

DISTRIBUTABLE (21)

Judgment No. SC.27/05
Civil Appeal No. 76/04

MARINE CENTRE (PRIVATE) LIMITED
vs O'BRIAN CHAKWIZIRA

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & GWAUNZA JA
HARARE, MAY 17 & JULY 18, 2005

N Madya, for the appellant

The respondent in person

CHEDA JA: The appellant was the employer of O'Brian, the respondent, and his workmate, Brian Dhende, ("the two workmates"). Their duties involved making seat covers and using glue. On 11 October 2000 the two workmates remained at their workplace, doing overtime. It seems that the overtime was authorised. At about 1800 hours a security guard came on duty and spoke to them briefly, then continued with his patrol of the premises. The two told him they would finish work at 2030 hours. Later that evening the respondent returned to the guard hut.

The security guard's report of what happened that evening reads as follows:

- “4. I then proceeded in patrolling around the premises. In the workshop there were two workers, namely Brian and O’Brian. I approached them in the workshop where they were sewing some seat covers. I asked them what time they were going to finish their overtime.
5. O’Brian responded saying they were knocking off at 2030 hours. I then left them in the workshop and continued with my patrols.
6. At 2030 hours I discovered that the two employees were still working. I did not ask them why they were still working...
7. I thought they were going to clock their cards when they were through with their overtime.
8. At approximately 2137 hours I was patrolling at the Boat Section. O’Brian approached me saying that they were about to finish. O’Brian went to the guard hut.
9. I then followed him behind the guard hut. I instructed him that he was supposed to be searched, which I did and he proceeded to the changing room.
10. On return from the changing room he brought an empty 5-litre container. I did not ask him about the container and he proceeded into the workshop where they were working.
11. I saw Brian coming from the East-Southern corner. At that moment O’Brian switched off the lights at the section where they were working.
12. Brian came straight to the guard hut and was carrying a small bag with some stripes colours blue and white (*sic*). The bag was empty as I searched him.
13. He went into the changing room, and on his return he had nothing except the empty bag. He went straight into the workshop.
14. O’Brian and Brian closed and locked all doors and proceeded to the Main Gate. I searched them and opened the gate for them.
15. They went along Bessemer Road, turned right into Edison Crescent. I then suspected these two. I went straight to the direction where Brian had come from. I discovered the 5-litre container brought by O’Brian from the changing room was in the drain, some rubbers and seat covers.
16. I took these items and discovered that the container was filled with glue, one roller seat cover and two windscreen rubbers.

17. I was observing whilst inside the premises at the point of (the) scene. I heard a voice saying 'The items are missing' and the people continued walking along Kelvin Road South.
18. I then took the items to the guard hut for safekeeping. Later my area Corporal visited me and I gave him the report and he later advised our Control Room about the incident. ...”

In his evidence to the labour relations officer the security guard said he heard the two saying the items are missing. This evidence was not challenged in cross examination.

Faced with this report, the appellant had the two workmates arrested.

Although the magistrate's court acquitted them, the appellant charged them with misconduct and found them guilty. They were suspended from employment and permission was sought from a labour relations officer to dismiss them. The labour relations officer granted permission for their dismissal. The two workmates then appealed to a senior labour relations officer, who dismissed their appeal.

The respondent appealed to the Labour Relations Tribunal (“the Tribunal”). The Tribunal upheld his appeal and ordered that he be reinstated. The appellant has now appealed to this Court against the decision of the Tribunal.

In upholding the appeal, the Tribunal said in its judgment that the security guard was rather rash in removing the property from the drain before the suspects got to

the property. It also said that the security guard did not identify the voice of the speaker who said: “The items are missing”, and could not say that the voice he heard belonged to the respondent. It said anyone could have been walking along the road at the material time, and so the respondent was not properly identified as the person who had deposited the property in the drain.

However, it must have been obvious that the persons had some connection with the things they said were missing from the drain. The security guard had earlier seen O’Brian carrying the empty five-litre container. This container was later found in the drain after O’Brian had previously passed the security guard without it. There were with it some rubbers as well as seat covers. The two workmates had remained sewing seat covers.

In view of this positive identification of O’Brian with the empty container, and the same container being in the drain with glue, I cannot agree that the security guard was wrong when he concluded that it was the two workmates who stole and hid those items in the drain. Even on a balance of probabilities it is safe to conclude that they are the persons who stole the property.

This is supported by the fact that once the two workmates left the factory the security guard heard the two saying: “The items are missing”. According to his evidence at the hearing this was after the security guard had taken the items.

I am satisfied that this detailed report of the security guard establishes that the respondent and his workmate are the people responsible for the theft of the items found in the drain.

The security guard also said he went straight to the direction where Brian had come from and that is where he discovered the five-litre container.

The above evidence is sufficient to support the conclusion that they are the ones who stole the above items.

In conclusion, the appeal succeeds. The decision of the Tribunal is set aside and the decision of the senior labour relations officer is reinstated. The respondent is to pay the costs.

SANDURA JA: I agree.

GWAUNZA JA: I agree.

Wintertons, appellant's legal practitioners