

CHRISPEN SANYATWE
and
TAURAI SANYATWE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHAREWA & MUZENDA JJ
MUTARE, 23 February 2022

CRIMINAL APPEAL

T Musara, for the appellants
M Musarurwa, for the State

MUZENDA J: On 23 February 2022 we dismissed an *ex tempore* appeal by both appellants and gave reasons in court for such a dismissal. Three months later Messrs *Gonese and Ndlovu* Legal Practitioners wrote a letter dated 6 June 2022 which was drafted as follows: “*Can we please be provided with the Reasons for the judgment as soon as possible.*” The record was placed before me on 23 June 2022. It is not clear where it was from 7 June 2022 to 23 June 2022. It is also not clear what the appellants’ legal practitioners were doing from 23 February 2022, yet they demanded prompt action by the judges to avail their reasons for judgment. Having made these preliminary remarks, the reasons for our judgment are outlined below.

On 11 October 2021 both appellants noted an appeal against conviction only seeking the following relief: “*WHEREFORE the Appellants pray that their conviction be set aside and be substituted with an order directing their acquittal on the charges of stock theft.*” The appeal is opposed by the state. it is self-evident that the prayer is defective.

Background facts

First appellant, Chrispen Sanyatwe, aged 32 years is a police constable in the Zimbabwe Republic Police stationed at Rusape Rural and second appellant Taurai aged 29 years is a young brother of first appellant. The state alleges that on 14 November 2020 at Tikwiri Village, appellants or one or both of them stole two oxen from grazing pastures which oxen belonged to Dianah Muronde. On 15 November 2020 the appellants bought two diseased bovine beasts

with similar description to those of complainant, one from Mariah Kadengu and another one from one colloquially known as “Mupositori”. On 20 November 2020 appellants delivered complainant’s two oxen to Surrey Abattoir using livestock clearance papers written in second appellant’s name and the livestock clearance certificate had been issued by first appellant and appellant’s aunt Magaret Chitiyo was written down as the seller. First appellant acquired a movement of animal permit in his name for the same 2 oxen. Complainant managed to recover her rope which she used to secure a bell on one of her oxen which had been stolen and also recovered were receipts from Surrey indicating that the appellants had sold two oxen at Surrey Abattoir where the description of the slaughtered beasts matched complainant’s. Value of the stolen beasts is US\$1 400.

First appellant in his defence before the court *a quo* stated that he cleared genuinely acquired cattle. He cleared the cattle in his capacity as a police detail. Second appellant in his defence told the trial court that he genuinely acquired two bovine beasts whose descriptions answered to the stock clearance and movement permit. Second appellant sold the beasts to Surrey Abattoir. Both appellants prayed before the trial court for their acquittal.

Court *a quo*’s judgment

After assessing evidence of both the state and defence the learned magistrate crystallised the issue for determination as whether or not the two missing beasts from complainant’s herd, that is a grey ox and a brown and white ox were the ones that were cleared by first appellant and delivered to Surrey Abattoir by second appellant. The trial court added that the two appellants having conceded that the description of complainant’s beasts was similar to those appellant allegedly purchased from third parties, appellants had the onus to prove that the so acquired beasts did not belong to complainant. The rationale from the trial court’s view was that the burden of proof shifted to the accused at the time it was conceded that the complainant’s two oxen went missing on 14 November 2020 and appellants delivered two beasts matching complainant’s beasts description at Surrey Abattoir on 15 November 2020.

The trial court in dealing with appellant’s claims that they had bought the two beasts from Maria Kadengu and Mupostori observed and concluded that the ZRP clearance certificate shows Magaret Chitiyo of Dendera Village as the registered owner of the two beasts. To the trial court no explanation was advanced by the appellants to explain the discrepancy which was

fundamental to the two's defences. The trial court also impugned the failure by the defence to adduce own evidence from Maria Kadengu and Mupostori to clear the creases depicted on this discrepancy. The trial court then doubted the existence of the three alleged sellers and accepted the evidence of Willard Duri who told the court that the alleged sellers distanced themselves from those beasts delivered at Surrey Abattoir and disowned the subject oxen. The trial court also came to a conclusion that both appellants were linked to the offence by the discovered tying rope belonging to the complainant which was found in appellant's motor vehicle. Court also believed and accepted complainant's evidence as being truthful, untainted and unbiased. Complainant identified the rope by the knots she made on the rope. Court also found that the credibility, of the two appellants was in serious doubt. However the court *a quo* was satisfied that appellants neither bought the beasts from Maria Kadengu nor from Mupostori. The trial court was boldened further by the recording of false information on the clearance certificate which puts doubt to the existence of one Magaret Chitiyo. It was also pertinent that diseased cattle were allegedly bought from Maria Kadengu and Mupostori, the cattle delivered to Surrey Abattoir were not diseased.

Dealing with first appellant, the court *a quo* noted that first appellant recorded false information on the clearance certificate pertaining the details of the seller of beasts. Court was satisfied that first appellant participated in the commission of the offence. Court *a quo* further observed that there was no reason why the two could not wait for Constable George to finish his task and then clear the beasts and issue the certificate given that it was not appellant's role to do stock clearance. It was also a finding of the court *a quo* that the speed at which appellants carried out the clearance and disposal of the beasts at Surrey Abattoir is a clear indication that the two brothers were acting in collusion and common purpose. Court convicted both appellants and sentenced them to 9 years imprisonment. Dissatisfied the two appealed.

Grounds of Appeal

Ad Conviction

1. *The trial court erred and misdirected itself at law when it failed or refused to grant the application for discharge at the close of the state case when no prima facie case had been established by the state thus failing to accord the appellants with a fair trial in accordance with the provisions of the constitution and the law.*

2. *The trial magistrate erred and misdirected itself at law in basing the conviction upon shifting the onus to the appellants disregarding the trite and well established legal principle that the onus of proving beyond reasonable doubt rests on the state. this was a case where there was no direct evidence implicating the appellants and circumstantial evidence has to be clear and satisfactory in every material respect to secure a conviction.*
3. *The trial magistrate erred and misdirected itself on the facts by proceeding to convict the appellants when the complainant did not positively identify the hides as belonging to her bovines and as such the evidence from Surrey had no probative value as inter alia one of the hides was not grey and no reliance could be placed on the evidence from Innocent Haparari.*
4. *The trial magistrate erred and misdirected itself in disregarding the failure by the complainant to produce a stock card indicating that she owned two oxen and placed over reliance on the issue of the tying rope which on its own is insufficient to secure a conviction particularly in the context of the insufficiency of the evidence of the complainant's down playing the previous dealings between the second appellant and her husband.*
5. *The onus on the appellants was only to provide an explanation which was reasonably possibly true and once this was done the obligation remained on the state to establish the guilt of the appellants beyond all possible reasonable doubt and it is submitted that the appellants ought to have been given the benefit of the doubt.*

Proceedings before this court

Mr *T Musara* who appeared for the appellants submitted that the trial court erred at law when it refused to grant an application for discharge at the close of the state case. He went on to cite the provisions of s 198(3) of the Criminal procedure and Evidence Act, [Chapter 9:07] and South African law authorities¹ and added that such a refusal by a trial court amounts to a breach of an accused's constitutional right to a fair trial. In this case appellants' counsel added the state had failed to establish a *prima facie* case against both appellants. The evidence led by the state was lacking in material respects as the vital essential elements of stock theft had not been proved. This was more so in the absence of a stock card of the complainant, there was no

¹ S v Lubaxa 2001 (4)SA 1251 (SCA)

conclusive identification done at Surrey Abattoir in respect of the hides, horns and hooves of the beasts hence there was no basis for the trial court to place appellants on their defence.

Addressing the court on the second and third grounds of appeal, Mr *Musara* submitted that the trial court made an error and misdirected itself at law when it placed onus on appellants to prove the origin of the beasts. He cited s18 of the Criminal Law Code². It is the state which should diligently prove that the assertions it makes or prove the guilt of an accused person³. It was appellants' counsel's argument that the allegations made by the state were not proven and the state failed to discharge its onus of proof. On the other hand all that appellants needed to do was to present a version to the trial Court that was reasonably possibly true.⁴ In the case before the court it was further submitted on behalf of the appellants that the state failed to establish the criminal element for stock theft as well as the aspect of possession to show that the appellants had knowledge of the possession of the beasts in question. It was added by appellants' counsel that the state failed to prove beyond reasonable doubt that the appellants were either in possession of the bovines or that they had a guilty mind when they sold the bovines. Appellants see no causal link between the theft and them. On the aspect of circumstantial evidence Mr *Musara* referred us to the matter of *S v Blom*⁵ and submitted that the circumstantial evidence available leads to numerous inferences so that the evidence from Surrey Abattoir has no probative value and nothing must be placed on the evidence of Innocent Haparari.

On grounds of appeal 4 and 5 appellants submitted that the Magistrates erred and misdirected herself in disregarding the failure by the complainant to produce a stock card. Appellants added that there was nothing unique about the tying rope and does not assist the state on the issue of identification. To the appellants the oxen said to be stolen were not the same as those sold to Surrey and the trial court ought to have believed the appellants and appellants prayed that the appeal against conviction be upheld and that a verdict of not guilty be substituted.

Mr *Musarurwa* to the *contra* contends that the trial Magistrate did not misdirect herself. On the first ground of appeal speaking about refusal of the court to discharge both appellants, the state submitted that the ground is not a ground of appeal but can qualify as an excellent

² [Chapter 9:23] Also *S v Kuper* 2000 (1) ZLR 113 (s) R V Difford 193f AD 370

³ *state v Edward Gumbo* HB 119/18

⁴ *State v Makanyanga* 1996 (2) ZLR 231

⁵ 1939 AD 188

ground for review. He cited the case of *S v Kachipare*⁶ and an appeal court has to consider the whole record of proceedings and cannot ignore the evidence led by the defence. It was further submitted on behalf of the state that once an accused is put on his defence, albeit wrongly, and is ultimately convicted, the refusal to discharge the accused is not in itself a sustainable ground of appeal against the ultimate conviction.

On grounds 2 and 3 the state submitted that the available circumstantial evidence placed before the trial court was sufficient for the court to safely convict the appellants. Mr *Musarurwa* further submitted that given the fact that appellants conceded that complainant's beasts were similar to the description of the beasts that the appellants acquired from the sellers whose names do not appear on ZRP clearance certificate appellants had the duty to explain this anomaly and both appellants failed to do so even before this court. The state reemphasized Willard Duri's evidence that both Maria Kadengu and Mupostori went to Surrey Abattoir and distanced themselves from the bovines delivered at Surrey. The state supported the conviction and added that complainant's beasts were stolen on 14 November 2020 and were slaughtered at Surrey Abattoir on the following day 15 November 2020 and the movement permit confirm so, the ZRP clearance certificate cleared by first appellant also reflects the delivery of complainants two oxen and first appellant cleared the oxen for his brother, second appellant. Margaret Chitiyo was never mentioned by the appellants as the seller of the two oxen, it was submitted by the state yet it appears on the clearance certificate. The state counsel reiterated the importance of the tying rope belonging to complainant and the totality of all circumstantial evidence excluded any other probabilities leading to the conviction of the appellants. The state added that the trial court properly disregarded the issue of hides in its final analysis. The state refuted appellants' allegation that complainant did not prove that she owns the two oxen. In addition Luckmore Duri and Nigel Muronde confirmed their knowledge of the subject beasts hence the issue of ownership does not hold water. State prayed for the dismissal of the appeal.

1. *Whether the court a quo erred and misdirected itself at law when it refused to grant the application for discharge at the close of the state case?*

An application was made by the appellants before the trial court for their discharge at the close of the state case and the trial court refused and allowed the matter to proceed to finality

⁶ 1998 (2) ZLR 271 (s)

by putting appellants to their defences. This ground of appeal is now basically academic given the fact that in an appeal this court has to look at the totality of all evidence led by both sides. Very often legal practitioners have now adopted as a matter of practice to apply for discharge of an accused at the close of the state case. This occurs even where there would be overwhelming evidence to show that the state had established a prima facie case. Looking at the analysis of all the evidence by the learned magistrate in her judgment I fail to see where she erred or misdirected herself in refusing to discharge the appellants. I will dismiss the first ground of appeal for having no merit.

2. Whether the Trial Magistrate erred or misdirected herself at law on basing the conviction upon shifting the onus to the appellants?

As clearly captured herein under background facts as well as from the submission of the state, the trial court on page 11 of the record ruled as follows:

“The burden of proof shifted to the accused at the time it was conceded that the complainants’ 2 oxen went missing on 14 November 2020 and the accused persons delivered 2 beasts matching complainant’s beasts’ description at Surrey Abattoir on 15 November 2020”

This is the paragraph that contains the criticism by the appellants. The appellants were not called by the court to prove their innocence or liability, the court *a quo* expected appellants to explain the discrepancies between cattle clearance papers and their defence more particularly the inclusion of appellant’s aunt Magaret Chitiyo of Dendera Village as the seller of the two oxen. On the other hand, appellants were all along saying they bought the two oxen from Maria Kadengura and Mupostori. The information on police clearance forms and appellants’ evidence exhibited a misrepresentations of facts which needed both appellants to explain. In my view no onus was shifted. It is the duty of the defence to traverse its own trajectory of defence to the satisfaction of the trial court in order for the trial court to be convinced that an accused person’s version is probably possibly true. Appellants failed to explain and the trial court drew adverse inferences against both appellants. Who else could have explained the inclusion of Magaret Chitiyo on a clearance form prepared by the first appellant other than first appellant himself. As the trial court properly pointed out on page 11 of the record of proceedings “No explanation has been proffered for the discrepancy in this crucial aspect of the accused persons’ defence.”

In my view that is a crucial observation by the trial court. I see no misdirection at all and I will dismiss that ground of appeal.

3. *Whether the Trial Magistrate erred and misdirected itself on the facts by proceeding to convict the appellants when complainant did not positively identify the hides as belonging to her?*

The ground of appeal should not detain us at all for it is baseless. It is apparent from page 12 of the judgment that the court *a quo* disregarded the evidence of the hides and expressed its reservations with regards as to how the issue of hides was handled by the police. It also excluded such evidence of the hides in its analysis of evidence. The third ground of appeal is dismissed.

4. *Whether the trial Magistrate erred and misdirected itself in disregarding the failure by the complainant to produce a stock card to prove that she owned the two oxen?*

Complainant lost her two oxen which she ably described to the police details one brown ox with white patches big horns facing forward and slightly pointing upwards and the second one as grey ox with horns facing downwards and curving upwards. Both appellants acknowledged this descriptive features with those they described in the clearance papers. Luckmore Duri and Nigel Muronde corroborates complainant on this aspect and more critically the identification of the two beasts is a point of fact and the court *a quo* was satisfied with the evidence of complainant on that aspect. This court has no legal basis to interfere with the trial court's finding on facts. Complainant was not describing non-existent objects. Although cattle are owned by one person the whole neighbour-hood has the opportunity to associate such animals with its possessor and owner so in my view I see no basis for appellants to argue that complainant failed to prove ownership. She was not asked by the state to produce the stock card, in any case the issue of ownership was not fundamental to appellant's defence, what was in dispute was whether appellants stole and sold 2 oxen which matched those bovines as described by the appellants on the clearance papers and cattle movement permit and whether those cattle belonged to complainant. Further s144 (2)(a)(1) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23] speaks of "*person is entitled to own, possess or control the*

livestock ...” and I am satisfied that complainant fits into the class of owner, possessor or controller of a subject of theft in the pastures on 14 November 2020. This ground of appeal has no merit and it is dismissed.

5. *Whether appellants provided an explanation which was reasonably possibly true and whether the court erred in not according the appellants a benefit of doubt?*

One wonders whether this is a ground of appeal or not. An observation of the analysis of the preceding grounds of appeal shows that this aspect has been extensively covered more specifically regarding the failure by the appellants to explain a number of discrepancies in their defence. First appellant is a police detail who is well versed with the need for accuracy and authenticity of information which is contained in a clearance form. He is also aware of the need for impartiality of the officer who should clear the animals before they are collected by buyers and *in casu* first appellant enters completely wrong and misleading details of his aunt on beasts allegedly bought from Maria Kadengu and Mupositori. Why would appellants not enter Maria Kadengu and Mupositori on the clearance papers as sellers of the two oxen? Why didn't first appellant let Constable George clear the cattle bought by second appellant his brother? On the date when the appellants were found with complainant's tying rope, what did the appellants say to explain the possession of the tying rope? In the court *a quo*'s judgement the trial court indicated a number of dissatisfactory incidences regarding appellants' conduct justifying why the court concluded that appellants' version was not possibly probably true. I fail to see where the trial court erred and like the rest of the grounds of appeal this fifth ground of appeal is meritless and it is dismissed

Accordingly the appeal by the appellant against conviction is dismissed.

CHAREWA J Agrees _____

Lawman Law Chambers, appellant's legal practitioners
National prosecuting Authority, state's legal practitioners