NOLLAN KAWADZA
versus
THE STATE

HIGH COURT OF ZIMBABWE
GARWE JP and UCHENA J
HARARE, 15 November 2005

Criminal Appeal

Mr *H. Simpson*, for the appellant
Mr *R. Tokwe*, for the respondent

UCHENA J: The appellant was convicted on one count of armed robbery by the regional court sitting at Harare. He had been charged with two counts of armed robbery of two motor vehicles. He was due to lack of evidence acquitted on the other count. He was sentenced to 10 years imprisonment of which one year was suspended on conditions of good behaviour and another 1½ years on conditions of restitution.

At the hearing of the appeal Mr *Tokwe* for the respondent conceded that the regional magistrate erred when he convicted the appellant of armed robbery when there was no evidence linking him to the robbery. Mr *Simpson* agreed with Mr *Tokwe* that the appellant should have been convicted of receiving the motor vehicle knowing it to have been stolen.

The complainant in the count for which the appellant was convicted only had 30 seconds in which he observed the robbers. Thereafter he was ordered not to look at his assailants and a gun was pointed at his head. In the 30 seconds he said he observed that the robber who approached his motor vehicle from the right was short, dark and stout. It is common cause that the appellant does not fit that description. The complainant said the robber who approached his motor vehicle from the left was tall and slim. Again the appellant does not fit that description.

It must be noted that the complainant did not have sufficient time to observe the robbers. His brief observation which was split between the robbers on either sides of his motor vehicle could not have founded the appellant's conviction even if the description he gave fitted the appellant.

On the contrary the complainant said he was not able to identify the appellant as one of the robbers.

In view of the above we were satisfied that the regional magistrate erred when he convicted the appellant of armed robbery in the absence of evidence identifying him as having been at the scene of the robbery. We therefore found that the concession made by Mr *Tokwe* was properly made.

Mr *Tokwe* in making the concession submitted that the applicant should be convicted on the competent verdict of receiving stolen property knowing it to have been stolen. He said this was to be premised on the appellant being in possession of the stolen motor vehicle the next morning after it had been robbed from the complainant after 10.00 p.m. the previous night. He further pointed out that the appellant's conduct after taking possession of the motor vehicle proves he knew it was stolen. He pointed to the following as proof of such knowledge.

(1) That the appellant used an illegal exit from Zimbabwe to Mozambique resulting in the motor vehicle being stuck in Mukumbura river.

(2) He gave Cst. Muchira incorrect information about his identity and that of the motor vehicle.

(a) He told Cst. Muchira that he was Victor Mujuru Chatibva.

(b) He showed him a driver's licence in the name of Victor Mujuru Chatibva.

(c) He gave an incorrect registration number and colour of the motor vehicle

This proves the appellant did not want to be linked to the motor vehicle he had driven from Harare to Mukumbura River. This can only be because he knew the motor vehicle had been stolen.

Mr *Simpson* for the appellant agreed with Mr *Tokwe* that the evidence proved that the appellant received the motor vehicle knowing it to have been stolen.

We were satisfied that the concessions made by counsel for both parties were properly made. We after hearing counsel's submissions on sentence and hearing the appellant's father's evidence in mitigation set aside the appellant's conviction on armed robbery and substituted it with one of receiving stolen property knowing it to have been stolen. We also set aside the regional magistrate's sentence of 10 years imprisonment with 1 year and 1½ years suspended on conditions of good behaviour and restitution and substituted it with one of 7 years imprisonment with 2 suspended on conditions of good behaviour. We gave our brief reasons on tapes and indicated that a detailed judgment would follow.

In his submissions against the appellant's conviction on armed robbery Mr *Simpson* submitted that the doctrine of recent possession does not apply to robbery. Mr *Tokwe* in his submissions submitted that he has not been able to find a case were it was applied to robbery but submitted that it has been used in housebreaking with intent to steal and theft cases.. This is an important point of law which this court must determine even though this case can be resolved without relying on the doctrine of recent possession.

In the case of *S v Parrow* 1973 (1) SA 603(A) referred to by Mr *Tokwe*, HOLMES JA at page 604 B-E said:-

> "I pause here to refer briefly to the so-called doctrine of recent possession of stolen property. In so far as here relevant, it usually takes this form. On proof of possession by the accused of recently stolen property, the court may (not must) convict him of theft in the absence of an innocent explanation which might be reasonably true. This is an epigrammatic way of saying that the court should think its way through the totality of the facts of each particular case and must acquit the accused unless it can infer, as the only reasonable inference that he stole the property. (Whether the further inference can be drawn that he broke into the premises in a charge such as the present one will depend on the circumstances). The onus of proof remains on the state throughout. Hence even if, after the closing of the cases for the State and the defence, it is inferentially probable that the accused stole the property, he must be acquitted unless the only reasonable inference is that he did so for the law demands proof beyond reasonable doubt."

I respectfully agree with the learned judge of appeal. The important aspects of HOLMES JA's decision in *S v Parrow supra* are:-

(1) The doctrine of recent possession is based on an inference being drawn that the possessor of recently stolen property stole the property.

(2) If he cannot give an innocent explanation of his possession and

(3) The inference that he stole the property is the only reasonable inference that can be drawn from such possession.

In other words recent possession can be used to found a conviction if the court after sifting through the whole evidence before it finds that the only reasonable inference which can be drawn from the recent possession is that the accused stole the property.

In the case of *S v Parrow* the doctrine was applied to a house breaking with intent to steal and theft case. In my view there is no reason why the doctrine cannot be used in any case of which theft is a component like robbery. It would be absurd for the court in a robbery case to be satisfied that if it was only dealing with theft it could have.drawn the inference that the accused stole the property but hesitate to find that since he stole the property he is the robber. There is in my view no reason for the hesitation. If the doctrine can be applied to house breaking with intent to steal and theft cases there is no reason why it can not be applied to robbery cases. The issue should simply be does the evidence of recent possession prove he is the thief. If it does and the stealing was during a robbery then he will have been proved to be the robber just as such evidence can be used to prove that the thief is the housebreaker.

In the case of *Black Samson v The Queen AD* 106/69 BEADLE CJ at page 2 of the cyclostyled judgment said:-

> "It appears from these cases that where fairly shortly after a housebreaking, the accused is found in possession of some of the articles which were stolen at the time and does not give an explanation that he received the stolen goods from a third party who may have stolen them, the court is perfectly justified in finding him guilty not only of housebreaking but also of the theft of the articles stolen at the time when the housebreaking occurred. <u>The reasoning</u>

> behind these cases is that where the evidence is sufficient to establish the fact that the accused stole a particular article from the complainant and if the theft of that particular article involved housebreaking, that evidence is sufficient to establish that the housebreaking which occurred at the time of the theft was committed by the accused....." (emphasis added)

In my view this also applies to a person who is found in recent possession of goods stolen during a robbery. If the only inference that can be drawn from the totality of the evidence is that he stole the goods then he can be convicted of the robbery of those goods and others robbed from the complainant at the same time.

On the question of sentence Mr *Tokwe* for the respondent having urged the court to substitute the conviction for robbery with that of receiving the stolen motor vehicle knowing it to have been stolen submitted that the appellant still deserved a custodial sentence. He submitted that there should be little difference between the sentence imposed on a motor vehicle thief and the receiver, as in both cases the victim is grounded. He submitted that the offence becomes serious and is more reprehensible if the motor vehicle is received with the intention of smuggling it out of the country for commercial gain.

He referred us to the cases of *Gabriel Manyika v S* SC 175-93, *Cephas Chimanga v S* SC 51-93 and *Chimbwanda v S* SC 110-93.

In the case of *Manyika supra* the appellant was convicted of receiving a stolen motor vehicle knowing it to have been stolen. He was found in possession of the motor vehicle in 1991 after it had been stolen in 1988. He bought the motor vehicle in circumstances which revealed that it could have been stolen. His sentence of 7 years, 2 suspended was reduced to 5 years imprisonment of which two years imprisonment was suspended on appropriate conditions. In the present case the appellant had the motor vehicle hours after the robbery. He immediately thereafter drove it to an illegal exit into Mozambique for gain. He said he was to be paid for driving it into Mozambique and handing it over to an Indian on behalf of Mike Zengeya.

In the case of *Chimanga supra* the appellant was convicted of theft of motor vehicle. He had surrendered it to the police saying he suspected it could have been stolen. Evidence proved he had dealt with the motor vehicle in a manner showing he knew it was stolen. On appeal his conviction of theft was set aside and substituted with one of receiving the motor vehicle knowing it to have been stolen. The sentence of 7 years, 2 suspended which had been imposed by the magistrate was not interfered with.

In *Chimbwanda's case* the appellant received a truck knowing it to have been stolen a sentence of 6 years imprisonment with 2½ years suspended was considered to be on the lenient side. He had acquired the vehicle in exchange for his Peugeot truck and twenty head of cattle and it had been re-registered in his name. He therefore had bought a stolen motor vehicle distinguishing the case from the appellant's case on the basis that the appellant received the motor vehicle for purposes of smuggling it out of the country.

Mr *Simpson* for the appellant in the Heads of argument dated 3 October 2005 suggested a sentence of 7 years imprisonment with 2 years suspended on conditions of good behaviour. In his supplementary heads dated 9th November 2005 he suggested a sentence of 7 years of which 4 years could be suspended.

The appellant's father gave evidence and told this court that his son's conduct in committing this offence was out of character. He told the court that his son was managing a family business before he was imprisoned and that he was a good and humble young man. He believes that the appellant may have been tempted into committing the offence.

The appellant is a first offender. He is 28 years old. He is married with two children aged 6 and 4 years. His parents are high blood pressure patients. He himself suffers from migraine headaches and since May 2004 when he was admitted into remand prison he suffers from swollen legs. He spent 10 months in remand prison prior to his being sentenced.

He has now been convicted of receiving a stolen motor vehicle knowing it to have been stolen.

The motor vehicle was fortuitously recovered. If it had not been stuck in Mukumbura river he would have smuggled it into Mozambique where he was to hand it over to an Indian man as instructed by his principal Mike Zengeya.

The motor vehicle was not damaged. This was obviously in the appellant and his principal's interest as the motor vehicle had to be delivered in good condition. The complainant however fortuitously benefits from the undamaged state of the motor vehicle. In assessing sentence afresh I have been guided by case law and counsel for both parties whose submissions were to the effect that a sentence of 7 years with 2 or 4 years suspended would be appropriate.

In arriving at the sentence of 7 years 2 suspended, I considered the accused's age and his status as a first offender and weighed this against the gravity of the offence. I considered it aggravating that appellant received the motor vehicle for the purposes of smuggling it out of the country to Mozambique. He almost succeeded. He failed because it got stuck in mud at the crossing point in Mukumbura river.

After he got stuck in the mud he lied about his identity and that of the motor vehicle to Constable Muchira. He obviously still intended to smuggle the motor vehicle out of the country. He travelled back to Harare so that the motor vehicle could be removed from the mud and be smuggled to Mozambique. It is only the timeous reaction of the police which prevented him and Zengeya from achieving their purpose. They had brought a Nissan Sunny to the scene but were intercepted by the police.

The appellant was therefore determined to smuggle the motor vehicle out of the country. He was acting with conscious deception to cover his tracks. He used someone else's driver's licence with a picture which could have passed as his when he was younger. This shows careful planning on his part. His deception succeeded to the extend that the police at

Kamutsenzere accommodated him over night and Cst. Muchira travelled with him on the bus up to Mount Darwin. He had carefully planned the offence. It is his determination, deception and careful planning which aggravates the offence and diminishes his status as a youthful first offender. When the appellant's case is compared to the cases referred to above it becomes more serious because he intended to smuggle the motor vehicle out of the country. When the appellant was arrested he attempted to escape by running away from police custody. This was after he had indicated Mike Zengeya to the police. As Zengeya got off the bus the appellant ran away from the police. In the confusion Zengeya shot and killed a police officer. This demonstrates the appellant's determination to avoid arrest even after he had been positively identified by Cst. Muchira and had himself told the police that Mike Zengeya was the owner of the stolen motor vehicle he had driven to Mukumbura river. He clearly was not remorseful for the offence he had committed.

Though no statistics were given on the prevalence of motor vehicle thefts, the facts of this case proves that organised motor vehicle thefts and robberies are still to be deterred. Two complainants were robbed of their vehicles the same night within four hours of each other in the same neighbourhood. The robbers and thieves are encouraged by the receivers who provide a market and outlets for the stolen motor vehicles. In this case the appellant had taken the motor vehicle to the illegal exit point in less than a day after the robbery.

It is for these reasons that we suspended only 2 years of the sentence of 7 years imprisonment which counsels for both parties had urged us to impose. The sentence had to be one with a deterrent effect in spite of the appellant's status as a young first offender.

The portion of the sentence suspended against restitution could not be retained as a receiver of stolen property cannot be held responsible for property stolen by the thief which was not passed onto him.

These then are our reasons for setting aside the appellant's conviction on armed robbery and substituting it with one for receiving stolen property knowing it to have been stolen and reducing his sentence to 7 years imprisonment of which 2 years imprisonment are suspended for 5 years on condition the appellant does not during that period commit any offence involving dishonesty.

GARWE JP, agrees.....

Manase & Manase, the appellant's legal practitioners
Attorney-General's Criminal Division, the respondent's legal practitioners