HB 07/16
HCA 275-6/14

**LOURENS M. BOTHA (SENIOR)**

**And**

**LOURENS M. BOTHA (JUNIOR)**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & TAKUVA JJ
BULAWAYO 9 NOVEMBER 2015 & 28 JANUAY 2016

**Criminal Appeal**

*Advocate P. Dube* for the appellants
*W. Mabhaudi* for the respondent

**TAKUVA J:** This is an appeal against conviction. Both appellants were convicted of theft by a magistrate sitting at Gwanda. The charge was framed as follows: "Contravening section 113 of the Criminal Law Codification and Reform Act Chapter 9:23 "Theft". In that on the 10th day of October 2013 and at Gonda North Mine Freda Gwanda, Lourens Botha (Senior) and Lourens Botha (Junior) or both or one or more of them unlawfully stole 165 KVA generator and quirl bowl with a total value of US$31 500,00 knowing that Brownson Marcus David was entitled to own, possess or control the property intending to deprive permanently of his ownership, possession and control of the property."

It is necessary for me to recount the facts as they appear in the outline of the state case. They are that –

"1. …
2. …
3. On the 10th day of October 2013, the two accused connived and went to Gonda North Mine, Gwanda and stole one 165 KVA generator and one quirl bowl after they misled Laxin Ndlovu that the complainant had lent them.
4. On the 22nd of October 2013 the complainant came back and discovered that his property was missing from Gonda North Mine and informed by Laxim Ndlovu that his property was taken by the accused persons.

5. A report was made to the police leading to the recovery of the property from the accused persons.
6. The stolen property is valued at US$31 500,00 and it was recovered. It can also be produced in court as exhibit.
7. The accused had no right to commit the offence."

Both accused persons pleaded not guilty to the charge of theft. To the extent that their defence outlines give a detailed history or background to this case I will quote it from the record in *extenso*. It goes like this:

> "… The generator and bowl in question were purchased by a company called Endless Fun (Pvt) Ltd. That company was incorporated on 15 July 2011. Marthinus Lourens Botha was the major shareholder at incorporation. The company entered into partnership with Derrick Conroy and Garvin Johnson. The shareholding in the partnership was 60% for Lourens Botha (Senior) and 40% for the other two partners. The two accused persons were then approached by Fredrick W. A. Lutzkie who indicated to them that he had talked to Derrick Conroy and Garvin Johnson, and that the two were no longer interested in the partnership. The partnership had purchased 12 mining claims at the time. Mr Lutzkie suggested that the accused part ways with Derrick and Garvin on the following terms:-
>
> (a) The accused persons will keep 6 mining claims with Derrick and Garvin taking the other 6.
> (b) Derrick and Garvin were to take the generator and the quirl bowl along with some other equipment that belonged to them privately.
> (c) A full shareholder's agreement would be drawn up to specify the exact terms of the dissolution.
>
> The shareholder's agreement was however never done. Up to date, it has not yet been done or finalised. So, the proposal was never carried into completion. It had been proposed that Mr Lutzkie will transfer the company Endless Fun (Pvt) Ltd to Abangane Mining (Pvt) Ltd after the shareholders agreement was signed and after 6 mining claims were transferred to Sihambasonke (Pvt) Ltd. That was also not done up to date.
>
> No payment was made by Mr Lutzkie. The accused will state that Marcus Brownson was never part of or shareholder in Endless Fun (Pvt) Ltd nor a partner in the partnership mentioned above. The accused have always been in possession of the said equipment that is the generator and bowl. They have always been the custodians of it. They moved the generator and quirl bowl from the yard where they were being kept to Sihambasonke Mine for security reasons. An electric motor had been stolen from that yard and also the electrical box of the generator had been tempered with, thus prompting the move to take the property to safety.

> The complainant reported this matter in December 2013, yet he had taken custody of the equipment in October 2013. The accused persons will thus deny that Mr Lutzkie had acquired ownership of the equipment in question. They will state that if he sold the equipment to the complainant, then he sold equipment that did not belong to him. They pray for their acquittal."

The learned magistrate crystallized the issues as follows:

> "(1) whether the accused persons took the generator and bowl from Gonda North Mine on 10 October 2013.
> (2) whether the generator and bowl belonged to Marcus Brownson David or any other person not the accused persons as at 10 October 2013.
> (3) If the generator and bowl belonged to someone else not the accused persons whether the accused persons knew of that fact.
> (4) whether the accused persons intended to permanently have the generator and quirl bowl as theirs and do with them as they pleased."

In view of the defence outline, it is surprising why the court *a quo* phrased the issues as it did. The 1st and 4th issues are common cause. The 2nd and 3rd issues are inelegantly drafted. The sole issue is whether or not the state rebutted the defence of claim of right. In other words, whether or not Lutzkie acquired ownership rights in the property and if so under what circumstances. Had the court *a quo* stated the issues properly, it would have dealt with the legal requirements of the defence of claim of right.

The court *a quo* concluded that appellants lost their rights to the property after they "transferred" their shareholding in Endless Fun (Pvt) Ltd on 25 June 2013. The court reasoned as follows:

> "I conclude that indeed the accused persons transferred their shareholding in the company to Lutzkie on 25 June 2013. I must state here that I have reached this conclusion, not on the basis of Lutzkie being a credible witness, but on the basis of exhibit 1 and exhibit ll which the accused persons admitted. It is neither here nor there whether any money changed hands between the accused persons and Lutzkie. The resolutions were about transferring (not selling) the shares. Why accused persons were transferring their shares to Lutzkie is not relevant. All that is relevant is that they transferred their shares in the company to Lutzkie.

When the accused persons transferred their shareholding in the company to Lutzkie they ceased to own the company and its assets and liabilities. Some of the assets that the company had were the generator and quirl bowl the subject matter of this case. With effect from 25 June 2013, the generator and quirl bowl were no longer accused persons' assets, because the accused persons no longer owned the company items …" (my emphasis)

The grounds of appeal as outlined in the notice of appeal are that:

"1. The learned trial magistrate in the court *a quo* erred in law in ruling that the state had proven its case beyond reasonable doubt. The court *a quo* ruled that it was not relevant or material that the fourth state witness had not paid for the purchase of shares in Endless Fun (Pvt) Ltd. The learned trial magistrate stated that what was material was the signing of transfer of shares form, by both appellants. This reasoning by the magistrate in the court *a quo* is wrong in that for there to be a valid contract of sale at law, there ought to be an agreement on both the merx or property that is subject of the sale and the *pretium* or price that is payable for the merx or item sold. The 4th state witness had no lawful right to sell the property.
2. The learned trial magistrate in the court *a quo* erred at law in not putting or attaching adequate weight to the fact that the 4th state witness paid a deposit of one million Rands as a deposit for shares in Doddieburn Holdings (Pvt) Ltd, and not for four companies as claimed by the fourth state witness, as shown and proven in the defense case. The total purchase price for the shares in Doddieburn Holdings and Crocoburn was three million two hundred thousand South African Rands. This agreement related to Doddieburn Holding (Pvt) Ltd only, and did not relate to any other venture or companies. In his evidence, the fourth state witness stated that he paid one million Rands, and that this was full purchase price due, and that this payment covered all other companies and transactions including Endless Fun (Pvt) Ltd. The evidence by the fourth state witness was false as proven in the defense case. In the light of this false testimony by the fourth state witness the learned trial magistrate should have ruled in favour of the appellants in the trial and acquitted the appellant of the charges.
3. The learned trial magistrate in the court *a quo* erred at law in ruling that the appellants concluded a valid and binding contract of sale of shares in Endless Fun (Pvt) Ltd with the fourth witness. The documentary evidence produced in court does not support that position.
4. The learned trial magistrate in the court *a quo* erred in law in not putting sufficient weight to the possibility of the manipulation of the docket as shown by the disappearance of the first statement by the third state witness. The first statement exonerated the two appellants. The statement was eventually replaced with an incriminating statement. A letter of complaint was done by the appellant's legal practitioners and served on the prosecution and the contents have not been disputed to date.

5. The learned trial magistrate in the court *a quo* erred in law in finding that the appellants had the requisite intention to commit the crime of theft. Considering the fact that the appellants believed at all material times that they owned the equipment and had not yet concluded any sale in respect of their shareholding in Endless Fun (Pvt) Ltd, it follows that, taken subjectively, the appellants had no requisite intention to commit the crime of theft." (my emphasis)

The appellants prayed for the conviction to be set aside and that they be acquitted. As pointed out above the sole issue for determination should have been whether or not the state proved beyond a reasonable doubt that the appellants had the requisite intention to steal. Put differently, whether the state was able to rebut the defence of claim of right. Exhibits 1 and 2 together with the rest of the evidence should have been utilized to answer this fundamental issue. Unfortunately, the court *a quo* approached the issue in a somewhat piece-meal manner.

A claim of right is as G Feltoe puts it, "a decently clothed ignorance or mistake of law. If ignorance or mistake of law is decently clothed that is where X either knows or suspects that his action would normally be illegal but because of some extraneous factual basis, he believes that his actions will not be unlawful in present circumstances .. This defence only applies in respect of property crimes such as theft, robbery or malicious injury to property" see G. Feltoe, *A Guide To The Criminal Law in Zimbabwe* 3rd edition at p 29.

The requirements for the claim of right defence are:

(a) the mistake must be material
(b) in crimes of intention, a genuine mistake will excuse. It need not be reasonable but the unreasonableness of the mistake may be evidence of lack of genuineness.
(c) where the crime is one of negligence, the mistake must be both genuine and reasonable.
(d) the defence will not avail in strict liability crimes
(e) it must be a properly clothed mistake or ignorance.

See *S* v *Mudimu* 1981 ZLR 381 (GS)

*S* v *Tamayi & Ors* 1982 (1) ZLR 267 (S)

*S* v *Mutonga* S-71-83

In *S* v *Machokoto* 1996 (2) ZLR 190 (H) it was held *inter alia* per CHINHENGO J, that the defence of claim of right is not limited to those cases where the belief is reasonable or justifiable. All that is required is that the belief be genuinely entertained, the reasonableness of the belief only being relevant to determining the genuineness of the belief. If the belief is genuine, then the possession is *bona fide*.

In *Mutizwa & Ors* 1988 (2) ZLR 74 (SC) it was held per KORSAH JA (as he then was) that "on a charge of malicious injury to property the infliction of intentional wrongful injury to the property of another raises a presumption of malice, which may be rebutted by showing a *bona fide* belief that the act done was lawful. It is not necessary for the accused to show that such a belief was reasonable, although the reasonableness or otherwise of the belief provides cogent evidence as to whether it was held *bona fide*. In the present case, it was eminently reasonable for the appellants to believe that they had a legal right to remove the structures that had been erected in their grazing area and the presumption of malice was accordingly rebutted."

There is also statutory provision for this defence in sections 233 and 237 of the Criminal Law Codification and Reform Act Chapter 9:23. Section 233 states:

"233. <u>When mistake or ignorance of fact a defence to subjective crimes</u>

> If a person does or omits to do anything which would be an essential element of a crime if done or omitted as the case may be, with any form of intention, knowledge or realization, the person shall have a complete defence to a charge of committing that crime if, when he or she was genuinely mistaken or ignorance to an essential fact of the crime concerned.
>
> Subject to this Code and any other enactment, mistake or ignorance of an essential fact may be a defence to a crime referred to in subsection (1) even if it is not reasonable;

> Provided that the reasonableness or unreasonableness of any mistake or ignorance may be taken into account in determining whether or not it is genuine."

*In casu*, the applicants laid a solid foundation to the existence of *bona fide* claim of right. From the record, the appellants' evidence can be summerised as follows:

The generator and quirl bowl in question were acquired by a company in which the appellants are the shareholders. This company was incorporated on the 15th of July 2011. The company then formed a partnership with one Derick Conroy and one other Garvin Johnson. The shareholding in the partnership was as follows: 60% by Endless Fun (Pvt) Ltd while 40% shareholding was held by the two partners i.e. Mr Conroy and Mr Johnson in equal shares of 20% each. Subsequently, the appellants were approached by Fredrick W. A. Lutzkie who indicated to them that he had met with Derick Conroy and Johnson and that these two were no longer interested in working in the partnership.

Meanwhile, the partnership had purchased twelve (12) mining claims. Mr Lutzkie suggested that the appellants part ways with the two partners on the following terms:

(a) the appellants were to keep six (6) mining claims, Conroy and Johnson were to take the other 6.
(b) Conroy and Johnson were to take the generator and quirl bowl along with some other equipment. Appellants were to remain with other equipment that belonged to them privately.
(c) a full shareholders agreement was to be drawn up to specify the exact terms of the dissolution.

According to the appellants, a shareholder's agreement was never reached and the partnership was never dissolved. Consequently, Mr Lutzkie in that sense, never really acquired ownership of the generator and quirl bowl. Mr Lutzkie later sold the property to a 3rd party, one Andre Wagner, who in turn sold it to the complainant. The appellants stated that they had always been in possession and control of the equipment in question from Gonda North Mine to

Sihambasonke Mine. They took the property in order to secure it as there had been an incident of theft at Gonda North Mine.

Both appellants denied the allegation of theft on the basis that they could not have stolen equipment that they had always owned and controlled and were custodians thereof. Further, appellants stated that while in the proposed dissolution of the partnership, shareholding in Endless Fun (Pvt) Ltd was to be transferred to Mr Lutzkie, that dissolution was not finalised. Mr Lutzkie did not pay in terms of the purchase price and as such would not acquire ownership of Endless Fun as stipulated in clause 6 of exhibit IX on page 106 of the record of proceedings.

On the other hand, Mr Lutzkie in his evidence stated that he paid a sum of R1 000 000,00 for the purchase of Endless Fun in a transaction involving four (4) companies – see page 38 of the record.

Faced with this glaring dispute of fact, the court *a quo* failed to resolve it by assessing the credibility of Mr Lutzkie and appellants as witnesses. Instead, it relied solely on exhibits 1 and 2, arguing that they contained conclusive evidence on their own. This, in my view is a misdirection in that, taken in isolation, exhibits 1 and 2 lead one to an ambiguity as they clearly do not reveal the full story of what transpired and why. Worse still, the court *a quo* shied away quite surprisingly from making a specific pronouncement on Lutzkie's credibility as a witness.

Astoundingly, the court not only spent quite a considerable amount of time criticizing appellants' testimony but also unjustifiably made adverse findings on their credibility. I take the view that these findings are totally against common sense and logic in that the agreement of sale of shares attached to the record of proceedings in pages 101 to 115 shows the purchase price for the sale of 35% shares in Doddieburn Holdings as R3 200 000,00 and not R1 000 000,00. Logically, if the purchase price is R3 200 000,00 and only R1 000 000,00 is paid, there was no full payment, as such the agreement was not perfect as Lutzkie was *in mora*. It is common cause that Lutzkie only paid R1 000 000,00 – see pages 38, 39, 41 and 47 of the record of proceedings. Further, the other conditions stipulated in the agreement were not carried into effect.

Obviously, the sale had been a conditional sale and unless all the suspensive conditions are carried into effect, the ownership, control and possession of the equipment remained with the appellants – see *Chinyegere* v *Fraser* 1994 (2) ZLR 254. It seems to me that the transfer was on account of an agreement of sale (Ex 1X) and should not have been viewed in isolation as an end in itself. In terms of exhibit 1X, ownership, risk, possession and control in the sale of shares was to be transferred to the purchaser upon the discharge of the obligations of the purchaser contained in that agreement. Lutzkie, the purchaser in my view is an incredible witness who did not discharge his obligations in terms of the agreement. Mr Lutzkie was very evasive on what the price for Endless Fun was. For example under cross-examination, the following exchange occured:

"Q - You say you paid R1m for the shares?
A - For four transactions and not just for Endless Fun
Q - What was the value of the shareholding you were purchasing in Doddieburn?
A - I am not able to answer that question. It is impossible to break the R1m down into four parts.
Q - I put it to you the R1m was shareholding in Doddieburn not in Endless Fun?
A - No" see page 41 of the record.

Further, on p 40 the questioning went as follows:

"Q - I put it to you, exhibit 1 was not an agreement of sale, but just a proposal of the manner of the dissolution of the partnership between accuseds and the two parties?
A - That is not correct.
Q - I put it to you, none of the conditions stipulated in the exhibit was fulfilled?
A - They were.
Q - I put it to you, there are many conditions that were in the proposal which were never fulfilled?
A - I have the shares in my name and the accused have not raised an issue in 12 months.
Q - To illustrate, has the transfer of 6 claims to Abangane Mine been done?
A - Yes
Q - Do you have documentary proof from the Ministry of Mines?
A - Yes. Here it is (D C shown some documents)

Q - But you are showing me the mining claims in the name of Endless Fun. I said were 6 mining claims transferred to Abangane Mine?
A - I cannot comment on that. I cannot testify on that. But I can tell you that, that clause was not a pre-requisite for the sale of the shares." (my emphasis).

I find Lutzkie's evidence to be unsatisfactory in two material respects. Firstly, there is nothing "impossible" in ascertaining the value of shares in each of the 4 companies he claimed to have purchased for R1 million. Secondly, he contradicted himself by initially saying all the conditions stipulated in exhibit 1 were fulfilled and later saying the clause relating to 6 mining claims (which was one of the conditions) was not "a pre-requisite for the sale of the shares".

Also, the evidence shows that Lutzkie was unable or unwilling to divulge his share-holding in the other two companies namely Sihambasonke Mine and Abangane Mine. He only mentioned 35% in Doddieburn and 100% in Endless Fun. He did not specifically mention the other companies. On page 38 of the record he was asked;

"Q - The accuseds say you did not make any payment for Endless Fun?
A - That is not true. There were four companies, all interlinked. One could not be sold without the others being paid for also. The agreement was for all four companies, and I paid for them and accused I received payment in South Africa, R1million, through my lawyers in South Africa. That was for 35% in Doddieburn, 100% in Endless Fun and so on. So all these transactions were one."

Now, I find it strange that Mr Lutzkie who, in my view, appears from his evidence to be an astute businessman bent on making profits, would blindly purchase two companies whose value and viability was a mystery. It seems to me that, from the totality of the evidence, it was eminently reasonable for the appellants to believe that they had a right in law, in the protection of their ownership rights of the property to recover or repossess the generator and the quirl bowl. As GOLDIN AJA points out in *S* v *Beale* 1981 ZLR 269 at 272 A:

"… what is decisive is not the lawfulness of what was done but whether the accused believed he was entitled to do it. (see *R* v *Bhaya* 1953 (3) SA 143 (N) at 148 – 9; *S* v *Marshall* 1967 (1) SA 171 (O) at 174)." (my emphasis)

*In casu,* the appellants believed genuinely that Mr Lutzkie had not fully acquired rights in Endless Fun (Pvt) Ltd because the other conditions tied to that contract had not been fulfilled. Also Mr Lutzkie had not fully paid for the shares. Therefore, appellants' mistake is clearly one of law in that they genuinely believed that this was their own property. In the result, the state failed to establish that element of *mens rea* which is necessary to support a conviction on a charge of theft.

Accordingly, the convictions are quashed and the sentences are set aside.

Makonese J ……. I agree

*Phulu & Ncube*, appellants' legal practitioners
*National Prosecuting Authority,* respondent's legal practitioners