

TANZANIA / JUDGMENT

19781130 TZHC Dodoma

COURT
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V IN THE HIGH COURT OF TNZANIA. AT DODOMA APPELLATE . JURISDICTION CRIMINAL
APPEAL No.125 OF 1978 . ORIGINAL CRThILTAL CASE No1 202 OF 1978 OF THE DISTRICT
COURT OF SINGIDA AT fIGA

1. SAIDI ABDALLAH ' AHELLKNTS versus THE REPUBLIC RESPONDENT

JUDGMENT

JONATH Before the district court of Singida were two accused e charged jointly with stealing from a motor vehicle c/s 269 () of the Penal Code. They were convicted as charged and each sentenced under the Minimum Sentences Act to 3 years' imprisonment' Against the conviction they have both..appealed to this court through their advocate, Mr. Ohambakare. On the relevant day at about mid—day Pw.1 and Pw.4, both employees of the Water .Department, Singida app.a± tb have parked a Land. Rover with registration No.ST.3562 somewhere ' in the township to buy cigarettes at , a shop nearby. They returned about 10 minutes later only to find the spare tyre had been stolen from the back of the van where it had been secured. They at once combed the neighbourhood and, following the tyre marks on the ground, they came, to the 1st accused's house. .Theyéarched inside and outside it,. but in vain. The marks did however continue past the house to the grass where they ended. They then decided Pw.i, the driver, should report the theft. at the police station while Pw..4, a store clerk of that department, stayed on to keep . watch for any more clues. . . . According to Pw.4, while he was ... c watching but in the area he saw a tyre 'offloaded from a vehicle and pushed to the house of Pw.3 by the accused persons. He therefore telephoned. the police. It would appear that, in the .meantime P. 2 7 a motor mechanic of the Water Department, Singida' had been stopped by the second accused who was accompanied by the 1st accused hiring him and the Land Rover he was driving to take their tyre to a place in the township.

- 2 - The second accused he continued, then brought forth a Land Rover tyre and put it on board the vehicle. From there, they V drove to a house where the accused persons offloaded that tyre and paid him sh. 10-as, the agreed reward. That transpired to be the house of Pw.3 :according to witness account the tyre was offloaded. at his house by Pw '2 'Who, then, drove off leaving the ,two. accused, the'o. They wished to keep the tyre at his but the' witness would not have them do so, so they took it away. The police in response to the telephone call of Pw.4 came to the area and found the ,tyre having been left at a footpath,

not tar. from the 1st accused's house. The second accused was then arrested and taken to the police station but not the 1st accused who appeared very drunk and who was left alone for the time being. That, in brief, was the prosecution evidence, at the close of which Mr. Mwalunga, the learned advocate - conducting the defence, sought and obtained an adjournment of about two weeks to enable him to prepare the defence. At the resumed hearing, however, the accused persons in answer to the provisions of section 206 of the CO said, obviously on the learned advocate's advice that they would not give any evidence and they would not call any. Either 'The strategy of Mr. Mwalunga appears based, on his contention that the tyre had not been identified as belonging to the Water Department or to any one at all, and that in the absence of evidence to that effect, his contention could not be said to have been proven. However, the contention is not explicitly dismissed by the learned district magistrate in his judgment, did not seem to take stock of the evidence. In fairness, to the learned advocate, he did however, appreciate that P. 1 had said he identified the 'exhibit tyre as that of the Water Department - by its serial number. Of such evidence, however, he said that, in his opinion, the witness had noted the serial number only after the tyre had been found. There was no evidence with respect to the learned advocate to back up his opinion. On the contrary, the witness in answer to a question by him, said he had recorded the serial number of that tyre. It is however true, as argued by the learned advocate, that the witness did not show where he had made note of the serial number but, going by the record, it is equally true that the advocate did not require of him to produce such record. In the light of P. 1's evidence, the inference is that Lao Lyre was identified as belonging to the Water Department. Were that to be found insufficient, there was also the evidence that that was the tyre stolen from motor vehicle Registration No. ST3562. It is public knowledge that the letters "ST" on vehicle number plates are peculiar only to vehicles belonging to the Government of Tanzania. The exhibit tyre being the spare tyre of that motor vehicle, the clear presumption was that it was Government property. Be that as it may the interest of Government in that tyre would at least have been that of a special owner within the meaning of section 258 of the Penal Code. (r. Chambakare at the hearing of this appeal took the point that P. 3 and Pw. 4 contradict each other in their evidence as to which, between the 'second accused and Pw. 2, offloaded the tyre at the house of P. 3. P. 3 said

- that was done by Pw. 2 while Pw. 4, and indeed Pw. 2 himself, said it was, the second accused. I would however think this is a point of detail about which the witnesses could not, have been that clear, and I may note in this connection that Pw. 3 was inside the house when the tyre was taken out of the Land Rover and deposited at his house, which is to say? I would think, that he could not, say with certainty which of them did the offloading. The learned advocate has also urged to view the account of P. 2 and Pw. 4 as suspect, the former in that it must have been an unusual coincidence for the accused to

- hire a person working in the same department as the complainant, and the latter because he did not raise an alarm as soon as he saw the accused persons in possession of a Land Rover tyre in suspicious circumstances. As regards 1N.2, there is no evidence to suggest that he was known by the accused to be
- working in the Water Department and it may well be the culprits stopped him: little knowing his employer was the same department. I am also in agreement with the learned state attorney that the conduct of Pm'7.4 attracts no suspicion either. He saw two people at the house of r.3 handling what he suspected to be the missing tyre and as he knew them there could have been no necessity for him to raise an alarm just then, and I cannot say he acted unwisely by asking some people to keep watch on the suspects and the tyre while he telephoned the police. was, in any case the evidence of Pw,3 which fully corroborated the accounts of Pw,2 and 1 w.4 as regards the
- fact of the accused being in possession of that tyre at his house. In my judgment, in the absence of a defence, the only reasonable conclusion to draw from the facts is that the evidence was that the stolen tyre, property of Government, was found in the possession of the two accused persons. 4 As however rightly conceded by Mr. Lyimo for the Republic, there is a grave doubt if the first accused was consciously in possession of that tyre so as to hold him as the thief or a guilty receiver. Both Pw.3 and P.4 say the accused was either drunk or very drunk. That would seem to be so. For, although both accused were found present at the house of the first accused, only the second accused was immediately arrested and taken to the police station. His own participation in the handling of the tyre seems to have been minimal, and only the second accused appears to have controlled the movement of that tyre. The impression to be gleaned is that, all along in the handling of that tyre, the first accused was little more than a bystander as the other accused made efforts to hide away the tyre. He should in the circumstances be given the benefit of doubt either that he was too drunk to know he was being criminally involved or that, having in mind his drunken condition, his mere presence both at the time the second accused stopped Pw.2 and at the house of Pw.3 did not necessarily constitute him an aider and abettor of the theft by the second accused. Accordingly, as regards the appeal, it is allowed, the conviction and sentence being set
- aside and an order being made hereby to effect his immediate release from custody, unless he is otherwise lawfully held. Coming back to the second accused's possession of that tyre, there can be no doubt that, in the absence of any explanation, such possession, so soon after the theft, was attributable only to him as being the thief, and I am satisfied he was rightly convicted. As for sentence, Mr. Chambakare has raised the possibility that the accused may not have known the tyre was property of Government so as to bring him under the N.S.A. and, on this, I would respectfully disagree. The Land Rover from which he stole that tyre had an "ST" number plate and there was a compelling presumption that he knew the tyre was Government property, especially as he himself appears to have been a driver of the Ministry of Health. As however more cogently submitted by the learned state attorney, the accused having been convicted under section 269(c) of the Penal Code the N.S.A. did not

apply, notwithstanding that the tyre was property of Government. ' , , • ' On the basis that he should have been sentenced without reference to the LSOAb the sentence of 3 years would appear too severe for a first offender as the second appellant, considering that as the result of the conviction he must have lost his job with Govenixaent. Accordingly, there is substituted a sentence of 2 years' imprisonment. Delivered in open court this 30th day of November, 1978. I. M. JONITFIJN JUDGE

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