

MALIMAWA v THE PEOPLE (1968) ZR 19 (HC)

HIGH COURT
SCOTT AGJ
3rd MAY 1968

Flynote and Headnote

[1] **Criminal law - Possession of stolen property - Elements of offence.**

In a charge of violation of Penal Code, section 287, the prosecution has to prove that the property is reasonably suspected of having been stolen.

[2] **Evidence - Hearsay - Statement in presence of accused to which accused reasonably expected to respond - Not evidence of facts stated.**

A statement made in the presence of an accused person accusing him of a crime upon an occasion which may be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated. It is a popular misconception among prosecuting officers that such a statement is admissible in evidence provided it was made in the presence of the accused.

SCOTT Ag J

[3] **Evidence - Hearsay - Statement by person not called as witness - Inadmissible unless adopted by accused.**

An out - of - court statement by a third person to the police officer affords no evidence of the facts he states, and unless the accused acknowledges the truth of what the third person says, it must be disregarded altogether.

Case cited:

(1) *Mandavu v R* 1962 R & N 298.

Statute construed:

(1) Penal Code (1965, Cap. 6), s. 287.

Chandran, State Advocate, for the People:
Accused in person.

Judgment

Scott Ag J: The appellant was charged with being found in possession of two dresses reasonably suspected of having been stolen, contrary to section 287 of the Penal Code, and he pleaded not guilty. The question whether the decision in the case of *Mandavu v R* [1] is good law is currently under consideration by the Court of Appeal for Zambia, and I was minded to adjourn this appeal to a later date until I observed a fundamental flaw in the prosecution case. The appellant appeals on the grounds, *inter alia*, that the two dresses are his property and that he did not steal them. What happened was that he and another were found selling them and the appellant claimed he bought them in Lusaka from an Indian whose name he had forgotten. A police constable came to Lusaka with the appellant who indicated a shop where he said he had bought the dresses. This witness went on: "The name of the shop is O.K. House. I entered into the shop. I spoke to the owner of the shop, Mr C. J Patel. I showed Mr Patel the dresses in the presence of the accused. Mr Patel denied knowledge of the dresses as he does not stock such dresses. The accused was present when Mr Patel said this. The accused said Mr Patel was only lying."

[1] The magistrate correctly reminded himself that the prosecution had to prove that the property was reasonably suspected of having been stolen, and clearly was satisfied on that point because in his judgment he said: "Mr Patel denied knowledge of the dresses as he did not stock such dresses." The magistrate, however, failed to appreciate that this was inadmissible evidence, a glaring example of hearsay evidence, because Mr Patel was never called as a witness. It is a popular misconception among prosecuting officers that such a statement is admissible in evidence provided it was made in the presence of the accused. This is quite wrong, and the sooner this misappreciation of the law is removed from their minds the better. [2] The law is only this, that a statement made in the presence of an accused person accusing him of a crime, upon an occasion which may be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated [3] save in so far as he accepts the statement so as to make it in effect

his own. Mr. Patel's statement to the police officer afforded no evidence of the facts he stated, and unless the accused acknowledged the truth of what Mr Patel said it must be disregarded altogether. In the instant case this appellant did not accept what Mr Patel said as the truth of the matter. On the contrary he said he was lying; therefore, the magistrate was unable to consider what Patel said, and without this evidence there was clearly no suspicion proved to justify the appellant being put on his defence.

I allow this appeal and under section 300 (1) (a) (1) of the Criminal Procedure Code reverse the finding and sentence and acquit the accused.

Appeal allowed.