

THE STATE  
versus  
FARAI MAPANZURE

HIGH COURT OF ZIMBABWE  
CHITAPI & CHINAMORA JJ  
HARARE, 13 January 2020

### **Criminal Review Judgment**

CHITAPI J: The accused was charged with 3 counts of stock theft as defined in s 114 (2) (a) of the Criminal Law (Codification and Reform) Act, *Chapter 9:23*. The accused appeared before the magistrate at Murambinda on 8 January, 2016 for trial. He pleaded not guilty to the 3 counts as charged. The accused was convicted on all the 3 counts on 13 January, 2016 and sentenced on each count to 11 years imprisonment with 1 year suspended on condition of future good behavior. The cumulative sentence was 30 years effective based on 10 years effective imprisonment on each count. When the record was placed before me on review I failed to read the magistrate's handwriting. I directed that the record should be described. The transcription was done.

The 3 charges on which the accused was arraigned were couched as follows:

“Count 1:- charged with stock theft as defined by section 114 (2) (a) of the Criminal Law (Codification and Reform) Act Chapter 9:23 in that on the 14<sup>th</sup> day of October 2015 and at Dhuvadhuwe village, Chief Nyashanu, Buhera, Farai Mapanzure unlawfully and knowing that Artwell Mureriwa, is entitled to own, possess or control one brown bull with horn curving front realizing that there was a real risk or possibility that Artwell Mureriwa may be so entitled and intending to deprive him permanently of his ownership, possession or control or realizing that there is a real risk or possibility that he may so deprive Artwell Mureriwa of his ownership, possession or control stole the said property.

Count 2: charged with stocktheft as defined by section 114 (2) (a) of the Criminal Law (Codification and Reform) Act Chapter 9:23 in that on the 14<sup>th</sup> day of October 2015 and at Dhuvadhuwe village, Chief Nyashanu, Buhera, Farai Mapanzure unlawfully and knowing that Elson Ziswa, is entitled to own, possess or control one brown heifer and brown cow that there was a real risk or possibility that Elson Ziswa may be so entitled and intending to deprive him permanently of his ownership, possession or control or realizing that there is a real risk or possibility that he may so deprive Artwell Mureriwa of his ownership, possession or control stole the said property.

Count 3: charged with stocktheft as defined by section 114 (2) (a) of the Criminal Law (Codification and Reform) Act Chapter 9:23 in that on the 14<sup>th</sup> day of October 2015 and at Dhuvadhuwe village, Chief Nyashanu, Buhera, Farai Mapanzure unlawfully and knowing that Wiseman Mapanzure, is entitled to own, possess or control one brown heifer hornless realising that there was a real risk or possibility that Wiseman Mapanzure may be so entitled and intending to deprive him permanently of his ownership, possession or control or realizing that there is a real risk or possibility that he may so deprive Artwell Mureriwa of his ownership, possession or control stole the said property.”

The outline of state case reads as follows:

### **“OUTLINE OF THE STATE CASE**

#### **COUNT 1**

1. The complainant in this case is Atwell Mureriwa a male adult aged 60 residing at Mureriwa village, chief nyashanu, Buhera nad is not employed.
2. The accused is Farai Mapanzure a male adult aged 39 residing and is not employed.
3. The complainant and the accused person are brothers.
4. On the 14<sup>th</sup> day of October 2015 at around 0700 hrs the accused person drove one brown bull with horns curvin front from the grazing land to Machedmedza homestead Betera and penned it at the homestead in custody of Morgan Machedmedze who is a juvenile aged 15.
5. The value of the stolen property is US\$350.00 and was recovered
6. The accused had no right to act in the manner he did.

#### **COUNT 2**

1. The complainant in this case is Elson Ziswa a male adult aged 53 residing at Dhuvedhuive village, chief Nyashanu, Buhera and is not employed.
2. The accused is Farai Mapanzure a male adult aged 39 residing and is not employed
3. The complainant and accused are not related but is a neighbor.
4. On the 14<sup>th</sup> of October 2015 at around 0700 hrs the accused person drove one brown heifer and brown cow all hornless from the grazing land to Machedmedze homestead, Machedmedze village Nyashanu, Betera he tried to pen the heifer but it escaped back home. He then tied the brown cow to an unknown destination.
5. The brown cow also escaped home
6. The value of the stolen property is US\$350.00 and was recovered
7. The accused had no right to act in the manner he did.

#### **COUNT 3**

1. The complainant in this case is Wiseman Mapanzure a male juvenile aged 14 residing at Mureriwa village, chief Nyashanu, Buhera and is not employed.
2. The accused is Farai Mapanzure a male adult aged 39 residing and is not employed
3. The accused is complainant’s uncle.
4. On the 14<sup>th</sup> day of October 2015 at 0700 hrs the accused person drove one brown heifer hornless from the grazing land to Machedmedze homestead, Betera. At around 1800 hrs he tried to pen it but it escaped back home.
5. The value of the stolen property is US\$350 and was recovered.
6. The accused had no right to act in the manner he did whatsoever.”

It is apparent from the State outline that the accused allegedly drove away 3 bovines being a bull in count 1, a heifer in count 2 and another heifer in count 3. The 3 bovines were driven from the same grazing land at the same time at 7.00am and on the same date, being 14 October, 2015.

The accused was also alleged to have driven the 3 bovines to Machedmedze homestead where the brother in law resided. In count 1, the bull belonged to the accused's brother. In count 2, the heifer belonged to a neighbour and in count 3, the heifer belonged to the accused's nephew. It was alleged that the accused penned the 3 bovine penned the bovines but the bovines in count 2 and 3 escaped and returned to their usual pens at the complainant's homesteads. All the 3 bovines were therefore recovered. It was not alleged that the accused tried to dispose of any of the bovines nor to alter their identity.

In his defence outline, the accused stated as follows:

"I intended to exchange my mother's beast. It was giving calves which would die pre-maturely. I had sought my mother's permission. I found the beast at the pastures. I tried to separate the bulls from the cow but I failed. I went with the beast on 14 October 2015 to Machedmedze. I left the beasts there. I thought Machedmedze would come timeously but he did not. I later went to collect the beasts. On my way, I met the beasts on a bridge. I did not manage to exchange my beast."

The accused stated that his defence outline would apply in relation to all the 3 counts.

An analysis of the accused's defence outline reveals that he admitted possession of the bovines. He however alleged that his possession was innocent because he drove them together with his mother's cow which he wanted to exchange with the brother in law Machedmedza as the cow was always giving birth to dead calves. In other words, the accused was arguing that he drove the bovines together with his Mother's bovines for convenience after failing to separate them. He therefore was denying any intention to steal or more specifically to permanently deprive the complainants of their bovines.

I carefully read through the record of proceedings and the evidence led was to the following effect. In relation to count 1, the complainant who is a brother to the accused testified that he was surprised to see the police coming to tell him that the accused had driven the complainant's beast from the grazing area. The complainant was told about the beast at 12 midnight. He testified that the accused's son had told him that the beast was taken at 4.00pm. The accused agreed with the complainant's evidence. In count 2, the complainant testified that the accused was his neighbour. It was the complainant's routine to telephone his home every end of day to confirm if all beasts had been penned. He was advised upon phoning his home that a cow and its calf were missing. He instructed that searches be conducted on the following morning. He stated that on the following morning, the cow called Market was recovered without the calf. The complainant heard at a funeral the next day that the accused had driven beasts into the area. The informant described the beasts

and one description fitted the complainant's beast. When asked how the "beasts" were recovered, he stated, "My herdboy searched for the beast but could not locate it. On 16 January 2016 towards evening, the beast was seen." The accused declined to cross examine the complainant. In count 3, evidence was led from a 14 year old juvenile. There is no indication that he testified in camera as the norm with young juveniles. That aside, he testified in count 3 as the complainant. Significantly he was asked:-

"Q. Do you know accused?

A. Yes. An uncle

Q. Why is he in court?

A. he missed our beast. We searched for it. We later discovered it. We never thought it was stolen. We thought it had followed other beasts since it is a bull".

The accused did not cross examine the witness. There followed questions headed"

#### CROSS EXAMINATION BY COURT

Q. How old is your beast?

A. I do not know.

Q. Is the bull capable of following other cows/heifers for reproduction?

A. Yes.

It worth noting that a court is an impartial arbiter. It does not cross examination a witness. It can only seek clarification on evidence which is not clear. In any event the questions put were curious ones for want of relevance.

Other witnesses called were the accused's son called Nyasha Mapanzure. His age was not recorded or ascertained. He testified that the accused who was his father was in court because they drove some beasts to an uncles' place. He said that the accused selected the bests which they drove from others. He stated that the beasts comprised a brown heifer and two bovines bulls. When asked what they wanted to do with the bests, the witness replied.

"We wanted to sell the heifer. As for the bulls we wanted to exchange them with donkeys."

He testified that they drove 4 beasts ad returned with one cow belonging to Mr Ziswa because "he said we should return it." When asked how he knew that the accused wanted to exchange the beasts with cows, the witness said that the accused had addressed the issue with him in the presence of one Morgan who incidentally was not called upon to testify. The witness said that he did not know

what became of the beasts when they left them. He was not asked as to why the intended sale and exchange was not consummated. He denied that the beasts followed the cow which they had. In cross examination the witness denied that the accused had a beast of his own.

Another 15 year old witness, Machedmedze gave evidence. It is not clear whether he did so in camera. He is a nephew to the accused. His evidence was colourless. He confirmed that the accused and his son got to the witness parents homestead with 4 beasts and returned with one. Of the three which he left behind one immediately escaped whilst the accused was still at the homestead. The other two also escaped from the pen. He was asked by the prosecutor whether the beats were mating (quite a curious question) and he answered that they were not mating. The accused did not cross-examine the witness. A further witness Fungai Maduma testified that he received a telephone call from Mr Machedmedze requesting him to advise the accused that the accused's cattle had escaped. He did not manage to inform the accused since the accused had gone to church. The last state witness was Faith Machedmedze. He testified that the accused was his brother in law and the accused brought some beast to his homestead. The witness was however not present at the homestead and did not witness when the accused came. He saw a bull and a heifer but did not know the owner. The beasts escaped. He tries to contact the accused to no avail. He did not know prior to the beasts being brought to his home that the accused would bring some beasts.

The accused adopted his defence outline as his evidence in chief. He was cross examined. The gist of his answers to the very cursory cross examination was that he made an error in driving the beasts in question. He was asked

Q. You wanted to steal the beats.

A. You might suspect so.

There was nothing further which arose from the cross examination as detracted from the defence outline.

In his judgment, the magistrate correctly identified the issue for determination as:” The issue of physical possession is not in dispute but the mental element to permanently deprive the complainants of their property.” The magistrate then reasoned as follows:

“There was no cow which belonged to the complainant's (sic) mother as per accused defence outline. The cow and heifer belonged to Mr Elson Ziswa. The other two bulls belonged to Artwell Mureriwa and Wiseman Mapanzure. Further evidence is that other beasts ran away showing that they had not volunteered to follow.

Nyasha Mapanzure told the court that his further wanted to sell the beasts and also to do barter trade in exchange of the donkeys.

This is sufficient evidence to show that accused wanted to deprive complainants permanently of their property. The physical and mental elements of the offence of theft are present. The accused is guilty as charged.”

The purpose of subjecting the proceedings of the magistrate’s court proceedings on review is the review is a quality control mechanism wherein a judge of this court checks whether the proceedings under review accords with real and substantial justice. The court’s powers on review are very wide as set out in section 29 of the High Court Act, [Chapter 7:07]. The court may in terms of subsection (2) (b) (i) of section 29 quash the conviction where proceedings are not in accordance with real and substantial justice. The exercise of this power to quash the proceedings is subject to the provisions of subsection 3 of s 29 which 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.”

In my view of the proceedings in this case, I consider that the proceedings are not in accordance with real and substantial justice and that a substantial miscarriage of justice occurred. In the first instance the accused did not get a fair trial on account of the magistrate being misguided on procedural issues. The magistrate largely relied on the evidence of the accused’s son on what the accused allegedly told his son about the purpose of driving the beasts from the field. It was noted that the age of the son was not recorded. If the son’s evidence as taken was that he was aware that the accused intended to steal the beasts, then by knowingly participating in the removal of the beasts from the grazing land, the son was complicit and therefore an accomplice. The magistrate proceeded with the case and his judgment oblivious to the fact that the principal state witness was an accomplice. I do not propose to dwell at any length on the dangers of relying on accomplice evidence to found a conviction without further ado. Suffice however that as pointed out in *S v Mamocha* HH 80/15 and *S v Ngara* 1987 (1) ZLR 91 (S), such a witness by virtue of his or her inside knowledge of the case in regard to all its ingredients is peculiarly equipped to convince the unwary that the accomplices evidence is true. It is trite that because of the dangers of false incrimination which loom large in regard to accomplice evidence courts approach accomplice evidence with extreme caution. The court is required to be alive to the fact that it is dealing with accomplice evidence, that such evidence can safely be relied upon and lastly that dangers of false

incrimination have been excluded. Section 267 of the Criminal Procedure and Evidence Act, [Chapter 9:07] provides that the prosecutor must inform the court that a witness called by the State is an accomplice and the court will be required to warn the witness of that fact, advise such witness to tell the truth and the consequences of doing so. Again I do not propose to interrogate the provisions of section 267 because the magistrate did not act in terms thereof which was in itself a misdirection and irregularity of gross proportions as to negatively impact on the fairness of the trial proceedings in that suspect evidence was used to convict the accused without such suspect evidence being subject to extra scrutiny and corroboration.

A further aspect of the judgment which shows a serious irregularity is the failure by the magistrate to make an analysis of the evidence based on credibility of witnesses and probabilities of the case. There is nowhere in the judgment where the magistrate indicated that the accused's defence was proven beyond a reasonable doubt to be false nor that it did not accord with probabilities. For example the facts of the case as far as one can possibly gather from the evidence led do not lead to the inference that the accused intended to deprive the owners of their beasts permanently. The evidence showed that the accused drove the beasts from the grazing lands early in the morning and made no attempt to cover up his steps. He drove the beasts to the brother in laws homestead again in the full glare of whoever cared to take notice. When the beasts escaped the accused did not make any efforts to chase after or recover them. He in fact went to church on the following day and did not check for the beasts. The evidence that the accused did not have a beast of his own was merely hearsay and more importantly there was no evidence led to rebut the accused's assertion that his mother had a cow which was suffering still births of calves. The magistrate was therefore supposed to take a measured and proportionate view of the evidence. Such exercise could only be achieved by taking account not only of the totality of the evidence but also the general credibility and reliability of the witnesses especially the accused's son who as I have observed was arguably an accomplice.

The judgment of the magistrate does not show that other than to regurgitate what a particular witness stated, the magistrate evaluated the evidence at all. In evaluating evidence in its totality, inherent probabilities must be considered. It is stated in *S v Chabalala* 2003 (1) SACR 134 (SCA) at para [15] that:

“The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent

strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt."

In *S v Shackell* 3001 (2) SACR 185 at para 30 it is stated;

"It is a trite principle that in criminal proceedings, the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally .... Is the observation that in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be re..... briefly because it is improbable. It can only be repeated on the basis of inherent probabilities if it can be said to be so improbable that it cannot possibly be true."

In holding that Nyasha Mapanzure's (the accused son) evidence that the accused had told him that he wanted to sell the beasts and do barter trade in exchange for donkeys was sufficient evidence to show that the accused wanted to deprive complainants permanently of their property, the magistrate was clearly misdirected. The magistrate was not guided to evaluate the evidence on any of the approaches I have indicated. The failure to do so amounted to a gross irregularity as resulted in a substantial miscarriage of justice bearing in mind that the charges against the accused were very serious and attracted mandatory sentences of imprisonment. The accused was also not legally represented. Where a judicial officer has been so misguided or misdirected in assessing evidence, to the extent that the fairness of the trial is compromised, then such misdirection amounts to an irregularity which can be reviewed even if the issue may also be subject of appeal.

Another issue which arises from the review of the proceedings is the propriety of charging the accused person with 3 separate counts of stock theft. The facts which are admitted were that the accused engaged in one act of driving away the beasts in issue from one grazing field. The fact that the beasts turned out to belong to different complainants did not alter the position. *A fortiori*, had the beasts belonged to one complainant the charge would have been one except that the number of beasts would have a bearing on sentence. There was an improper splitting of charges since the same evidence essential to prove one count was the same evidence required to prove the other two remaining counts. See *State v Ephraim Nyoni and Anor* HB 39/2004 where NDOU J dealt with a comparable circumstances where the accused set snares to trap two cattle and were charged with theft of the two cattle and another count of setting up snares. If the 3 counts arose from the same *mens rea*, then only one count ought to have been charged. See *S v Chovava* HB 16/03. The

irregularity of preferring multiples charges instead of one is an error that can be corrected by setting aside the proceedings and correcting them to the extent that reflects what the magistrate should have done. Such power of correction is provided for under section 29 (2) (b) (iii) of the High Court Act. I will however not act in terms thereof because the irregularities as noted are such that the whole proceedings should be quashed.

It is my view, upon a consideration of the proceedings as a whole, the misdirections and irregularities which I pointed out to rendered the trial of the accused inherently unfair and the convictions of the accused cannot be supported. A miscarriage of justice occurred in the accused's trial. The only feasible way of ensuring that the accused is accorded a fair hearing is to quash the proceedings. I must state that in determining on this course of action, I have also elicited the views of my brother CHINAMHORA J who agrees with this judgment. The following order is made:

- a) The proceedings against the accused in case no CRB 484/15 are hereby quashed and the conviction and sentence set aside.
- b) The Prosecutor General may in his/her discretion recommence the prosecution of the accused afresh and if a fresh prosecution is initiated:
  - i. The trial must be presided over before a different magistrate.
  - ii. In the event of a conviction and the accused is sentenced to imprisonment, the period which he has already served shall be computed as part of the new sentence to be served.
- c) A warrant for the liberation of the accused shall immediately issue.

CHINAMORA J *I agree*:.....