NASHMENTO KATAWARA
Versus
STATE

HIGH COURT OF ZIMBABWE
MWAYERA J AND MUZENDA J
MUTARE, 10 June 2020 and 2 July 2020

Criminal Appeal

Mr K G Muraicho, for the Appellant
Mrs J Matsikidze, for the Respondent

MUZENDA J: This is an appeal filed by the appellant against both conviction and sentence reached and passed by the Magistrate sitting at Mutare on the 8th of January 2020 where the appellant was convicted for a charge of unauthorised borrowing or use of property as defined in s 116 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and was sentenced to 14 months imprisonment of which 5 months imprisonment was suspended for 5 years on the usual conditions, 3 months imprisonment was further suspended on conditions appellant pays a fine of $1000-00 and the remaining 6 months were further suspended on condition of restitution.

The appellant's grounds of appeal are as follows:

1.0 AS AGAINST CONVICTION

1.1 The Learned Magistrate erred by convicting appellant of the offense of unauthorised borrowing when such an offense was not proved against him beyond reasonable doubt.

1.2 The Learned |Magistrate erred by convicting appellant on the evidence of the complainant which was not clear and satisfactory on every material respect and was thoroughly discredited during her cross examination and the entire court proceedings.

1.3 The Learned Magistrate erred in rejecting appellant's defence of authorisation which was reasonably true and probable and was not proved to be palpably false.

1.4 The Learned Magistrate erred in suggesting that the appellant ought to have proven his own defence or call witness to corroborate his defence when clearly the law did not put such an onus on the appellant.

2.0 AGAINST SENTENCE

2.1 The fine imposed by the Learned magistrate was manifestly excessive and induces a clear deep sense of shock considering the circumstances of the offence and that of the appellant which were highly mitigatory.

2.2 The Learned Magistrate erred in her assessment of the sentence when she over-emphasized issues of aggravation turning a blind eye on the otherwise compelling mitigatory factors in favour of the appellant.

2.3 The Learned magistrate erred in imposing excessive restitution on appellant and thereby failing to take into account the type of the motor vehicle and its value and also that the complainant's vehicle is still there and was not damaged beyond repair.

BACKGROUND

Complainant and appellant used to be friends. On the 21st of October 2018 complainant went to United Kingdom and asked the appellant to drive her Honda Fit Motor Vehicle from Harare to Mutare and directed appellant to go and park the vehicle at her house in Murambi, Mutare. Appellant complied as per complainant's instruction and he handed over the car keys to one Bobo Moyana a security guard at complainant's place of residence. On the 27th day of October 2018 the appellant went to complainant's residence and took the Honda Fit from Bobo Moyana without complainant's consent and drove away. Sometime in November 2018 whilst complainant was still in United Kingdom she received information from her sister to the effect that her vehicle was involved in a road traffic accident at Rutenga. On the 11th of March 2019 the complainant returned to Zimbabwe, and reported the case to the police. The value of the stolen property is given by the state as US$5500-00 The appellant was charged for theft as defined in s 113 (1) (a) of the Criminal Code alternatively the state charged appellant with unauthorised borrowing or use of the property as defined in s 116 of the Criminal Code. Appellant pleaded not guilty to the main and alternative charge. He was found guilty to the alternative charge. He now notes appeal against both conviction and sentence.

As against conviction the appellant submitted that complainant's evidence as well as the other state witnesses' evidence was glaringly inconsistent. The totality of the state's evidence did not prove that appellant did not have authority to use the complainant's motor vehicle. Appellant further contends that the complainant had previously granted him authority to administer her taxis which included the car in question. Appellant also pointed out that the evidence of Bobo and Tawona conflicted with that of the complainant. The appellant went on to submit that complainant's evidence was gravely discredited during cross examination and as a result it was no longer worthy to be relied upon. Appellant added that the court *a quo* displayed a complete bias towards complainant's version. A lot of criticism was placed on the evidence of the state witnesses and appellant urges this court to believe appellant's version, because complainants' was an afterthought. At the centre of appellants' submission is that he

was authorised to use the vehicle in question especially at the particular time he was instructed to manage the complainant's fleet of Taxis. Appellant submitted that on the day in question he was given the car keys by Bobo Moyana. Given the foregoing the court *a quo* misdirected itself in placing onus on the appellant to prove his own defence or call witnesses to corroborate his defence.

The question for this court to decide is whether the appellant was authorised by the complainant on 27 October 2018 to drive Honda Fit registration number AEW 7016? Bobo Moyana told the court that though he gave the appellant the keys, he assumed that appellant has been granted permission. That evidence was controverted by appellant. The complaint was consistent throughout that she did not authorise appellant to drive her car on 27 October 2018. On that aspect she never prevaricated nor stammered. The defence of the appellant of an assumed previous authorisation is totally misplaced to the facts of the matter. The court *a quo* had the opportunity to assess the demeanour of complainant during trial and it accepted her version, I fail to see any misdirection or erring on the part of the trial on that aspect. When the court *a quo* remarked that the appellant had a duty to prove his defence, it does not amount to shifting of onus at all, the court is simply stating that the version of the appellant required clarification or explanation that is supported by other evidence other than the sole side of the appellant. The onus still lies on the state. However more credence is added to the fort of the accused's defence if more supportive evidence is added to the recipe and such evidence would assist the trial court to reach at a fair decision whether for or against the accused. The apparent and undisputed truth proved by the state was that on 27 October 2018 appellant did not get authority to drive complaint's car, the authority ought to have come explicitly from complainant in no uncertain terms, not from Bobo Moyana nor any other agent. Appellant should not have just assumed that because he had previously been granted permission then it would follow whether complainant be there or not he would drive her car, appellant would be found guilty of unauthorised use or borrowing. The appeal against conviction has no merit and it ought to be dismissed.

As regards sentence the appellant strongly contended that the Learned Magistrate over-emphasised aggravating issues and paid leap service to the highly mitigatory factors. He submitted that the court *a quo* ought to have exercised leniency. Appellant went on to submit that the restitution imposed by the court *a quo* was too excessive given the model of the motor vehicle in question. He added that the damaged vehicle is still there and repairs can be effected

to it, the value imposed by the court is allegedly that of a new Honda Fit. On this note the appellant urged this court to remit the case to the court *a quo* for a proper assessment.

A close analysis of the reasons for sentence by the court *a quo* reflects that the court factored in the submissions by counsel or accused's circumstances. Appellant's counsel in mitigation before the court *a quo* submitted that the motor vehicle was right off and urged the court to order restitution. When such a submission is made by a legal practitioner in mitigation there are two possibilities: either the legal practitioner is urging the trial court to order restitution in the form of the value of the property amplified in the state outline, which in this case is US5 500-00 or assist the court by proposing value for the repair of damages. Appellant's legal practitioner left the trial court with no choice. The value for the loss of the complainant was US$5 500-00 and this value was not contested by the appellant during trial. This court is bound by the corners of the record of proceedings in appeal matters. I see no misdirection on the part of the trial court which would justify interference in its penultimate sentence. Appellant had a duty to put before the court *a quo* the reasonable amount of damages for this "right off" car and proceed to convince the trial court during mitigation as regards restitution. He did not. There is nothing peculiar for the appellant to pay restitution of US$5 500-00 in RTGS currency pegged against the legalised bank rate of the US$ to RTGS. The sentence passed by the court *a quo* in our view does not induce a sense of shock at all.

It is because of these reasons that we are unable to agree with the concession made by the state. The appeal against both conviction and sentence is dismissed.

Messrs Mugadza Chinzamba & Partners, legal practitioners for the appellant.
National Proscecuting Authority, for the respondent