

JEANS SHICHAMPWA v THE PEOPLE (1981) Z.R. 283 (H.C.)

HIGH
CULLINAN,
26TH
(HLA/138/80)

COURT

SEPTEMBER,

1980

J.

Flynote

Criminal law and procedure - Possession - Possession of property recently stolen - Whether an inference of guilty can be drawn.

Criminal law and procedure - Prima facie case - When made out.

Criminal law and procedure - Prima facie case - Whether made out in the presence of strong alibi.

Evidence - Extra judicial explanation - Whether can prevent an evidential burden from falling.

Headnote

The appellant was convicted of stock theft. The two stolen cattle were found in the possession of the appellant's co-accused. The latter told the complainant and the police that he had purchased them from the appellant. The only evidence against the appellant was that of a police officer who testified that he took the appellant and his co-accused to the place where the cattle were found. Evidence was also adduced to show that the appellant had previously been summoned to the local chief to whom the complainant earlier brought both the co-accused and the two cattle. The appellant in his defence put forward an *alibi* in respect of which he was in no way shaken in cross examination.

The learned trial magistrate nonetheless found that a *prima facie* case had been made out and put the appellant on his defence. On appeal:

Held:

- (i) The trial magistrate quite unreasonably found that no prima facie case had been made out against the co-accused who was

p284

found in recent possession of stolen property; consequently the application of the so-called doctrine of recent possession was sufficient to place upon him an evidential burden of explanation.

- (ii) While the co-accused's explanation to the complainant and the police would ultimately have to be taken into account in considering his explanation in court, nonetheless, such extra judicial explanation could not, in the face of prima facie evidence in any way prevent an evidential burden from falling upon the co-accused at his trial.

Cases referred to:

(1) Hahuti v The People (1974) Z.R. 154.

(2) Maseka v The People (1972) Z.R. 9.

For the appellant: In person.
For the respondent: T. Kunaseelan Esq, State Advocate.

Judgment

CULLINAN, J.: The appellant was convicted of stock theft.

Two stolen cattle were found in the possession of the appellant's co-accused. The latter told the complainant and the police that he had purchased them from the appellant. The statement was obviously inadmissible against the appellant. The only evidence against the appellant was that of a police officer who testified that, he took the appellant and his co-accused to the place where the cattle were found. He stated: "I then took them to Maala to view the cattle alleged stolen. I was shown the cattle by the suspects". That evidence is vague in the extreme when it comes to indicating whether the appellant and his co-accused simultaneously indicated the stolen cattle, or if not, which of them first did so. In any event, the evidence adduced shows that the appellant had previously been summoned to the local chief to whom the complainant had earlier brought both the co-accused and the two cattle, in which case the appellant had no doubt been shown the cattle.

As I said earlier, the only evidence against the appellant was that of the police officer and no reasonable tribunal could possibly have convicted him on that evidence. The learned trial magistrate nonetheless found that a *prima facie* case had been made out and put the appellant on his defence. He should not have done so - see the case of *Hahuti v The People* (1). In any event, the appellant in his defence put forward an alibi in respect of which he was in no way shaken in cross-examination.

In passing I am bound to observe that the learned trial magistrate quite unreasonably found that no *prima facie* case had been made out against the co-accused and acquitted him. The co-accused was found in recent possession of stolen property and the application of the so-called doctrine of recent possession was sufficient to place upon him an evidential burden of explanation. While the co-accused's explanation to the complainant and the police would ultimately have to be taken into account in considering his explanation in court, if any - see *Maseka v The People*

p285

(a) at p.13 - nonetheless, such extra-judicial explanation could not, in the face of *prima facie* evidence, in any way prevent an evidential burden from falling upon the co-accused at his trial. In other words, once the prosecution adduced *prima facie* evidence, such extra-judicial explanation could only be considered after the co-accused had been out on his defence. Quite plainly a *prima facie* case had been made out and the co-accused should have been put on his defence.

As to the appellant, the conviction cannot stand. This appeal is allowed. The finding and sentence of this court below are set aside and the appellant is acquitted.

Appeal allowed
