JAPHET DUBE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI AND TAKUVA JJ
BULAWAYO 19 FEBRUARY 2018 AND 22 FEBRUARY 2018

Criminal Appeal

R Ndlovu for the appellant
T Hove for the state

MATHONSI J: The appellant is a 63 year old villager with a homestead in Mbuso Village under Chief Bango in Kezi Matabeleland South. He was charged with two counts of stock theft which allegedly occurred at Mangwe ranch and at Grillman grazing area in Kezi but for some strange reason he was tried at Gwanda Magistrates court instead of Kezi Magistrates court under whose jurisdiction the offences were allegedly committed. One of the complainants, Alfred Maseko, admitted in court that the transfer of the case followed a complaint he had raised against both the police and the public prosecutor for Kezi after they had refused to prosecute the appellant insisting that the facts suggested that it was a civil dispute which should have been resolved by the civil court.

Going through the record, it becomes apparent why the prosecution was disinclined to prosecute the appellant as shall become clearer later. This court has in the past bemourned the coercion of public prosecutors to institute public prosecutions against individuals even where they are not convinced that any offence was committed or that the evidence uncovered by investigations is sufficient to secure a conviction. See *S* v *Revesai* HB 135-17. A police officer should only arrest a suspect in terms of s25 of the Criminal Procedure and Evidence Act [Chapter 9:07] when he or she has a reasonable suspicion that an offence has been committed. By the same measure a public prosecutor has a right to decline to prosecute a suspect where there is no evidence to secure a conviction.

What is clear is that from its inception this case did not find favour with the prosecution. The investigating officer did not initially arrest the appellant after attending the scene because he

was not convinced that a case of stock theft existed. Even after eventually arresting the appellant the police did not recover the two beasts which were allegedly stolen but left them in the custody of the appellant right up to the end of the trial. If that was not indicative of lack of confidence in the case, nothing is. It is no good for state resources and indeed hours and hours of valuable court time to be wasted on pursuing a dead case merely to baby seat an inflated ego of a complainant pursuing a local village agenda which has absolutely nothing to do with the commission of an offence.

Doing that not only inconveniences a lot of people, it also puts what may be an innocent person in the line of fire unduly. In the unpredictable hassle and tumble of an adversarial criminal justice system like ours with its attendant short comings including human error, one runs the risk of a wrong conviction and sentence condemning an innocent person to several years in custody when that should be avoided by purposely refusing to prosecute a case where clearly there is no evidence to sustain a conviction.

The appellant was convicted by a provincial magistrate sitting at Gwanda on 19 August 2016 of two counts of stock theft. He was sentenced to 18 years imprisonment of which 6 years imprisonment was suspended on condition of future good behaviour. The sentence itself appears inappropriate but that is outside the scope of this appeal. Only the appellant appealed and he appealed against conviction only. The appellant listed nine grounds of appeal the essence of which is that the court *a quo* erred in convicting him when there was no evidence upon which he could be found guilty. The appeal is opposed by the state, the same state which had exhibited reluctance to embark on the prosecution in the first place and had to be arm-twisted by Maseko.

In count one, the appellant was accused of stealing "one greyish dehorned steer with a short tail" belonging to Alfred Maseko between April and August 2015 from Mangwe ranch grazing pastures, which he took to his home where he earmarked and branded it with his own earmarks and brandmark. The said steer had not been earmarked and had no brandmark. In count two he was accused of stealing "one brown heifer with short horns" belonging to Solomon Ndlovu between 25 August and 6 September 2015 from Grillman grazing area Mapaneni ranch in Kezi. He again took it to his home and put his ear marks and brandmark.

The facts in count one, as appear in the state outline were that Alfred Maseko who was then aged 64 and residing at his own homestead at Makwati Village in Kezi had, sometime in April 2015 penned his 39 head of cattle for grazing at Mangwe ranch grazing area. On an unknown date the appellant stole one greyish dehorned and short tailed steer and later marked and branded it aforesaid. On 4 September 2015 the complaint came across the said steer at the appellant's homestead leading to the appellant's arrest.

In count two the facts were that Solomon Ndlovu, an 80 year old villager residing at his homestead in Makwati village Kezi had put his brown heifer with short horns to pasture at Grillman grazing area on 25 August 2015. It had no earmark neither did it have a brandmark. The state alleged that the appellant again stole that heifer and took it to his homestead where he put on his own earmark and brandmark. It was discovered by the complainant ably assisted by the complainant in count one who is his neighbour, two weeks later leading to the appellant's arrest.

In its judgment, after reciting the evidence led in court, the court *a quo* condemned the appellant for failing to avail the steer in count one for a DNA test (it had remained in his custody throughout). It also rejected the evidence of the defence witness Witness Moyo who had confirmed the appellant's version that the two beasts belonged to him. The court remarked:

> "The failure to produce this steer for such tests was obviously convenient to the accused. Complainant who was prepared to foot the expenses for these tests was therefore disabled by the accused's conduct ---. On the other hand accused testified and remained resolute that these two beasts were his. He called one witness to that effect. This witness who is accused's neighbour states that the two beasts in question belonged to the accused. He says both of them were born of accused's cows in accused's kraal. <u>This version is however contrary to the version accused gave to the police when confronted at his homestead.</u> The accused told the police officer he had bought the two beasts and the clearance papers to that effect had been kept by the person who had sold him those weaners. This version as noted earlier on was not challenged or disputed by the accused himself during cross examination. <u>This therefore leaves the court with no option but to view accused's witness as a liar who had come to court to mislead it as his story could have been told by anyone who would have been coached to do so.</u> ---. The evidence of this witness is therefore unable to sustain accused's defence. It cannot be relied upon. Equally accused's conduct is a clear indication that he does not wish the truth about the ownership of the steer to be known. Would it be proper therefore to allow accused to benefit from withholding vital and decisive evidence from the court? No. This conduct helps the court to view the accused as an unreliable witness who does not have to be

> relied upon especially in view of this disputed fact. Any defence therefore fails in this aspect." (The underlining is mine).

Reading this extract one would be forgiven for concluding that the onus to prove criminal conduct was on the appellant. It was not. The state had to prove the guilt of the appellant beyond a reasonable doubt. There is a glaring misdirection on the part of the court which comes out of the part of the judgment which I have quoted above.

Firstly, not a single police officer testified in court. Just where did the court get the notion that the appellant had told the police a different story from that given by Witness Moyo? In his defence outline which he adopted as part of his *viva voce* evidence the appellant made it clear in paragraph 5 that "the two beasts are the accused's cattle born in his kraal." There was therefore no contradiction whatsoever in the testimonies of the appellant and Witness Moyo.

The problem which is an obvious misdirection, is that the court *a quo* considered all that the state witnesses said as the gospel truth and did not bother to subject their evidence to any form of scrutiny. For that reason the court swallowed hook-line-and-sinker what Maseko said about the events which occurred when the complainants and the police visited the appellant's homestead. It is Maseko who testified that the appellant had told the police that he had bought the two animals from a certain Ndlovu and not the police. (see p 37 of the record). It was therefore wrong to find contradictions between the appellant and his witness not from their respective testimonies, but from what the complainant said.

In any event, if indeed the appellant had given a statement to the police could that statement be admissible as to be relied upon by the court the way it did without satisfying the elementary requirements of admissibility. Dealing with the admissibility of statements made to the police by an accused person the Supreme Court stated in *S* v *Nkomo* 1989 (3) ZLR 117 (S) at 124 E-H, 125A:

> "No statement to a person in authority by an accused person, made outside the court room, may be produced (if it is in writing) or quoted (if it was oral) unless the rules have been observed, that is to say unless the court is satisfied that it was made freely and voluntarily and without undue influence being brought to bear. That is what s 242 (1) (now s256) of the Criminal Procedure and Evidence Act means. A statement is a statement, that is, it is something said by the accused."

It was therefore naïve of the magistrate to even refer to what was allegedly said by an accused person to the police without even mentioning the issue of admissibility which clearly did not exercise his mind at all. As I have said that criticism was actually unwarranted given that the evidence of the defence witness in that regard was consistent with that of the appellant.

In nailing the appellant the court proceeded as if the onus was on him to prove his innocence. It is trite that an accused person does not have to prove anything in a criminal trial. The onus is on the state to prove the guilt of the accused person beyond a reasonable doubt. Mr *Ndlovu* for the appellant has referred me to the pronouncement of GILLESPIE J in *S* v *Makanyanga* 1996 (2) ZLR 231 (H) at 235 E-G where the learned judge remarked:

> "Whilst it is axiomatic that a conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of a criminal complaint, still, the fact that such credence is given to testimony for the state does not mean that conviction must necessarily ensue. This follows irresistibly from the truth that the mere failure of an accused person to win the faith of the bench does not disqualify him from an acquittal. Proof beyond a reasonable doubt demands more than that a complainant should be believed and the accused disbelieved. It demands that a defence succeed wherever it appears reasonably possible that it might be true. This insistence upon objectivity far transcends mere considerations of subjective persuasion which a judicial officer may entertain towards any evidence. If it were not so then the administration of criminal justice would be the hostage of the plausible rogue whose insincere but convincing blandishments must prevail over the stammering protestations of truth by the diffident, frightened or confused victim of false incrimination."

In this matter the magistrate convicted the appellant not because there was evidence of theft but because he lost a beast which had been entrusted to him throughout the trial when the court now wanted it for purposes of DNA tests. The court was so annoyed by that occurrence which actually comes outside the trial proper and was not subjected to any test of a trial but is the one which made the appellant lose the faith of the court. One really wonders why at that very late stage of the proceedings an accused person was still entrusted with exhibits. There is no doubt that he was saddled with that responsibility and the court itself thrust a burden on him even to prove his innocence.

In the process the court got it all twisted and overlooked that the state still had the burden to prove his guilt. The tail end of the court *a quo's* judgment illustrates my point. The court remarked:

> "As alluded to above therefore the court finds accused's failure to produce the steer for DNA test as evidence that corroborates complainant's evidence in count one that the steer in question was stolen from him hence accused's fear to have the tests executed. In accused two's version (*sic)* of ownership of the weaner in question is in conflict with his witness's evidence. In that regard therefore complainant's evidence remains solid and intact. Accordingly therefore accused is found guilty of stocktheft in both counts."

The court was punishing the appellant for failing to produce the steer for DNA test long after the trial had been concluded. What happened after the closure of the defence case was not subjected to a trial. The court had no reason not to believe that the steer in question had strayed.

Yet there was no evidence whatsoever of any theft of stock. Neither was there any evidence that indeed both complainants had lost beasts and if they had that they had been taken by the appellant. Only the two complainants and their herdboy testified for the state. They did not produce even their stock cards to point to the loss of any animals. They claimed to have found their animals in the custody of the appellant but could not allude to any features on them with which the two beasts could positively be identified as belonging to them. The two lost beasts were not branded and had no ear marks. The ones found in the custody of the appellant were earmarked and branded.

What is worse is that even the descriptions given by the complainants and indeed the state papers were not only at variance but also did not match the two beasts pointed by the complainants as belonging to them. The beast which was the subject of count one is described in the state papers as "one greyish, dehorned and short tailed steer." When giving evidence, although careful not to give a description of the beast that went missing except to say it was dehorned with a short tail and grey in colour, Alfred Maseko described his lost beast as a "weaner". Surely a weaner and a steer cannot be said to be the same. This raises a reasonable doubt as to whether it is the same beast.

The one which was the subject of count two is described in the state papers as a "heifer which had no ear marks, no brand marks and had short horns and brown in colour." At the trial the complainant Solomon Ndlovu described it has a "calf whose mother was mooing looking for it." At p52 of the record he described it as "a weaner but still suckling and it was female reddish." He insisted at p56 of the record that he could not brand it because his "calf was still

young. It was too early for it to be branded ---." Again a calf which is described like that cannot be said to be a heifer with short horns. A calf cannot have horns. It had been missing for two weeks and could not have grown any during those two weeks. There is therefore a reasonable possibility that this is not the same beast found in the appellant's custody.

In the absence of further identifying marks there was not sufficient evidence to identify the beasts found with the appellant as those that were lost by the two complainants. The state failed to prove its case beyond a reasonable doubt and the appellant should have been acquitted.

In the result, it is ordered that;

1) The appeal succeeds.

2) The conviction and sentence of the appellant on two counts of stock theft are hereby set aside and substituted with the verdict that the appellant is hereby found not guilty and acquitted.

Takuva J……………………………………………agrees

R Ndlovu and Company, appellant's legal practitioners
National Prosecuting Authority, state's legal practitioners