Hon Justice J.W.N. Tsekooko.

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

HIGH COURT MISC. APPLICATION NO 12 of 1997
(FROM HIGH COURT CRIMINAL APPLAL NO 2/1997)
AND
ORIGINAL SOROTI CRIMINAL CASE NO 28 of 1997)

AJOKET CHARLES _____ APPLICANT

versus

U G A N D A _____ RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE AGUSUTUS KANIA

JUDGMENT

This is an appeal by Ajoket Charles against the judgment and orders dated 22.4.1997 of the learned Grade One Magistrate, His Worship Mr. R. Byaruhanga, sitting at Soroti. The appeal is against both conviction and sentence.

The brief facts leading to this appeal are as follows. The appellant was charged with burglary and Theft under Sections 281(2) and 252 of the Penal Code Act respedtively. He was also charged with an alternative count of Possessing suspected Stolen Property contrary to Section 299(1) of the Penal Code Act. He was acquitted of the first two counts of burglary and theft at the state of a no case to answer but he was however found guilty and convicted of the alternative count and sentenced to 24 months imprisonment. The appellant was aggrieved and disatisfied with the said conviction and sentence, hence this appeal.

At the commencement of the hearing of the appeal it was realised on the court record there were two memoranda of Appeal each of which had different grounds of appeal.

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They were respectively filed on the 30.7.1997 and 7.8.97. With the consent of Mr. Opolot Ejoku, Principal State Attorney, Mr. Wakembo, learned counsel for the appellant applied to prosecute the appeal on the memorandum of appeal dated 7.8.1997. I allowed the application and the said Memorandum was taken as an amended memorandum of appeal. It contained the following grounds of appeal:-

1. That the learned trial Magistrate misdirected himself in convicting the appellant under Section 299(1) of the Penal Code Act with which the appellant was not charged.
2. That the learned trial Magistrate erred in law in allowing himself to be influenced by hearsay evidence.
3. The learned trial Magistrate misdirected himself in law in shifting the onus of proof on the appellant.
4. That a sentence of imprisonment of 2 years was excessive in the circumstances.

On the first ground of appeal Mr. Wakembo, learned Counsel for the appellant, submitted that the appellant was charged with possessing suspected stolen property contrary to section 298(1) of the Penal Code Act which is neither minor nor cognate to the offence created under Section 298(1) of the Penal Code Act. He pointed out that in any event there is no offence known as possessing suspected stolen property under Section 298(1) of the Penal Code Act.

He invited me to allow the appeal, quash the conviction and set aside the sentence on this ground alone. Mr. Opolot Ojoku, learned Principal State Attorney conceded that there was an error on the record but contended that this was not fatal to the proceedings as the offences created under Sections 298(1) and 299(1) were of the same genus. He submitted that the learned trial Magistrate throughout the trial had in mind the offence created under Section 298(1) of the Penal Code Act as is evident in the proceedings. He contended that the errors on the record were typographical and should be ignored.

From the court record, the appellant was charged under Section 299(1) of the Penal Code Act. The offence created thereunder is quite different from that under Section 298(1). Section 299(1) of the Penal Code Act provides as follows:-

> "299(1) When any police officer has stopped, searched or detained any vessel, boat, aircraft vehicle or/person under the provisions of Section 20 of the Criminal Procedure Code or searched any building vessel, carriage, box receptacle or place pursuant to a search warrant issued under 69 of the Magistrates' Courts Act, 1970, and has seized anything which may reasonably be suspected of having been stolen or unlawfully obtained, and if the person in whose possession such thing was found shall not account to the satisfaction of the court, of how he came by the same, he shall be guilty of a misdemeanour."

Though the appellant was charged under this section, from the charge sheet the particulars of the offence related to section 298(1) and from the proceedings the trial was conducted on the basis of these particulars of the offence. The learned trial Magistrate also convicted the appellant under Section 298(1). Mr. Kakembo contended, and he was right here going by the typed judgment, that the appellant was convicted under section 299(1). On perusing the handwritten judgment of the trial Magistrate I found it as a fact that the conviction was under Section 298(1) of the Penal Code Act.

Being charged under one section, tried and convicted under another section creating a different offence is extremely irregular. A charge sheet is intended to notify the accused of the nature of the allegations against him. It should contain no ambiguities as these are likely to embarass him in his defence. This is a case where the charge sheet was materially defective. The learned trial Magistrate could have cured it by effecting an amendment under Section 130(1)(b) of the M.C.A which provides as follows:-

> "130(1) where, at any stage of trial, it appears to a Magistrate's court that,
> (a) ----------
> (b) the charge is defective in a material particulars.
> (c) ----------
> then the court, if it is satisfied that no injustice to the accused will be caused thereby may make such an order for the alteration of the charge by way of its amendment or by the substitution or addition of a new charge as it thinks necessary to meet the circumstances of the case. "

The learned trial Magistrate did not take this course. He instead proceeded to try the appellant under Section 299(1) and to convict him under Section 298(1) under which he was not charged. I can not agree with Mr. Opolot that the conviction was correct because the offences under Section 298(1) and Section 299(1) is not minor and cognate to Section 299(1). This was a fundamental irregularity rendering the trial a nullity. This ground of appeal succeeds and on it alone I allow the appeal, quash the conviction and set aside the sentence. In the circumstances it is unnecessary to consider the other grounds of appeal. The appellant shall be immediately set free unless he is being detained on some other lawful ground.

sgd. AUGUSTUS KANI

J U D G E

3/11/1997