HB 183/18
HCAR 966/18
CRB BYO P1369A-B/18

THE STATE

Versus

NOMORE HONDO

And

DANIEL MOYO

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 5 JULY 2018

Criminal Review

MAKONESE J: The two accused persons appeared before a Provincial Magistrate at Tredgold facing allegations of contravening section 125 (a) of the Criminal Law Codification & Reform Act (Chapter 9:23); being found in possession of property reasonably suspected of being stolen. The accused persons tendered pleas of guilty. They were duly convicted and sentenced to 8 months and 5 months imprisonment respectively.

The scrutinizing Regional Magistrate raised a query with the court *a quo*, indicating that it was not proper for the learned magistrate to accept a guilty plea in cases involving receiving of stolen property, without receiving evidence on whether or not the accused had the requisite intention to commit the offence.

The brief facts of the matter as gleaned from the outline of the state case are as follows. On the 6th of May 2018 around 0130 hours and at corner George Silundika and 8th Avenue, Bulawayo, police officers from Bulawayo Central Crime Prevention Unit were on patrol. The police officers spotted the two accused persons who were walking along George Silundika Avenue, ladden with an assortment of goods. The police officers requested to search the accused persons. Accused one was found in possession of a Remington hair clipper, Remington hair cut video tape, 6 car modulators, a Huawei Y 220 cellphone, 2 auto lamp holders, 1 pair of reflectors

and tools, a bag, a timing belt, 27 spanners of different sizes, 13 screw drivers of different sizes, 3 pliers, a hammer and various other scrap materials suspected to be stolen. Accused two was in possession of empty 10 litre containers, yellow jerry can, pair of reflectors, 2 caps and other scrap materials. The two accused persons were asked to account for the property and they failed to give a satisfactory explanation of the source and origin of the property in their possession. The total value of the property in their possession was US$408. The accused persons were arrested and taken to court on allegations of being found in possession of property suspected of being stolen.

Section 125 (a) of the Criminal Codification and Reform Act is a re-enactment of section 12 (2) (b) of the Miscellaneous Offences Act (Chapter 9:15). The learned magistrate in the *court a quo* proceeded in terms of section 271 (2) (b) of the Criminal Procedure and Evidence Act (Chapter 9:07). Having read and explained the essential elements of the charge to the accused persons, both accused indicated that they understood them. The magistrate then put the following questions to accused one;

"Q Correct on 6 May 2018 around 0130 hours you were at corner George Silundika Street and 8th Avenue, Bulawayo.

A Yes

Q Correct you were approached by police officers who were on patrol?
A Yes

Q Correct you were searched and found in possession of Remington clipper, Remington hair video tape, a Huwei cellphone Y 220, tool bag with 27 spanners of different sizes, 13 screw drivers, 3 pliers, a hammer and various scrap materials?

A Yes

Q Were did you get all the property?

A City hall, we picked the property

Q Correct your possession of the property raised a suspicion that you had stolen the property?
A Yes

Q Any defence to tender?

A None
Q Is your plea a genuine admission of the charge and facts and essential elements?

A Yes

Verdict Guilty as charged"

The same procedure was adopted by the trial magistrate in respect of the second accused. He was also convinced on his own plea of guilty. It was upon these facts and answers solicited from the accused persons that the accused were convicted and sentenced. It is abundantly obvious that the explanation as to how the accused had come into possession of the property suspected of having been stolen was not enquired into. It was necessary to call the police who effected the arrest to lead evidence of the circumstances that gave rise to their suspicion that the goods were stolen. The accused persons told the police that they had "picked" the property at City Hall. There was a need to rebut this defence and to prove the essential elements of the offence. The essential elements relate to the reasonable suspicion that the property was stolen. The accused persons were nevertheless convicted as charged. In mitigation, accused one conceded that he had relevant previous convictions relating to unlawful entry and theft. The trial magistrate proceeded with the sentencing of the accused person without enquiring into whether the essential elements had been proved and established.

In matters relating to contravention of section 125 (a) of the Criminal Law Codification and Reform Act the following essential elements must be proved:

1. Possession of property capable of being stolen

2. Circumstances of his or her possession 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 that property it was stolen.

Proof of knowledge that property was stolen may be:

(a) Direct, e.g. testimony given by the thief which is corroborated; or
(b) Indirect, e.g. reliance upon a number of suspicious factors which may assist in proving intention such as:
    (i) the accused was found in possession at an unusual time and place;
    (ii) the accused was found in possession of such property in suspicious circumstances and was unable to give a satisfactory account of the possession.

See *A Guide to the Criminal Law* by G. Feltoe at page 125.

In this matter, it is the police officer who must have seen that something was amiss about the accused persons' possession of the property. Such is within the police officers' knowledge and the accused persons could not testify on behalf of the arresting detail. The accused persons had no knowledge of how the police arrived at the conclusion that there was a reasonable possibility that the goods were stolen. These are essential elements that are not within the accused's knowledge and therefore any admission of these elements by the accused would not be of much value. See *S* v *Gaviyaya* 2008 (2) ZLR 159 (H), where the learned judge had occasion to deal with a similar matter.

Such essential elements are in the class of elements noted by DUMBUTSHENA CJ in *S* v *Dube & Anor* 1988 (2) ZLR 385 (S) when he remarked at page 390A as follows:

"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 a prohibited area. See S v Deka & Anor S-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 *S* v *Chiwondo* 1999 (1) ZLR 407 (H) at page 415-15, CHATIKOBO J had this to say in a similar matter:

"it would be absurd to ask an offender in plea proceeding 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, normally a police officer. It is such a person harbours the suspicion. He is who assesses the circumstances under which he finds the accused in order to determine if the suspicion harboured by him is reasonable."

In the circumstances of this case, the accused told the arresting detail that they had picked the property in question at the City Hall. It was imperative for the trial court to conduct a short trial, put the police officer on the stand and ask him how and why he arrested the accused persons. The accused's defence would have been put to the test and the court would then have come up with an informed decision as to whether the accused persons had sufficiently explained their possession of the property.

In all the circumstances, there was no evidence to satisfy the court that the essential elements of the offence had been satisfied. The learned trial magistrate has conceded that it was not proper to accept the plea of guilty without proceeding to trial.

In the result, and accordingly, the conviction was not proper and cannot be allowed to stand. The conviction and sentence are hereby set aside.

The matter be and is hereby referred to the court a quo for a trial *de novo*.

Mabhikwa J ……. I agree