STATE
versus
CASPER CHIKANGA
and
MAVHURAMBUDZI EDSON

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
HARARE, 23 MARCH & 5 APRIL 2022

Criminal Review Judgment

BACHI MZAWAZI J: This is a review matter from the Magistrates Court brought in terms of s 57 of the Magistrates Court Act [*Chapter 7.10*] read in conjunction with ss 26 of the High Court Act 7.10.

The two accused persons herein, were arraigned and charged of two counts of stock theft in contravention of s 114 of the Criminal Law (Codification and Reform Act), [*Chapter 9.23*]. Both accused persons were self-actors. They pleaded not guilty. They were convicted after a short trial and were sentenced to the minimum mandatory prison term of, nine years each per count making total of eighteen years. The two nine-year prison terms were to run concurrently. Effectively they were to serve nine years each.

FACTS

Summarily, the facts as extracted from the synopsis of the State case are that, the two accused persons acting in connivance stole two beasts which were grazing unattended in the month of August 2021. It is alleged that they proceeded to the second accused person's homestead where they left the beasts. The beasts were then sold to one Masango Estoni, by the second accused person. The two were then arrested after the owner of the beasts had filed a report of stolen cattle with the police resulting in the recovery of the beast from the purchaser. The purchaser in turn led the police to the second accused person.

ACCUSED PERSONS'DEFENCE

Both accused persons, denied any knowledge of the stolen cattle. They vehemently protested that they were never involved in the alleged theft. Although they are related, they asserted that they did not act in connivance or in common purpose. They also stated that they stayed in different villages and that they did not plan to, or steal the cattle.

Accused two further stated that he was beaten by the police on mere allegations made by the person who was found in possession of the stolen beasts that the accused was involved in the theft of the cattle.

STATE CASE

First Witness

The state case was comprised of four witnesses. The first witness, the purchaser, stated that after he made some enquiries as to where to purchase some cattle, he was directed to the second accused person's homestead where he purchased the two beasts for $US 250.00 and $US 310.00, respectively. The first, witness in both evidence in Chief and re-examination by the State counsel, mentioned that the second accused told him that, he was acting under the instructions of the first accused. He claimed that he did speak to the first accused *albeit* over the phone. It was his evidence that he later learnt that the beasts had been stolen when the police came to his homestead. He then led them to the second accused parents' home. He further stated that the second accused mother witnessed the sale transaction and that she is the one who informed him of the relationship between the two accused persons and further that the first accused was in the business of selling cattle. He also claimed that the mother of the second accused offered to reimburse the purchase funds on behalf of her son on the day of her son's arrest.

Second Witness

In her evidence, the second State witness, Chapa Zuze, stated that after he had discovered that he had lost one of his beasts he approached the village head of Tsega Village. After describing his beast, he was informed that accused two passed by the village driving two herd of cattle. The village head told this witness that he had gone an extra mile to capture the two bovines and the whole incident on camera. After being shown the photographs the witness stated that he identified

one of the beasts as his. Armed with this information, he then proceeded to make a police report leading them to the house of the first witness, Eston Masango.

During cross examination by the first accused, the witness stated, on p 9 of the record, that all he knew about the first accused is what he was told by the first witness, that they spoke over the phone and that his name was Casper jointly charged with the second accused. When asked by the second accused, of the proof that he had sold the bovines, the second witness repeated that he was informed by the first witness that his parents had confirmed that he had brought both beasts and sold them to the first witness.

Third Witness

The third witness is related to the second witness. She claims she was in Botswana when she learnt of the theft and the recovery of her own bovine from the second witness who was in custody of the same. When asked by the first accused why it never dawned to her that the first witness, who was found in possession was the thief, she responded that it was because the said witnesses had implicated them as the sellers.

Fourth Witness

The fourth witness to be called by the state was the investigating officer. He stated that he became aware of the offence after a report was made by the second witness who is the owner of the first beast. He further stated that from his investigations, he discovered from the villagers who had taken pictures, and the first witness's version, that it is the second accused who had sold the two beasts. The police officer, after cross examination by the first accused mentioned that he learnt of his connection to the offence from the first witness who claimed he had spoken to him over the phone. When asked by the second accused of the part he played, the investigation officer said he saw the agreement in respect to the sale in addition to what the first witness had told him.

DEFENCE CASE

In his defence, accused one adopted his defence outline and called no witnesses. He maintained his innocence and stance and was not shaken during cross examination. Accused two when asked by accused one denied acting in connivance or stealing any cattle, let alone ever incriminating him in any manner from the time of his arrest and throughout the trial.

Accused two, in turn, steadfastly denied any involvement in the theft. Whilst admitting to his relationship with the first accused, he stated that, accused one only sells goats not cattle. He

challenged the whole testimony of the first witness as mere fabrications and untruths meant to save his own skin as he was the first to be arrested and to be found in possession of the cattle. He further posited that if the said witness was an authentic purchaser, he should have been familiar with the need for the police clearance and the attendant clearance certificate, whenever there is such a transaction. He indicated that the failure by the first witness to follow due process in clearing the cattle points strongly to the fact that he was the real culprit. Accused two disputed that his mother ever told the first witness anything in connection with the offence as all what was said by the first witness in relation to his mother were mere unsubstantiated averments.

It is on the basis of the above testimony, that the court proceeded to convict both accused persons on two counts of stock theft and sentenced each to nine years per count totaling eighteen years to run concurrently. The court's reasons for conviction were that all the witnesses had stated that the bovine were driven by and sold to the purchaser by the second accused. He stated that the evidence linking accused one to the offence was mainly that he was in the business of selling cattle and the relationship he had with second accused.

In his words the trial magistrate stated that:

> "first accused was well known for buying and selling cattle. They used that advantage so that the second accused would keep cattle at his home under the pretext that they belonged to first accused until they were bought and this is what second accused mother referred to first witness."

Analysis of evidence against accused one

The first witness stated that the only evidence linking accused one to the offence is his conversation with him over the phone in a quest to verify ownership of the cattle being sold. He expressed that he had no previous encounter nor dealing with the said accused prior to that phone call. He failed to explain how he then concluded it was accused one at the end of the line on the day in question, given that he was not familiar with accused one's voice and that they had no previous interactions. No evidence was placed on record to show how the said witness identified the person at the end of the line as the first accused. There was mention of some phone number, but no investigations where made linking the first accused to the call in question. The police did not trace the call, nor the line used. This was the crucial piece of evidence. Police did not carry out any investigations from the service provider to link the accused to the phone. In the absence of such vital information was the conviction of the first witness safe under the circumstances?

Of interests are the following questions that were posed to the second witness in examination in chief by the State, (p 8 of the record)

Q. Who was with it when it was recovered?

A. Eston Masango.

Q. Did you ask him why he was in possession of it?

A. He said he bought it from the second accused.

Q. Did he mention anything about the first accused?

A. He said he didn't know him because he only spoke with him on the phone.

Upon re-examination by the State, on p 4 of the record, the first witness was asked the following question:

Q. Did the 1st accused admit that the bovines were his?

A. Yes, he said that he was uncle to the second accused.

Clearly, this assertion from the second witness dispels any notion that the first witness knew the identity of the person he spoke to let alone that of accused one. It is actually contradictory to the said witnesses' testimony in evidence in –chief and re-examination above. Inevitably, this speaks to the credibility of the first witness' evidence. As has already been stated there was no evidence to suggest that the witness was familiar with the accused's voice. In my view, if this witness's version was to be believed, the dangers of any other person posing as the first accused at the end of the line was not eliminated. Again from my own perspective the first shadow of doubt was cast as to the evidence linking the first accused to the offence.

The second aspect stated by the court of origin, as allegedly linking the first accused to the crime, is again an extract of the first witnesses' attestations. He asserted that it was accused two's mother who stated that the first accused was in the business of selling cattle and that he was related to her son the second accused. It is crucial to note that the business of selling cattle was the court's main anchor leading to the conviction of the first accused. It is the first witness who mentioned that he learnt of the first accused's cattle selling business from a third party, accused two's mother. Notably, the first witness never mentioned that the alleged mother, whom he claims witnessed her son driving the cattle to their homestead, did see accused one in the company of his son during

that stage or at any other time during the sale or the exchange of money. One then wonders why then, was this key witness who is claimed to have seen the beasts being driven to her homestead and the sale transaction was not called to testify? In addition, she was supposed to explain the circumstances that made her offer reimbursement and clarify all what is claimed she uttered. The mother of the second accused was a crucial witness to this case. It is illogical that the police did not bother to record any statement from her let alone interrogate her. The state did not bother to call her. In the absence of her word confirming that which was stated by the first witness, the first witnesses' evidence in this regard is hearsay. Its veracity was not tested. The uncorroborated hearsay evidence of a single witness was the basis of the conviction of the first accused person. Why a single witness, because the other three relied on what the first witness told them, they were not eye witnesses and their evidence was only to state the identification and ownership of the beasts.

In my view, from the above analysis, there was not even an aorta of evidence linking the accused to the offence in question. There is not even any need to delve into circumstantial evidence as no circumstances suggestive of guilty were established. The trial court's decision, judging from reasons for judgment, was grossly irrational and falls short of being in accordance with real and substantial justice.

In respect to the second accused, it is only the word of the first witness against his. As has already been indicated above, all that has been said about the mother in respect to her son's evidence unless corroborated remains hearsay and is inadmissible. Technically this means no one saw the second accused driving the cattle to the homestead or witnessed the sale transaction. There is mention of an agreement of sale, but that was never made part of the record nor was evidence led to that effect although there was mention that the existed an agreement signed by accused two.

Nothing is on record indicating that it is the second accused who led to the arrest of the first accused. No admissions were made by both accused to the police even after the beatings mentioned by the second accused. In court, accused two did not at any given time give evidence to incriminate the first accused. He admitted that he was a nephew of the first accused. He testified that he only sells goats not cattle. No reference was even made to the warned and cautioned statement, a crucial piece of evidence that could have assisted the court as to the responses of the accused persons upon arrest.

Notably, when the cattle where driven from the pastures there were bound to be many witnesses who saw the culprit or culprits. Another twist is that, the second witness said he was shown pictures taken by a head man. The pictures were not produced in court. Surely, there must have been someone in those pictures driving the cattle. The second witness did not shade light as to whom he saw in the photos save for identifying his own ox. Further, the photographer himself, knew the culprit, but he was not summoned to testify. There is only mention that he said he saw the second accused person. Without the photographic evidence, there was no reliable evidence to connect the second accused to the stolen cattle.

In the final analysis it is the first witness's word against that of the accused persons. One of the witnesses indicated that at one stage even the first witness was made an accused in this matter. The state papers are silent on that point, yet he is the person who was found in possession of the stolen oxen. Inevitably, he was a suspect witness. The possibility that he could leave no stone unturned to save his skin could not be ruled out. If his version was to be believed that he moved around looking for cattle to purchase then surely he must have been aware of the process of clearing the cattle with the police. If he was an innocent purchaser why did he by pass this major process? Why did the investigating officer fail to investigate the issue of the clearance certificate? The whole story of the first witness in my opinion, does not add up. The benefit of the doubt should have gone to the accused persons.

In my view the decision of the trial court to convict in the face of such glaring disparities was grossly irregular and irrational especially in such a serious offence. As earlier indicated. in particular to the first accused the court convicted on the basis of extraneous evidence, 'business of selling cattle and so on' which was not proved. In their address on special circumstances the accused simply stated they were not the thieves. In my view that was a loaded statement especially from undefended persons who were not only certain of, but genuinely believed in their innocence and faith in the justice delivery system.

THE LAW

From the above facts the court was satisfied that the state had proved the guilt of the accused persons beyond a reasonable doubt. Having made a finding of fact it is therefore necessary to interrogate the legal position. There is also need to revisit the question, whether the decision made by the court in this regard is rational or grossly irrational given the evidence on record and the

statements by the accused persons against the backdrop of the law. The law, as espoused in *the locus classicus* case of, *Difford 137 AD* at 370-3 is very clear. In this case JA GREENBERG, succinctly noted,

> "no onus rests on the accused to convince the court of the truth of any explanation, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but it is false. If there is any reasonable possibility of his explanation being true then he is entitled to his acquittal".

In the case of *Isolano* 1985 (1) ZLR 62, proof beyond reasonable doubt is expressed at pages 64-65 as:

> "The state is required to prove the guilt of the accused beyond reasonable doubt, proof beyond reasonable doubt requires more than proof on a balance of probabilities. It is not however, proof to an absolute degree of certainty or beyond a shadow of doubt. When there is proof beyond reasonable doubt no reasonable doubt will remain as to the guilty of the accused. If a reasonable person will still entertain a reasonable doubt as to whether accused is guilty, the accused is entitled to be acquitted. Fanciful or remote possibilities do not introduce a reasonable doubt."

The same dicta resonated in the cases *Kombayi v State HH-27/04, Sv Dube 1997(1)ZLR 221, Kapende v S ,HH-157/02* that,

> "All the accused needs to do is to put forward a case which is reasonably true……..if there is doubt then the benefit of the doubt should go to the accused."

In the present case although four witnesses were called to testify, it is only the testimony of the first witness that resonated in the evidence of the other three. They all repeated what they had been told by the first witness. There was no independent witness called to corroborate everything the first witness said, yet the State case was made up primarily from the testimony of this witness. It is on record that the two civilian witnesses called after the first were the owners of the stolen cattle who were not privy to the contract of sale nor witnesses to the commission of the crime. Their evidence consisting of uncorroborated hearsay, was in my view of no probative value.

The most crucial witness whose testimony could have added value to the state case, the investigating officer only parroted what he heard gathered from the first witness. There is no evidence of investigations having been done from independent witnesses and key aspects raised from the evidence of from both sides. In *S v Mupfumira* HH64/15 it was highlighted by HUNGWE and BERE JJ that,

> "The courts have pointed out that proper investigation of criminal cases will usually uncover corroborating evidence and that it is seldom necessary to rest the entire State case upon single uncorroborated testimony. The courts have exhorted police officers and prosecutors not to be content with the production of evidence from a single witness. However, where it appears to a court

> that there are other witnesses who may be called, it has the power to call these witnesses itself in appropriate cases."

In the present case, to begin with, the reasons for conviction as stated in the above quoted statement by the trial court that the first accused was in the business of selling cattle. This was a repetition of what the first witness claimed to have heard the mother of the second accused saying.

In the absence of the supporting evidence from the mother herself, this in my view was hearsay. There is nowhere in the record where evidence was led and established that the first accused was in the business of selling cattle let alone the agreement to keep the stolen loot in the custody of the second accused. This is all that the court relied on to convict in particular the first accused. The trial court did not relate to any other evidence linking the first accused to the offence other than what he uttered in the said statement. Clearly, based on the foregoing was the trial court's decision based on the uncorroborated evidence of this single witness in the absence of any shred of independent let alone circumstantial evidence rational? What is more perturbing is that the first witness himself relied on what he claimed was said by a person who was not called to authenticate her alleged statements?

This court is alive to s 269 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which stipulates that that a conviction can be made on the evidence of a single competent and credible witness. I am also cognizant of the legal jurisprudential development from the test formulated by DE VILLIERS JP in *R v Mokoena* 1932 OPD 79 at 80, that the evidence of such a single witness must be found to be "clear and satisfactory in every material respect" culminating to the *Banana v The State* SC 41(2000) case on the dispensation of the cautionary rule on corroboration of single witness evidence in sexual offences. I am of the strong view that in the present case there was need for corroboration. I associate myself with the authoritative stance taken in the case of *S v Mupfumburi* HH 64/15 above.

In that regard, the requirements for corroboration as stated in *Fox* v *HM Advocate* 1998 JC 94, LJG (Rodger) at 100-101 are as follows:

> "Corroborative evidence is…… evidence which supports or confirms the direct evidence of a witness….. the starting-point is that the jury have accepted the evidence of the direct witness as credible and reliable. The law requires that, even when they have reached that stage, they must still find confirmation of the direct evidence from other independent direct or circumstantial evidence…… the evidence is properly described as being corroborative because of its relation to the direct evidence : it is corroborative because it confirms or supports the direct evidence. The

> starting point is the direct evidence. So long as the circumstantial evidence is independent and confirms or supports the direct evidence on the crucial facts, it provides corroboration and the requirements of legal proof are met."

In *Chingurume* HH-454-14 the court pointed out that

> "There is a need to exercise extreme caution when one has to rely on the evidence of a single witness in order to guard against possible deception in the whole process. The right to convict on the evidence of a single credible witness, stated without qualifying words in s 269 of CPEA, should not be regarded as putting the evidence of one witness on the same footing in regard to the cogency as the evidence of more than one. Although the evidence of one witness may in any particular case be more convincing than of a number, it remains true that, given the same apparent quality in the witnesses, the more there are, the more reason there is to accept their story. It is not a mere rule of thumb: if there are two or more witnesses to the same facts their version can be checked against each other to see if they have given honest and accurate evidence. Elements of corroboration may of course appear from the circumstances; the fact that an accused person has given no evidence may be an element. The apparent reluctance to easily accept the evidence of a single witness is demonstrated by the proviso to the s 269, which renders it incompetent for the court to rely on such evidence in respect of certain offences specified therein. Even in other offences like assault, our courts have espoused the need to exercise caution when dealing with the evidence of a single witness."

In the premises I am not convinced that the Court's decision that the State has proved its case beyond reasonable doubt was rational. It was not founded on any cogent evidence. The conviction was improper. It stands to reason that the proceedings were not in accordance with real and substantial justice due to gross irregularity of convicting the accused without evidence to prove the accused's commission of the *actus reus.*

Accordingly, it is ordered that;

1. The convictions of both accused on both counts are quashed and the sentences are set aside.

CHITAPI J agrees……