

**IN THE SUBORDINATE COURT OF
THE FIRST CLASS FOR THE LUSAKA
DISTRICT HOLDEN AT LUSAKA
(CRIMINAL JURISDICTION)**

BEFORE HON.MR. BRIAN.M. SIMACHELA.



THE PEOPLE v COLLINS MOONGA AND CHARLES SHAWA

JUDGMENT

For the People : Mrs S.Tembo, Public Prosecutor.

For the Accused: In person.

LEGISLATION REFERRED TO: Sections 272 and 265(1)/ (2) of The Penal Code Cap 87 of The Laws of Zambia.

CASES REFERRED TO: David Zulu v The People (1977) Z.R. 151 (S.C.)

The accused person stands charged with one count of Theft contrary to section 272 of The Penal Code Cap 87 of the Laws of Zambia. The particulars allege that Collins Moonga and Charles Shawa, on unknown dates but between 22nd and 29th July 2016, at Lusaka in the Lusaka district of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with unknown persons did steal 150 boxes of white floor tiles, 20 boxes of black floor tiles altogether valued at K121000.00 the property of Sonny K.Chanda.

The burden is upon the prosecution to prove the case beyond all reasonable doubt. There is no burden upon the accused to prove his innocence. If, after considering all of the evidence in this case there is any doubt in my mind as

to the guilt of the accused, then the accused is entitled to the benefit of that doubt.

In order to establish the guilt of the accused, the prosecution must establish that the accused:

1. Fraudulently, and
2. Without claim of right,
3. Took,
4. Property,
5. Being the property of another.

The prosecution called four (5) witnesses. The accused elected to give evidence on oath and called no witness. I will now review the evidence on record.

PW1, Sonny K.Chanda a customs officer stated that on the 29th July 2016, whilst at his sister in law's house, Mrs Mbulo told him that the brick layer discovered that the room which harboured the building materials was tempered with. He stated that A1 was a care take sleeping in the next room from the tiles. They discovered that some tiles were missing and A1 and his family had relocated somewhere. He testified that when he went to check the room, four hundred and sixty (460) boxes of tiles valued at K139,650.00 were missing and he was told that A1 was last seen on the 22nd July 2016. He reported the matter to chungu police post and later on the suspect A1 was arrested with their help. He stated that forty eight (48) boxes of tiles valued at K13, 000.00 were recovered and he went to the police to identify them. On the boxes were his initials 'SKC' and that of his friend 'MN' for Miyoba Nyanga. He testified that the police apprehended two suspects whom he identified in court.

In-cross examination PW1 stated that he did not give A1 the total number of tiles because they were not left in his custody. He stated that A1 led the police to the recovery of the tiles. He informed the court that he had known A2 after he was apprehended.

PW2 Marvis Mbulo a business lady stated that between 22nd and 29th July 2016, she noticed that her neighbour and his family were missing and She peeped through their house window and they were not there. She testified that she called PW1 to come and secure the tiles which were in the next dark room. When PW1 sent his builders to check, they entered in the house together with PW2 and they discovered that tiles and household goods for A1 were missing. She called PW1 to inform him that the tiles were missing together with A1's family. When PW1 went there, they reported the matter to the police. She identified A1 in court.

In-Cross examination PW2 told the court that she had never seen the accused A2 before, and when they entered the house where the tiles were kept, only broken pieces were found.

PW3 Leonard Chisenga a businessman testified that in July 2016, his friend Simon went to his shop with samples of floor and wall tiles for sale. He told him that his mother in-law was the one selling and PW3 told him to call his in-laws so that they could agree on the price. He stated that when the owner went to his shop they agreed on K21, 500.00 for which he paid K19, 000.00 and the balance of K2, 500.00 payable the following day. After three months the police went to his shop and they informed him that he bought stolen tiles. He went to police and explained what happened, and when he tried to call the woman who sold him tiles, she could not pick up his calls. Upon seeing that the woman was not picking his calls, he decided to apprehend Simon and took him to chungu police post where the woman went after some phone calls. He stated that the woman apologised for having sold him stolen tiles as she did not know anything. He identified the tiles in court which were whitish and brownish in colour and marked "ID1"

During cross-examination PW3 stated that he did not know the accused person and that he has never seen him before.



PW4 Simon Tembo a worker at unisigns testified that in July 2016, his mother in law called to ask if he could find customers for the tiles. He immediately went to see his friend PW3 who demanded to see the samples of tiles first. He stated that he called his mother in law who gave him the cell number for the sellers. He contacted them and they met at SOS matero village where three (3) samples were collected. When he took the samples to PW3, he was interested in buying them and PW4 called his mother in-law to take the tiles to the shop. He testified that after some hours, his mother in-law went to the shop and called the sellers to drop the tiles at the shop. After some few hours a truck load of tiles reached the shop and he and the sellers started offloading the tiles as his mother in-law went inside to negotiate the price with PW3. He identified the tiles and the accused persons in court as the ones who took the tiles to PW3's shop.

During cross-examination PW4 stated that A2 was amongst the three (3) sellers who took the tiles to the shop and they off loaded them together. He testified that it was difficult to recall his name since he did not ask for it.

In Re-examination PW4 stated that A2 was present at SOS village when he went to collect the samples.

PW5 Detective sergeant Noah Habenzu testified that on 29th July 2016, he received a report of theft of tiles from Sonny Chanda (PW1), who stated that his care taker together with others unknown had stolen **460** boxes of tiles. The tiles were valued at **K139, 650.00** and were kept in Barlastone where A1 was the care taker. He visited a scene of crime and thereafter launched a man hunt for the suspects. On 6th August 2016, he apprehended the two suspects whom he came to know as Collins Moonga and Charles Shawa. The two suspects were taken to the scene of crime and they demonstrated how they opened the door and stole the tiles. From there, the suspects took PW5 to the town centre where the tiles were recovered. He testified that Leonard Chisanga (PW3) is the one who bought 28 boxes of wall tiles, and A2 took him to kabanana where 19 boxes of wall tiles were recovered from Peter Chiluba. He called PW1 who went to identify the tiles by his initials



"SKC".He proceeded to jointly charge the two suspects for the offence, under warn and caution statements the two admitted the charge.A2 further stated that from the proceeds he bought a fridge, Plasma TV and the items were taken to police awaiting another charge.PW5 identified the two accused persons in court and the floor and Wall tiles marked (ID1) and (ID2) respectively. He tendered in the exhibits for evidence as "P1" and "P2" respectively. He stated that the third suspect was still at large.

During cross-examination PW5 stated that he found suspected items bought from proceeds of crime and A1 informed him that the items were acquired by both the accused persons.

In Re-examination, PW5 stated that both A1 and A2 led him to the recovery of the items. He found a fridge, Plasma TV, a fan, TV stand and GO-TV decorder.He confessed that the items belonged to A2 and nobody went to claim the items at the police.PW5 testified that A2 led him to the scene of crime and to where the tiles were sold.

That marked the end of the prosecution case and the accused was found with a case to answer and put on his defence.

REVIEW OF DEFENCE

DW1 Charles Shawa (A2) stated that on 3rd August 2016 whilst he was working, his son called to tell him that police officers had gone to collect household goods from his home. He testified that his son told him that the police wanted A2 to show them where A1 stayed. He went to his home and found that items were collected together with his sister in law and niece. The police later on picked up A2's sister from mutendere and took her to chungu police post. The same day A2 was apprehended and asked where the house for A1 was, but he told them he did not know his house. He was taken to police and later on to court.

During cross-examination A2 stated that he did not demonstrate how they stole the tiles and that he did not lead the police to PW3's shop. He testified



that he did not know why the police confiscated the items from his house, and he never said the items were acquired from proceeds of crime.

There was no Re-examination.

From the above facts, what is the position as regards the law? Section 265 (1) and (2) of the Penal Code Cap 87 provides as follows:

- 1) 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.**
- 2) 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:**
 - (a) an intent permanently to deprive the general or special Owner of the thing of it;**
 - b) an intent to use the thing as a pledge or security;**
 - (c) An intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;**
 - (d) An intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;**
 - (e) In the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner.**



FACT FINDING

The evidence on record shows that floor and wall tiles worth **K121, 000.00** were allegedly stolen. A1 the convict during his plea stated that he stole the items together with A2, and they bought the confiscated household goods from the proceeds of crime.

PW4 stated that the accused was present at SOS Village when he went to get the samples, and he went to the shop of PW3 and helped offloading the tiles.

PW5 stated that A2 confessed having stolen the tiles and he led the police to the recovery.

Is there direct evidence to prove the allegation against the accused person? The answer is in affirmative. The prosecution alleged the accused person is the one that committed the offence and have invited me to find him guilty. what evidence is there?

It is clear that there is no direct evidence to show that the accused committed the offence, however, there is circumstantial evidence pointing to the accused persons. In **DAVID ZULU v THE PEOPLE (1977) Z.R. 151 (S.C.)** it was held that:

1. *It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of the fact in issue may be drawn.*
2. *It is incumbent on a trial judge that he should guard against drawing; wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt.*

In the present case, the question that begs for an answer, has the evidence on record taken the case out of the realm of conjecture that the only inference to be drawn could be that of guilty.

The accused A1 (Convict)'s confession that he and A2 bought the household goods together using proceeds of crime, is evident enough to implicate A2.



VERDICT

I had an opportunity to observe the demeanour of the accused person from the beginning of the trial to the end of his defence. It is not in dispute that floor and wall tiles worth **K121, 000.00** were stolen from Mr Sonny Chanda's place. It is not in dispute that the two accused persons confessed having stolen the items and bought household goods together. It is not in dispute that A2 took PW5 to kabanana and recovered 19 boxes of tiles from Peter Chiluba.

In these circumstances, I can only come to the conclusion that the accused is guilty as charged for the offence of Theft contrary to section 272 of the Penal Code Cap 87 of the Laws of Zambia and I will and hereby convict him accordingly.

DELIVERED IN OPEN COURT THIS 3rd APRIL 2017



HON. BRIAN. M. SIMACHELA (Mr)

MAGISTRATE CLASS III

