STATE
versus
CLACSON MOYO

HIGH COURT OF ZIMBABWE
CHIGUMBA & TAGU JJ
HARARE, 17 June 2015

Criminal Review

CHIGUMBA J: It is incompetent for a court to accept a guilty plea from an accused person who is charged with an offence that involves the formulation of reasonable suspicion on the part of the arresting officer. The accused's plea of guilt alone is insufficient to support admissions in respect of matters of which the accused has no knowledge. Evidence must be led to show what was in the mind of the person who had a reasonable suspicion (e.g. on a charge of being found in possession of goods in regards to which there is a reasonable suspicion that they were stolen) It is an analysis of the surrounding circumstances which must be scrutinized and held up to a certain standard, the standard of the reasonable man. This is part of the reasoning behind the prohibition against accepting a plea of guilt from an accused person who will have been charged with contravening what is now s 125 of the CODE. The state is required to prove the element of reasonableness beyond a reasonable doubt. It may not do so by accepting admissions from the accused about the state of mind of the arresting officer.

The accused was charged with contravening section 124(1) (a) of the Criminal Law (Codification and Reform) Act (the CODE), [*Chapter 9:23*], 'receiving property reasonably suspected of being stolen'. It was alleged that on 1 January 2015, at 1642 Majange Street Masvingo, he took possession of gold ore knowing that it had been stolen or realizing that there was a real risk or possibility that it had been stolen. According to the outline of the state case the accused received the gold ore from three suspects who were on the run for processing. The police received a tip off and on 9 January 2015 they confronted the accused person, who failed to

produce a prospector's licence or a permit authorizing him to prospect for gold. The police recovered 30 kilogrammes of pounded gold ore valued at USD$183-31.

The accused person pleaded guilty to the charge and confirmed the facts as read and understood. He admitted to taking possession of 30kilogrammes of gold ore without a licence or a permit. He admitted that he knew that the gold ore was stolen. During mitigation the accused submitted that he was a first offender aged 45 years who was married, had two children, self employed realising USD$30-00 per week, had no savings, no cash on hand, but had four beasts as assets of value. He was sentenced to pay a fine of USD$200-00 or alternatively to serve 90 days. He was given time to pay up to 28 February 2015.

The scrutinizing regional magistrate raised a query as to whether the accused was correctly charged and convicted under s124 (1) (a) of the CODE, or whether he ought to have been charged under s 125. He was of the view that the trial magistrate was confused about the charge. The trial magistrate conceded that the accused person was incorrectly charged under s 124 and conceded that he ought to have properly been charged under s 125 of the CODE.

Sections 124 and 125 of the CODE provide that:

"*Division C: Receiving or possessing stolen property*
124 Receiving stolen property knowing it to have been stolen
(1) Any person who **takes possession** of stolen property□
(*a*) **knowing** that it has been stolen; or
(*b*) realising that there is a real risk or possibility that it has been stolen;
shall be guilty of receiving stolen property knowing it to have been stolen…"

125 Possessing property reasonably suspected of being stolen
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; the person shall be guilty of possessing property reasonably suspected of being stolen, and liable to…"(My underlining for emphasis)

The essential elements of s 124 are receiving stolen property knowing it to have been stolen or realizing that it was most likely stolen. The essential elements of s 125 are being in possession of stolen property in circumstances which give rise to a reasonable suspicion that the property was stolen. The difference between s 124 and s 124 is that in s 124, the accused knows or must have known that the property was stolen. Where the accused was ignorant or pleads

ignorance as to the status of the property, and says that he did not know that the property was stolen, the state must prove, beyond a reasonable doubt, that the circumstances in which the accused person was found in possession of the said property are such as to give rise to a reasonable suspicion that the property was stolen.

The state may itself not have sufficient information as to the title holder of the property, i.e. its duly registered owner. To borrow from the facts of this case, if the accused had not confessed that he got the gold from three men on the run and supplied their names, the state would have had to prove beyond a reasonable doubt that being found in possession of 30 kilometers of pounded gold ore, without a permit or a licence, gave rise to a reasonable suspicion that the ore was stolen. There is no doubt that section 124 is the more serious offence, when regard is had to the prescribed penalties. A level fourteen fine and or twenty five years imprisonment is incomparable to a level ten fine and five years imprisonment.

It is trite that reasonable suspicion which is formulated in the mind of the arresting officer cannot be pleaded to by the accused person. See ***State v Chiwondo*** [1]**,** where it was held that;

> "…the court cannot find an accused guilty of contravening section 12 (2) of the Miscellaneous Offences Act [cap9;12] without evidence being led from the person who found the accused in possession about what led him to believe that the goods were stolen. The basis upon which the finder formed his suspicion is not a fact known to the accused and is not a fact to which he can admit".

It was held further, that:

> "…the procedure under section 271 (1) (b) of the Criminal Procedure and Evidence act requires that the accused makes admissions. The accused can only admit to facts known to him. It is absurd in plea proceedings to ask the accused if he admits that the person finding him in possession of the goods had a reasonable suspicion that the goods were stolen. The accused cannot know what is in the mind of the person who found him in possession. The person who found him in possession should testify about the basis upon which he formed his suspicion that the goods were stolen. It is on the basis of this testimony that the court can evaluate whether the suspicion was reasonable or fanciful".

In ***S Chitsinde***[2]**,** the Supreme court stated that there must be evidence of circumstances giving rise to a reasonable suspicion that the goods were stolen, and that, unless such evidence

[1] 1999 (1) ZLR 407

[2] 1982 (2) ZLR 91 (S)

exists, the obligation to give a reasonable explanation of his possession does not arise for the accused person. See also ***S v Ganyu***[3]**.** In the case of ***Benjamin Paradza* v *the Minister of justice Legal & Parliamentary Affairs***[4]**,** the Supreme court said that:

> "It is clear from s 25(1)(b) of the Criminal Procedure and Evidence Act that the officer effecting the arrest must have reasonable grounds for suspecting that the person he intends to arrest has committed the offence in question. As GUBBAY CJ said in *Muzonda v Minister of Home Affairs & Anor* 1993 (1) ZLR 92 (S) at 96 C-D:
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> > '… he must satisfy himself that reasonable grounds for suspicion of guilt do exist. That requirement is very limited. He is not called upon before acting to have anything like a *prima facie* case for conviction. Certainty as to the truth is not involved, for otherwise it ceases to be suspicion and becomes fact. Suspicion, by definition, is a state of conjecture or surmise whereof proof is lacking …'".

The question that we must ask ourselves is therefore this; what do the facts of this case, coupled with the admissions made by the accused on his plea of guilt, allow us to surmise about the circumstances in which 30 kilogrammes of gold was recovered from the accused person. We do not need proof, or *prima facie* evidence. We must be in a state of conjecture. After reading the above-stated cases, I am persuaded that all that the trial magistrate did wrong in this matter was to be careless in checking the wording of the offence that the accused was charged with, on the charge sheet, and on the review cover. The scrutinizing regional magistrate took issue with the caption 'receiving stolen property reasonably suspected of being stolen'. As correctly pointed out no such offence exists. Section 124 is captioned as 'receiving stolen property knowing it to have been stolen'. Section 125 is captioned as 'possessing property reasonably suspected of being stolen'. In my view, in s 124 it is necessary to prove receipt of the stolen property, and to prove that the accused knew, or ought to have known that the property was stolen. Proof of receipt is not required for purposes of s 125. The accused has to be found in 'possession'. He may not have received the property but he must be in possession of it at the time that he is 'found'. The property must be reasonably suspected of being stolen which in my view, in light of the definition of 'suspicion' set out above, means that no one knows for sure whether the property

[3] 1977 (2) ZLR 97 @ 104G

[4] SC46-03

was stolen but it can be inferred from the surrounding circumstances that it is more likely than not that the property was stolen. The facts of each case will determine which section the accused is charged under.

From the facts of this case, the accused told the police that he had received the gold ore knowing that it was stolen. He named the three persons who had given him the gold. He confirmed that he did not have a permit or a licence. The accused was correctly charged with contravening s 124 of the CODE. The charge sheet shows that he was charged with contravening s 124. The essential elements of contravening s 124 were put to him and admitted by him. The sentence imposed on the accused person was competent. Trial magistrates are exhorted to carefully cross check the wording of the offences that accused persons are charged with, in order to avoid a situation where the accused is correctly charged with an offence but the wording of the charge is mixed up with the wording of a corresponding or alternate charge.

We find that there was substantial compliance with the elements of the offence and the accused was correctly charged and convicted and sentenced. May the trial magistrate be guided in future in relation to the correct wording of each and every charge that appears before him, whether on a plea of guilty or not guilty. It is the responsibility of the presiding officer to ensure that charges are supported by the facts, and correctly formulated. For the reasons stated above, the proceedings of the court a quo are certified as being in accordance with real and substantial justice.

CHIGUMBA J……

TAGU J agrees……