

MARGARET KATSOKORE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUSAKWA & KWENDA JJ
HARARE, 17 & 29 January 2019, 12 February 2019 & 16 February 2021

Criminal Appeal

K Tundu, for appellant
S Ferro, for respondent

KWENDA J: The appellant appeared before the Magistrates Court at Harare charged with theft as defined in s 113 (2) (d) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] it being alleged that she received a Massey Ferguson 390 E tractor from Takunda Trust Tekere to keep in her safe custody but contrary to the trust agreement she unlawfully converted it to her own use. The appellant pleaded not guilty and the matter proceeded to trial leading to her conviction. The State case, which the trial Court accepted was that sometime in the year 2014, the complainant, a male adult, bought the Massey Ferguson tractor from his friend, one Philip Nherera for USD2 700. The tractor was a non-runner in need of refurbishment. The complainant kept the tractor at 6 Hendrickz in Mt Pleasant Harare, premises owned by the appellant which, the appellant and he were using as offices. The parties were in love and when the relationship ended in the year 2016, the complainant allowed the tractor to remain at the appellant's premises because it was not easy to transport it from there. In February 2017 the appellant contacted the complainant to inform him that she wanted to sell the tractor. The complainant told her that the tractor was not for sale. On 2 March 2017 the complainant went to the premises to attend to an electrical fault on the tractor and found it missing. As it turned out, the appellant had sold the tractor without his knowledge and permission.

The appellant's defence which was rejected by the court was that the premises at 6 Hendrickz road are her residential property and never were used by the complainant and her as offices. In 2013 she fell in love with the complainant who was an electrical engineer at ZESA.

Shortly thereafter, the complainant lost his job at ZESA. In 2014 she decided to buy a tractor to use at her farm. She asked the complainant to find one and negotiate the price. Her decision to involve the complainant was largely informed by the fact that they were in love and the knowledge that the complainant, as an engineer, would have sound knowledge of machinery. Pursuant to that, the complainant advised her that his friend was selling a non-running tractor for USD2 200 and assured her that the tractor was capable of being refurbished for use at her farm. She gave the complainant USD2 150 to pay for the tractor after agreeing with him that he would add USD 50. One Doctor Mtangadura, the appellant believed was the complainant's brother, ferried the tractor to her residence at 6 Hendrickz Mt Pleasant. The tractor was not refurbished as planned until June 2016 when the appellant and the complainant went separate ways. The separation turned acrimonious. After their separation, the appellant was summoned to Marlborough Police Station where she was told that the complainant wanted her to give him the tractor as compensation for a borehole he had sunk and equipped for her at the cost of USD3 200. She refused. After listening to the parties' respective versions, the Police determined that the dispute was civil in nature. The tractor remained at her residence and she sold it on the 21st February 2017 for \$3 500. She therefore denied committing the crime on the basis that:

- She was the owner of the tractor
- It is not correct that she had received it from the complainant in terms of a trust agreement.
- The complainant wanted the tractor as compensation for the money he spent on the borehole because he is bitter about their separation.
- The complainant's report was therefore false and malicious.

As stated above the trial court accepted the State's version of events and convicted the appellant at the end of the trial and sentenced her to pay a fine of USD400 or in default of payment to serve 4 months' imprisonment. In addition, she was sentenced to imprisonment for 3 months wholly suspended on condition she paid restitution to the complainant in the sum of \$3500.

The appellant appealed against the conviction and sentence.

Her grounds of appeal against conviction are paraphrased below: -

- (a) The trial court erred in finding that the tractor belonged to the complainant and accepting the receipts and invoices produced by him as proof of ownership, yet they did not bear the name of the person who claimed to have sold the tractor.
- (b) The trial court erred in failing to find that the appellant had paid the purchase price for the tractor.

The grounds of appeal against sentence are summarised below: -

- (c) The trial court erred in sentencing the appellant to both a fine and restitution which both serve the same purpose. Having imposed a wholly suspended sentence of imprisonment the court should have imposed a fine or restitution but not both.
- (d) The sentence of imprisonment for 7 months is too harsh.
- (e) The court *a quo* erred in imposing a short period for restitution considering the current harsh economic conditions prevailing in the country at the time of sentencing.

The appellant prayed that either the conviction be quashed or that if it is allowed to stand she be sentenced to imprisonment for three months suspended on condition she pays restitution in five months. The first ground of appeal against sentence is difficult to understand but it is not necessary to delve into the ambiguity in view of the conclusion arrived at against conviction.

The appeal is opposed by the State. At the hearing, the State objected to all the grounds of appeal which, according to State counsel do not comply with the requirements of rule 22 (1) of the, now repealed, Supreme Court (Magistrate Court) Criminal Appeals Rules, 1979. State counsel submitted that all grounds of appeal are fatally defective and moved the court to strike off the appeal. In the event that the appeal was allowed to stand, the State conceded that the appeal has merit. The appellant abandoned the third ground and persisted with the grounds 1 and 2. We dismissed the State's objection after holding that although the grounds were inelegantly drafted, it was clear that the thrust of the appeal is that the trial court fell into error in finding that the State had proved that the tractor belonged to the complainant and the appellant had received it in terms of a trust agreement yet the weight of evidence showed that her defence that the tractor belonged to her was reasonably possibly true.

After hearing argument, I make the findings stated below. At the centre of the trial was an ownership dispute. In my view the trial court misdirected itself when it placed too much weight, as stated at p 9 of its judgment, on the fact that there was no evidence either that the appellant negotiated the purchase of the tractor or that she paid the purchase price. That the complainant negotiated the sale of the tractor and handed over the purchase price to the seller without the involvement of the appellant was not in dispute even from the beginning. The appellants' defence outline is clear about that. Her position was that she entrusted all that to the appellant because they were in love and he had the necessary technical knowledge. She therefore left him to look for a tractor to buy, assess it and negotiate the price. On the complainant's recommendation she agreed, to purchase the tractor and gave the complainant the money to pay for the tractor which was therefore delivered to her because it was her property and not to hold it in trust. The appellant tried to grab the tractor with the help of the Police when their love relationship terminated leaving the complainant bitter and the bitterness motivated him to demand compensation for a borehole he had sunk and equipped for her and when that did not materialise, he fabricated the theft charge.

The State was therefore duty bound to disprove the issues raised by the defence. See section 18 (4) of the *Criminal Law (Codification & Reform) Act [Chapter 9:23]*

“PROOF OF CRIMINAL LIABILITY

18 Degree and burden of proof in criminal cases

- (1)
- (2)
- (3)

(4) Except where this Code or any other enactment expressly imposes the burden of proof of any particular fact or circumstance upon a person charged with a crime, once there is some evidence before the court which raises a defence to the charge, whether or not the evidence has been introduced by the accused, the burden shall rest upon the prosecution to prove beyond a reasonable doubt that the defence does not apply:

Provided that where an accused pleads that, at the time of the commission of a crime, he or she was suffering from a mental disorder or defect as defined in section *two hundred and twenty-six*, or a partial mental disorder or defect as defined in section *two hundred and seventeen*, or acute mental or emotional stress, the burden shall rest upon the accused to prove, on a balance of probabilities, that he or she was suffering from such mental disorder or defect or acute mental or emotional stress.”

In light of the appellant's defence, the trial court was required to determine, after all evidence had been led, whether the State had proved that the appellant's defence that she had bought the tractor through the agency of the complainant and that his claim to it was motivated by their fall out was, beyond reasonable doubt, false. That trial court resolved the issue by reference

to who (between the complainant and appellant) negotiated the sale, handed over the purchase price and received the receipt. In my view it fell into error because all that was common cause between the parties. They were in agreement that all that was done by the complainant but still both claimed to own the tractor. It was therefore necessary for the court to consider whether there was independent evidence available which could resolve the dispute and whether the State had called such evidence. The trial court fell into error when it failed to do so. What I have to decide is whether the misdirection resulted in a wrong verdict or a miscarriage of justice.

The complainant, Takunda Trust Tekere, was the first witness to testify for the State. His testimony was as follows. The appellant was his girlfriend for 3 years. During the subsistence of the relationship, sometime in June or July 2014, he bought the tractor from one Phillip Nherera for USD2700. He paid the price in two instalments. The tractor was a non-runner when the complainant bought it and it was transported for safekeeping at the appellant's house which the appellant and he were using as offices. Once at the appellant's house, the tractor was driven to the back of the house where it was kept. He refurbished it by putting new tyres, tubes and repairing the starter, alternator, fuel tank, radiator pump and injectors. He spent the sum of \$3308 on repairs and transportation. He produced an invoice and receipts which he said had been issued to him by the seller. His name appeared as the purchaser. Sometime in the winter of 2016 he broke up with the appellant whereupon he removed his property from the appellant's residence, leaving the tractor and other big things because he did not have the money to pay for their transportation. In or around April 2017, he went to the appellant's house to attend to an electrical fault on the tractor. The tractor was missing. He called the appellant who told him that she had sold the tractor but refused to disclose the contact details of the purchaser. He said the tractor was his and that it was not correct that the appellant had paid for it. He valued the tractor at USD13 000. During his relationship with the appellant he had renovated her gazebo which he used as a showroom and he had also paid for the installation of her borehole. Cross-examination by appellant's counsel solicited the following answers from the complainant. He failed to produce an agreement of sale. The invoice which the complainant produced in court had been issued by a company known as *Tinpil Ha Sky View Investments*. Meanwhile Phillip Nherera, had stated in his statement to the Police that the tractor was a wedding gift. The complainant could not explain how a wedding present ended up being the property of a company. He confirmed several tobacco sales invoices

which showed that the appellant had indeed sold tobacco during the 2014 selling season but denied that she had used the proceeds to buy a tractor. The complainant confirmed that he approached Marlborough Police Station in September 2016. He confirmed that the parties appeared before Constable Nyazamba who counselled them. He however denied that he attended at the Police Station to force the appellant to give him the tractor as compensation. He said he approached the Police because he wanted access to the tractor to repair it.

Most of the complainant's evidence was common cause. The only disputed evidence was that he claimed the tractor as his ad that he had refurbished it for his own use. To prove his ownership of the tractor he produced an invoice dated 11 June 2014 issued by a company known as Tiphil showing that the tractor had been sold to the appellant for USD2700.00. He had paid the price in two instalments. The first payment was on the 11th June 2014 in the sum of USD2000.00 under receipt number 19. The second payment was made on the 24th July 2014 in the sum of USD 700.00 under receipt number 49. The appellant's counsel pointed that the receipts relied upon by the complainant were not genuine. The invoice was not in the seller's name. He submitted that they were clearly forged. The invoice purports to have been prepared on 11 June 2014 but records a receipt number for a payment done on a future date- 24 June 2014. Instead of being corroboratory, the information on the invoice put its authenticity in doubt. It is unlikely that a genuine receipt authored on the 11th June 2016 would record a future payment as well as a receipt dated later than it. In all probabilities the receipt was made in preparation for court. It was not existing on the 11th June 2014 when it purports to have been written. As submitted by appellant's counsel, the invoice put the credibility of the complainant in doubt.

The second witness was Phillip Nherera. He was complainant's friend. He said he sold the tractor to the complainant sometime in 2014. The complainant paid in instalments. He issued receipts in the name of Tinfield Investments t/a Skyview Energy. He said the tractor was a non-runner. He does not know the appellant and never dealt with her.

Nothing much turns on the evidence of this witness. The complainant did not claim to have dealt with him.

The state then closed its case.

The appellant testified. She confirmed her defence under oath. She gave evidence on how she acquired the tractor, repeating what she had said in her defence outline. She said the seller

collected the payment for the tractor from her house. She produced documentary evidence of her earnings during the tobacco selling season up to May 2014. She said in addition to that, she collects rentals for her several properties. She broke off with complainant in June 2016. In August 2016 she was summoned to Marlborough Police Station. At a meeting convened by the Police the complainant indicated that he had drilled a borehole for her and he wanted her to return his money. He wanted the tractor as compensation. She refused to release it. While acknowledging that he had paid for the borehole, she said she had in turn refurbished a well at the complainant's residence in Marondera. In any event they used to assist each other as people in a relationship.

Ms Fero who appeared for the State conceded to the merits of the appeal. She submitted that the nature of the relationship that existed between the appellant and complainant called for caution. It was common cause that the parties gave each other money without keeping records. The appellant had produced proof of how she had raised the money to buy the tractor. The terms under which the tractor was held by the appellant could have been unravelled if the state had called the Police Office from Marlborough who attended to the parties. She opined that the trial court should have invoked the powers given to it in term of s 232 of the Criminal Procedure & Evidence Act [*Chapter 9:07*] to *mero motu* subpoena Constable Nyazamba who had attended to the complainant and appellant at Marlborough Police Station. He was key to the resolution of the matter before it. In the absence of his evidence, the appellant ought to have been given the benefit of the doubt.

We accept that the concession by the state as well grounded. The appeal should succeed and accordingly we order as follows:

1. The appeal against conviction is allowed.
2. The conviction is quashed and substituted with the verdict of 'NOT GUILTY AND ACQUITTED'.

Musakwa J agrees.....

Chihambakwe, Mutizwa and Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners