OTTO CHAITEZVI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA & KWENDA JJ
HARARE, 22 July 2019 & 10 March 2021

Criminal Appeal

M. K Misihairambwi, for the appellant
F. I. Nyahunzvi, for the State

CHATUKUTA J: The appellant was convicted, after contest, of contravening s 113 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Code). It had been alleged that on 24 July 2018 and at the corner of Visage and Princess Park, Pretoria, South Africa, the appellant stole a motor vehicle, a Chevrolet Trailblazer, belonging to one Lazarus Chitsungo. He was sentenced to 6 years imprisonment of which 8 months were suspended on condition of future good behaviour. Aggrieved by the conviction and sentence he appealed against both.

The appellant raised two grounds of appeal against conviction. The first ground was that there was no evidence placed before the court *a quo* upon which a finding could be made that the State had proved its case beyond a reasonable doubt. The second ground was that there was no evidence before the court to prove that the appellant was a co-perpetrator.

Regarding the appeal against sentence, the appellant contended that the sentence imposed by the court a quo was excessive and induced a sense of shock.

The Prosecutor-General filed a notice in terms of s 35 of the High Court Act, [*Chapter 7:0*6], conceding to the appeal. We were not persuaded by the submissions in the notice and proceeded to hear the matter on the merits.

The following facts are common cause. On 24 July 2018, Lazarus Chitsungo took his vehicle, a Chevrolet Trailblazer with engine number AGDG130851145, vehicle identification number (VIN) MMM156EGODH682673, for service to William and Hunt, corner of Visage and Princess Park, Pretoria, South Africa. When he went to collect the vehicle he was advised that the

vehicle had been stolen and was shown CCTV footage on how the theft occurred. The vehicle was blue in colour. On 8 August 2018, (two weeks after the theft) the appellant was found in possession of the vehicle at the corner of South Avenue and Second Street, Harare Zimbabwe. A copy of the vehicle licence in the complainant's name was produced as evidence. The police recovered from the vehicle a temporary import permit (TIP) in the appellant's name, a South African vehicle plate bearing the number HDZ092MP. Also recovered was a Zimbabwean number plate ADA 3573 which related to a different Trailblazer, blue in colour with VIN MMM156 HODH673104 registered in the name of a Zimbabwean company, Investment Authority of number 109 Rotten Row Road, Harare.

During trial, the appellant denied stealing the motor vehicle. His defence was that he was not in South Africa when the vehicle was stolen. He bought the motor vehicle from one Isaac Cheza for a sum of USD25 000. He paid a deposit a deposit of USD 18 000 and took possession of the vehicle. He produced during trial an agreement of sale of a motor vehicle bearing the description of the stolen vehicle. The agreement was dated 27 July 2018. He also produced a copy of Isaac Cheza's identification card. He further explained that the TIP had been processed for him by Cheza to facilitate easy travel in Zimbabwe. Cheza retained the clearance document issued by both the South African and Zimbabwean authorities and a letter issued by Jabulani which authorized Cheza to sell the motor vehicle.

The court *a quo* did not find the appellant's defence to be satisfactory. It accepted that the State had not disputed that the appellant was not in South Africa on 24 July 2018 when the vehicle was stolen. It also found that the State had not disputed the existence of the agreement of sale between the appellant and Isaac Chesa. It however concluded that the appellant was aware that the vehicle was stolen property. This was evidenced by the possession of the Zimbabwe registration number for a similar vehicle and possession of a TIP in his name yet he had not imported the vehicle into Zimbabwe. The court concluded that theft is a continuing act and the appellant was therefore a co-perpetrator in terms of s 196 of the Code.

It is trite that the onus rests on the State to disprove an explanation given by an accused person. (See *S* v *Machakaire* S 30/92, *R* v *Difford* 1937 AD 372). The trial court will only convict an accused where the explanation is false beyond any doubt.

The submissions by the appellant were that the explanation tendered by the appellant for his possession of the stolen vehicle was probable. Upon making a finding that the appellant was not in South Africa when the vehicle was stolen and that the appellant bought the vehicle from Isaac Cheza, there was no proof that the appellant was a co perpetrator. The court *a quo* therefore ought to have acquitted the appellant.

The State conceded that the State failed to disprove the appellant's defence that he was an innocent purchaser. The temporary importation permit (TIP) which was referred to in evidence was not produced in court as an exhibit and this was fatal to the state case.

The issue for determination by this court is therefore whether the appellant's defence was reasonably true. The porousness of the appellant's case was summarized by the complainant when he said that one does not buy a vehicle as if buying a loaf of bread. The agreement of sale was silent on all the explanations given by the appellant at trial on the importation of the vehicle. It was imperative to include in the agreement that the proper clearance of the vehicle had not been completed by the Zimbabwe Revenue Authority. As testified by the complainant, the appellant could not part with the sum of USD 18 000 without satisfying himself that all the requisite steps had been taken to import the vehicle into the country. The only conclusion that can be drawn from the absence of the information in the agreement on the importation of the vehicle is that the appellant was aware that the vehicle had been stolen. This puts the authenticity of the agreement of sale into question. The finding that the appellant was aware that the vehicle was stolen is bolstered by the fact that despite not having been in South Africa when the vehicle was stolen, the TIP reflected that the appellant was the person who had imported the vehicle into Zimbabwe. The explanation that Cheza obtained the TIP in the appellant's name to facilitate easy travel is not reasonable. There was no reason advanced by the appellant why the TIP would not have been in the name of the person who imported the vehicle into Zimbabwe. Sight should not be lost of the fact that the vehicle was stolen on 24 July 2018, the appellant entered into a sale agreement with Cheza three days later on 27 July 2018. The time within which the vehicle was brought into the country, cleared by ZIMRA and sold by Cheza is unrealistic. As rightly observed by the court *a quo*, the TIP and the agreement of sale were not supportive of each other. The TIP was proof that the appellant had imported the vehicle whilst the agreement of sale stated that the appellant had purchased the vehicle from Cheza. As stated by the trial magistrate:

> "Put differently accused presented himself as the importer of the motor vehicle in question (*albeit* on a temporary basis). In 'buying' a motor vehicle that is imported in his name, accused was technically 'buying' a motor vehicle he had temporarily imported into the country."

In other words, the appellant was purchasing his vehicle from Cheza.

Further, the appellant was found in possession of a Zimbabwe number plate for a vehicle of the same make and colour as that stolen in South Africa. He was also found in possession of a South African registration number and the original licence of a vehicle with the exact particulars of the stolen vehicle except the owner of vehicle was said to be one Jabulani. Neither number plates were affixed to the vehicle eleven days after the agreement of sale. The appellant did not explain how the TIP was assisting him to travel easily in Zimbabwe when the vehicle did not have registration numbers.

Despite being in possession of the TIP in his name, the appellant conceded under cross examination that the vehicle had not been cleared by ZIMRA. How he had in his possession a TIP in his name was therefore incomprehensible. The explanation that Cheza retained the clearance documents relating to the vehicle so as to process the clearance of the vehicle with ZIMRA does not make sense. The appellant was found in possession of the original registration book in Jabulani's name which would have been required by ZIMRA for the clearance of the stolen vehicle.

The State set out in the State Outline that the appellant had in his possession the Zimbabwean number place, the TIP and the registration licence in Jabulani's name. The appellant did not respond to those allegations in his defence outline or his evidence-in-chief. He first tendered the explanations under cross examination. A defence outline sets out the facts upon which an accused relies on for his defence and is elaborated on in evidence-in chief. The appellant was legally represented and therefore had counsel on how to prosecute his defence.

The State case was poorly investigated as observed by the trial magistrate. In fact it was also poorly prosecuted. The police should have traced Cheza through the cellphone number provided by the appellant. It was not in our view adequate to simply phone Cheza. The investigating officer should have traced the cellphone number through the service provider. It is however noted that the appellant himself could not locate Cheza after having allegedly parted with

USD 18 000. The appellant responded under cross-examination, to a question whether he was going to produce the documents for the importation of the vehicle and that he was also looking for Cheza. This corroborated the evidence of the investigating officer, Bernard Matonzi that the police could not contact Cheza (if he exists). It certainly was necessary for the State to have produced the TIP. As stated by the court, its production would have shed light on the date when the TIP was alleged to have been issued, who applied for the TIP and when the vehicle was brought into the country. However, that does not detract from our earlier remarks of the genuineness of the sale agreement. Regarding the TIP, it is common cause that the TIP in the appellant's name was found in the appellant's possession and the appellant's admission that the vehicle was not cleared by ZIMRA.

The trial magistrate was dealing with circumstantial evidence. The law on circumstantial evidence was summed up in *R v Blom* 1939 AD 188 where WATERMEYER JA referred at 202 and 203 to "two cardinal rules of logic" which govern the use of circumstantial evidence in a criminal trial which are:

> (1) the inference sought to be drawn must be consistent with all the proven facts ….
>
> (2) the proved facts should be such that they exclude every possible inference from them save the one to be drawn.

The trial magistrate correctly found that all the proved facts established that the appellant was aware that the vehicle was stolen property. He found that the appellant was a co-perpetrator as envisaged in s196 of the Code. The circumstances surrounding the appellant's possession of stolen vehicle show that the appellant was acting in common purpose with the persons who stole the vehicle in South Africa. He therefore qualifies as a co-perpetrator in terms of s 196 of the Code. In terms of s 123 of the Code, any person found in recent possession of stolen property and fails to give a reasonable explanation for his possession thereof shall be guilty of theft or receiving property stolen property.

The physical control the appellant had over the motor vehicle constituted a sufficient *actus reus*. As per the remarks of DUMBUTSHENA CJ in S v *Dube & Anor* 1989 (3) ZLR 245 (SC) at 246 C-E:

> "It is trite that theft is a continuing offence. See *S* v *Muleya* 1977 (2) RLR 149 (GD). The appellants were punished for what they stole in Botswana and brought to Zimbabwe. Cross-

> border thefts, especially of motor vehicles, are on the increase. It may be the time will come when thieves will be prosecuted for goods stolen in a neighboring country more frequently than is happening now. And the time may come when the law of the country where the property, for instance a motor vehicle, was stolen will be applied by the country where the theft is discovered."

Thirty years on as at the date of theft of the vehicle, the remarks held true and still hold true as to date. Cross-border thefts are still continuing unabated. The conviction of the appellant cannot therefore be faulted.

Turning to the sentence, the trial magistrate adequately justified the sentence he imposed and referred to relevant authorities. Section 113 (1) provides for a level 14 fine or a term of imprisonment of not more than 25 years. A sentence of 6 years with 3 years suspended on condition of good future behavior cannot be said to be so excessive as to induce a sense of shock.

In the result, the appeal against both conviction and sentence be and is hereby dismissed.

Kwenda J concurs ……

Mbidzo Muchadehama & Makoni, the appellant's legal practitioners
National Prosecuting Authority, the respondent's legal practitioners