THE STATE
versus
NORMAN GAVIYAYA

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 11 September 2008

Criminal Review

CHITAKUNYE J: The accused was charged with the crime of being found in possession of property reasonably suspected to have been stolen as defined by section 125(a) of The Criminal Law (Codification and Reform) Act, [*Cap 9:23*].

This section is a re-enactment of s 12(2) (b) of the Miscellaneous Offences Act [*Cap 9:15*].

He was convicted on his own plea of guilty and sentenced to $10 000/ 2 months imprisonment. In addition 30 days imprisonment wholly suspended for 5 years on conditions of good behavior.

My main concern is on the appropriateness of the conviction.

The pertinent part of the state outline reads as follows:-

"3. On 23 day of September 2006 and at about 1800 hours, police detectives were at Valley section, Glendale on general patrol with a civilian vehicle when they were approached by the unsuspecting accused person.

4. On approaching the detectives, the accused who misjudged the Police as newly resettled farmers, told the police that he was selling some bearings.

5. So the police were shown five bearings sizes 3 x 30209; 1 x 29029 and 1 x uc205 to which they pretended as though they wanted to buy the bearings and thus told the accused to enter into their vehicle and hence drove straight to the police station leading to the accused's subsequent arrest.

6. On being interviewed, the accused failed to give a satisfactory account for the bearings thereby giving the police a rise to a reasonable suspicion that the Bearings were stolen.

7. The total value of the bearings as per the quotation obtained from Valley Graders, Bindura is $43 000-00 Zimbabwean currency and all was recovered."

The essential elements canvassed comprised the following:-

"Q. Do you admit that on 23 September 2006 and at Valley Section you were found in possession of 3 size 30209 3 x 30209) bearings?

A. Yes

Q. And that upon being asked to account for the bearings you could not tell where you found the bearings from?

A. Yes

Q. Any lawful right to those bearings?

A. No."

It was upon these facts and his answers to these essential elements that the accused was convicted. As can be noted the facts did not contain any explanation of how accused acquired the bearings and the questions posed did not enlist any explanation from the accused as to how he came to possess the bearings or even what explanation he gave to the police. The accused was nevertheless convicted as charged.

It was only in mitigation that the accused said something regarding his possession of the bearings. His explanation was that:-

"I was given the bearings by a person whom I do not know."

Section 125 of the Criminal Law (Codification and Reform) Act sates that:-

If any person-

a) is or has been in possession of property capable of being stolen and the circumstances of his or her possession are such as to give rise, either at the time of his or her possession or at any time thereafter, to a reasonable suspicion that when he or she came into possession of the property it was stolen: and

b) is unable at any time to give a satisfactory explanation for his or her possession of the property:

c) The person shall be guilty of possessing property reasonably suspected of being stolen…"

The essential elements of the offence in question may be stated as follows:

1. Possession of property capable of being stolen.

2. Circumstances of his or her possession are such as to give rise either at the time of his or her possession or at any time thereafter.

3. A reasonable suspicion that when he or she came into possession of that property it was stolen.

4. Unable at any time to give a satisfactory explanation for his or her possession of the property.

The elements of possession and failure to give a satisfactory account (i.e. 1 and 4) are for the accused as these are within the accused's knowledge. He must have been in possession of

the property at some time and he must then after being called upon to account for his or her possession fail to give a satisfactory explanation for his or her possession. It is for him to admit possession and to then explain such possession.

However the elements of circumstances which give rise to the suspicion that the property was stolen must be as perceived by and considered by the person calling upon him or her to account. Thus if it is a police officer, there must be something that the police officer saw and considered in the accused's possession or manner of possession for him to suspect that the property was stolen. Such is within that officer's knowledge and the accused cannot answer for him. Equally the element of reasonable suspicion is within the officer to explain how it came about. These are elements that are not within the accused's knowledge and so any admission of these elements by the accused would not be of much value.

Such elements are in the class of elements noted by DUMBUTSHENA CJ in *S v Dube* and another 1988(2) ZLR 385 when he said that:-

> "Not every fact should be regarded as proved simply because it is admitted. Thus an admission of being in a prohibited area should not be blindly accepted. The court should require proof that the area was indeed prohibited area. *S v Deka and Another* SC 199/88. The same is true of an admission of possession. The court must be careful to establish what it is that the accused is admitting, because possession is a difficult concept."

In *casu*, the circumstances giving rise to a suspicion were observed and considered by the police officers and not the accused himself. It was thus imperative for the officer to testify on those circumstances that gave rise in him or her that the bearings were stolen.

In *State v Chiwondo* 1999 (1) ZLR 407 (H) at page 414-15 CHATIKOBO J had this to say in such a case- "it would be absurd to ask an offender in plea proceedings if he admits that there was a reasonable suspicion that the goods found in his possession had been stolen. It is not the accused who suspects himself. The suspicion is formed by a third person, usually a police officer. It is such person who harbours the suspicion. He it is who assesses the circumstances under which he finds the accused in order to determine if the suspicion harboured by him is reasonable." It is therefore for this third party or officer to testify on those circumstances he observed and considered in arriving at a suspicion that the property was stolen.

The officer must testify on those circumstances and show that his suspicion was reasonable and not fanciful. If the officer fails to show the circumstances that gave rise to the

suspicion, the case falls on that. If on the other hand he shows that the suspicion was reasonable the next step is to consider the accused's explanation.

In *State v Chiwondo supra,* at page 412 CHINHENGO J noted that-

> "Even where the accused person enters a plea of guilty the presiding magistrate should still receive evidence on the circumstances giving rise to a reasonable suspicion that the goods were stolen. The result would be that, if the person giving such evidence fails to satisfy the court that the circumstances giving rise to a reasonable suspicion existed, then the state case would have crumbled on the first hurdle. In Ganyu's case *supra*, a caution was given that the provisions of s. 12(2) must be applied with exceptional care if the manifest possibility of injustice is to be avoided (at 106F) and it was appreciated that the accused may prejudice himself if he fails to give evidence under oath, more particularly where he has given no account at all, or no acceptable account of his possession prior to trial."

In any case where no evidence has been given court is never in a position to satisfy itself that the explanation is not satisfactory. It is court that has to be satisfied that the accused has failed to give a satisfactory account of his possession and that the suspicion alleged is therefore reasonable in the circumstances.

In *casu* it was only in mitigation that the accused said that he was given the bearings by a person whom he did not know. This explanation was given to court in mitigation and was thus not part of the reasons for convicting. In as far as conviction is concerned all that the trial magistrate was told was that the accused failed to give a satisfactory account. Such a statement was highly unsatisfactory for court to have been satisfied that the accused was guilty of the offence as charged. If upon being asked the accused gave an explanation of his possession it was upon the police officer or arresting officer to confirm the explanation given and to then explain why he or she found such an explanation unsatisfactory. The accused himself would in all honest not know why the police officer deemed his explanation unsatisfactory or why he suspected that the bearings were stolen in the first place. Such knowledge being in the domain of the police officer it was for that officer to give evidence in that regard. In the absence of such evidence o f the circumstances that gave rise to the suspicion and evidence as to why whatever explanation accused gave was not satisfactory to the police officer the conviction cannot stand. As aptly put by CHATIKOBO J, in *State v Chiwondo supra,* at p 415 (C-D),

> "No court can convict an accused person under the section purely on the basis that the accused has not put in issue the question of his guilty. A conviction can properly be based on an admission of facts which are known to the accused. Where facts are not known to the accused evidence must be led to establish them. The fact that the accused may not be in a position to controvert such evidence is not a reason for not putting such evidence before the court."

Further on the judge said that; -

> "a court cannot make a finding on the satisfactoriness of an explanation given by the accused in court in the absence of evidence from the person who formed the suspicion. The accused is never in a position to apprise the court on the nature of that suspicion."

In the circumstances of this case there was absolutely nothing to satisfy court that the accused was guilty of the offence.

Accordingly the conviction was not proper and cannot stand. The conviction is hereby quashed and the sentence is set aside.

The matter is referred to the magistrate court for a trial *de novo.*

CHITAKUNYE J:……

GUVAVA J: agrees……