

REPORTABLE (53)

Judgment No. S.C. 118/83

Crim. Appeal No. 308/03

SHINE SANGANE V THE STATE

SUPREME COURT OF ZIMBABWE,

GEORGES, CJ & BECK, JA,

HARARE, OCTOBER 24 & NOVEMBER 8, 1983.

I.R. Deeks, for the appellant

P.J. Batty, for the respondent

GEORGES CJ: The appellant was charged with malicious injury to property and theft. It was alleged that he had wrongfully, unlawfully and maliciously with building instruments or other tools broken a building, the property of Cornelius Masawi with intent to injure Masawi, and that he had stolen 4 000 bricks the property of Masawi. He was convicted on both counts and sentenced to two months' imprisonment wholly suspended on condition that the appellant paid to Masawi the sum of \$88, the value of the bricks allegedly stolen.

Mr Batty, for the State, does not support the conviction on the theft charge but argues in support of the conviction on the charge of malicious damage.

The case for the prosecution was that Cornelius Masawi operated a grinding mill at Hwana Township, Mhondoro Communal Lands, in the 1970's. During the liberation war the freedom fighters operated the mill with Masawi's

2. S. C. 118/83

permission. A toilet and a room adjoining

the mill fell into disrepair and were demolished the bricks from both being piled nearby. In 1981 the mill had a minor breakdown. Masawi's son decided to dismantle the mill and move it to Marisanhuka Township.

To do this he removed the door of the structure housing it, two ventilator windows and the roof. He left the area in September 1981.

In March 1982 he returned and found the appellant in occupation of the plot on which the structure stood. It had been converted into a smaller building and another mill installed. The pile of bricks which he says numbered 4 000 had disappeared. A concrete bed on which his old mill had been installed had allegedly been destroyed. Replacing that would cost \$1 000.

The appellant's case was that the Chief in the area had informed him that Masawi had moved his mill from the area and that that was causing hardship. He applied for and got a licence from the Council to operate a mill in the area - indicating that he would put the mill in the spot from which the other had been moved. He found the remains of a structure there without a roof, door frames or window frames and with one wall demolished by vandals. Using such bricks as were still usable from a pile that had been left exposed to the weather he modified the structure to make a building in which he installed his mill. When he had completed this police came and ordered him to close the mill. Masawi had apparently been willing to accept compensation and the appellant was willing to pay for such of Masawi's

### 3. S. C. 118/83

bricks as he had used but Masawi's son advised against that course.

The area Chief of Nyamuda confirmed that there had been only three walls standing when the appellant began his building work. He stated that he thought the Masawis were leaving for good and he looked for the appellant to put a mill in the area. He did not instruct the appellant to use that stand but to apply for a licence.

The argument in the matter has centred on the issue as to whether there was damage or not. Mr Deeks indeed submitted that he could not argue on the issue of intent since the appellant had consciously and deliberately done what he did so that there would clearly have been constructive legal intent. The magistrate did

not avert to this issue in his judgment.

Apart from the intention to do the act which causes the alleged damage it must be shown that the injury was wrongful; R v Bhaya 1953 (3) SA 143 at 148F. This pre-requisite has not been satisfied. What stood on the site when the appellant saw' it were three walls which appeared derelict. He asked for permission to establish a mill in the area and indicated that he would use the spot. There is no evidence that he was warned not to do this. The Chief stated that he was under the impression that Masawi was leaving for good. All the actions of the appellant were entirely open for all

to see and he said that his intention was to compensate Masawi for such of his materials as he used. While the appellant did admit that Masawi had not told him that he had abandoned the structure or that he no longer required the bricks, it is clear that he thought that there would be no difficulty in compensating Masawi for his use of them since Masawi would not be returning

4. S. C. 118/83

to the site, and that he bona fide believed that his

conduct was lawful in re-establishing a mill by rebuilding the ruins of the abandoned structure that had housed the former mill. The suggestion by Masawi's son that the concrete bed on which the previous mill stood had been destroyed was not pursued and the evidence concerning this aspect is scanty in the extreme and is far from satisfactory. A new mill was installed by the appellant and it is hardly likely that he would have destroyed the existing concrete bed and erect another one for the purpose.

In S v Marshall 1967 (1) SA 171 at 176C-D HOFMEYR J stated that there was no onus on an accused to prove the absence of unlawful intent which was an element of the offence of malicious injury to property.

If his explanation of the injury done to the complainant's property might reasonably be true and which, if true, is inconsistent with his guilt, it follows that the State would have failed to prove its case beyond a reasonable doubt,

5. S. C. 118/83

I am not to be understood as accepting that there was any damage to the complainant. The statement that the concrete base on which the former mill was erected had been destroyed was, as I have mentioned, far from satisfactory. It is clear that the appellant did not think that he was causing any damage to Masawi. The fact that this was his frame of mind would be irrelevant if he in fact caused damage. In that sense Mr Deeks' submission is entirely correct.

But it seems also plain that the appellant was not acting wrongfully. It is clear that he thought that the structure in its existing state served no useful purpose and that though the materials may not have been abandoned their use would involve compensation and no more.

The Chief was anxious to have a mill in operation in the area and he was filling that need as quickly as it could be filled. While the term bona fide claim of right may be inapt to describe the situation, it is correct to say that he had a bona fide belief that his behaviour was not unlawful.

As I have indicated, the trial magistrate did not consider this issue. He stated:-

"The court accepts, therefore, that the complainant who had a building standing at Hwana Township which building had no doors and had no roofs and had no ventilators had that same building demolished or modified or renovated but in fact it had changed its face completely as a result of the accused's activities. Further that the accused had obtained no permission or authority either from the complainant or from

6. S. C. 118/83

the local licensing authority, in this case the Mhondoro Council. And at that particular time the complainant held a valid trading licence in respect of this stand. Accused had no permission to destroy, modify or rehabilitate that same building. That as it may would appear to this court to be largely a civil matter, in so far as the quantum of damages that the complainant would have suffered."

The issue as I see it is not whether or not there was positive permission but whether in the circumstances of the case the appellant obviously thought that it would not be wrongful to do what he did. I am satisfied that this was his frame of mind and that one of the pre-requisites for establishing the offence had not been proved. The conviction for malicious damage to property must be set aside.

On the theft charge, the evidence was that he had used such bricks as were piled on the stand and that were still usable in his rehabilitation of the building.

As Mr Deeks pointed out, there was no intent to steal because the appellant believed that the complainant would be content to accept compensation for the materials which he may not have abandoned but for which there was no prospect of immediate use and which were deteriorating because of their exposure to rain. Mr Batty properly agrees with that submission.

The appeal on the charge of theft is also allowed.

As the trial magistrate partly perceived, this is a dispute which should be resolved in the civil courts.

BECK JA: I agree.

Surrey, Pittman & Kerswell, appellant's legal representative