

THE STATE
versus
KNOWLEDGE SAIZI

HIGH COURT OF ZIMBABWE
MAWADZE DJP & MUSHURE J
HARARE, 16 October 2024

Review Judgment

MUSHURE J:

Introduction

- [1] These incomplete proceedings are before me at the behest of the trial magistrate sitting at Marondera Magistrates' Court. They are accompanied by a request that I exercise my powers for review in terms of s29 (2) of the High Court Act [*Chapter 7:06*].
- [2] S29 (2) of the High Court Act provides that: -

“29 Powers on review of criminal proceedings

(1)

(2) If on a review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings—

(a) are in accordance with real and substantial justice, it shall confirm the proceedings;

(b) are not in accordance with real and substantial justice, it may, subject to this section—

(i) alter or quash the conviction; or

(ii) reduce or set aside the sentence or any order of the inferior court or tribunal or substitute a different sentence from that imposed by the inferior court or tribunal.”

- [3] That this court has authority to entertain the trial magistrate's request is settled. In the matter of *Dombodzvuku & Anor v Sithole NO & Anor* 2004 (1) ZLR 242 (H), MAKARAU J (as she then was) held that: -

The power of this court to review criminal proceedings of the magistrates' court at any stage of the proceedings in the lower court is not in dispute. Section 29 of the High Court Act [*Chapter 7:06*] grants this court extensive power to review the criminal proceedings of the magistrate's court. It is specifically provided for in s 29(4) that this court or a judge of this court may *mero motu* call for a record and review the criminal proceedings of the lower court if it comes to the courts or the judge's notice that any such proceedings may not be in accordance with real and substantial justice. The

powers conferred on the High Court and its judges by this section can be exercised at any stage of the proceedings (at 245B).

[4] The proceedings are therefore properly before me.

Background facts

[5] Given the request by the trial magistrate, a summation of the proceedings in the court *quo* is necessary. The accused appeared before the trial magistrate jointly charged with Obert Mangisi. He was charged with contravening section 111B of the Water Act [*Chapter 20:26*] (the Act). It was alleged that on a date to the prosecutor unknown, but in January 2024 and at Village 3 Wenimbi, Macheke, either one or both of the accused persons, without lawful cause, removed and took possession of a blue TA32 (20 horse power) water pump which belonged to the complainant. It was further alleged that the removal of the water pump disrupted the irrigation of the complainant's crops. The water pump was said to have been valued at US\$400. It was recovered from a third party who had purchased it from one of the accused persons.

[6] When the accused persons appeared in court, Knowledge Saizi, whose proceedings are subject of this review, pleaded Guilty. His co-accused pleaded Not Guilty. The prosecutor applied for the accused persons' trials to be separated in accordance with s190 of the Criminal Procedure & Evidence Act [*Chapter 9:07*] (the Code). The trial magistrate duly directed the separation.

[7] The trial magistrate then proceeded to canvas what he deemed to be the essential elements of the offence in terms of s271 (2) (b) of the Code. Having satisfied himself that the Guilty plea was proper, he entered a Guilty verdict. He remanded the accused person for sentence.

[8] At the next appearance, the trial magistrate advised the prosecutor and the accused that he had noted that he did not have jurisdiction to sentence the accused. When he canvassed the essential elements, he had harboured under the false impression that s51 of the Magistrates' Court Act [*Chapter 7:10*] as amended by the Judicial Laws Amendment Act of 2023 clothed him with the special jurisdiction to sentence the accused.

[9] Acting in terms of s54 of the Magistrates Court Act, the trial magistrate adjourned the case, remanded the accused and submitted a report, together with the record of proceedings to the Prosecutor General. The trial magistrate was directed to transfer the record to the High Court for sentence in terms of s225 (b) (i) of the Code.

[10] In transferring the record to the High Court, the trial magistrate attached an accompanying note in which he narrated what had happened in the matter leading to its referral to the

Prosecutor General and subsequent transfer to the High Court. He concluded his note as follows:-

“V. After conducting additional study of the record, I learned that the conviction might not be proper. The state did not produce a permit or a lease to show that the field where the water pump was stolen from is within the ambit of a "farm" as defined by section 111 A of the Water Act

It is against this background that the record is being referred to the High Court for further directions.”

- [11] When the record was placed before me, I noted that from a reading of the State outline, the accused stole the pump from a ‘cabbage field’.
- [12] I sought clarity from the trial magistrate on the attitude of the State and the accused to his request and whether the complainant had a lease or a permit to the ‘farm’. The trial magistrate’s response was to the effect that the ‘farm’ was actually a garden to which the complainant holds neither a permit nor a lease. The trial magistrate also advised that the State insisted that the conviction was proper. Additionally, the complainant did not hold any lease or permit to show that the ‘cabbage field’ was a farm.
- [13] I turn to look at the applicable law.

The law

- [14] The substratum of the request by the trial magistrate is that a gross irregularity was committed when the accused was convicted without proof of an essential element of the offence. In a number of cases decided before this court, there has been emphasis on the need for each and every essential element of an offence to be proved, for a court to be able to satisfy itself that an accused’s guilt has been proved beyond reasonable doubt.
- [15] The reasons for doing so were succinctly stated in the case of *S v Mubvumbi & Ors* 2011 (2) ZLR 251 (H), as follows: -

The purpose of canvassing the essential elements of the offence when a plea of guilty is tendered is to satisfy the court that the accused committed the offence charged. In doing so the court seeks to satisfy itself that the accused is not tendering an ill-informed plea of guilty. It does so by explaining the essential elements of the crime charged and verifying the accused’s admission of those essential elements by putting them to him in a series of questions, covering each essential element of the crime, and ensuring that he has no defence to offer to the crime charged. (at p253 F-G)

- [16] In *casu*, the relevant section under which the accused was charged provides that: -

111B Wilful damage to or, interference with or theft of water infrastructure and farm irrigation works components

(1) Any person who—

(a); or

(b) without lawful cause, the proof whereof shall lie on him or her, destroys, injures or removes any water infrastructure component or farm irrigation works component; or

(c)—

shall be guilty of an offence, and if there are no special circumstances peculiar to the case as provided for in subsection (7), be liable to imprisonment for a period of not less than ten years.

Analysis of the law and the facts

[17] It seems to me that, for a person to be properly convicted under s111B of the Act, it is key to prove that that person has-

(i) *without lawful cause*;

(ii) *destroyed, injured or removed*;

(iii) *any water infrastructure component or farm irrigation works component*.

[18] In the present case, the accused stands convicted of removing a farm irrigation works component. That he removed a water pump from an irrigation pipeline is common cause. That he did so without lawful cause is also common cause. The pivotal issue is whether that water pump was a farm irrigation works component.

[19] S111A is the interpretation section of Part IXA under which s111B falls. It defines ‘farm irrigation works component’ as ‘any pump, filter, valve, pipe, pipeline, tube, water meter, sprinkler or other equipment or device for abstracting, discharging or distributing water or that is otherwise necessary *for the operation of any farm irrigation works*. (emphasis mine).

[20] The section further defines ‘farm irrigation works’ as ‘any works *on a farm* by means of which water may be artificially applied to land for agricultural purposes’ (emphasis added).

[21] The section then defines a farm in the following terms: -

“farm” means any area of alienated land, or of land held by a person under a permit or lease issued in terms of Agricultural Land Settlement Act [*Chapter 20:01*], which is not within—

(a) parks and wild life land or forest land; or

(b) a municipal area, town area or local government area as defined in the Urban Councils Act [*Chapter 29:15*];

(c) a town ward of a rural district council or an area that has been declared a specified area in terms of the Rural District Councils Act [*Chapter 29:13*]; or

(d) the area of any township as defined in the Land Survey Act [*Chapter 20:12*]; or

(e) State land the layout of which has been approved in terms of—

(i) section 127 of the Town and Country Planning Act [*Chapter 213 of 1974*]; or

(ii) section 43 of the Regional, Town and Country Planning Act [*Chapter 20:12*];

[22] My reading of the above definitions leads me to conclude that for a component to qualify as ‘farm irrigation works component’, it has to be necessary for the operation of farm irrigation works. Such a component has to be connected to the farm’s irrigation system and has to be essential for the farm irrigation works to function. Its removal, destruction or injury has to have a negative impact on the operation of the farm irrigation system either through disturbance, interruption or termination of the system. While it may be common cause that a water pump is necessary for farm irrigation works, a person can only be competently convicted under s111B if the component destroyed, injured or removed interferes with farm irrigation works, in so far as it somehow interferes with or interrupts the irrigation process at a farm. The import of s111B is that it would be incompetent to charge a person who removes, destroys or injures a water pump that is not connected to a farm irrigation system under this section.

[23] A proper construction of the definition of ‘farm irrigation works’ for the purposes of s111B of the Act shows that the act of destroying, injuring or removing a farm’s irrigation component has to occur ‘on a farm’. If the irrigation component is so destroyed, injured or removed from any place other than a farm, a person cannot be competently convicted under s111B. It therefore stands to reason that it is necessary that before a court convicts a person under s111B of the Act, that court interrogates if the place from which the irrigation component was removed, destroyed or injured accords with the definition of a farm as provided under s111A. If the place is not a farm, a person may be convicted under some other statute, but not for contravening s111B of the Act.

[24] The Act makes reference to a farm being any area of alienated land or of land held by a person or lease issued in terms of the Agricultural Land Settlement Act. I take note that the Agricultural Land Settlement Act has been repealed by the Land Commission Act [Chapter 20:09] but the Land Commission Act in its section 2 defines a farm in a substantially similar fashion and also defines ‘alienate’, in relation to agricultural land that is State land, as including the issuance of a ninety-nine year lease, lease with a purchase option, permit, offer letter or deed of grant to a person.

[25] The effect of the definitions in s111A is that in proceedings of this nature, it is necessary to produce proof of the status of the place where the offence was committed. This aspect is a critical element for a conviction under s111B. In order to pass muster, that aspect must be

fully and properly investigated and presented in evidence. In the absence of such proof, the court would not be obliged to convict.

[26] Discharging the burden of proof is a function bestowed upon the prosecution in the normal course of many criminal cases. The long established rule of our law is that it is the prosecution that must prove the guilt of the accused person, and that proof must be beyond a reasonable doubt. In *casu*, the prosecution bore the burden to prove affirmatively that the offence was committed on a farm. It did not. Neither did the prosecution have any proof to show that the crime scene was a farm. Strangely, the prosecution insists that the conviction was proper. However, the position taken by the prosecutor has not been supported by any documentary proof to show that the cabbage field was a farm.

[27] In the absence of such conclusive proof, I am in agreement with the magistrate that it was necessary to prove that the offence occurred on a farm. There was no legal basis on which the trial magistrate made a finding that all the essential elements of the offence had been proved. The conviction constitutes a gross misdirection.

Disposition

[28] Section 29(3) of the High Court Act provides that:

- (3) No conviction or sentence shall be quashed or set aside in terms of subsection (2) by reason of any irregularity or defect in the record of proceedings unless the High Court or a judge thereof, as the case may be, considers that a substantial miscarriage of justice has actually occurred.

[29] I find that the proceedings in the court *a quo* were not in accordance with real and substantial justice. I consider that a substantial miscarriage of justice has actually occurred. The conviction cannot be confirmed and stands to be vacated.

[30] At best, the accused could have been convicted of theft. However, from my reading of the Act, theft is not a competent verdict for a charge under s111B. Even if theft was a competent verdict, there would be no benefit in remitting the matter to the court *a quo* for a trial *de novo*. The accused has been in custody since 2 February 2024. The water pump he removed is valued at US\$400. It was recovered. A custodial sentence of eight months would not be justified even if he were convicted of the correct charge. The accused is entitled to his immediate release.

In the premises, it is ordered as follows:

1. The conviction of the accused in the court *a quo* be and is hereby quashed.
2. The Registrar is directed to immediately execute the warrant of liberation to enable the accused to be released forthwith.

MUSHURE J:.....

MAWADZE DJP agrees