

LAWRENCE USHEWEKUNZE
and
MACHINGURA MANATSA
versus
THE STATE

HIGH COURT OF ZIMBABWE
BERE AND MANGOTA JJ
HARARE, 17 June 2014

Criminal appeal

F Murisi, for the appellant
I Muchini, for the respondent

MANGOTA J: On 7 May, 2012 the appellants appeared before the court at Kadoma facing the charge of stock theft as defined in s 114 (2) (a) of the Criminal Law (Codification and Reform) Act [*Cap* 9:23]. The State allegations were that on 3 October, 2011 and at Chetsanga Village which is in Chakari area the appellants did steal three herd of cattle which belonged to one Norah Mapfumo whom the State cited as the complainant. The complainant, the State claimed, recovered her cattle.

The appellants pleaded not guilty to the charge. The first appellant made a bold denial of the offence and the second appellant raised an *alibi* as his defence. He said he was not in his home area or at the complainant's area on the day of the alleged theft of the cattle. He stated that he was at Kadoma Cotton Training Centre where he was attending a workshop when the cattle were allegedly stolen from the complainant.

After a lengthy trial, the appellants were convicted of the crime which the State had levelled against them and they were sentenced therefor. The present appeal is against conviction only.

The notice of appeal which was filed with this court on 23 August, 2012 relates to the two appellants. The papers which followed that notice, however, related to the first appellant only. The papers in question comprise:

- (i) the first appellant's heads of argument – and
- (ii) the respondent's heads of argument which were filed in respect of the first appellant.

During the hearing of the matter, the court sought clarification from the appellant(s)' counsel on whether the appeal which was being argued related to the first appellant only or to both appellants. Counsel who was standing in for the firm which filed the notice of appeal with the court remained unclear as regards the correct position of that matter. He started by stating that he was under the genuine but mistaken view that he was representing both appellants. When, however, his attention was drawn to the name(s) which appeared in the papers which were filed with the court after the notice of appeal, he acknowledged the anomaly and he urged the court to deal with the matter which pertained to the second appellant in terms of s 26 of the High Court Act, [*Cap 7:06*].

The court remained alive to the fact that, when the appellants filed their notice of appeal, their intention was to appeal against the court *a quo*'s decision of convicting them and not to have that decision reviewed. It also noted that none of the appellants, the second appellant in particular, withdrew or abandoned the notice of appeal which he had filed with the court. The argument which counsel for the appellants advanced when he was not aware of the matter which the court raised with him at a later stage related to the two appellants and not one of them. It was, accordingly, for the mentioned reasons that the court proceeded to deal with the present appeal as a complete whole which pertained to both the appellants and not in a piece-meal manner which counsel had proposed.

On a reading of the evidence which is filed of record in this matter, it is common cause that:

- (i) the complainant's three herd of cattle disappeared from where they were grazing in the afternoon of 3 October, 2011
- (ii) the cattle in question comprised:
 - (a) one cow - and
 - (b) two heifers
- (iii) the complainant recovered her three cattle - a cow which was known by the name Queen and two heifers.

The key witness for the State in this case was one Forget Jocho. He stated that at about 8 pm of the day of the theft of the bovines he saw the two appellants driving the cattle which belonged to the complainant. He informed the court that he recognised the cow which was known by the name Queen as one of the three herd of cattle which the appellants were driving through or past his homestead. He said he had, in the past, used the cow in his sister's field and he, therefore, knew that cow very well. It was his testimony that he was able to identify the cow with the help of moonlight. He said there was full moonlight on the day that he saw the appellants driving the cattle passing through his homestead. He stated that he was not mistaken at all in his identification of the appellants and/or the cow.

It is Forget Jocho who led to the recovery of the cow and the two heifers. His evidence on the point that the appellants passed through his homestead driving the cow and two heifers was corroborated by none other than the appellants themselves. The first appellant, for instance, put such questions as the following when he was cross-examining the mentioned witness:

- “X Is it not correct that you woke up when we had already passed your homestead and the beasts were 10-15 meters from your homestead
- No
-
- X Why did you remain talking to me when accused 2 proceeded to drive the beasts
- You stopped as I was talking to both of you and accused 2 proceeded to drive the beasts”

The second appellant put the following questions to the witness:

- “X Did you not see the cattle I drove from Mukohwe to Nhau
- I saw them, you passed through daylight and I saw the beasts
- X That is when I passed with accused 1 and it was during the daylight
- No, I saw you during daylight with those cattle and I saw you during the night with accused 1 with Queen.
- X How many times did I pass through, please my brother in-law.
- Twice, one during the day and when you were with Queen during the night. (emphasis added)

The appellants' above mentioned line of questioning pushed them deeper into the matter than out of it. They corroborated Forget Jocho's testimony which was, or is, to the effect that he saw them driving the complainant's cattle past his home during the night. Forget Jocho made a clear distinction of the cattle which he said he saw the appellants driving during the day from those which he said he saw them driving during the night. The ones which the appellants were driving during the night did have, as part of the herd, the cow called Queen, he said. He did not confuse the two incidents, the court observed. The incidents remained as clear as night follows day, in the court's view. He had no reason to lie against any of the appellants except to state what he had observed.

The first appellant made an effort to persuade the court to go along with the suggestion that Forget Jocho and members of the latter's family had a stone to grind with him. That was, however, a bold statement which he belatedly made as an after-thought. He, however, could not substantiate his assertion in the mentioned regard. The second appellant advanced no reason which showed that the State witnesses, Forget Jocho in particular, wanted to see him in trouble.

During the time that the first appellant was being cross-examined he, in answer to the Prosecutor's questions, stated as follows:

- "X Evidence of all witnesses is vivid in your mind
- Yes
- X If I zero in on Forget Jocho
- Yes
- X You don't deny driving some beasts through their home during one night
- Yes
- X You were in company of accused 2
- Yes
- X Forget says beasts belonged to Norah Mapfumo as he identified cow called Queen
- It is a lie, he lied in this court, there was mistaken identity as it was dark and at night. The moon was shining and I wonder how he identified male or female beasts (emphasis added)

- X You admit that you spoke to him
- Correct
- X How far were the beasts
- Accused 2 drove the beasts past up to approximately 30 meters
- X You went past his homestead with the cattle and you were stopped
- He did not stop us we exchanged greetings.
- X He knew cattle as they belonged to complainant and accused 2 did not stop
- He lied, he saw three beasts but it was during the night at around 8 pm the moon was shining (emphasis added)

All the above is well in sync with what Forget Jocho gave as his testimony. The first appellant did nothing but to confirm a story which Forget Jocho had told in some clear and unambiguous language. The second appellant, the court observed, raised the defence of the *alibi* to the charge which had been preferred against him. He, in the court's view, raised that defence as a possible way of explaining his alleged absence from the scene of crime. He, however, failed to substantiate his defence in any convincing manner. He, in fact, mixed up issues during the time that he spoke in defence of himself. He, for instance, stated, in-chief, that he went to Kadoma Cotton Training Centre on 12 October, 2011. He said he returned home from the workshop on 5 October, 2011. There was clear confusion on what he actually wanted to convey to the court when he stated as he did.

Part of the evidence which he gave in the form of question and answer reads:

- “X It's not in dispute that one day in October, 2011 in the company of accused 1 you passed through Jocho's driving some cattle
- Yes, we passed through
- X probable what is in dispute is date and number of cattle
- It was on 7 October 2011; it was a Friday
- X Did you see Jocho on the night in question
- No, I heard him talk to accused 1 and I asked whom he was talking to, when we got to Jocho's homestead, dogs barked and cattle got off the road into the

bush. I rushed to get them back onto the road. I did not see Forget but he talked with accused 1

X You were driving beasts together with accused I?

- Yes

X How do you explain when accused 1 talked to Forget and you say you were not present?

- No, we were together driving the beasts, so I rushed to bring them back to the road.

X You went past Jocho's place and you were stopped?

- No, it was not around 7pm, but towards 8pm."

The appellants' abovementioned pieces of testimony corroborated the evidence of Forget Jocho in a manner which requires little, if any, debate. It is Forget Jocho who linked the appellants to the crime in a very material way. He caused the arrest of the appellants and the recovery of the complainant's cattle. Much of the evidence which he gave in-chief and under cross-examination tallied in a material respect with what the appellants respectively stated in their evidence in-chief and when they were under cross-examination. He remained thoroughly unmistakable in his identification of the appellants as the culprits or the cattle which they were driving on the evening of the day that the cattle were stolen from the complainant.

The State witnesses were clear on the point that the two heifers were recovered from the first appellant's place as well as that the cow which is known by the name Queen was recovered from Tawengwa Nhau's place. The first appellant did, in fact, confirm the State witnesses' testimony which was to the effect that the cow was recovered from Tawengwa Nhau's place. The prosecutor asked him under cross-examination and he answered as follows:-

"X On 21 October 2011 Chengetai Shumba recovered the dehorned cow from Clemence's homestead?

- No, they recovered the beast from Nhau's homestead."

One requires no more evidence than to go by what the first appellant himself stated on the matter.

Two of the bovines which had horns at the time that the cattle were stolen had been dehorned. The brand marks which the complainant had made on the ears of her cattle prior to

the theft had been altered into some V-shaped marks. All this is consistent with the appellants' desire to deprive the complainant permanently of her three herd of cattle. The chain of events which started with theft of the cattle from their grazing area running through to their identification by Forget Jocho and their recovery from the first appellant's area remains stubbornly unbroken. That chain ties the appellants to the commission of the offence in an irrefutable manner.

The apparent variances which counsel for the appellant raised in the notice of appeal as well as in the Heads of Argument do not take his clients' case any further than they left it. Those variations do not go to the substance of the case. They, if anything, dwell on the superficial aspects of the case. The State witnesses were able to convince the court that the complainant's cattle were stolen on 3 October 2011 and that the cattle in question were recovered with the brand marks which the complainant used to identify them having been substantially altered into some marks which were different from the original ones. The appellants, on their part, confirmed the testimony of the key State witness in all its material aspects.

The court has considered all the circumstances of this case. It remained convinced of the fact that the appellants were properly charged, prosecuted as well as convicted. The appeal against conviction is, accordingly, dismissed.

The court will not deal with the issue of the sentence which the court *a quo* imposed on the appellants. That aspect was not made the subject of the present appeal and the court will not, in the circumstances of this case, interfere with that part of the trial court's decision.

Murisi and Assocoates, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners

MANGOTA J.....

BERE J agrees