HB 30/07

Judgment No. HB 30/07
Case No. HCA 199/03

TRIUMPH MUSHAMBA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND NDOU JJ
BULAWAYO 20 MARCH 2006 AND 1 MARCH 2007

Ms N Dube, for the appellant
Ms B Wozhele, for the respondent

Criminal Appeal

NDOU J: The appellant, aged 30 at the time of the trial, was convicted by a Bulawayo Regional Magistrate sitting at the Western Division of theft by conversion. He pleaded not guilty to the charge but despite his vehement protestations he was found guilty. He was sentenced to four (4) years imprisonment of which one (1) year was suspended on conditions of future good behaviour and a further 2 years on condition of restitution. He now appeals against both conviction and sentence. The salient facts of the matter are that on a date unknown to the prosecutor but sometime in the year 1998 and at number 8 Muir Road, Queenspark, Bulawayo the appellant received into his possession after his parents' death household property, the property of Sweden Chirodza, for the purpose of safekeeping. The appellant did not keep the property as entrusted to him, but instead he sold it on a date unknown.

The property comprised of a kitchen table and six chairs, two carpets, two Tempest radio speakers, one television set, a radio metal stand, dinning room adjustable table with eight chairs (oak), side cupboard (oak) and four piece tan sofas (oak). The value of the stolen property was worth $7 999 944-00 and property worth $4 598 043-00 was recovered.

On the question of conviction there were two issues for determination during the trial, viz.

(a) whether the property in question belongs to the complainant and,

(b) whether the appellant sold the property knowing that the property was the complainant's.

It was common cause that the accused sold the property in question. Part of the property was recovered after the appellant's arrest. The appellant conceded during the trial that he sold some of the property in 2002 that is after being approached by the complainant who laid down to the property and tried to collect it. The prosecution case was based on two witnesses that the complainant, Sweden Chirodza, and his wife Shuvai Mupoperi. I propose to deal with their testimony in turn.

Sweden Chirodza: He testified that the appellant's grandmother and mother were close to his late parents and they enjoyed cordial relationship resulting in him regarding the appellant as a nephew. In 1998, when he started college, he gave the property to the appellant's parents for safekeeping. The appellant was resident in South Africa and was therefore not privy for this handover. After the death of the appellant's parents he decided to collect the property. He actually tried to do this immediately after the death of appellant's mother. [appellant's father predeceased the appellant's mother]. When he attempted to collect the property as alluded to above, the appellant was also present. He came in a motor vehicle to collect the property. He asked the appellant's grandmother, Mrs Martha Sengwayo for the property. Mrs Sengwayo requested that he comes at a later date to collect the property as the mourners were still using the property. Because of the good relationship between Mrs Sengwayo and him he agreed as he did not foresee any problems. The following morning Mrs Sengwayo sent appellant's sister Sympathy Mushamba to ask for more time and he indulged them and he delayed taking his property. On two instances thereafter the appellant approached him to sell him part of the property, that is, the sofas and a set of speakers. He informed the appellant that he could not sell the property to him as he (that is the witness) had inherited it from his late parents. After a period of about three months had lapsed he again approached the appellant's grandmother to collect the property. The grandmother said to him that the property was locked in the cottage and that she did not have keys to the cottage. He later approached the appellant and he also said that the property was locked in

the cottage and that he did not have keys to the cottage. He and his wife visited the appellant another three or four times without success. On a later visit the appellant told him that the property had been moved to his aunt's place in Nkulumane.

Then in November 2001, he managed to see the appellant once more. He asked him about the property and the appellant informed him that the property had been conveyed to his grandmother's place of abode in Gweru. Having failed to get a positive answer, he eventually reported to the police. He confirmed that he saw the property in the house after he had discussions with the appellant about it. He said that when the appellant approached him and offered to buy the sofas and the set of speakers he was in company of his cousin Samson Sengwayo.

The witness was cross-examined at some length by the appellant. The trial magistrate however, made a finding of fact that the witness was credible. The finding of this nature is the province of the trial magistrate and this court cannot upset it unless the appellant shows any gross irregularity or that it is illogical. There is no such averment in this case - *S v Zulu* HB 52-03; and *S v Isolano* 1985 (2) ZLR 62(S) and *S v Ramushu and Others* SC 25-93.

I find that this finding of fact cannot be faulted.

Shuvai Mupoperi: This witness supported the previous witness in all material respects. I will not repeat her testimony. The trial court believed her version as being truthful. The finding cannot be faulted.

The appellant testified under oath. He said he only met the complainant when he approached him only twice and not several times as alleged by the complainant. He accepted that the complainant first asked him about the property in December 2000.

Under corss-examination the appellant said he sold the property after complainant laid claim to it in order to pay his rates and rent. He tried to explain his sale of the property by stating that the complainant had not described or specified which of the property in the house was his. In other words, he did not know which of the property was being claimed by the complainant.

The trial court rightly found that even in such a scenario he was not entitled to sell before establishing which property belonged to the estate. In fact, he did not even consult any of his siblings or members of his family about the sale. He was not even appointed the executor to his parent's estates. From the facts, when he told the complainant and his wife that the property was in Nkulumane and Gweru he had already sold part of it. The learned trial Regional Magistrate made an adverse finding on his credibility. There is no basis for interference with such a finding of credibility –*Marx v S* [2005]4 All SA 267 (SCA). *Hayes v Bar Council* 1981 ZLR 183 and *S v Rufaro* 1975(1) RLR 97. I am satisfied that there is no case made for the interference with trial magistrate's finding of fact. The defence witnesses Solomon Mushamba and Florence Chakawa also testified. Their testimony is mainly irrelevant to the resolution of the issues. What they said does not take the appellant's case any further. The overall picture that emerges from the credible evidence is that the appellant was aware that the property belonged to the complainant before he sold it. The complainant had made his interest in the property known to the appellant and appellant's grandmother and others. The appellant accepted such ownership of the property by the complainant as evinced by his attempt to buy some of the property from the complainant. He also tried to mislead the complainant on the whereabouts of the property. All this shows that the appellant sold the property with the necessary mens rea – *S v Chikasa* 1994(2) ZLR 6(S). The offence was properly proved.

I agree with Ms Dube, for the appellant, that, it is not a satisfactory way to simply let an unrepresented accused to give his evidence in chief by adhering to his defence outline and confirming that he had nothing to add to it. This may be lead to confusion and accusations of admitting things. – *S v Chikukutu* 1996(1) ZLR 702 (S) at 705 D-F, *S v Zhou* HB 36-96 and *S v Mandive* 1993(2) ZLR 233(S) at 234. But, in this case the trial court went further and guided the appellant on issues of substance. He was able to articulate the basis of his defence. He called two witnesses in support of his case. The approach by the trial magistrate, in casu, did not prejudice the appellant in his defence.

In fact he benefitted therefrom. Accordingly, the appellant was properly convicted and his appeal against conviction must fail. As far as sentence is concerned, this is the province of the trial court. The appeal court should only interfere in the case of misdirection or when the sentence is disturbingly severe – *S v Ramushu*, supra; *S v Mundowa* 1998 (2) ZLR 392(A)*; S v Matanhire and Others* HH 18-01 and *S v Mavhundura* 2002(1) ZLR 598(H) at 600 C-E. The sentence is within the sentencing discretion of the trial magistrate. In any event, the sentence is not by any stretch of imagination excessive let alone manifestly excessive. The trial court struck a correct balance between the mitigatory and aggravatory factors. His approach cannot be faulted.

Accordingly, the appeal against both conviction and sentence is hereby dismissed.

Cheda J ……I agree

Marondedze and Partners, appellant's legal practitioners

Criminal Division of Attorney General's Office, respondent's legal practitioners