IN THE HIGH COURT OF TANZANIA

AT BUKOBA

(HC) CRIMINAL APPEAL NO. 40/2002

(Arising from Criminal Case 140/2001 at Biharamulo D/Court)

PAULO FELIX ... APPELLANT

VRS.

THE REPUBLIC .. RESPONDENT

JUDGMENT

LUANDA, J.

On 30/4/2004 I quashed the proceedings, set aside the conviction and sentence and I ordered the release of the appellant. I promised to give reasons for doing so at a later date. I now give the reasons.

The trial court record shows that, the charge sheet, the basis of this appeal, contains three counts involving five persons including the appellant one Paulo Felix. The other four were charged with stealing by servant c/s 271 and 265 of the Penal Code. And alternative to this court, three out of those four were charged with neglect to prevent an offence and not a felony as per amendement affected by Act No. 14 of 1980. The appellant alone was charged with receiving stolen property c/s 311 (i) of the Penal Code.

However, at the close of the prosecution case the four charged along with the appellant were acquitted under S. 230 of the CPA, 1985; the reason being the prosecution side failed to establish a prima facie case. The appellant was called to give his defence after the court had found out that he had a case to answer. At the end of the trial the appellant was convicted as charged. He was sentenced to 5 years imprisonment.

Aggrieved with both the conviction and sentence, hence this appeal.

The appellant raised seven grounds in his memorandum of appeal. In a nutshell he is challenging the finding of the trial court in that it convicted him without sufficient evidence. In other words he is saying the prosecution side didnot prove its case beyond the standard required i.e. beyond reasonable doubt.

Mr. Vitalis learned State Attorney who appeared for the Republic, rightly so, didnot support the conviction. The prosecution case is to the following effect:- Some unknown day but between 28/10/2000 and 27/2/2001 a pressure pump the property of Chato Ginnery was stolen by unknown persons. Following that incident, investigation commenced.

The first suspects were watchmen guarding the ginnery. The ginnery was guarded twenty four hours. The watchmen were querried, All denied.. On 28/2/2001 the matter was reported to Chato Police Station. Some watchmen were arrested.

On 3/7/2001 Mulome Masome (PW 3) Acting General Manager of the said ginnery received a telephone call from someone in that the pump was sold to one Indian in Mwanza. He reported to the OCS Chato Police. The OCS wrote a memo addressed to OCS Mwanza. On 4/7/2001 PW 3 in accompany with Seni Mtani (PW 2) Chief Engineer of the ginnery left for Mwanza. They went to Mwanza without a police officer. The ginnery administration were doing investigation on their own!

Be that as it may, in Mwanza one D. 8217 D/Sgt Seleman (PW 4) was assigned to accompany the two to the place where the pump was. They went to one person called Lugela. They didnot meet him. But while in the office of Lugela, PW 4 opened a visitors book and saw a message in a chit of paper indicating that the appellant would like to meet with Lugela. PW 2 and PW 3 claimed to identify the handwritting of the appellant. The appellant was their General Manager. At the time the pump was stolen, the appellant was interdicted.

PW 4 seized it. They traced Lugela. Fortunately, they managed to get him. When asked about the pump he told them that the appellant had the pump and that he was looking after a buyer. Finally, the pump landed in the hands of Vijahi Khana, the buyer, Lugela told them. They thus went to Vijahi Khana. Vijahi Khana admitted buying the pump from the appellant. The pump was seized. It was duly identified by PW 2 and PW 3.

But Lugela and Vijahi Khana who were acrucial witnesses in this case didnot testfy. However, the statement of Vijahi Khana was produced in court under S. 34 (b) (2) (c) of the Evidence Act, 1967 because of ill health.

Mr. Vitalis submitted that since the evidence of Vijahi Khana and Lugela is vital to the prosecution case and they didnot testfy, the conviction connot stand. In otherwords what PW 2, PW 3 and PW 4 testified in respect of the recovery of the pump is hearsay. Further, he said it is not proper to rely on S. 34 (B) (2) (C) of the Evidence Act, 1967 only, the entire Section should come to play. He cited R V Hassan Jumanne (1983) TLR 432.

This court through Lugakingira, J.(as he then was) held inter alia, that the provisions of S. 34 (B) (2) of the Evidence Act, 1967 are cumulative and all the paragraphs (a) to (f) have to be satisfied.

As the conditions were not satisfied, the Statement of Vijahi Khana was then inadmissible.

Before, I part with this file, let me say a word or two about the way this case was handled.

The available evidence on record show that the pump in question was found with Vijahi Khana and not with the appellant. And when querried he said he bought from the appellant. If that is true, then on the basis of the doctrine of recent possession, the appropriate charge ought to have been preferred against the appellant

was stealing and not receiving stolen properly. And as stealing is not a minor offence to receiving stolen property rather it is the other way round, this court was unable to enter conviction in lieu of receiving stolen property. The case was not properly investigated and prosecuted.

In view of the foregoing, hence the quashing and release order.

B. M. Luanda

JUDGE

AT BUKOBA

14/5/2004.