



REPUBLIC OF KENYA

IN THE HIGH COURT APPELLATE SIDE NAIROBI

CRIMINAL APPEAL NOS 76 AND 77 OF 1979

STEPHEN M NGUGIAPPELLANT

SIMON PETER KAMAU MAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The two appellants, Simon and Stephen, were convicted of capital robbery. The case set against them was that, in the early hours of 2nd September 1977, they were two of three men who raided a *pombe* club and there stole Shs 1500, ten packets of Sportsman cigarettes, two packets of Senate cigarettes, two packets of Embassy cigarettes and a sack, using violence to achieve their purpose. Each appellant denied the charge suggesting that it was a made-up case. Why it should be so was not explained to us.

It is said that the charge was not properly drawn, and that is so. It should have been in accord with Form 8 of the Second Schedule to the Criminal Procedure Code and the property said to have been stolen was not accurately described; but whilst, as counsel urged, it would have been better had the charge been put right at the trial, it is of no consequence on the facts before us. It is also said that the theft was complete before any violence was used. It is not so. We think, however, that we should say that a prosecution witness, Lucas, spoke of the affair occurring in 1978, an obvious but unchecked error for 1977; and another prosecution witness, Ochola, at first gave what appeared to be incorrect evidence. But this was because he spoke in a language of which he has but an imperfect knowledge.

The prosecution case was this. Nyangweso, who works at the club, was asleep on his two sacks on the floor of what is called “the juke-box room” when three men burst in, said that they were police and ordered him to lie down; he lay down, and they beat him. He screamed. Next day he noticed that the juke box had been broken open and that one of his two sacks had been taken away. We think that he meant later in the day; but it is no matter. The sack was used to carry away some, or the rest, of what was stolen. Nyangweso later recognised his sack explaining how he could do so; and Lucas also recognised it. But Nyangweso could identify none of the men who had attacked him. Nor could Ochola, the club’s watchman. He saw three men coming out of the kitchen, one of whom was carrying what he called a big bag like a sack which was heavy. He fought them, was hit and bled; but although he did not manage to arrest anyone, his intervention caused the sack to fall to the ground, spilling some of its contents. His evidence was attacked because he said that he thought that he had been hit with an iron pipe; and a clinical officer, Mr Ombati, said that it was more likely to have been a sharp weapon; but there is nothing in this. We would think that the wound which Ochola received could have been caused by either. In any event the clinical officer gave no reasons for his conclusion and Ochola went no further than to say that he thought that he had been hit with an iron pipe.

Lucas, the club's owner, had been asleep. He heard Nyangweso scream, got up and went to the bar. He was too late; but he noticed that the juke box had been broken into. It was empty and it should not have been; it should have had about Shs 2000 in it, because its average takings were about Shs 700 a week and it had not been opened for about three weeks. As the charge sheet speaks of a theft of Shs 1500 and the money stolen only came from the machine, an error on the conservative side might be thought to have been made; but the amount recovered and produced in the case was only Shs 1086 and counsel drew our attention to this. We shall deal with it in a moment, but what is now more to the point is that to coax music from the machine it is necessary to insert a one-shilling piece. Of course, only Kenya coins ought to be used; but according to Lucas, and he should know, East African and Tanzanian coins were also used.

Police, in the person of a corporal and two constables, went to the club with a police dog. They picked up what was strewn around, which was Shs 771 in Kenya shillings, Shs 21 in East African shillings, Shs 12 in Tanzanian shillings, nine packets of Sportsman cigarettes and one packet of Embassy cigarettes. Then they began to track their quarry. The dog picked up the scent soon enough because the party found some coins as they went along although it is less than clear how much it was and it seems not to have been produced. No doubt the police thought it better to continue tracking. But after this there is discrepancy and confusion about timings and telephone calls, regrettably not explored at the trial. However, as the evidence goes, at about 6.30 a.m. the police saw three men some distance away, one of whom escaped, the other two entering a swamp. Undeterred, the police followed them. Then, according to the dog handler, P C Charles, "at 11.00 am we found two men buried under the swamp with their heads only showing". Arrests were made and the two men were searched. They were the appellants. Among other things found upon them, Simon had Shs 132 in Kenya shillings, Shs 2 in East African shillings and one Tanzanian shilling; and Stephen had Shs 144 in Kenya shillings, one East African shilling, Shs 2 in Tanzanian shillings, three unopened packets of Sportsman cigarettes and one unopened packet of Senate cigarettes. On the way to the police station, the "two appellants offered to show us a bag ... they took us to a place where they had left it", the police went there) and there was the sack.

In his statutory statement, Simon said that on the 2nd September 1978 (he obviously meant 1977) he decided to go and see his grandmother at Naivasha, so he got on to an omnibus and got off it at North Lake Road. It was raining. He had Shs 65 in notes, a one-shilling piece and 35 cents and no more with him; but none of the money which was produced in Court and said to have been taken from him; and he did not set eyes on Stephen until he was taken to Court. In short, he was arrested for nothing. Stephen said that he was in process of selling a weighing machine at Naivasha when he saw the police approach, so he ran away only to be arrested by members of the public and delivered up to the police. He had Shs 197/55 upon him; but it was not part of the money produced in this case and said to have been taken from him. The police took his money but they produced it in another case. Nor did he have the cigarettes.

It is now to be asked why the police should want wrongly to implicate the appellants in the crime. Apart from all else, if they claimed that they had what they said was taken from them and those at the club had said "but those are not the men who robbed us", they might have got themselves into serious trouble, unless, that is, they already knew that no-one could identify them. But in the light of Stephen's defence and Cpl Jacob saying, "there was also a weighing machine (not connected with this case)" at the club, we have considered whether that could be so; and it is. Stephen said that he left Kiambu at 3.00 am. on 31st August in possession of a weighing machine and on the following day he was arrested while showing it to a possible customer. If "the following day" means later the same day, then he was arrested on 31st August; but if it means what it says, he was arrested on 1st September; but the charge sheet shows that he was arrested on 2nd September and PC Charles says that he was arrested on 1st September; Cpl Jacob on 2nd September; and that is what Inspector Kawinzi says. This difficulty is experienced when one is speaking of the periods before and after midnight, and we believe the witnesses were speaking of 2nd September. Stephen said that he was taken to Court on 2nd September; but the charge sheet shows it to be 3rd September; and we think that is when it was. Let us consider each of the dates. If Stephen was arrested on 31st August or 1st September, this was before the club was raided, and if he was arrested on September 2nd, the raid was over by some hours. As the corporal's evidence is that he saw the machine in the small hours of 2nd September and no one has said, or suggested, that he took it there, we must have two different machines. The police were not to anticipate the raid and who would commit it, and there is

no suggestion that the machine was carried when the raid was being carried out, and thereafter.

The case against the appellants depends, as the magistrate appreciated, entirely upon circumstantial evidence, and in the main on what was said to have been found upon them when they were arrested. With the advantage of seeing and hearing the witnesses and the appellants giving their evidence, the magistrate believed the prosecution case, saying why he did so. But counsel is right to say that the prosecution case contains discrepancies, some of which defy being resolved; and the question is whether they are such that they cast doubt upon the evidence, to say nothing of the *bona fides* of the police. They do not. They go to detail and in any case serve the prosecution case with no advantage. We have referred to the weapon said to have been used and we now point to the question whether one door was broken and two were open, or whether two doors were broken and one was open. It cannot affect the outcome of the case. But there is confusion and discrepancy about whether telephone calls were made to the police station, or whether someone went there to report; and whether the inspector saw two or three men when he got to the swamp. We cannot entirely resolve the confusion, but we can ask what point there would be for the police to stoop to untruthfulness here? Whether calls were made or someone went to the police station, police reinforcements went to the swamp; and, particularly as two policemen could speak to there being three men, there simply was no point in the inspector saying that he, too, saw that number if he only saw two. We believe he saw three. It would be otherwise upon the corporal's evidence; but PC Charles says that they found the men at 11.00 am up to their necks in the swamp and "a quick search was conducted by 1 P Kawinzi and Sgt Kiprono". The sergeant had gone there with the inspector. As we see it the tracking took several hours, and time was of no great moment. Each man spoke to the best of his recollection and not all were right in detail. But all of them say the appellants were arrested in the swamp and what they had.

If, then, what was found on the appellants was what was taken during the robbery, they were in very recent possession of it when they were arrested, and neither has offered any explanation for that possession, because they have denied possession. Such possession can in a proper case help point to the commission of any offence, not only of simple theft (*R v Yego s/o Kitum* (1937) 4 EACA 25); and in the absence of explanation a presumption of guilt arises (*R v Hassani s/o Mohamed* (1945) 15 EACA 121). It was certainly open for the lower court to have utilised the presumption to support the charge. But having said so much, money and cigarettes are not ordinarily possessed of special characteristics, so can one safely say that the money and cigarettes found on the appellants were part of the proceeds of the robbery? The way the magistrate saw it was this:

Both the first and second [appellants] were found in possession of a large number of silver coins within less than twelve hours of the robbery. These coins were similar to those used to play records in Lucas's club and similar to those found at the scene where Ochola was attacked. Ochola said that his assailants robbed some of the things they were carrying before they escaped. It is quite unusual for persons like the [appellants] to carry such large amounts of silver coins as they did. I am satisfied on the evidence that the silver coins found with the two [appellants] are part of the money stolen from Lucas's juke box and part of the money which was found at the scene.

Furthermore, Lucas stated that stolen from his bar were ten packets of cigarettes [Sportsman], one packet of Senate cigarettes, and one packet of Embassy cigarettes. The charge sheet states that two packets of Senate were stolen. Here again this matters not.

At the scene where the watchman was attacked nine packets of Sportsman [cigarettes] and one packet of Embassy were recovered.

The [first appellant] was found in possession of one [unopened] packet of Senate cigarettes and three packets of Sportsman cigarettes. These were similar to the cigarettes stored by Lucas. There appear to have been only ten packets of Sportsman stolen but twelve were recovered, ie nine at the scene and three with the [first appellant], Lucas could have been mistaken in the total number of packets stolen.

That is generally acceptable to us. It is surely unusual for a man to have upon his person so many as 135 or 147 one-shilling coins in three currencies; and, in circumstances such as that in which the two men

found themselves, their possession called for some explanation. So, too, possession of four unopened packets of cigarettes not of one kind but of two. We are not, of course, for one moment putting any burden of proof on the appellants; but there is too much of a coincidence here. But to return to the question of identification. In *Dhayabhai Dharandas Patel v R* (unreported) Sir Kenneth O'Connor CJ delivering the judgment of the court said:

It is not necessary, in order to establish identity of goods found with goods stolen, that any particular article found in possession of the accused should be positively identified with an article stolen by means of a name or mark or in some such way (*R v Sbarra*, 13 Cr Ap Rep 118; *R v Fuschillo*, 27 Cr App Rep 193). Where evidence of positive identification by name or mark or confident recognition exists, the case is strengthened; but absence of positive identification is not necessarily fatal. Property found in the possession of an accused person may be held to be stolen property for the purpose of applying the doctrine of recent possession, where, although positive identification is impossible, the possession of the property cannot, without violence to every reasonable hypothesis, but be considered of a guilty character (*Wills on Circumstantial Evidence* (7th Edn) page 107 and *R v M' Kechnie* there cited).

This case has been relied upon time and time again in these Courts, although it is as we think unfortunately not reported. In this case the evidence can only point to the money and cigarettes found on the appellants having been acquired through the raid. But there are one or two matters yet requiring discussion.

There should have been, as we said earlier, about Shs 2000 in the juke box when it was broken open. But the amount produced in evidence was Shs 1086 and, although there was a third man and the coins on route, it may be fairer than saying that more than Shs 1086 was stolen, to reduce the amount in the charge to the lowest amount it could be; and that we do. So, too, whilst two packets of Senate cigarettes are particularised in the charge and two packets may well have been stolen, only one was spoken to; and we limit the convictions accordingly. The difference in the number of packets of Sportsman cigarettes needs to be thought on, too; for ten were said to have been stolen and twelve recovered. We have observed that Lucas was not quite right in his recollection as to what the police showed him, or the amount picked up from the ground; and we think that he was probably wrong as to detail here, as well. It must be impossible to suppose that any of the cigarettes came from a different source. In relation to the sack, we cannot say that we like the use of the plural, but the evidence is that both appellants volunteered to point out where it was. Corporal Jacob said: "the two [appellants] then showed us where they had thrown a sack"; PC Charles said:

The two [appellants] offered to show us a bag before we reached Naivasha police station. They took us to the place where they had left it.

and the inspector said:

I started my way back to Naivasha police station and on the way we received an old sack. The two [appellants] directed us to where they had thrown the sack in a maize plantation.

We do not know exactly what happened for the two appellants to have resolved to show the police where the sack was (they were under arrest at the time). We shall, therefore, only use so much of this evidence as relates to the fact of the discovery of the sack within section 31 of the Evidence Act. In this connection we refer to what Ainley C J said about this topic in *Wambua Musai v The Republic* (unreported), another judgment which we regret is not in the books. But then, the magistrate only referred to this evidence by saying, "The two [appellants] directed the police to a place where a sack was recovered" and our decision could be no different if we left the finding of the sack entirely out of consideration. But we do not follow the magistrate in taking judicial notice of what actuates a juke box. Nor was it necessary to do so on the evidence which Lucas gave. Finally, two of the magistrate's comments in his judgment were unfortunate, the one that the appellants did not give "reasonably true accounts of their possessions of the rather large amounts of silver coins found in their possession"; and the other "I am inclined to draw an inference", but these last quoted words were followed by "and only inference in the circumstances"; and it is obvious

from the judgment as a whole that the magistrate completely believed the prosecution case and disbelieved the defence case. However, we draw his attention to the decision in *R v Aves* (1950) 34 Cr App Rep 159. We do not accept, as we were asked to do, that the magistrate did not evaluate the evidence as a whole. He did.

We have made our own assessment of the recorded word in the light of the grounds of appeal set before us and the arguments proffered in support of them, and we are of the view that the two appellants committed the crime charged, the evidence before the Court proving that beyond all reasonable doubt. It follows that the appeals fall to be dismissed and we dismiss them.

Appeals dismissed.

Dated and delivered at Nairobi this 29th day of May 1979.

E. TREVELYAN

JUDGE

SCRIVEN

JUDGE