

**CRIMINAL APPEAL No 112 OF 2016**

Islands. It was said that they had in their possession African Grey Parrots. The police laid an ambush and at about 8.00pm on the 5<sup>th</sup> of September 2015 a boat from Ssesse Islands came ashore at Kigunga landing site. The two accused person came off the boat with a box which they placed in a white car. At that stage the Police struck and arrested the two accused persons. The box was found to contain 6 African Grey Parrots. They were arrested and charged.

In their defence, the accused persons told the Court they were fishermen who had been hired to transport a person who had the box with him. When they were arrested, the owner of the items fled leaving them in possession. They both deny the charge.

The learned trial magistrate did not believe the prosecution case and acquitted the respondents. The appellant being dissatisfied with the acquittal filed this appeal.

There are 2 grounds namely,

- i. The learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence as a whole thereby arriving at a wrong conclusion which occasioned a miscarriage of justice.
- ii. The learned trial magistrate erred in law and fact when she held that the prosecution failed to prove the criminal intent as an element of the offence of unlawful possession of protected species.

## **Representation**

Ms Charlotte Nanziri State Attorney for the appellant

Mr Allan Nshimye for the both Respondents

## **Submissions**

The parties filed written submissions which are on record and will not be reproduced verbatim here. Nevertheless this court will refer to them in resolving the appeal.

## Determination

This Court reminds itself that as a first appellate court, it has a duty to subject the evidence to a fresh scrutiny and come to its own conclusions, bearing in mind that it has not seen the witnesses testify (**Kifamunte Henry V Uganda SCCA NO. 10 of 1997** unreported).

For the above reason the appellate court may take into consideration evidence lawfully adduced at the trial but overlooked by the judgment of the trial court and it may base its decision on it. The court is also reminded to ensure that it evaluates the evidence as a whole carefully balancing each material piece of evidence against the rest of the case.

It is trite that the onus is on the prosecution to prove all the elements of the offence the respondents were charged with to a standard beyond reasonable doubt.

I shall handle the grounds jointly. The contention for the appellant is that the offence carried the following elements:

- i. Possession of a protected species
- ii. That the possession was without first obtaining a grant of a wildlife use right
- iii. Participation of the accused persons

The appellant submits farther that the evidence on record overwhelmingly establishes all three elements. That this was a strict liability offence. Mere possession, as the respondents had, proves the offence. For that reason the trial magistrate erred in her failure to find the accused persons guilty as charged.

In reply, the respondents submitted that they had in their custody 6 African Grey parrots. What was challenged was whether this custody amounted to possession for the purposes of the sections under which they were charged. That the accused

persons were hired by a customer to transport the African Grey Parrots which were in a sealed box. That the arresting officers confirmed this claim.

It is argued that possession should be looked at from its legal definition. That in the 4<sup>th</sup> Edition of **Black's Law Dictionary** possession is defined as the detention and control, of anything which may be the subject of property.

That the contents of the box were always under the control of the passenger. The respondents were only transporters. That indeed the passenger was with them at the shore on arrest but fled when the police appeared.

This Court has a duty to re-evaluate all the evidence.

I agree with and adopt the elements of the offence set out by the appellant. PW 1 testified that he was a law enforcement ranger from the Uganda Wildlife Authority. He stated that the respondents were arrested with 6 African Grey Parrots. That this species is listed in the 1<sup>st</sup> schedule of **the Game Preservation and Control Act** as animals not to be hunted or captured without a special permit.

As an officer was from a specialised Authority, he could in my view, properly identify the birds as African Grey Parrots. It is true under both **the Uganda Wildlife Act** and **the Game Preservation and Control Act** possession of this species is restricted and controlled. That parrots cannot be hunted or captured without a special permit.

The question therefore is whether the prosecution proved the element of possession to a standard beyond reasonable doubt. In **Woolmington vs DPP (1935) AC 462** at page 482 it was stated in reference to a defence in murder case that,

If the jury are either satisfied with his explanation or, upon a review of the evidence, are left in reasonable doubt, whether, even if his explanation be accepted, the act was unintentional or provoked, the prisoner is entitled to benefit of doubt.

The court is required to evaluate all the evidence adduced. It must consider the explanation given by the accused as well as the evidence adduced by the prosecution. The accused never bears a burden to prove his innocence however in a strict liability offence his explanation brings context to his defence in the case.

The charges preferred were of offences which are regulatory and these tend to be of a strict liability nature. Mere possession of the African Grey Parrots, without a licence, would sustain the charge.

In this case PW 1 stated that when the respondents were arrested, they were with a third person who escaped. Earlier the Police had been tipped off that there was a boat coming from Kalangala where people were transporting restricted birds. The police then laid siege at the landing site and arrested the two accused person holding the box. It was at that point of arrest that a third person ran away.

It is the evidence of the respondents that they were fishermen in Kalangala in Ssesse Islands. On their way to Kigunga in Entebbe, by boat, there was a man with a sealed box who requested lift. He said he would pay them on arrival in Entebbe. When they got to Entebbe the owner of the birds told the accused persons to put them in a nearby car. That they would be paid by the person seated in the car. As instructed, they carried the box to the car but were immediately surrounded by the Police who arrested them. That the box was sealed at all times and they had no idea what was in it.

The possession in this case is key.

In **A Concise Law Dictionary by P.G. Osborn** possession is defined as Physical detention coupled with the intention to hold the thing detained as one's own. It adds that it includes the continuing exercise of a claim to the exclusive use of a material object.

The 9<sup>th</sup> of Edition of **Black's Law Dictionary** defines possession as the fact of having or holding property in one's power; the exercise of dominion over property.

The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object

The above definitions show that the prosecution had to show that aside from the physical possession, the prosecution had to prove that the respondents had exclusive control and authority over the box and its contents. That there was no doubt they owned it. The respondents stated that the owner of the box was the man who run away. The police did not state that their informant said the respondents were the owners of the box. At arrest it was sealed. The respondents stated that from the very beginning they protested to the police that they had no ownership. That the person who ran away was the owner of the box. They state the police would not accept their explanation.

This explanation raises doubts regarding who had possession, that is, ownership and control of this box. This Court finds that exclusive control and authority, or an intention to portray the box of birds as theirs, was never proved against the respondents. This element had to be proved to a standard beyond reasonable doubt. Any doubt must be resolved in favour of the respondents. Consequently the fact of possession is not established.

Here the essential ingredient of possession was not proved meaning the respondents had to be acquitted.

For the reason stated this court confirms the findings of the Trial Court and upholds the acquittal of the respondents.

The appeal stands dismissed.

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**Michael Elubu**

**Judge**

**26.03.2022**