ARTHUR KAZANGARARE
versus
THE STATE

HIGH COURT OF ZIMBABWE
BERE AND MATHONSI JJ
BULAWAYO 18 JANUARY AND 4 FEBRUARY 2016

Criminal Appeal

Ms H. Moyo for the appellant
Ms N. Ngwenya for the respondent

MATHONSI J: After hearing arguments in this criminal appeal we upheld the appeal against conviction and sentence, substituted the conviction and sentence of the appellant with a verdict of not guilty and acquitted him. We said that the reasons for that outcome would follow. These are they.

The appellant and one other were arraigned before a magistrate at Bulawayo on a charge of stock theft in contravention of s114 of the Criminal Law Code [Chapter 9:23]. It was alleged that on a date unknown to the prosecutor but during the period extending from 2011 to October 2013 himself and one Victor Nyoni had stolen a bull belonging to Thandokazulu Ngwenya at some grazing area in Fort Rixon. The facts were that he had driven the bull to a neighbouring homestead belonging to Adage Gumbo where he kept the bull for sometime before selling it to Adage Gumbo who later branded it with his own brandmark.

After hearing evidence from two state witnesses, Thandokazulu Ngwenya and Tafadzwa Richard Marufu, three defence witnesses for the appellant and two for Victor Nyoni the co-accused, the court *a quo* convicted both of them and sentenced each to the mandatory 9 years imprisonment having found no special circumstances as would inform the preference of a sentence other than the mandatory one. The appellant was aggrieved by both the conviction and sentence. He then lodged an appeal to this court against both conviction and sentence. The grounds of appeal against conviction are set out in the notice of appeal as:

"AD CONVICTION

1. The court *a quo* erred and misdirected itself in law in finding that the state had proved its case beyond reasonable doubt when in fact it had not.
2. Having made a factual and judicious finding that the appellant purchased the bovine bull in issue from his co-accused, the court *a quo* erred and misdirected itself at law in inferring common purpose amongst the two notwithstanding their irreconcilable and incompatible versions of what transpired.
3. Moreso, having made a factual and judicious finding that the second accused knew the identity of all the complainant's beasts and his earmark, the bovine bull in question included, and also having concluded that the second accused's lies and prevarications on material respects supported appellant's version, the court *a quo* erred and misdirected itself further in finding the existence of common purpose, moreso also considering that the evidence available did not support second accused's defence that he had given appellant the bull in issue because appellant claimed the bull was his.
4. The court *a quo* erred and misdirected itself at law in overly emphasizing the issue of police clearance as if it were legally a pre-requisite for the sale or purchase of stock.
5. The court *a quo* erred and misdirected itself in disregarding off hand the evidence of the second state witness and the appellant's defence witness merely on account of their relationship to him without making any credibility findings.
6. The court *a quo* erred and misdirected itself in basing its judgment on speculation and conjecture by placing reliance on extraneous and unproved facts to establish *dolus eventualis."*

In her heads of argument *Ms Moyo,* who appeared for the appellant, submitted that the appellant's co-accused was shown to have lied when he said that he had released the bull to the appellant because the latter had claimed it as his after it had strayed to his herd. Those lies therefore corroborated the evidence of the appellant that he had in fact bought the bull from his co-accused. In making the point that lies told by an accused person in court may provide

corroboration, *Ms Moyo* relied on the authority of *S* v *Mhlanga* 1987 (1) ZLR 70 (S) 77 B-C where DUMBUTSHENA CJ, said;

> "To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realization of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behavior from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of an accomplice who is to be corroborated, that it so say by admission or by evidence from an independent witness."

It was further submitted on behalf of the appellant that he had given a reasonable defence that he had purchased the bull from his co-accused for $300-00, he had kept it for more than 1 ½ years in open and had not bothered to seek a police clearance for it because he trusted his neighbour who sold it to him. The court could not reject the appellant's version because he had no onus to convince the court of the truth of any explanation that he gives: *R* v *Difford* 1937 AD 370 at 373. It is sufficient that there is a reasonable possibility that the explanation may be substantially true: *R* v *M* 1946 AD 1023 at 1027; *S* v *Kuiper* 2000 (1) ZLR 113 (S) 118C-D

Ms Ngwenya for the respondent submitted that the appellant had offered what she termed a "cut throat" defence which the court *a quo* was able to sift through and correctly found that he and his co-accused had acted in common purpose and as such the conviction should not be interfered with. I do not agree.

Navigating the way towards conviction the magistrate made quite startling observations. At pages 13 – 14 of the record she started:

> "The parties (were) neighbours, the inference that can be safely drawn is, they knew each other's earmarks and brandmarks. They lived so close that accused two had room as had been tradition to advise the complainant that a bull was in his kraal yet he did not. He turned out to be a grossly unreliable witness, did not stand his ground. It then came out in evidence that accused two had a prior meeting with accused one during which meeting the bull was discussed and the arrangement of collection made. <u>It therefore crashes accused's defence and places him right where his co-accused placed him that he sold him the bull. And clearly he had no right to sell the bull. Accused one took control of the bull from accused two he assumed control, his argument is that he thought he was buying the bull from the owner. This defence he maintained till the very end</u>. He called a witness to confirm his story, though the court exercised caution with the evidence of this witness due to the relations between them. <u>To this extent the court believed that he could</u>

> have bought the bull. The question is, does this sell (sic) connect accused one with accused two's intent to deprive the owner permanently of his bull? Did the accused have the requisite state of mind? Having evaluated the evidence before the court, it is now vital to address the issues of law aligned to the proven or established facts. The questions before the court are whether or not accused one and accused two acted in common purpose to deprive the complainant of his property. This involves the question whether either or both accused had the requisite *mens rea* to commit the offence charged. For the doctrine of common purpose to apply it should be established that accused one participated with accused two's crime (or vice versa) with the necessary mental state that is that either of the accused persons participated or foresaw that the other was committing the crime in question. Where the accused have not actually agreed in advance that the crime in question will be committed but foresees the real possibility that the crime will be committed. The accused would be guilty of the crime committed by the other on the basis of legal intention i.e. *dolus eventualis*. *Dolus eventualis* is whereby accused foresees the possibility of a result but however he reconciles himself with that possibility i.e. accused consciously accepts the risk." (The underlining is mine)

It is not easy to follow the magistrate's line of reasoning or what it is that she was saying. Legal expressions are thrown all over the place on facts to which they scarcely apply thereby betraying a very muddled thought process. In all the maze of confusion the magistrate only succeeded in confusing herself and in the process misdirected herself sharply. Whatever it is that she was saying what is clear is that she found Victor Nyoni to have lied and the appellant to have told the truth and she believed him. She then proceeded to make a finding, which she could not at the same time run away from, that Nyoni sold the bull to the appellant.

Having arrived at the conclusion that the appellant bought the bull, she could not at the same time conclude that the appellant and Nyoni acted in common purpose in stealing the bull from the complainant for which the appellant could also be found guilty of stocktheft. The doctrine of common purpose is a simple one and it is now wholly codified in Chapter XIII of the Criminal Law Code [Chapter 9:23] dealing with participation or assistance in the commission of crimes. Basically liability arises out of two or more persons knowingly associating with each other with the intention that each or any of them shall commit a crime.

In my view it is not possible for one to purchase an item which then turns out to have been stolen while at the same time knowingly associating with the seller with the intention of stealing. It just does not make sense. At page 17 of the record the magistrate made the pronouncement:

> "No direct evidence establishes that accused one and accused two acted in common purpose. This conclusion can only be inferred from the circumstances discussed above. The evidence connecting the two is purely circumstantial."

She then went on to misapply the concept of circumstantial evidence.

Again the rules governing the use of circumstantial evidence are fairly simple. As stated by the learned authors Hoffman and Zeffert, *The South African Law of Evidence*, third edition, Butterworths, at pages 589-90:

> "In *R* v *Blom*, WATERMEYER JA referred to two cardinal rules of logic which governed the use of circumstantial evidence in a criminal trial:
> 1. The inference sought to be drawn must be consistent with all the proved facts. If it is not then the inference cannot be drawn.
> 2. The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

See also *S* v *Vhera* 2003 (1) ZLR 668 (H) 679 D-G; *S* v *Dzira* HB149/11; *S* v *Moyo and Another* HB 162/11.

The court *a quo* inferred the offence from the proved facts namely that the appellant and the complainant were neighbours; that the appellant did not seek police clearance of the beast after purchasing it and that the appellant kept it for a long time before branding it. In my view that was not the only inference to be drawn. In fact the proved facts point in a completely different direction, that of the appellant's innocence. He paid $300-00 for the beast before driving it across to his home where he kept it in the open for several months. He later branded it without attempting to conceal the original earmark. This is not the conduct of a guilty person. In addition, he gave a reasonable explanation for not seeking police clearance even as he bore no onus to prove the truthfulness of the explanation; *S* v *Kuiper, supra*, at 118C.

In any event, the moment the magistrate made a finding that the appellant bought the bull, she could not at the same time find him guilty of stock theft together with the one who sold it to him. Perhaps another crime could have been preferred but unfortunately there is not even a permissible verdict to stock theft in terms of s275 as read with the Fourth Schedule to Chapter 9:23. The inquiry should therefore end there.

Even if I were wrong in drawing that conclusion, I would still find the appellant not guilty for another reason. It is that the two state witnesses gave mutually destructive evidence which was contradictory to such an extent that the court should not have convicted on it. The first witness, Ngwenya testified of the theft of his employer's bull. The second state witness Marufu was adamant that the appellant purchased the bull. His evidence was not impeached but the court, in its wisdom, still convicted the appellant. It could not do that.

To the extent that the state evidence was contradictory, it follows that the state failed to prove its case beyond a reasonable doubt. No court should convict on the basis of such blatantly unreliable evidence. For that reason, there is merit in all the grounds of appeal set out by the appellant.

In the result, it is ordered that;

1. The appeal against conviction is hereby upheld.
2. The conviction is hereby set aside and the sentence quashed.

Ndove, Museta and Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners

Bere J agrees……..