

*Hon. Mr. Justice
J. K. N. Tsekooko.*

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT SOROTI

CRIMINAL APPEAL NO. 6 OF 1993

(From original Soroti Criminal Case No. 426/92)

UGANDA APPELLANT
VERSUS
A1: ASIU JOSEPH MILTON)
A2: OPIO s/o OMANI) RESPONDENTS
A3: AROPET MAX)

BEFORE: THE HON. MR. JUSTICE S.G. ENGAU.

J U D G M E N T:

Before the Chief Magistrate at Soroti, A1 - Asiu Joseph Milton, A2 - Opio s/o Omani and A3 - Aropet Max hereinafter referred to as the respondents, were charged with House breaking and theft, contrary to sections 281 (1) (a) and 252 of the Penal Code Act.

It was alleged that the three respondents during the month of July, 1992 at Kikota village, Serere County in the Soroti district did break and enter the dwelling house of Mrs. Esabu with intent to steal therein and did steal therein 52 corrugated iron-sheets valued at shs 520,000/- the property of Esimu Nathan.

To prove the case, the prosecution called seven witnesses. A summary of their evidence is that in the early 1980's PW1 entrusted PW5 with 60 iron-sheets of gauge 28 and 10 ft long for safe custody in her home. In July, 1992 while PW5 was away from her home, PW2 received a report as the area R.C.1 Chairman that Mrs. Esabu's house was broken into and some mabatis therein were stolen. He informed PW5 of the alleged theft through a letter. PW1 went to the scene and confirmed the report true.

In August, 1992, i.e., about one month after the alleged theft, PW6 saw a white pick-up pass along Odungura road and stopped after a short distance. She heard noise of something like mabati being loaded on the pick-up just from a nearby bush. Later she saw the pick-up make its way towards Soroti town and on board there were some new mabatis. The vehicle in question had its number plate handwritten. She went to the scene only to see yellow grass indicating that the mabatis had been hidden there for sometime. She sent a report to PW2 who had earlier informed all the villagers to be on the look out for the alleged theft of some iron-sheets from the house of PW5.

The matter was reported to Soroti Police who traced PW3 as the driver of the vehicle which collected the mabatis from the bush. PW3 confirmed that it was A1 who hired him to collect those iron-sheets which were traced and found in the house of PW4 at the Senior quarters, Soroti Town.

PW4 confirmed that it was A1 who sold those iron-sheets to him from a source not disclosed. So 22 iron-sheets were recovered from PW4 by the Police and exhibited. They were iron-sheets of gauge 28 and 10 ft long. PW4 further informed court that A1 again had earlier on sold to him 25 iron-sheets of the same gauge and length which he had kept at his home in Agwara. Those mabatis were also recovered by the Police as exhibits.

Evidence of identification of the 47 iron-sheets so far recovered is that PW1 bought 60 of them with gauge 28 and 10 ft long from the Republic of Kenya bearing Lion brand. He then gave a certain number which he could not remember to a friend but were replaced by iron-sheets made in Uganda of the same gauge and length.

In his ruling, the learned Chief Magistrate held that a prima facie case was not established on the principles laid in R.T. Bhatt v. R (1957) EA 332 to warrant the respondents be put on defence. He discussed several issues which made him come to that conclusion and among them is the identification of the iron-sheets exhibited in court. He held among other things that there was nothing special to differentiate the 47 iron-sheets so far recovered from any other iron-sheets made in Kenya and Uganda of gauge 28 and 10 ft long and also from the iron-sheets allegedly stolen from the house of PW5. He said the Police did not do enough investigations over the matter but instead went for the obvious. The three respondents were therefore acquitted under section 125 M.C.A. 1970.

The appeal is based on the following grounds:-

1. THAT, the trial magistrate erred in law in holding that the prosecution did not prove a prima facie case against all the accused persons thereby acquitting them under section 125 of the Magistrates' Courts Act.
2. THAT, the trial magistrate erred in law when he failed to make an order in respect of the iron-sheets brought in court in respect of the offences charged under section 213 of the Magistrates' Courts Act.

In arguing the first ground stated above, the learned State Attorney said that in light of evidence on record, the learned trial Magistrate did not address his mind on the doctrine of recent possession and circumstantial evidence. Evidence is that the house of PW5 was broken into around July, 1992 and 52 iron-sheets therein stolen. In August, 1992 a period of about one month some 47 iron-sheets were recovered from PW4 in Soroti town and also at Agwara village. In her view the doctrine of recent possession would apply.

The learned Counsel for the 1st and 2nd respondents submitted that the doctrine of recent possession does not apply in the instant case because the exact date in which the house of PW5 was broken into is not stated.

The 3rd respondent was not represented but supported the ruling of the trial magistrate.

For a doctrine of recent possession to apply, the following is an extract from Kenny's Outlines of Criminal Law (15th Edn p. 391:)

"The possessor of goods recently stolen may fairly be regarded as either the actual thief or else a guilty receiver. His possession raises also - but less strongly - a presumption of his guilty connection with any further crime that accompanied the theft, e.g. a burglary, arson or murder."

And on page 392:

"As to what time is near enough to be recent, no general rule can be given for the period within which the presumption can operate will vary according to the nature of the article stolen. Three months has been held sufficiently recent for a motor car, and four months for a debenture bond. But for such articles as pass from hand to hand readily, two months would be a long time."

As regards the necessity for a trial court to direct itself properly as to the law when purporting to act on a presumption the Court of Appeal had this to say in Jagat Singh v. R (1953) 20 EACA 283 at p. 286.

"It is not the law that proof of possession of recent stolen articles will necessarily or in every case justify an inference of guilt, what constitutes 'recent possession' depends upon the nature of the property and the circumstances of the particular case."

In other words, where a conviction is to be founded on the law of recent possession, the Magistrate must sufficiently direct himself on the scope and limitation of the presumption to be drawn.

The facts of the case as found by the learned Chief Magistrate, are that on an unspecified date (which from perusal of the record would appear to have been in July, 1992) the house of PW5 was broken into by unknown persons and stole therein 58 iron-sheets belonging to PW1. By then PW5 who had left the 2nd and 3rd respondents keeping her home, was sick in Soroti Town. PW1 who had entrusted her with safe custody of 60 iron-sheets altogether was also staying in Soroti Town.

According to the area R.C. official, PW2, when the house was broken into and a theft committed therein the 2nd respondent was not around. He was at his home in Agwara. The 3rd respondent also had gone to his home to harvest millet. But when the 3rd respondent returned, he reported the theft to PW2 who told him to look round the bush in the vicinity and 6 iron-sheets were recovered. The door to the store was then permanently sealed by nailing timber across.

On 23.8.92 a brother to PW4 hired the vehicle of PW3 for collecting some iron-sheets in Acilo village. The 1st respondent directed the driver to the village and 22 iron-sheets of gauge 28 and 10 ft long were picked from a bush five paces off the road and there were no houses in the vicinity. The only reason he gave was that the vehicle could not reach the home where he had kept the iron-sheets. According to PW6, the grass had turned yellow indicating that the iron-sheets had been kept there for sometime. From that place to the home where iron-sheets were alleged to have been stolen was more than 2 kilometres away.

When asked to account for his possession of the 47 iron-sheets which he sold to PW4 in two consignments, the 1st respondent informed both PW4 and the investigating officer, PW7 that those were the iron-sheets of his brother who had died. He even told the investigating officer the name of his later brother. That piece of evidence was not further investigated.

I do not agree with Ms Nandawula, who has appeared for the appellant, that the ruling in the case now under appeal is defective - because it is clear that although the learned Magistrate did not direct himself at all as to the scope and limitation of the presumption to be drawn from the recent possession of stolen goods, that possession, one month after a breaking, of an article in common use such as iron-sheets, could not raise the presumption that the possessor of the iron-sheets was guilty of the offence charged. Moreover, there was no other evidence whatsoever to connect the 1st respondent with the house-breaking and theft therein nor was there any suggestion that any of the iron-sheets stolen on that occasion were ever in the 2nd and 3rd respondents' possession. Be that as it may, I am not satisfied that the learned Magistrate, had he properly directed himself, would necessarily have found the respondents guilty even of receiving, having regard to the lapse of time and the nature of the articles. Circumstantial evidence in the instant case does not also apply on the principles laid in Simoni Musoke v. R (1958) EA 715.

On the second ground, it was conceded by both Counsel that under section 213 M.C.A. 1970, it was mandatory for the learned trial Magistrate to have made an order in regard to the iron-sheets which were tendered in court as exhibits to the rightful owner or his representative. However, different views as to who was the rightful owner of the iron-sheets erupted. The learned Counsel for the appellant suggested the complainant, PW1 or Mrs. Esabu, PW5 who was in custody before, during and after the alleged theft, or the bona fide buyer, PW4. On the other hand, the Counsel for the first and second respondents suggested the bona fide purchaser but the 3rd respondent unrepresented made no comment at all.

As already indicated, this appeal fails in the first ground but succeeds in the second ground and the 47 iron-sheets be restored to the bona fide purchaser - PW4, one Obubula.


STEVEN GEORGE ENGWAU

JUDGE

20.4.94.

28.4.94: Nandawula for appellant.
Mr. Kakembo for respondents.
Judgment delivered in open court.


STEVEN GEORGE ENGWAU

JUDGE

28.4.94.