

SIMON KORERA  
and  
LORAN CHASAYA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
MWAYERA and MUZENDA JJ  
MUTARE, 16 October 2019

### **Criminal Appeal**

*V Chinzamba*, for the appellants  
*M Musarurwa*, for the respondent

MUZENDA J: On 16 October 2019 we upheld an appeal against both conviction and sentence passed by the court *a quo* and indicated that reasons would follow. These are they:

On 24 June 2019, the two appellants were convicted of stock theft as defined in s 114 (2) (c) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], a section of the Code which deals with possession of stock; in that on the date to the prosecutor unknown but during the period extending from May to 27 June 2017 and at Muzarawetu Village, Chief Zimunya, Mutare, the appellants one or more of them unlawfully and intentionally had been in possession of one heifer in circumstances which gave rise either at the time of possession or at any time thereafter, with reasonable suspicion that at the time of such possession such heifer was stolen and were unable at anytime to give satisfactory explanation of their possession of the stock.

The facts as amplified on the State outline are that appellants are husband and wife, complainant is not known to the State. On 1 May 2017, first appellant appeared at Nyanga Magistrate's Court on allegations that he had stolen an ox belonging to Blessing Gwandigwa. First appellant once offered Blessing Gwandigwa \$300-00 as compensation for the alleged stolen beast but complainant rejected it, and demanded a live beast. Two days later appellants delivered a heifer to Blessing Gwandigwa. Blessing Gwandigwa then withdrew the charges. The public complained to the police alleging that the beast given to Blessing was stolen by the appellants. During investigations police discovered that the police livestock certificate as well

as the veterinary permit contained irregularities relating to the details of the seller, details of the witnesses as well as the destination of the purchased stock.

The appellants were then arrested and prosecuted, the court *a quo* then convicted the two. First appellant was sentenced to 5 years imprisonment, 12 months imprisonment was suspended for 5 years on the usual conditions of future good behaviour. The second appellant was sentenced to 24 months imprisonment of which 12 months was suspended for 5 years on the conditions of future good behaviour. The remaining 12 months imprisonment were suspended on conditions that the second appellant performs community service. The appellants appealed against both conviction and sentence.

### GROUND OF APPEAL

#### 1. Against conviction

- 1.1 The Learned Magistrate erred by accepting without applying the cautionary rule, the evidence of Douglas Mariwadze.
- 1.2 The Learned Magistrate also erred by making a finding that the appellants gave false information to the vet officer and to the police when both Pardon Mataruse, the vet officer and Douglas Mariwadze, the police officer confirmed that the appellants furnished them with proper information and all the false information was given to them by Admire Chigure.
- 1.3 The Learned Magistrate also erred when stated that the appellants made up a fictitious person called Admire Gweshengwe when the said person's existence was confirmed not only by three defence witnesses but by a State witnesses as well.
- 1.4 The Learned Magistrate also erred when he rejected the evidence of the defence witnesses which was quite clear and accepting that of Sergeant Mariwadze who did not do his work properly and did not explain why and had a clear motive to mislead or hide facts in exchange for immunity from prosecution and discipline.
- 1.5 The Learned Magistrate thus erred when he concluded that the appellants took possession of the heifer in circumstances where they should have reasonably suspected that the beast was stolen.

#### 2. As against sentence

- 2.1 The Learned Magistrate erred by not considering a fine as a suitable sentencing option when a fine is permissible under the penal provision.
- 2.2 The Learned Magistrate also erred by differentiating between the first and second appellants and reaching the conclusion that first appellant was the real criminal who influenced the second appellant.
- 2.3 The Learned Magistrate also erred by taking a case which is still being tried as a previous conviction against the first appellant.
- 2.4 The Learned Magistrate thus erred by not applying the same sentence to the first appellant.

In his judgment leading to the conviction of the appellants, the Learned Provincial Magistrate concluded that the second appellant told Pardon Mataruse, the veterinary officer that the seller of the heifer was Nicholas Macheke who could not avail himself due to his

advanced age, but the second appellant brought a stock card. He reached a decision that second appellant had lied to the veterinary officer. The police Sergeant Douglas Mariwadze's evidence was treated by the court *a quo* as credible to the effect that the two appellants took the cattle movement permit to his office for clearance. The close analysis of the evidence of record clearly shows that the appellants genuinely sought both veterinary officers and police involvement to clear the heifer and supplied correct identification details relating to the purchasers. The second appellant did not provide any false information to the veterinary officer. The first appellant did not provide any information to the veterinary office at all.

It is also not in dispute that the very information on the cattle movement permit was used by police to compile the clearance form. In effect therefore the crucial document containing false information is the movement permit and first appellant had no input on any of the information contained therein. It is also not in contention that all the false information on the State papers did not originate from the second appellant but from Nomatter Gweshengwe also known as Admire Chigure the person who presented himself to the appellants as the seller of the heifer. Both State and defence witnesses confirm the existence of the person and it is clear on the record that he exists by virtue of his identity particulars verified by the police. This beyond reasonable doubt in my view authenticates the version of the appellants. They were advised that Nomater Gweshengwe was selling a beast and then went to him and located him. In order to follow the requirements of the law, they went to the veterinary offices and police to get a permit and clearance respectively. As admitted by Sergeant Mariwadze during cross-examination, the duty to establish the seller's identity lies with the police not the purchaser. The police have a duty at law to request for documents from the seller so as to ascertain ownership, that process excludes the buyer. No law places that process or exercise on the buyer contrary to what is submitted by the State in its heads.

I am satisfied that all the grounds of appeal against conviction are sound in every respect. All the five grounds of appeal are valid and each and every one of them is upheld. The court erred on facts and indeed misdirected itself moreso when it interpreted the presence of the second appellant as collusive to the misrepresentation made by Admire Chigure.

It is indeed trite that the assessment of the credibility of a witness is the province of the trial court. An appellate court will not interfere unless there is something grossly irregular in the proceedings to warrant such interference.<sup>1</sup> This is one case which justifies such interference

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<sup>1</sup> State v Zulu HB 52-03 per NDOU J

by an appeal court. Further, before a person can be convicted, the State must prove beyond reasonable doubt that it was the accused who committed the offence in question. In my view, if there is an offender in this case, it is Admire Chigure and none of the two appellants. The conduct of the appellants in this matter is beyond reproach. Dealing with facts almost identical to the matter in point BEADLE CJ<sup>2</sup> remarked as follows:-

“On a charge under s 5 (1) of Stock Theft Act [*Chapter 48*] it is for the accused, once the State has proved that the accused had received stolen stock or produce to satisfy the court on a balance of probabilities that he genuinely and reasonably believed at the time of his acquisition of stock or produce that it was the property of the person from whom he received it or at such person was duly authorised by the owner thereof to deal with it or dispose of it.

In deciding whether the belief was genuine the approach is subjective. In deciding whether it was reasonable, however, the approach is objective, that is; would a reasonable man in the circumstances of the case have entertained the same belief.”

Admire Chigure had the owner’s stock book, he had the national identity card number and knew the place where the beast was. He agreed to go to the law enforcement agency to clear the beast as well as to get a cattle movement permit. He provided an authentic identity number to a police detail. The genuineness and reasonableness of the appellant’s belief in all this is beyond reproach. Any reasonable buyer undoubtedly would have believed that Admire Chigure was either the owner of the beast or an authorised agent of the seller. I am satisfied that the conviction of the appellants was not safe and they are accordingly found not guilty and acquitted.

The appeal against sentence thus become academic in view of the return of not guilty verdict.

MWAYERA J agrees\_\_\_\_\_

*Mugadza Chinzamba & Partners*, appellants’ legal practitioners  
*National Prosecuting Authority*, respondent’s legal practitioners

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<sup>2</sup> In *S v SITIS* 1974 (1) RLR 203, citing *Hamadziripi v State* Ad 49/71