THE STATE
versus
KOOSTER MOYO

HIGH COURT OF ZIMBABWE
MUTEVEDZI & NDLOVU JJ
BULAWAYO 26 NOVEMBER 2024

Criminal review

MUTEVEDZI J: The above record of proceedings was placed before me for review under the cover of a scrutiny minute by the scrutinizing regional magistrate. As will be demonstrated later, the issues he raised therein are pertinent.

[1] The offender whom for purposes of this judgment I shall call the accused, was charged with and convicted of contravening s 125 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (the Code). That offence relates to possessing property reasonably suspected of being stolen. The provision is couched as follows:

> 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 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-

[2] At his trial, the accused allegedly pleaded guilty to that charge and was duly convicted. The allegations were that on 22 January 2024 and at Dian's Pool village, Chief Gwebu in Esgodini, the accused unlawfully possessed 43 table spoons, 96 teaspoons, 13 forks and 2 table knives and that his possession of the property at the time, raised reasonable suspicion that when he came into its possession, it was stolen. A further allegation was that he was unable at any time to give a satisfactory explanation of his possession. When the proceedings were placed before the scrutinizing regional magistrate, he was of the view that the trial magistrate had erred in accepting the accused's plea of guilty. As a result, the conviction was in in the regional magistrate's own words 'improper,

irregular and incompetent.' He addressed a query to that effect to the trial magistrate who responded as follows:

> "I acknowledge receipt of your query. With the benefit of hindsight, I do acknowledge my error. When I was canvassing the essential elements to the offender he did acknowledge that the property was suspected to have been stolen. His explanation was that he got the property from a deserted homestead. In my opinion at the time, that gave rise to a reasonable suspicion that the property had an owner. I endeavor not to repeat the same error again. I stand guided."

[3] The above response from the trial magistrate, like the regional magistrate rightly pointed out, betrays a deep-seated misconception about the offence in question. The crime requires the formulation of reasonable suspicion by the police officer who arrested the accused. That matter was put beyond debate by my sister CHIGUMBA J in the case of *S v Moyo* HH 531/15 where she remarked that:

> "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 guilty alone is insufficient to support admissions in respect of matters 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 a reasonable man. This is part of the reasoning behind the prohibition against accepting a plea of guilty 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 essential element of reasonableness beyond a reasonable doubt. It may not do so by accepting admissions from the accused about the state of mind the arresting detail."

[4] Commenting on s 12 of the then Miscellaneous Offences Act [Chapter 9;12], which is the predecessor provision of the current s 125 of the Code, in the earlier case of *S v Chiwendo* 1999(1) ZLR 407, this court made the same point once more when it stated that:

> "The court cannot find an accused guilty of contravening s 12 of the Miscellaneous Offences Act [Chapter 9:12] 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 to which he can admit.

[5] In *S v Nyamunda* HH 687/22 MUGWARI J was seized with a similar scenario. She held that for a conviction of contravening s 125 of the Code to stand the following essential elements must have been proven against an accused:

a. Possession of property capable of being stolen
b. Circumstances of possession such as give rise at the time of his possession or any time thereafter that the property could have been stolen
c. A reasonable suspicion of theft is formulated
d. Failure by accused to render a satisfactory explanation for possessing the property

[6] In *Nyamunda* (supra), the court emphasized that s 125 of the Code is a crime which is notoriously difficult for prosecution to prove because it requires evidence of a palpable failure by an accused to explain how he/she came to be in possession of the property. An accused's duty is to simply give an innocent explanation of that possession. Once that is done, the onus is thrust back to the state to rebut the accused's explanation. A trial court cannot take it upon itself to make that rebuttal. The state's case will become more complicated if the evidence of the arresting detail is not called because as shown by the authorities cited above, it is only him/her who can and must advise the trial court why and how he concluded that on a reasonable basis the property in the accused's possession was stolen.

[7] The reason(s) why the arresting detail alleges that there is suspicion that the property was stolen must be as was discerned by him or her. He/she must show that they considered the circumstances. They must further demonstrate that they called the accused to explain his/her possession and that the accused failed to do so at the time that he/she was called upon to render the explanation or at any other time thereafter. Put bluntly, a police officer who arrested the accused must come to court and advise the court of what it is that he/she saw and gave thought to in order for him/her to reach the conclusion that the property was stolen. It is not possible for an accused to become the officer's proxy and answer such questions for the officer. For an accused to make such admissions would be ludicrous. Nothing substantial can be drawn from it. Needless to state, the court itself cannot usurp the police officer's role and formulate the reasonable suspicion on its own accord. Instead, the court's findings must be based on the officer's explanation of the circumstances which aroused the suspicion in him that the property was stolen.

[8] In addition, it is noteworthy that subparagraphs (a) and (b) of s 125 are not independent of each other. They are conjoined by the word '*and'.* For the crime to be complete, both subparagraphs must be proved. An arresting officer cannot simply allege that because he/she formulated the opinion that there was reasonable suspicion that the property was stolen, the accused is therefore guilty. Rather it must, in addition to the reasonable suspicion, be proved that the accused failed to give an explanation at all or that his explanation thereof was unsatisfactory.

[9] In all this, what I may need to clarify and take a slightly different approach about is the emphatic nature of the findings in *S v Moyo* (supra) which informed the regional magistrate's concern in this case that *"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." My view is that contrary to *Moyo* the view expressed in *S v Chiwendo* (supra) obviates the need to hold fully contested trials even in matters that may appear obvious and in which an accused himself accepts that any reasonable person would have formulated the opinion that the circumstances of his (accused's) possession of the property gave rise to reasonable suspicion that it was stolen. As already said, the court therein said *"The court cannot find an accused guilty of contravening s 12 of the Miscellaneous Offences Act [Chapter 9:12] 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 underlining is for my emphasis). Critically, the court refrained from saying it is incompetent to accept a plea of guilty. I entirely agree with that position because it is possible and permissible to both accept a plea of guilty and still lead evidence from the person who found the accused in possession of the property.

[10] In the case of *S v Ndlovu* HH 522/23 I expressed the view that when explaining the essential elements of a crime: -

> "Putting questions to an accused is not the only method of explaining a charge and its essential elements. There could be others but there is little doubt if any that it is effective and greatly assists an unrepresented accused to understand the constituent parts of the charge he/she faces. For instance, s 271(4) of the Code is a provision which can be employed to aid in the explanation of a charge yet it so underutilised in our procedure that one will be forgiven to think that it remains undiscovered for many who practise criminal law. It provides that in the midst of recording a guilty plea in terms of s 271:
>
> "4) The court may—
> (a) call upon the prosecutor to present evidence on any aspect of the charge;"

I further stated and I restate it once more, that in view of the above provision, it is therefore not prohibited for a court to direct a prosecutor to lead evidence on a particular aspect of the charge to assist the court in the resolution of the matter through the plea procedure in s 271(2) (b) of the Criminal Procedure and Evidence Act [Chapter 9:07] (the CPEA). As we all know, the adduction of evidence can take various forms. Evidence can be through the formal admissions of statements in terms of s 314 of the CPEA; it can be through affidavits or the *viva voce* testimonies of witnesses. Sight must not be lost that the plea procedure remains a form of trial. The only difference is that it is a truncated trial meaning that some aspects of the full-fledged and contested trial are dropped. Cases of contravening s 125 of the Code present prosecutors and trial courts with the opportunity to utilise s 271(4). For instance, in cases where the accused admits having been found in possession of the property and concedes either that he/she did not

explain that possession at all or that his/her explanation was clearly a red herring, it is not necessary to prove those admissions. What would be left is only to prove that such possession gave rise to a reasonable suspicion that the property was stolen. Where that is the case, the court is permitted to direct the prosecutor to lead evidence from the arresting detail concerning the issue of how he/she formulated the opinion that the accused's possession of the property gave rise to reasonable suspicion that the property was stolen. That way the danger of the trial court substituting its opinion for that of the arresting officer is foreclosed

[11] In the case at hand, the trial magistrate committed the cardinal transgression of not doing any of the things suggested above. He took it upon himself to formulate the reasonable suspicion. It is forbidden to do so. What is conspicuous is not only the absence of the evidence of how the arresting officer formulated the opinion of reasonable suspicion but that the accused explained his possession. He said that he had found the property at an abandoned homestead. In other words, his defence was that the property was *res derelicta.* Such property is incapable of being stolen because it is abandoned. In the absence of contrary evidence, that explanation cannot be said to be unsatisfactory.

[12] In the final analysis, without the trial court having satisfied itself that the above safety valves had been properly closed the conviction of the accused was not safe. I cannot certify it. I have consulted my brother NDHLOVU J who agrees not only with the views I express herein but also with the order I make. Accordingly, I order as follows:

a. The conviction of the accused and the and sentence imposed on him be and are hereby set aside
b. The matter is remitted to the trial court for a trial *denovo* before a different magistrate
c. In the event that the accused is found guilty at the new trial, any part of the sentence that had been imposed on him which he has already performed shall form part of the new sentence and shall be taken as already performed.

Mutevedzi J……

Ndlovu J ……..…….. I agree