SYDNEY ZONDE, AARON SAKALA, EDWARD CHIKUMBI v THE PEOPLE
(1980) Z.R. 337 (S.C.)

SUPREME COURT
SILUNGWE,C.J., CULLINAN, J.S., AND MUWO, AG.J.
10TH MARCH, AND 23RD JULY, 1981
(S.C.Z. JUDGMENT NO. 20 OF 1981)

Flynote
Criminal law and procedure - Possession - Recent possession - Doctrine of - When applicable
Evidence - Accomplice - Evidence of person in possession of stolen property - Need for court to warn itself.
Evidence - Statements by accused - Exculpatory statements.
Evidence - Corroboration - Accomplice or witness with a possible interest of his own to serve - Need for court to warn itself.

Headnote
The appellants were charged with aggravated robbery, the particulars being that they jointly and whilst acting together robbed Kantulak Patel of property to the total value of K5,535.00. The first appellant was convited as charged and given custodial sentence of fifteen years imprisonment with hard labour. However, the second and third appellants were covictted, not as charged, but of receiving stolen property, and were each sentenced to six years imprisonment with hard labour.

They appealed to this Court against the said convictions and sentences on the ground that the learned trial Judge erred in law by his failure to final and treat, as an accomplice or witness with a possible interest of his own to serve, a witness named Keith Banda who was found in possession of a TV set belonging to the complainant. Counsel submitted also that the learned trial Judge misdirected himself in law by basing the

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convictions of the second and third appellants on their own exculpatory statements contending that guilt was not the only inference reasonably possible.

The first appellant was found in possession of the complainant's property barely a few hours after the complainant had suffered an aggravated robbery. The Supreme Court was however satisfied that there was no misdirection by the trial judge either on the question of voluntariness of the statements or the exercise of the court discretion.

Held:
(i) No appeal lies against the statutory minimum sentence of fifteen years imprisonment with hard labour.
(ii) The doctrine of recent possession applies to a person in the absence of any explanation that

might be true when found in possession of the complanant's property barely a few hours after the complainant had suffered an aggravated robbery.

(iii) A person in whose possession stolen property is found is prima facie an accomplice or witness with a possible interest of his own to serve and the trial court must warn itself of the danger of acting on the uncorroborated endence of such a person.

(iv) Although the appellants respective statements were exculpatory in relation to the offence of aggravated robbery, they amply supported the offence in respect of which the appellants stood convicted.

Cases cited:

(1) Machobane v The People (1972) Z.R. 101.

(2) Kapindula v The People (1978) Z.R. 327.

Legislation referred to:

Penal Code Cap. 146, s. 294 (1), 318 (1).

Supreme Court Act No. 41, 1973, a. 15 (1).

For the appellants: J.R. Matsiko, Legal Aid Counsel.

For the respondent: R.G. Patel, State Advocate.

Judgment

SILUNGWE, C.J.: delivered the judgment of the court.

The appellants were charged with aggravated robbery, contrary to section 294 (1) of the Penal Code, Cap. 146, the particulars being that they jointly, and whilst acting together, robbed Kantulak Patel of property to the total value of K5,535. After evidence had been led in the matter by both sides, the first appellant was convicted as charged and given a custodial sentence of fifteen years imprisonment with hard labour. However, the second and third appellants were convicted, not as charged, but of receiving stolen property, contrary to section 318 (1) of the Penal Code and were each sentenced to six years imprisonment with hard labour. All three now appeal to this court against the said convictions and Defences.

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It is not in dispute that an aggravated robbery took place in this case. What is in issue is the propriety of the convictions and sentences. There are three grounds advanced on behalf of all the appellants by Mr Matsiko, the learned Legal Aid Counsel. In the first place, he contends that the learned trial Judge was in error by admitting in evidence the warn and caution statements in that the appellants had stayed in police cells for about five to six days without food, and that they had been subjected to questioning by the police for the same period of time (i.e. five to six days) which questioning amounted to an inducement designed to weaken their will.

It is noteworthy that in the court below, the defence objected to the admission of the warn and caution statements on the basis that the appellants had been coerced by the police - through physical violence - to sign pre-recorded statements the authorship of which they attributed to the police. During the course of a composite trial-within-a-trial that ensued, no mention whatsoever was made, either in the cross-examination of the prosecution witnesses, or in the evidence adduced by the

defence, as to any of the appellants having been starved during the period of their detention in police cells. After hearing the evidence of the prosecution and the defence, the trial court ruled that the appellants had not suffered any physical violence at the hands of the police, as alleged, and that the statements had in fact been made and signed freely and voluntarily by the appellants. In the event, those statements were admitted in evidence. It is clear that the first time that allegations of the appellants havig been starved during their detention in police cells were ever made, was after the case for the prosecution in the main trial had been closed and the appellants were giving evidence in their own defence. The court in its judgment once again considered the question of voluntariness of the statements and reiterated its satisfaction that the appellants had made them freely and voluntarily. In so doing it rejected allegations of starvation on grounds that those allegations were mere fabrications and an after-thought. We are satisfied that the trial court correctly directed itself as to the voluntariness of the statements and that it came to a proper conclusion in the matter.

There is then the submission that the appellants were questioned by the police for a period of five to six days prior to the recording of the warn and caution statements and that the questioning amounted to an inducement designed to weaken the appellants' will. This submission is obviously based on the assumption that the appellants must have been subjected to persistent police interrogation during the period of detention in police cells. However, the submission overlooks the clear evidence of the police and civilian prosecution witnesses which was believed by the trial court and which discloses in no uncertain terms that the police were carrying out investigations in the matter and interviewing persons, including at least four civilian prosecution witnesses, three of whom were found to be possession of certain items of property the subject of the charge. There is nothing In the cross-examination of the police witnesses or the endence of the defence that points to the appellants have fallen victims of persistent questioning.

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After considering the matter, the learned trial judge expressed satisfaction as to the voluntariness of the statements. He then gave due consideration to the question of exercising his discretion in the matter but could find no impropriety attaching to the conduct of the police or any unfairness surrounding the making of the statements. He specifically found that the appellants had been fairly treated by the police. In the event, the statements were admitted in evidence. As we see it, there was no misdirection, either on the question of voluntariness of the statements or the exercise of the court's discretion.

Secondly, it is contended that the learned trial judge erred in law by his failure to find, and treat, as an accomplice or a witness with a possible interest of his own to serve, a witness named Keith Banda, in whose possession was found a TV set belonging to the complainant. This contention is well founded and the learned State Advocate readily accepts the fact. As this court has held in several cases of which *Machobane v The People* (1), and *Kapindula v The PeopIe* (2), are well-known, a person in whose possession stolen property is fond is prima facie an accomplice or a witness with a possible interest of his own to serve and a trial court must warn itself (and heed the warning) of the danger of acting on the uncorroborated evidence of such a person. What effect the misdirection has upon the present case depends on whether or not conviction can be sustained by the application of the proviso to section 15 (1) of the Supreme Court Act.

Finally, it is submitted that the learned trial judge mis-directed himself in law by founding the convictions of the second and third appellants on their own exculpatory statements contending that guilt was not the only inference reasonably possible.

As we have said at the beginning of this judgment, both the second and third appellants were convicted only of the offence of being in pos - session of stolen property. Although the appellants' respective statements are exculpatory in relation to the offence of aggravated robbery, they amply support the offence in respect of which the appellants stand convicted. Both were close associates of the first appellant and they received stolen property from him in circumstances that suggest in the clearest way possible that they knew that the property had been stolen or unlawfully obtained. The second appellant was visited by the first appellant at 0600 hours - four-and-half hours after the aggravated robbery had been committed. On that occasion the first appellant was carrying a radio and other items of property all of which were later proved to belong to the complainant and his wife. Two hours later, the second appellant received several blankets from the first appellant and was told they were not for sale and that a friend of the first appellant had given them to him. The second appellant then gave away most of those blankets to prosecution witnesses. All those blankets were shown to be the property of the complainant's wife.

The third appellant, on the other hand, said he was visited by the first appellant 0500 hours - three-and-half hours after the commission

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of the robbery. The first appellant had come in a motor vehicle containing a lot of goods and was in the company of three other men. At his request the third appellant agreed to accompany the first appellant to his house where he saw the first appellent and three colleagues of his sharing the property. The third appellant then received from the first appellant one pair of bed sheets, one bath towel, one black pair of ladies' shoes and a ladies' wrist-watch. Both the second and third appellants assisted the first appellant in selling the TV set to Keith Banda.

We are satisfied that there was abundant evidence on which to convict the second and third appellants of receiving stolen property.

As regards the first appellant, his statement was a clear admission of his part in the commission of the aggravated robbery. That apart, he was found in possession of the complainant's property barely a few hours after the letter had suffered an aggravated robbery and so, the doctrine of recent possession applied to him in the absence of any explanation that might be true.

The appellants' alibi were rejected by the trial court and rightly so in our view considering the nature of evidence that was before the trial court. All the appellants were thus convicted on clear evidence. As we have said earlier, the trial court misdirected itself in relation to the status of Keith Banda who should have been treated as an accomplice or witness with an interest of his own to serve. We would invoke the proviso to section 15 (1) of the Supreme Court Act and dismiss the appeals against conviction in respect of all the three appellants.

As to sentence, the first appellant received the statutory minimum of fifteen years' imprisonment with hard labour against which no appeal lies. The position of the second and third appellants is, however, different: both are first offenders and the property received by them is of negligible value. In the circumstances, the sentence of six years' imprisonment imposed upon each one of them comes to us with a sense of shock. The sentence is set aside and in its place one of three years' imprisonment with hard labour is imposed on each of these appellants to take effect from February 11th, 1978.

Sentence substituted
