctrine of recent possession the appellant was then required to render an explanation. In terms of section 123 of the Criminal Law Code [Chapter 9:23];

- “(1) Subject to subsection (2) where a person is found in possession of property that has recently been stolen and the circumstances of the person's possession are such that he or she may reasonably be expected to give an explanation for his or her possession, a court may infer that the person is guilty of either theft of the property or stock theft, or of receiving it knowing it to have been stolen whichever crime is more appropriate on the evidence, if the person—
- (a) cannot explain his or her possession; or
 - (b) gives an explanation of his or her possession which is false or unreasonable.
- (2) A court shall not draw the inference referred to in subsection (1) unless the circumstances of the person's possession of the property are such that, in the absence of an explanation from him or her, the only reasonable inference is that he or she is guilty of theft, stock theft or receiving stolen property knowing it to have been stolen, as the case may be.”

I have said that possession placed an onus on the appellant to explain his possession. We therefore have to examine his story closely. According to him, he met with Masimba and Mudzviti by the pay toilet next to OK Supermarket. He was introduced to Masimba as a person who desired to hire this vehicle to ferry groceries to Mkoba 17. He charged him \$7-00 but still proceeded to Masimba's workplace in the company of Mudzviti as well. This was at night. Upon arrival at the place the gate was wide open and three shangani bags had been placed at an open area about 4 metres from the road.

The other two disembarked and started loading the bags with him conveniently busy on whatsapp. The complainant arrived and a commotion ensued which attracted his attention. The other two fled and he remained to face the music. In my view that explanation is extremely unreasonable, it is in fact false. How does it happen that bags capable of being stolen can be placed in the open by the road side unguarded at night? How is it possible that a security guard would have three or four bags of groceries to be transported from his work place in the middle of the night? The contents of the bags are not even groceries in the strict sense but maputi, nanax etc. Why would a guard acting lawfully remove hinges from a gate to gain access?

Even if the appellant had not been the actual perpetrator, his involvement qualifies him as an accomplice as defined in section 195 of the Criminal Law Code, namely "rendering to the actual perpetrator any form of assistance which enables, assists or encourages the actual perpetrator to commit the crime." In terms of section 197 (1) an accomplices is guilty of the same crime as that committed by the actual perpetrator. That therefore resolves the matter completely. The appeal is without merit.

Mr *Mandipa* for the appellant withdrew the appeal against sentence from the bar. We shall therefore not be detained further by it.

Accordingly the appeal is dismissed.

Makonese J agrees.....