

THE STATE
versus
KRYONA NYAMURI

HIGH COURT OF ZIMBABWE
TSANGA & CHITAPI JJ
HARARE, 3 October 2018

Review Judgment

CHITAPI J: The accused was convicted of theft as defined in section 113 (1) (a) of the Criminal Law Codification and Reform Act, [*Chapter 9:23*]. She was convicted on 7 March 2018 by the magistrate at Bindura.

The facts of the matter in brief were that the accused a 27 year old female adult and the complainant, a 31 year old female adult were aunt and niece. They resided together at their house at Masasa Farm Mazowe. On 16 February, 2018 the complainant left the house and went about her business. The accused remained at the house. The accused took advantage of the complainant's absence and stole the complainant's property which comprised, cash of \$450.00, a phone and some clothing items. The total value of the cash and property was put at \$575.00. The accused went away to her rural house and consumed the property with the result that nothing was recovered.

The accused pleaded guilty to the offence following her arrest and arraignment before the court. When the essential elements were put to her, the complainant was asked what she wanted to do with the property. In response the accused said that she took the property as recompense for her unpaid salary. When asked as to who was paying her salary, she responded that it was the complainant and that she was employed by the complainant as her maid. The magistrate retained a guilty verdict despite the accused's explanation.

In the case *State v Zondiwe Ncube* HB 14/15, a review judgment of TAKUVA J which judgment MUTEMA J agreed with, the accused had been tasked to ferry 4 heifers belonging to the complainant to an agreed destination. The accused and complainant were brother and sister. The accused drove away the 4 heifers belonging to the complainant and transported them to some other

place and the heifers were not recovered. On arraignment to answer a stock theft charge, the accused pleaded guilty. When the essential elements were put to her and she was asked in mitigation as to why she acted as she did, she responded, "I took the cattle with an intention to recover a debt owed by the complainant. The complainant owed me \$1 454.00 and I thought of recovering my money from the cattle. My brother (complainant) kept on changing goal posts." The magistrate did not alter the plea in the light of the accused's explanation for her conduct. The conviction was however set aside on review and the court was directed to alter the plea to not guilty and conduct a full trial.

In the said judgment, TAKUVA J had this to say;

"In respect of property crimes, such as theft, robbery or malicious damage to property, the court should always investigate whether the accused committed the crime under any sort of claim of right. A claim of right is a "decently clothed" ignorance or mistake of law. Such an ignorance or mistake of law is said to be clothed where the accused either knows or suspects that his actions would normally be illegal but due to some extraneous factual basis, he believes that his actions will not be unlawful in present circumstances.

"Where there is doubt as a result of this defence, the court should alter the plea to one of not guilty in order to determine the contentions issues. The rationale for this principle is to ensure that there is a fair trial especially where an accused is unrepresented and for where the case involves a mandatory sentence ..." see *S v Kawocha* SC 22/92 and *S v Chirodzero* HH 14/88."

I would add that mistake or ignorance of fact as a defence is provided for under ss 232-234 of the

Criminal Law Codification and Reform Act. Significantly, mistake is defined as "*mistake in relation to a fact means an erroneous impression concerning the fact.*" Mistake or ignorance of fact grounds a complete defence to a charge where its requirements are met. Equally, it is so with mistake or ignorance of law. Sections 235-237 provide that if the requirements set out in those sections are proved, mistake or ignorance of law grounds a full defence. Where the accused facing a crime against property pleads the defence of claim of right, the court is required to determine the veracity of the defence as provided for in s 237 of Criminal Law Codification and Reform Act.

The magistrate *in casu* did not deal with the claim of right defence raised by the accused. The failure to do so amounted to a misdirection which resulted in a substantial if not complete miscarriage of justice. The conviction of the accused cannot be left to stand and must be set aside. The accused having been sentenced to an effective 12 months imprisonment on 7 March, 2018 has

served almost 6 months of the sentence. Given a possible one third of remission of sentence for good behaviour normally given to convicts, the 6 months would equate to a 9 month sentence before remission.

What also presents itself as worrisome is the total sentence which was imposed. 24 months for theft of property worth \$575-00 is shockingly and disturbingly excessive. The magistrate imposed a sentence which was the maximum of her ordinary jurisdiction on summary trial as provided for in s 50 (1) (a). There was just no justification for this. The magistrate did state that a fine would trivialize the offence but did not consider community service and dismiss it as inappropriate. Therefore, even if the conviction had been upheld, the sentence would have been set aside and substituted.

I would have considered a remittal of the case for a full trial on a plea of not guilty as being justiciable. However, to do so would mean that the accused who has already served a sentence which by all objective and subjective considerations is disturbingly severe would remain on remand pending trial. Under the circumstances, a justiciable order should be one that sets aside both the conviction and sentence and leave the decision whether or not to reinstitute a fresh prosecution to the Prosecutor General.

In consequence therefore, I make the following order.

1. The proceedings in case No. CNC 281/18 do not accord with real and substantial justice.
2. The conviction and sentence imposed on the accused are set aside and the accused must be released from prison forthwith.

Tsanga J agrees.....