

TANZANIA / JUDGMENT

19790516 TZHC Tanga1

COURT
TZHCDECIDED
16 May 1979

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VAIC 1) 9M IN THE HIGH COURT OF TANZANIA AT TANGA APPLATE JUIIDICT1ON TDR
CRIMINAL APEAL NO, 2 OF 1979 (original Criminal Case No. 301 of 1978 of the District. Court of
Korogwe District at Korogwe) BEFORE: F .. A. PUSSI, Esq., District Maistra.te AEDALLAH
bALEHE : : ., : : APPELLANT (Original Accused) versus THE RL2PUBLIC :RESPONDENT (original
Prosecutor) CHARGE:1,Brèaking into a building - contrary to..section 296(1) of the Penal Code;
and .

2. Stealing - contrary to section 65 of:•the Penal Code,

JUDGMENT

NYALJXII C.J. -. This criminal appeal otiginates in the Djstrjct Court of Korogwe District where
the •appellndnt wis ch'aged with tio other persolas with the offence of breaking into a building -
contrary to Section 296(1) of the Pena.l Code in the first count, and stealing - contrary to section
265 of the same Code in the second count. The two other persons who were charged as second
and third accused were acquit±ed on both counts by the lower court but the appellant who
appeared as the first accused at the trial in the District Court was convicted as charged on both
counts and sentenced. to three years' imprisonment on the first count and six imprisonment on
the secona count. The sentences were diaècted to run concurrently. The appellant was aggrieved
by the convictions and sentences and henO this a peal to thin Court. In his memorandum of
appeal he elected not to apearor be represented at the hearing of his appeal. The Republic was,
however, represeited by:Mr. Sekule, learned Principal State Attorney. I have carefully examined
the evidendace adduced at the trial in the District Couct, the judgment of the trial court the
memorandum / (

- 2 - of appeal submitted by the appellt to this Court, the brief oral submissions m:de by
theled'rned Pri.:nciplal State áttieney at the hearing of this appeal, and it seems there is no
dispute between The portios that, during: the night of the 22nd/23rd Jamcry, 1973, the Hotel
of P..1 was hrbken into and various articles were stolen ,froni: the Hotelstore and kitchen.
Later, in the morning of the 23rd 'January; 1978, the appellant and two other perSon were
appreheia4 by the police. Thereafter, in the sOme morning, P.P.l was called to the Police
Station and shown various articles which P.d.l claimed to he among the articles stolen from
his hotel. \ith regard to ters which are in dispute in. this Qase, it was the prosecution case' us
laid out at the trial in the District Court in respect of the appellant that the appellant had

offered to Sell to P.1.2 some property in the morning of the 23rd January, 1978..

Furthermore, it was part of the prosecution case. That the appellant's possession of the property was made known to P.1.2 by the third accused, who was acquitted at the trial, and that P.1.2 was suspicious and contrived to inform the police who came and apprehended the appellant and the third accused who was acquitted. It is part of the prosecution case that the police found the appellant in possession of the properties which were later claimed by P.1.1 as being part of the property stolen from his Hotel. On the other hand the defence case of the appellant at the trial in the District consisted in a general denial of the prosecution case and a claim that he was 'Oppressed' while drinking local liquor in contravention of the cholera quarantine imposed in the area prohibiting the consumption of local liquor. It was also part of the defence case of the appellant that he was surprised when later he found himself being charged with this offence.

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- ? -3- The first point for consideration and decision in this case, is whether the appellant was found in possession of the properties which P.1.1 subsequently claimed to be part of his stolen property. It is apparent on record that the appellant did not suggest to the prosecution witnesses, while cross-examined, that he was arrested in connection with contravention of cholera quarantine regulations. On the other hand, there is the evidence of P.7.2, the person to whom the appellant offered to sell the property in question and the policeman (p.13) who apprehended the appellant, to the effect that the appellant was in possession of the properties which later P.7.1 claimed to be part of his stolen property. On this evidence, I am satisfied that the appellant was found in possession of the property in question and I find it so to be a fact. The next point for consideration and decision in this case, is whether the property which the appellant was found in possession of was among the property stolen from P.1.1's Hotel. According to the evidence of the lower court, the property in question consisted of common crockery with no specific marks. P.1.1 stated 'I know them as I was always using them for a long time.' This, of course, is a bare assertion made by P.1.1 about the identification of the properties found in the possession of the appellant. The question arises whether this is sufficient identification of the properties in question. As a general rule, where ownership or identity of stolen property is in dispute, the prosecution is required to prove the identity of such property beyond reasonable doubt by 'adducing evidence regarding marks or unique features or particulars on the property by which a witness can identify the property with confidence. I am, however, of the considered opinion that in a case where ownership or identity of stolen property is not in dispute, then a bare assertion of a witness made on oath about ownership or identity of the property in question is sufficient evidence to establish the fact beyond reasonable doubt. This is consistent with common sense, and no one is required to give a detailed description of anything which is not in dispute. In the present case, there is no dispute regarding the ownership or identity of the crockery found in the possession of the appellant. The bare assertion made by P.7.1 on oath that the crockery in question was part of his stolen property is sufficient evidence to establish that

fact beyond reasonable doubt I therefore find it as a fact that the property found in possession of the appellant was part of the property stolen from P.L. The next point for consideration and decision in this case, is whether the appellant was properly convicted on both counts. The offence for which the appellant was charged arises under section 296(1) of the Penal Code, that is, the offence of breaking into a building and committing a felony therein. It is a single offence and not two separate offences of breaking into a building on the one hand and committing a felony on the other hand. It was, therefore, wrong to charge and convict the appellant on two separate counts. The appellant should have been charged and convicted on one count only. The question arises, therefore, whether this irregularity vitiates the proceedings in this lower court. I do not think so - because the appellant knew exactly the nature of the offence which he was involved in. He was - therefore not prejudiced and the irregularity is curable under section 346 of the Criminal Procedure Code. I, therefore, hereby cure the irregularity by setting aside the convictions for -5- breaking into a building on the first count and stealing on the second count, and substituting instead a conviction for breaking into a building and stealing - contrary to section 296(1) of the Penal Code. The consequence of this is to set aside the sentence of Six months' imprisonment imposed on the second count with regard to the sentence of three years' imprisonment imposed by the lower court on the first count, there is nothing that this Court can do, since it is the bare minimum prescribed for the offence under the Minimum Sentences Act, 1972. In the final analysis, therefore, with these technical modifications, the appeal is, in effect dismissed in its entirety. (P. L. NYALALI) CHI JUSTICE Delivered in Court at Tanga this 16th day of May, 1979 in the presence of Mr. Selele, learned Principal State Attorney for the Republic and in the absence of the appellant duly notified. (I. L. NYALALI) CHIEF JUSTICE

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