

THE STATE
versus
MARTIN MOYO

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 7 JULY 2016

Criminal Review

MOYO J: The accused person in this matter was convicted of the offence of possessing property reasonably suspected of being stolen.

I believe whilst no statute is cited giving impression that this is a common law offence, a proper charge should have been that of contravention section 125 of the Criminal Law Codification and Reform Act [Chapter 9:23] which provides as follows:

“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 the time of his or her possession or at any time thereafter, to a reasonable suspicion that when he or she come 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, the person shall be guilty of possessing property reasonably suspected of being stolen----.”

The facts of this matter are that on 24 March 2016 and at around 11:00 hours, Constable Chazireni and Assistant Inspector Majawa got a tip off from an anonymous person that Michael Simon was in possession of a sony laptop suspected to be stolen.

The two officers went to arrest Michael Simon and recovered the sony laptop. He then led them to Martin Moyo (the accused) whom he alleged had pawned the laptop for \$10-00. The accused person was arrested and failed to account for ownership of the laptop and alleged that he had stolen it from another unknown traveller from South Africa at Macs Garage in Bulawayo.

The accused person in his defence outline told the court that:

“I returned from South Africa in 2013 and I bought the laptop at the border. I went to Michael and asked for \$10-00 and I gave him the laptop as security.”

The first state witness Richard Madawu told the court that upon receiving a tip off from an unidentified person that there was someone selling a laptop for \$6. He then questioned this person. He asked the person where he had gotten the laptop from, and the person said he got it from the accused person when they met in town. The accused person was then arrested. The accused person was not asked anything by this witness. Neither was Michael asked the circumstances through which he got the laptop from the accused person.

These were the material aspects of first witness’s evidence. The next witness was the investigating officer. He received the docket and asked the accused person where he had gotten the laptop from. He told the court that the accused person said he had found the laptop amongst his things when he came back from South Africa. He told the court that the accused said he got the laptop from Macs Garage.

In cross- examining this witness the accused said he had told him that he bought the laptop on his way from South Africa. The witness answered No.

Under the accused person’s own cross examination he said he bought the laptop for R1200. The trial magistrate in her judgment places an onus on the accused person to prove his innocence.

He infact goes on to say that a failure by Michael Simon to mention certain things to the police proves the accused person’s guilt. Michael Simon was never called to testify in court, by the state which had a case to prove against the accused person. The accused person told the court that he bought the laptop for R1200 at the border on his way from South Africa. It cannot be said in my view that the accused person failed to give a reasonable explanation for his possession of the laptop. He said that he bought it on his way from the Republic of South Africa was not proven that it was false. An accused person cannot be disbelieved simply because he is an accused. The court should justify its decision to refute the accused person’s explanation and it cannot be a justification that simply because the accused had used the laptop for a debt of \$10 then it was stolen. What if the accused just had that kind of asset which was acceptable to the lender?

Again the evidence of Michael Simon of selling for \$6 as given by the police officers is of no value since Michael Simon was never called to court by the state, to prove its case against the accused person. The accused person is certainly not responsible for Michael Simon's actions, and no imputations of guilt can be made as against the accused person because of Michael Simon's conduct.

An accused person's defence can only be rejected if it is improbable, unreasonable and not possibly true.

In the case of *S v Makanyanga* 1996 (2) ZLR 231 the court summed it up as follows:

"A conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of the criminal complaint, but the fact that such credence is given to the testimony of the complaint does not mean that conviction must necessarily ensure. Similarly, the mere failure of the accused to win the faith of the bench does not disqualify him from an acquittal. Proof beyond reasonable doubt demands more than that a complainant be believed and an accused disbelieved. It demands that a defence succeeds whenever it appears reasonably possible that it might be true."

The accused person in this case says he bought the laptop for R1200 at the border on his way from South Africa. The state has not adduced any evidence to rebut that. It cannot be held that simply because he used it as security for a debt of \$10, then his version is false. He could use it for that amount of a debt depending on the circumstances. Nowhere is it shown in the court record that it could not have been possible to do so and the reasons. The learned magistrate misdirected himself when he had that the accused person had sold the laptop for \$10. There is nowhere in the court record where it is alleged that the accused person sold the laptop for \$10 but that he had used it as security for a \$10 debt. It does not necessarily follow that you only given as security on item equivalent in value to the sum loaned as you can give as securing on item of higher value for a lesser amount.

Instead of calling Michael Simon to establish what happened, the court seeks to blame the accused person for the inadequacy of the state's version in so far as Michael Simon's statements are concerned. It was for the state to prove the issues surrounding Michael Simon's version of events by bringing him to court, not for the court to balance the accused person's version as against the allegations stated by Michael Simon to the police as that was not evidence

before it. A court cannot cast any onus whatsoever on an accused person to prove his defence. Refer to the case of *Machakaire v S* SC 30/92.

The conviction can thus not be sustained on the facts as contained in the court record.

I accordingly make the following order:

Both conviction and sentence are set aside. The magistrate’s decision is substituted with the following:

- 1) The accused person is found not guilty and is acquitted.
- 2) The laptop that was forfeited to the state shall be returned to the accused person immediately.

Moyo J.....