

IN THE SUBORDINATE COURT OF THE FIRST CLASS  
FOR THE LUSAKA DISTRICT  
HOLDEN AT LUSAKA  
*(Criminal Jurisdiction)*

The People versus                    **STEVEN PHIRI**  
BEFORE:                                **HIS WORSHIP F. KAOMA**  
FOR THE PEOPLE:                    **MALAMBO – PUBLIC PROSECUTOR**  
FOR THE ACCUSED:                 **IN-PERSON**

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**J   U   D   G   E   M   E   N   T**  
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**CASES CITED**

RV WASH (1824) 1 Mood C. C. 14 C.C.R

**CHARGE**

In this case the accused stand charged with one count of theft OF Goods in Transit contrary to section 276© of the Penal Code chapter 87 of the laws of Zambia. The particulars of the offence alleged that the accused on the 24 November, 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with others unknown did steal 6 boxes containing assorted car stereos, amplifiers, speakers and cables altogether valued at K28, 500. 00 ~~cash~~ the property of Muchemwa Mfula from a Man Diesel truck registration No. CJ 60ZV GP, which was in transit from Kazungula to Lusaka. The accused pleaded not guilty to the charge hence leading to this trial.

**WARNING**

I warn myself from the outset that the burden of proof in criminal proceedings such as the present one lies squarely with the Prosecution. Notwithstanding the defenses available to

an accused person, the primary responsibility to prove the allegations against such a person remains with the Prosecution.

The Prosecution in this case is required to prove each ingredient that constitutes this offense as charged **beyond all reasonable doubt**. I must reiterate that proof **beyond reasonable doubt** is not synonymous with proof beyond any **shadow of doubt**. In the event of reasonable doubt, such doubt must be decided in favor of the accused and he must be accordingly acquitted.

At this point I propose to analyze the law creating this offence before considering the evidence adduced by both parties herein.

#### **ANALYSIS OF THE LAW**

The offense of theft of goods in transit is created by section 276© of the Penal Code Chapter 87 of the Laws of Zambia which is couched as follows;

If a theft is committed under any of the circumstances following, that is to say among other things:

- (c) *If the thing is stolen from any kind of vessel or vehicle or place of deposit used for the conveyance or custody of goods in transit from one place to another; the offender is liable to imprisonment for seven years.*

For the purposes of this offence the term 'theft' is defined by section 265(1) of the Penal code as follows;

*"A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing."*

In the same vein the word 'taking' or *asportation* for this purposes is defined by section 265(5) of the Penal Code as follows;

*"A person shall not be deemed to take a thing unless he moves the thing or causes it to move."*

Further, sub section 2 of the same section in defining fraudulent taking provides that a person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say among other things an intent permanently to deprive the general or special owner of the thing of it.

In the light of the foregoing therefore the onus is on prosecution to prove each of the following ingredients beyond all reasonable doubt;

- a) Taking of the items as per indictment from a vehicle which is used of conveyance of the goods in transit from one place to another
- b) The identity of the offender
- c) Lack of bonafide claim of right
- d) The intent of the offender at the time of taking.

Having analyzed the law creating this offence it has now become absolutely necessary to consider the evidence adduced herein in order to satisfy myself as to the guilt of the accused.

In their Endeavour to prove the guilty of the accused the prosecution called to court 4 witnesses while accused opted to give a sworn statement and did not call any witness of which he is perfectly entitled to do at law.

The evidence of both parties is as per case record suffices to mention that I have closely considered the evidence adduced by both parties from which it seems to me that some facts are not in dispute while other facts are actually in dispute

#### **FACTS NOT IN DISPUTE**

It seems from the totality of the evidence that the accused does not dispute that on 24<sup>th</sup> November, 2016, a Man Diesel Truck Reg No. CJ 60ZV GP was travelling from Kazungula Boarder coming at Lusaka. When the driver Micheal Lungu (P2) who was with Steven Phiri



reached Monze he was informed that the container was open. When he stopped they discovered that 6 boxes as per indictment were missing. It is further not in dispute that on 27/11/17, PW2 jumped on a bus from Kafue where accused was a passenger as well. When they reached Lusaka at the point accused alighting from the same bus PW2 saw that he had 2 speakers and a car radio similar to the ones stolen from his truck belonging to PW1. That is how he took him to Embassy Police post. It is also not in dispute that at the Police accused led Constable Malama Bimos to Kafue where they recovered 2 boxes containing sony MP3 car sterio, 2 wire cables, one pair of twitters, a plain cable with multiple colours, one star Sound car sterio, one box containing a pioneer sub-woofer and one box containing ST amplifier that were identified by PW1 to be among his stolen items. Later accused was charged with the offense he is now charged with by Detective Sergeant Emmanuel Kaluba of Chawama Police Station which the accused denied. I therefore find these to be facts in this case.

#### **FACTS IN ISSUE**

What seems to be in dispute to me is the identity of the person or persons that opened the container of the truck and got items as per indictment some of which was found with the accused on his person and some at a house where accused led the officers. These are the facts in issue I have to resolve in this case and I propose to resolve them concurrently with the application of the law.

#### **APPLICATION OF THE LAW**

##### **a. Taking at law**

The first question to be decided at this point is whether or not there was taking of the ~~money~~ <sup>Items</sup> as per indictment.

In addition to the definition of 'taking' or *asportation* provided for by the penal code already alluded to, I wish to also refer to the definition in Halsbury's Laws of England 3<sup>rd</sup> Ed V10 at p767 par 1484. It is defined in the following terms;

*"The removal, however short the distance may be, from one position to another upon the owner's premises is sufficient asportation."*

The foregoing definition is fortified by the decision holding in the ancient of RV WASH (1824) 1 Mood C. C. 14 C.C.R where a prisoner tried to remove a bag from the boot of a coach but did not succeed in getting it entirely out was held to be sufficient *asportation* to constitute the offence of larceny.

It follows therefore that in order to constitute taking at law the offender need not part away with the thing in question but it is sufficient to prove any slightest moving of the thing even within the owner's premises.

Turning to the case in *casu* I wish to mention here that I need not stretch my mind in this matter in order to satisfy myself as to whether there was taking of the items as per indictment or not. This is so because it is a fact that the truck in question had the container opened whilst it was moving and at the point the driver was alerted they discovered that items as per indictment were missing from the truck. Some of the items that were in boxes were found with accused in Lusaka and others were found in Kafue. In the circumstances I am satisfied beyond all reasonable doubt that there was taking of items as per indictment within the meaning of the law. Further, there is sufficient evidence of the fact that the taking was done from a truck which was moving goods from a Kazungula to Lusaka which is no doubt a vehicle for conveyance of goods from one place to the other.

#### **b. Intent of the offender or offenders**

The question to be decided at this point is the intent of the offender at the time of taking of the items as per indictment.

I wish to state here that the *mens rea* for the offense theft is clearly stated in section 265(2) which provides that a person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say among other things an intent permanently to deprive the general or special owner of the thing of it.

What should be proved therefore among other things is the intention of the offender to deprive the owner permanently of his thing. I must state however, that it difficult to know what a person is thinking about until he puts his thought into action. It follows therefore that intent of any person when his actions are called into question can only be inferred



from overt acts. In this case the overt acts includes the act of opening the container of the truck whilst it was moving coupled with taking of the items as per indictment in the middle of the night without the owner's consent. All these put together leads to an irresistible inference of the fact that the offenders intended to deprive the owner of his items permanently and did in fact succeed in doing so as only a few items were recovered. In the circumstance and by the reasons stated I am satisfied that there is sufficient evidence for the *mens rea* to constitute the offense of theft.

**c. IDENTITY OF THE OFFENDER**

The crucial question that rises at this point is as to the identity of the offender or offenders that took the goods as per indictment from the vehicle.

The prosecution has alleged that it is the now accused who whilst acting together with other unknown that took the items as per indictment which accused had denied.

Reverting to the evidence I must hastily mention here that there is no direct evidence of any eye witness who saw the accused stealing the items as per indictment other than the fact that accused was found in possession of property recently stolen that is to say he was found with some of the stolen items barely 2 days from the date they were stolen. In other words accused was found in possession of property that was recently stolen.

In respect of possession of property recently stolen it was held by the Supreme Court in the case of *GEORGE NSWANA v THE PEOPLE* (1988 - 1989) Z.R. 174 (S.C.) that;

“The inference of guilt based on recent possession, particularly where no explanation is offered which might reasonably be true, rests on the absence of any reasonable likelihood that the goods might have changed hands in the meantime and the consequent high degree of probability that the person in recent possession himself obtained them and committed the offence. Where suspicious features surround the case that indicate that the applicant cannot reasonably claim to have been in innocent possession, the question remains whether the applicant, not being in innocent possession, was the thief or a guilty receiver or retainer.”

Accused has given an explanation in this matter on how he came to possess the said property. He deposed that he got on a bus coming to Lusaka in Kafue when a person came to sell car radios to the driver. He asked him if he had speaker of which he said they were home. That is how accused went with him home to get speakers. He bought 2 speakers and one radio at a total cost of K800. However, PW3 and PW4 both deposed that accused was changing statements. Initially he told them that he bought them in Mazabuka but later said he bought them in Kafue. I wish to state here that I have failed to appreciate accused's explanation on how he came to possess the stolen items more also that he knew the house where the other items were recovered. In the circumstances I don't find the explanation to be reasonable. Further, given the fact that accused came with a bus from the direction where the items were stolen from, it is highly probable that he only came to look for market of stolen items. Therefore in the absence of a reasonable explanation and given the fact that accused had in his possession some of the stolen property barely 2 days from the date they were stolen coupled with the fact that he came from the direction where the items were stolen from, the only inference that can be drawn is that accused is the thief himself who stole the items from the moving vehicle.

In the circumstances and by the reasons of the foregoing therefore I am satisfied that the prosecutions have proved their case against accused for the offense as charged and as such I find him guilty and I accordingly convict him.

DELIVERED IN OPEN COURT

DATED THE .....DAY OF .....



**F. KAOMA**