

THE STATE

versus

EMELLY NDLOVU

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 17 OCTOBER 2002

Review Judgment

CHEDA J: The accused, a woman aged 38 years appeared before the regional court on 22 July 2002 and was charged with theft by finding of a colour television valued at \$75 000 which was recovered.

The brief facts according to the state outline are that sometime in June 2002 in the early hours of the morning while on her way to the market she came across the said television hidden in the bush. She picked up the television set, took it to her home and kept it for herself.

As a result of information received she was arrested and brought to court. She pleaded guilty to the charge and was sentenced to 36 months imprisonment with labour of which 18 months imprisonment with labour was suspended on condition of good behaviour.

In mitigation accused told the court that she is an unmarried mother of two minor children. In addition she looks after two of her late sister's minor children and also looks after her mother as she is the only breadwinner. She is not formally employed but she is a vendor who realises about \$1 800 per day. She has no savings and no assets.

During the proceedings the following exchange recorded in long hand took place between the court and the accused.

“Q Intend to permanently deprive complainant of his property?

A I was just keeping and I was g... (this was later cancelled)

Q Why did you not surrender it to the police?

A I did not know that I was supposed to surrender it to the police.”

The plea was altered to not guilty. The accused was then remanded to 26 August 2002. When she appeared on 26 August 2002 the following exchange took place between the court and herself:-

“Q Do you stick to your explanation that you intended to surrender the television to the police?

A Yes

Q For how long did you keep the television

A 3 weeks

Q What stopped you from surrendering the television to the police in 3 weeks?

A I was waiting for ... to come and claim the television (sentence not complete)

Court:- You have no defence, you had ample time to surrender the television to the police. I am convinced that you intended to permanently deprive the owner of the television. I find you guilty as charged.”

There is then a typed judgment, which reads:

“Madam, you are raising no defence, I see no defence in what you are saying. In fact it will be a waste of time for me to alter your plea from one of guilty to not guilty because at the end of the day you will be convicted.

You kept the television for three weeks and I believe you had ample time to surrender that television at the police if your intention was not to permanently deprive the owner of the television.

In fact, you are lucky that you were not charged with housebreaking with intent to steal and theft. Because it is difficult to believe that you pick a television from the bush and keep it for three weeks. It is like you pick a motor vehicle from the bush and drive it for three weeks and say that you intended to surrender it. Any right thinking person like you should have been forced to go and surrender the television, take the television straight from the bush to the police without even going to your home.

Like I said you have no defence, I find you GUILTY AS CHARGED.”

The accused found the television in the bush in the early hours of the morning. When essential elements were being put to her she proffered an explanation. It is clear from the explanation that her plea of guilty cannot objectively be said to be a genuine plea of guilty. A plea of guilty should emanate from a full and conscious understanding of the charge the accused is facing especially in a common law offence. The accused was remanded to appear again after a month and the first question put to her is designed in such a way that the court hoped that in view of the length of time the accused would have changed her mind. The change of mind on accused's part would thus make the magistrate's work easier, as it appears to me that he was eager to conclude this matter at all costs. A judicial officer should never ever lose sight of the fact that his duty is to dispense justice in the fairest manner possible. Justice should never be sacrificed at the altar of expediency. It is essential that judicial officers should constantly remind themselves of the danger of misuse or abuse of power, which can easily result in miscarriage of justice.

It is quite clear that the accused wanted to explain why she did not surrender the television to the police, but the magistrate seems to have omitted the last part of the explanation. In view of the magistrate's attitude as evidenced by his unsavoury and unwarranted remarks which have no factual or legal basis one can only draw one obvious inference being that he allowed his thoughts to be overcome by malice and as such lost focus of the facts before him which resulted in convicting the accused despite her desire to explain herself.

His remarks that accused has no defence when he has not accorded her an opportunity to be heard is to say the least unfair and offends against the *audi alteram partem* rule. There is no basis for this conclusion as no trial was conducted. He wrote what he refers to as “Judgment”, the question is what judgment, when there was no evidence. In the so called “judgment” he remarks:- “In fact, you are lucky that you were not charged with housebreaking and theft.” There is no where in the record to indicate that the television in question was found where it was as a result of a break-in. I therefore cannot see the relevance of this remark. It is either the magistrate does not understand the procedure of a trial or deliberately chose to circumvent the whole procedure for his own purposes.

He proceeded to sentence accused to 36 months imprisonment with labour of which 18 months imprisonment with labour was suspended on the usual conditions. The sentence is manifestly excessive in the circumstances. The offence of theft by finding is clearly distinguishable from ordinary theft in that in theft by finding there is a sudden temptation to keep what one has found as the accused erroneously believes that the property is *res nullius* as opposed to ordinary theft where in most cases there is pre-meditation. In light of this the moral blameworthiness of the accused would generally be lower and as such should attract a more lenient sentence, see *S v Khumalo & Anor* HB 115-93 where accused found property in the bush worth \$1 700. It was held by CHEDA J with BLACKIE J concurring that in theft by finding cases accused should not be sentenced to prison terms for the simple reason that the value of the property involved is high. The sentence was altered to a fine of \$500 and 3 months imprisonment suspended. The accused is a female first offender with a lot of

responsibility. Women are generally treated leniently, see *S v Storry* HH 176-94 where a cashier stole \$6 101,00 from her employer. She made full restitution for the stolen money. On review the sentence was reduced to a fine of \$1 500 and 3 months imprisonment with labour wholly suspended.

In the present case the complainant was not found and the property was recovered. There are in my view more mitigatory features than the aggravating ones, which should have attracted a sentence other than a prison term. It is pertinent to highlight that of late there has been an influx of cases coming for review from the same magistrate with either excessive sentences or procedural errors. The Ministry of Justice, Legal & Parliamentary Affairs' attention is drawn to the increasing errors by the same magistrate. There is therefore a need for urgent intervention to correct what is glaringly an injustice being perpetrated by the acting Regional Magistrate.

There has been a misdirection by the learned acting regional Magistrate which has resulted in the miscarriage of justice in this matter. Accordingly both conviction and sentence is set aside and the matter is referred for trial *de novo* before a different magistrate.

Cheda J

Chiweshe J I agree