

A house. The second appellant and the sixth accused were inside as well as the third appellant who used to frequent the house. PW5 was also at home. Apparently the three saw the police in good time and PW5 saw them run in different directions. The police arrived only to find the doors ajar and they do not appear to have taken notice of PW5 because PW1 said: "Nobody was at home." In one room the police found three mattresses (Exhibit P7), a blanket and two bed sheets and in the second room they found the engine block and other accessories (Exhibit P9). Earlier on the same day they had gone to the seventh accused's house and recovered the motor cycle (Exhibit P4).

At the trial PW3 identified in Exhibit P7 the mattresses taken from his room as well as Exhibits P4 and P9, pointing to the service number on the engine block. The fourth appellant was arrested on 24 May after a chase in which he was shot in the leg. He was then found with a Seiko watch (Exhibit P11) which was identified by PW3 because of his initials "S H" inscribed at the back and the glass.

The Courts below believed the prosecution witnesses that the second, third and fourth appellants were in possession of the various items either at the Airport house or at the seventh accused's house. In the light of the evidence just reviewed, we have no cause to differ. It has not been demonstrated to us that there was any misdirection or non-direction as would have led to a perverse finding. The matters raised by these appellants are so trivial as not to deserve attention. We are satisfied that these appellants were similarly properly convicted for the robberies and that all the appellants were properly convicted on the conspiracy charge. The appeal is dismissed in its entirety.

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SULTAN SEIF NASSOR v. REPUBLIC

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Kisanga, Ramadhani and Lugakingira, JJ.A.)

CRIMINAL APPEAL No. 66 OF 2000

(From the Judgment of the High Court of Tanzania at Dar es Salaam, Ihema, J.
dated 20 September 1999 in Criminal Appeal
No. 43 of 1999)

Criminal Law – Theft – Doctrine of recent possession – Accused explains how he got possession of the stolen goods – Whether the doctrine may properly apply.

Criminal Practice and Procedure – Sentencing – Sentencing powers on appeal – Whether appellate Court may interfere with sentence of a lower Court

Criminal Practice and Procedure – Appeal – Evaluation of evidence on appeal – Powers of appellate Court – Whether appellate Court may evaluate the evidence afresh.

The appellant together with seven others were charged with two counts of conspiracy to steal and stealing contrary to sections 384 and 267 of the Penal Code respectively. The prosecution case was that goods belonging to Daniel Kapapa, a State Minister in Zambia, stolen while in transit from Dar es Salaam, were then found in possession of the appellant. The appellant explained how he came into possession of the goods and a witness was called to testify in his favour. Both the Courts below rejected the explanation and the trial District Magistrate convicted the appellant and sentenced him to five years' imprisonment, and acquitted the other accused persons. On first appeal the High Court upheld the conviction and enhanced the sentence to seven years imprisonment.

Held: (i) It is trite law that where the accused person explains how he came into possession of the stolen goods, the doctrine of recent possession should not stand.

A (ii) Where a second appeal is brought under section 5(7) of the Appellate Jurisdiction Act 1979 on a point of law the second appellate Court can evaluate the evidence afresh and make its own findings.

B (iii) Where the sentence is manifestly inadequate or excessive to amount to a miscarriage of justice, and where the Trial Court acted on a wrong principle or overlooked some material facts, the appellate Court may interfere with the sentence passed by the lower Court.

C ***Appeal allowed***

Cases referred to:

(1) *Director of Public Prosecutions v. Jafari Mfaume Kawawa* [1981] T.L.R. 149

D (2) *James Yoram v. R* (1951) 18 E.A.C.A. 147

(3) *Republic v. Abdallah Selemani* [1983] T.L.R. 215

(4) *Republic v. Mohammedali Jamal* (1948) 15 E.A.C.A. 130

E (5) *Silvanus Leopard Ngumwe v. Republic* [1981] T.L.R. 66

Mr Ndolezi for the Appellant

Ms Malecela for the Republic

F Statutory provisions referred to:

(1) Penal Code sections 384 and 265

G **JUDGMENT**

(Dated 23 July 2001)

H **Ramadhani, J.A.:** The appellant, Sultan Seif Nassor, together with other seven persons were charged with two counts: conspiracy to steal contrary to section 384 and stealing goods in transit contrary to section 265 of the Penal Code. The story of prosecution is that some goods belonging to one Daniel Kapapa, a state Minister in Zambia, (PW6), were stolen while in transit to Zambia from Dar es Salaam. These goods were found in the possession of the appellant

and his companions four of whom were his co-accused persons. A locomotive driver, a train guard and train escort who were on duty on the fateful day were also charged.

The learned District Magistrate of Kisarawe district was not satisfied that the charge of conspiracy to steal was proved. So he acquitted all eight accused persons on the charge. He also acquitted all accused persons, except the appellant, on the second count of stealing goods in transit. For that offence the appellant was sentenced to a term of imprisonment for five years.

The appellant being aggrieved by the conviction and sentence unsuccessfully appealed to the High Court where his sentence was enhanced to seven years. This is his second appeal and this was advocated for by Mr Ndolezi, learned counsel, while Ms Malecela, learned State Attorney, represented the Republic/respondent.

The evidence before two lower Courts was that PW6 went to Bangkok in April 1997, and had massive shopping of assorted items of goods, which were then "packed in a package (*sic*): it was sealed and got my name Mr Kapapa". The container was shipped to Dar es Salaam where the container was loaded on a train to Kasama, Zambia. PW6 received the container on 15 August 1997, and on 24 August 1997 he opened it before two police officers, Ackson Zulu (PW7) and Mark Mwingu (PW8), only to discover that it was empty. The opening of the container was at PW1's residence where PW7 and 8 found it already off-loaded and on the ground.

That discovery was reported to the Tanzania Zambia Railway Authority (TAZARA). PW7 and 8 came to Dar es Salaam where they were shown 54 parcels with PW6's name written on them. PW6 himself identified the goods in Court but wondered why his luggage had some Kiswahili writings. PW6 also could not satisfactorily explain the difference in the weight of the container from 6032 kilos in Bangkok to 6740 in Dar es Salaam, that is, an increase of 708 kilos.

These goods were recovered by Assistant Inspector Mohamed Juma (PW1) from the appellant, Sultan Seif Nassor, and his six colleagues

A on 11 August 1997, at Kisanga Village in Kisarawe District, where the vehicle transporting the goods broke down. The appellant claimed ownership of the goods and told PW1 that he bought them in Arusha. At the time of his arrest, however, he did not have receipts because they were lost in the accident. The appellant later produced copies of receipts and he was prepared to take the police to Rumbo General Enterprises, the shop from which he bought them. However, when these charges were placed to his door, the appellant declined to cooperate. So D/C Phillipo (PW5) went to Arusha to look for the shop but found "Tumbo Games Stone" (*sic*). PW5 admitted that he did not make enquires at the Registrar of Companies.

D Vedasto S Lugemalila, a train controller with TAZARA, (PW3), said that the container in question left Yombo for Kasama at 5:00am on 11 August 1997. After covering some 71 kilometers, it stopped for some forty minutes because of some technical reasons. The seal on the container was found tampered with. PW6 said "TAZARA staff found the seal was different in number from Bangkok the seal was reddish and while in Zambia it were green with different figures" (*sic*).

F In his defense, the appellant reiterated his claim of ownership of the goods and produced Martin Masanja (DW6) who affirmed to have sold the goods to the appellant.

G Mr Ndolezi had a three-ground Memorandum of Appeal. His first ground was whether as a matter of law the prosecution proved theft of the goods in transit beyond reasonable doubt. Mr Ndolezi submitted that even invoking the doctrines of recent possession, the appellant gave an explanation of how he came to possess the goods that they belong to him. The learned advocate contended that PW5 did not prove the non-existence of the Tumbo General Enterprises. The learned advocate submitted that the Registrar of Companies should have been consulted. He pointed out that DW9 was not cross-examined on the existence or otherwise of the store. Ms Malecela, on the other hand, argued that the learned District Magistrate did not believe the claim of the ownership of the goods by the appellant and his witness, DW9.

A On the second ground of appeal Mr Ndolezi submitted that the enhancement of the sentence was contrary to law because the appellant was not heard on the matter. He cited *Republic v. Abdallah Sulemani*, (1) at 215. Ms Malecela argued that the advocate for the appellant addressed the Court on the question of punishment.

C Finally the learned advocate submitted that the order of giving the goods to PW6 while the process of appeal had not been exhausted was wrong in law. Ms Malecela did not make any submission on that.

E We must admit that the learned district magistrate erred in convicting the appellant with theft of goods in transit without expressly stating that he was invoking the doctrine of recent possession. Besides that, the question is whether the evidence before the two Courts proved the offence beyond the reasonable doubt.

F It is undisputed that the first five accused persons were found in possession of the goods that are alleged to have been stolen. Nevertheless, four of those persons were acquitted of the offence of stealing goods in transit. Only the appellant was convicted of the offence. The question was why? What distinguished the appellant from his four colleagues who were all found by PW1 to possess the goods at Kisanga Village?

G The answer is not difficult to come by, the appellant consistently owned to have been in possession of the goods claimed to belong to PW6. Whereas both lower Courts believed the appellant's admission of possession of the goods, they disbelieved his claim of ownership. We must emphasize that it was not the evidence of PW1 that swayed the lower Courts. If it were so, then all of the first five accused persons would have been convicted. It was the claim of the appellant to the ownership of those goods that clinched the matter. The two Courts did not also believe DW9's assertion that he sold those goods to the appellant and, therefore, the goods belonged to the appellant.

H Were the Courts legally correct? Were the goods conclusively identified to belong to PW6?

A PW6 claimed that when he left Bangkok his purchases were put in a container and sealed. One wonders why then it was necessary to write the name of PW6 on every one of the 116 packages in the container. That doubt is reinforced by the existence of Kiswahili words on those packages that baffled even PW6 himself.

The learned district magistrate was satisfied that ownership of the good by PW6 was proved and he said:

C I also inspected Mr Kapapa's receipts (PW6) by which he was acknowledged when he bought the goods in Bangkok and the copies of original receipts of the first accused, and found that the documentary evidence and real evidence produced in Court prove more certainly that it is the properties of Mr Kapapa (PW6) (*sic*).

D We had a look at the receipts and saw that they merely said "boys' suits", for instance. There were no detailed descriptions of those suits. Then in a number of cases those brief descriptions were followed by scribblings in Thai characters which we are dead sure the two lower Courts could not decipher just as we were unable to do so.

F The duplicate copies of receipt tendered by the appellant were equally brief. However, these had rubber stamp impressions "Tumbo General Enterprises, P O Box 4552, Arusha" and also "stamp duty paid. Composition Agreement Number SD/95/1/42". Now, these receipts were presented to the police very early in their investigation, according to PW1 one wonders why those details could not have been investigated and witnesses brought to disprove their authenticity. The learned district magistrate merely dismissed them by saying:

H ... receipts first accused produced in Court as Exhibits it has not the name of the company Tumbo Enterprises, Arusha, it is only sealed with the company seal as Tumbo Enterprises Arusha. The company should be known reliably if it would have the printed title of the company. The copies appear any one could afford to use ordinary paper as receipt by using a fake or fabric company seal Tumbo Enterprises, Arusha in sealing on that paper to make copies of the receipts (*sic*).

A So, the learned District Magistrate dismissed those receipts because they were not in printed letterheads but merely had rubber stamp impressions bearing the company name. But such details as "Box Number" and "Composition Agreement Number" should have been investigated so as either to give the lie to the appellant or exonerate him.

C It is trite law that it is not for an accused person to prove his innocence but merely to raise a reasonable doubt. Where there are such clear leads as shown above and the prosecution does not disprove them while a conscientious one would have done so, then a Court, albeit an appellate one is justified to draw adverse inference as we do.

D There are other issues that raise eyebrows. It is not in evidence when PW6 collected the container from the railway station in Zambia. The container arrived on 15 August but it was opened on 24 August that is after 9 days. We are prepared to take judicial notice of the fact that PW6 being a Minister is obviously a very busy man. But we cannot understand that whereas he was personally present when the container was lifted onto the truck at the railway station, PWs 7 and 8 did not witness the loading and the unloading. They found the container on the ground. So, they would not know what happened to the container before they were called to witness the opening. Yet the reason for summoning these two officers, according to PW8, was that the leadership of Zambia requires the police to know any business done by any minister! We wonder whether that was accomplished. Incidentally, PW6 gave a different reason: he said that as a Minister he was entitled to have bodyguards.

H Apart from what we have said, we ask ourselves why did DW9 stick out his neck and assert on oath that he had sold the goods to the appellant. What he actually did was to confess that he was a person to be in the dock instead of the appellant. Could any one be so bold as to sacrifice oneself in that way while fully aware that what he was stating was false? That raises a lingering doubt not to be lightly waved aside.

A We are satisfied that the decisions of both lower Courts were perverse: such finding was untenable. This Court has Director of Public Prosecutions in *Director of Public Prosecutions v. Jaffari Mfaume Kawawa*, (2) that:

B Where a second appeal was brought under section 5(7) of the appellate Jurisdiction Act 1979 on a point of law, the second appellate Court can evaluate evidence afresh and make its own findings of fact where there are misdirection or non-directions by the first appellate Court. [The section now as amended by Act Number 16 of 1984 is 6(7)].

C This is what we have just done in this appeal.

We, therefore, quash the conviction and set aside the sentence.

D This ought to have settled the matter. However, there is a question of the enhancement of the sentence by the High Court.

E Admittedly, before the High Court the appeal was also against the sentence and, therefore, the appellant's advocate had an opportunity of addressing the Court and argued that the sentence was stiff and should be reduced. The learned state attorney told the High Court "the sentence of 5 years is a proper sentence".

F It would appear that the learned first appellate judge was of view that the sentence ought to have been the maximum provided by the law. There is abundant guidance on when an appellate Court could interfere with a sentence passed by a lower Court: One, if the sentence is manifestly inadequate or excessive so as to amount to a miscarriage of justice in *Republic v. Mohamedali Jamal* (3) and two, if the Trial Court acted on a wrong principle or overlooked some material factor in *James Yoram v. Republic* (4). This Court has encapsulated these principles in *Silvanus Leopard Ngumwe v. Republic* (5).

H Be it as it may, the learned judge should have disclosed his intention and should have specifically invited the appellant or his counsel to address the Court on the matter. This was not done and was, therefore, against the decision in *Republic v. Abdallah Selemani* cited by Mr
I Ndolezi:

Enhancement of sentence should not be made to the prejudice of the accused persons, for example, where he cannot be given an opportunity to be heard.

Finally, it is a matter of a great pity that the goods were by Court order given to PW6. That order now cannot be reversed. It would be proper in future that such goods are sold and the proceeds of the sale are kept in Court pending the finalization of the entire appellate process.

The appeal is allowed. The appellant is to be set free immediately unless his continued incarceration is otherwise lawful.

MINISTER FOR LABOUR AND YOUTH DEVELOPMENT AND ANOTHER v. GASPAR SWAI AND 67 OTHERS

COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(Ramadhani, Lubuva and Lugakingira, JJ.A.)

CIVIL APPEAL No. 101 OF 1998

(From the decision of the High Court of Tanzania at Dar es Salaam (Mapigano, Bubeshi and Kaji, J.J.), dated 31 December 1997, in Miscellaneous Civil Case No. 29 of 1995)

Appeals – Appeals to the Court of Appeal – Notice of Appeal – Need and time to file a Notice of Appeal – Rule 76 of the Tanzania Court of Appeal Rules 1979.

Appeals – Appeals to the Court of Appeal – Filing the record of appeal – Rule 83(1) of the Court of Appeal Rules 1979.