

THE STATE
versus
MAXWELL DZINGAYI

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 19 February 2015

Review Judgments

MATANDA-MOYO J: The accused person was arraigned before the magistrates court on a charge of possessing property reasonably suspected of being stolen in contravention of s 125 (a) (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was convicted of the charge and sentenced to a \$200-00 fine and/or alternatively two months imprisonment. In addition six months imprisonment was wholly suspended for three years on condition the accused person does not within that period commit any offence involving theft for which upon conviction he will be sentenced to imprisonment without the option of a fine.

The accused person pleaded guilty to possessing property reasonably believed to be stolen. The magistrate accepted the plea in terms of s 271 (2) (b) of the Criminal Procedure and Evidence Act and on putting elements of the offence to the accused he posed the following questions;

“Q. Admit that on 8 August 2014 at Matangira Complex Bindura you had in your possession the alleged Samsung Dual Sim cell phone.

A Yes

Q Where had you got it from

A I stole it from Musiiwa night club

Q so you took it without permission from the owner

A Yes

Q What did you want to do with this cell phone

A To use it forever

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The magistrate proceeded to find the accused guilty as charged. The above facts do not disclose an offence of possessing property believed to be stolen but theft. The conviction cannot therefore stand.

The magistrate explained that he made an error of omission. According to him he convicted the accused on a charge of theft. In his mind that is what he said he did. He claims theft is a competent verdict of the charge of possessing property believed to have been stolen. The correct position is that possessing property believed to have been stolen is a competent verdict of a theft charge and not vice versa. Where a person is charged with a particular offence, he or she could still be convicted on a competent verdict to that offence where the evidence is sufficient to prove the accused’s guilt to the competent verdict. See *Doma v S* (2013) ZAGP JHC 116.

The meaning of competent verdict put in simple term is compromised verdict. It can only be a lesser charge than the one preferred against the accused person. See *S v Masuku* HB 2/04. In this instance the magistrate purports to have convicted the accused on the charge of theft. As I have said above, this could never be interpreted as a competent verdict and the conviction cannot be allowed to stand.

The magistrate was supposed to stop trial and refer the matter to Prosecutor-General for directions if he felt he needed to convict on theft. However, overall I see no prejudice suffered by the accused to warrant my intervention at this stage.

Accordingly I withhold my certificate.