MULOMBA MWAMBA AND ANOR v THE PEOPLE (1980) Z.R. 173 (S.C.)

SUPREME COURT
GARDNER, AG.D.C.J., BRUCE-LYLE, J.S. AND CULLINAN, AG. J.S.
15TH JULY ,1980
S.C.Z. JUDGMENT NO.15 OF 1980

Flynote
Criminal law and procedure - Charge - Charge alleging breaking and entering and theft - Whether conviction for receiving stolen property could be substituted. Criminal Procedure Code, s. 188 and Penal Code, s. 318.

Headnote
The applicants were convicted on three counts of storebreaking and were sentenced to five years' imprisonment with hard labour on each count to run concurrently. The facts indicated that the applicants were both found in possession of drugs a month after the last of the three storebreakings. The magistrate convicted the applicants on the ground that their recent possession of stolen drugs led to the only possible inference that they had been guilty of storebreaking on each occasion.

The Supreme Court found that the magistrate had misdirected himself by arriving at the inference that possession indicated guilt of storebreaking and by failing to consider whether the account given by the applicants of having purchased the drugs could reasonably be true.

Held:

(i) Under the provisions of s. 188 of the Criminal Procedure Code, a conviction for receiving stolen property contrary to s. 318 of the Penal Code can be substituted when persons are charged with breaking and entering under s. 303 of the Penal Code.

1980 ZR p174
GARDNER Ag. D.C.J.

(ii) Although s. 303 is a composite charge of breaking and entering and stealing, the offence referred to in s. 188 of the Criminal Procedure Code, namely stealing, is a part of the composite charge in this case, and was specifically referred to in the particulars. In these circumstances s. 188 of the Criminal Procedure Code gives power to a court to convict for receiving on a charge alleging breaking and entering and theft.

Legislation referred to:
Criminal Procedure Code, Cap. 160, s. 188.
Penal Code, cap. 146, ss. 303 and 318.

For the applicants: In person.
For the respondent: K.C.V.Kamalanathan, Senior State Advocate.

Judgment
GARDNER, AG.D.C.J.: delivered the judgment of the court.

The applicants were convicted on three counts of store-breaking. The particulars of the offence being that on dates between 7th April and the 16th August, 1977, they with others did break and enter University Teaching Hospital, Lusaka, and stole therefrom various drugs. They were sentenced to five years' imprisonment with hard labour on each count to run concurrently, and they now seek leave to appeal against conviction and sentence.

The facts of the case indicate that the applicants were both found, on a train leaving Lusaka, with

quantities of drugs in their possession. The drugs were identified as belonging to the University Teaching Hospital and the applicants both admitted to the Police who arrested them that they had purchased the drugs from a co-accused named Ng'andu. As the only evidence against Ng'andu was that of his co-accuseds, there was no acceptable corroboration of the evidence against him. He was therefore acquitted.

The magistrate convicted the applicants of storebreaking on three counts on the grounds that their recent possession of stolen drugs led to the only possible inference that they had been guilty of store-breaking on each occasion.

Mr Kamalanathan, on behalf of the State, has quite properly conceded that the possession of the drugs a month after the last of three storebreakings could not lead to an inevitable inference that the applicants were guilty of the three store-breakings.

The magistrate failed to consider whether the account given by the applicants of having purchased the drugs could reasonably be true, and, by arriving at the inference that possession indicated their guilt of store breaking, he misdirected himself. Because of this misdirection we propose to allow the appeals against the convictions for store-breaking. The applications will be granted and treated as the appeals and the appeals against convictions for store-breaking are allowed.

1980 ZR p175
GARDNER Ag. D.C.J.

We have considered whether, under the provisions of s. 188 of the Criminal Procedure Code, a conviction for receiving stolen property contrary to s. 318 of the Penal Code can be substituted when persons are charged with breaking and entering under s. 303 of the Penal Code. Section 188 of the Criminal Procedure Code reads as follows:

> "(1) When a person is charged with stealing anything and (a) The facts proved amount to an offence under subsection (1) of section three hundred and eighteen of the Penal Code, he may be convicted of the offence under that section although he was not charged with it."

In this case the charge under s. 303 of the Penal Code is of breaking and entering a schoolhouse or other premises of a similar nature and committing a felony therein. The particulars of the charges referred to breaking and entering a hospital and stealing therein all the drugs referred to. It follows therefore that, although s. 303 is a composite charge of breaking and entering and stealing, the offence referred to in s. 188 of the Criminal Procedure Code, namely stealing, is a part of the composite charge in this case, and was specifically referred to in the particulars. In these circumstances it is our view that s.188 of the Criminal Procedure Code gives power to a court to convict for receiving on a charge alleging breaking and entering and theft. We substitute a conviction of receiving property having reason to believe the same to have been stolen, under s. 318 (1) of the Penal Code, in respect of both applicants.

The conviction of the first applicant Muziamba Ndumba is in respect of one packet of Combicating tablets, 254 penicillin procaine bottles and one bottle of septogin. The conviction in respect of the second appellant Mulomba Mwamba is in respect of two bottles of Ampricine guigy capsules 141 ambilher pills, thirty-five packets of anti-biotic capsules, twenty-nine packets of green tablets, twenty-eight packets of yellow tablets, fourteen packets of white tablets and 1 242 packets of a upent powder.

The applicants were originally convicted on three counts of breaking and entering in respect of a much larger quantity of drugs and they were sentenced to five years' imprisonment with hard labour to run concurrently in respect of each count. Having regard to the fact that the reduced convictions relate to only one offence in respect of each appellant and the total quantity of drugs is not so high, there must be an alteration in the sentence. Each applicant is sentenced to three years' imprisonment with hard labour with effect from the date of arrest, 3rd October, 1977.

Sentence altered
