HB 246/16
HCA 70/15

WASHINGTON MUCHENU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & MOYO JJ
BULAWAYO 26 & 29 SEPTEMBER 2016

Criminal Appeal

Zvinavakobvu for the appellant
W. Mabhaudi for the state

MAKONESE J: On the 31st July 2014 in the late hours of the night the appellant was driving a Nissan Sunny saloon vehicle with at least four occupants. He drove the vehicle over rocky terrain, on a dirt road. The vehicle was laden with 194kg of fresh beef in the boot. At Cyrene Farm, the appellant was intercepted by farm workers who lay an ambush as they suspected he was ferrying stolen meat. After stopping the accused the farm workers introduced themselves as farm workers who were on patrol. The appellant promptly produced his police identity card indicating that he was an Assistant Inspector in the Zimbabwe Republic Police and that he was coming from his plot. The appellant was requested to open his boot to confirm what he was carrying. Appellant pretended to be parking his car off the road but suddenly sped away. A high speed chase resembling a Hollywood style escape ensued. The Cyrene Farm workers who had quickly jumped into their pick-up truck chased the appellant's vehicle for some distance. The appellant drove towards the Bulawayo-Plumtree road and on reaching the main road, he took a right turn. The pick-up truck continued to give chase and the two vehicles side-swiped. The appellant's vehicle suffered a puncture on the rear left wheel forcing him to drive off the road to West Acre shopping area. The appellant stopped his vehicle and his associates jumped out of the vehicle disappearing into the darkness. The appellant attempted to off-load the stolen loot from the boot of his car but he gave up and surrendered when he realised that he had been cornered. The appellant claimed that he was not aware that he was carrying stolen meat. He stated that he believed that he was carrying groceries which he had been hired to collect from

a bush at Cyrene Farm. The appellant who was anAssistant Inspector based at ZRP Mzilikazi in Bulawayo appeared before a provincial magistrate sitting at Plumtree facing one count of contravening section 114 (2) (b) of the Criminal Law (Codification and Reform) Act (Chapter 9:23), that is, stock theft. He pleaded not guilty and after a protracted trial he was convicted and sentenced to the minimum mandatory sentence of 9 years imprisonment. Appellant was not satisfied with the conviction and sentence and noted an appeal with this court.

The appellant's appeal is premised on the following grounds of appeal as set out in the notice of appeal.

1. The court *a quo* erred in convicting the appellant when he was a hired driver and had no knowledge and could not foresee that he had been hired to transport stolen beef.
2. The court *a quo* erred in convicting the appellant when he had been exonerated by evidence given by appellant's co-accused who was acquitted on the same charge.
3. The court *a quo* erred in convicting the appellant when it was proven that he had no knowledge or had not realised that he could have been in possession of stolen beef.
4. The court *a quo* erred by convicting the appellant on the basis of unreliable evidence led from state witnesses.
5. The decision reached by the trial magistrate was grossly unreasonable to such an extent that no reasonable court could have convicted on the facts laid before the court.

As regards sentence, the appellant argues that an effective sentence of 9 years imprisonment is so excessive as to induce a sense of shock. The appellant contends that the court did not give due weight to the mitigating circumstances of the case and erred in imposing a custodial sentence. It is further argued that the trial magistrate based his sentence on the fact that the appellant was a senior police officer.

This court notes that the trial court delivered a well reasoned and articulated judgment. Most of the issues raised during the trial are to a large extent common cause. There are as follows:

(a) the appellant drove off from the Plumtree-Bulawayo road into the bush well into the night.
(b) he found men with bags waiting for him at two different locations
(c) the men loaded meat into the accused's motor vehicle
(d) the accused claims that he did not bother to see what two men were loading into his car, in a bushy area at night
(e) he drove the vehicle towards the direction of Bulawayo with two strangers and one Sheila with goods that weighed 194 kg
(f) when appellant was confronted by farm workers who wanted to search the boot of his car he produced his police identity document
(g) appellant sped away and only stopped when one of his tyres was punctured in a high-speed chase. The occupants of his vehicle fled and were never apprehended.

On the basis of the established facts the trial court came to the conclusion that the state had proved its case beyond reasonable doubt. This case is based on circumstantial evidence. There is no direct evidence linking the appellant to the commission of the offence. The law on circumstantial evidence is well established in our jurisdiction. The law on this subject has its basis on two cardinal rules of logic as laid down in the case of *R* v *Blom* 1939 AD 188 where the learned judge observed that the following rules must be observed:

(a) the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
(b) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.

In the instant case the following facts are clearly established by the evidence led by the state.

(a) that beast belonging to Matopo Research Institute was slaughtered on the night in question in a bushy area
(b) the appellant's motor vehicle was seen headed in the direction of the farm that night
(c) that upon being stopped the appellant introduced himself by producing a police identification card and stated his rank in the police force as an Assistant Inspector.
(d) the farm workers who had erected a road block indicated to the appellant their intention to search his motor vehicle
(e) the appellant drove off without subjecting himself to the search
(f) the farm workers gave chase and in the process the two vehicles side-swiped. The appellant did not stop
(g) the appellant ran out of luck when his rear left tyre was punctured. He only stopped at a dark area at West Acre. He attempted to removed the bags of meat from the boot before he was apprehended

It is my view that the proved facts reflect an unusual behaviour on the part of the appellant who was a senior police officer. The purpose of the appellant's journey to Cyrene Farm in the dead of the night was certainly not an innocent adventure. His determination and commitment to the entire trip only leads one to the conclusion that he was aware that he was on a mission to collect stolen meat. His explanation that he was hired to collect groceries from a bush at night defies logic and common sense.

In our law, the state has to prove the guilt of an accused person beyond reasonable doubt. Proof beyond reasonable doubt does not translate to proof beyond a shadow of doubt. Proof beyond reasonable doubt does not mean proof of an absolute degree of certainty. It simply means that there should be such proof as leaves no reasonable doubt in the mind of an ordinary man capable of a sound judgment and of appreciating human motivations. The state does not have to close every avenue of escape and fanciful or remote possibilities. See the case of *S* v *Isolano* 1985 (1) ZLR 62 (S).

I entertain no doubt that the trial court did not err when it came to the conclusion that from the evidence adduced by the state the only reasonable inference that may be drawn is that the appellant was aware that he was carrying stolen meat. When he was intercepted he fled the scene because he was well aware that he had been caught with stolen meat. His attempt to produce his police identification card was meant to evade the road block.

The trial court cannot be faulted for the factual findings that it made. The court was alive to the fact it was dealing with a case in which the guilt of the accused was sought to be established by circumstantial evidence. It was satisfied upon application of the relevant test that the only fact which can be established by reasonable inference from all the circumstances of the case was that the appellant was well aware that he was ferrying stolen meat.

The court said:

> *"It is clear that the accused did not behave like an innocent hired driver. He protected the contents of his car boot. He did not want them to be seen or discovered by the eye witnesses. He only turned into West Acre because he had a tyre burst, not that he wanted light, because even when he arrived there, he did not park where there was light. It is apparent that the accused lied that he had been hired. He lied too that he did not produce his police identity.*
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> *He also lied about the source of the groceries. It is an afterthought that he wanted to go the West Acre and get illumination as proved by the evidence as discussed above. The accused was fleeing. A hired driver has nothing to hide. The accused had already been paid $20,00 according to him. He had nothing to lose by allowing the witnesses to search the boot whose contents he did not know and in respect of which the owners did not protest. He could not allow that because the witnesses would have discovered the offence, hence his refusal and flight …"*

The decision of the court *a quo* is supported by evidence. There is therefore no basis on which this court can interfere with the conviction. The position of our law is that the court will not lightly interfere with the factual findings of a lower court. This is so because the trial court has the benefit of assessing the demeanour of witnesses and of commenting on their credibility.

In the result, there is no merit whatsoever in the appeal against conviction. As regards sentence the appellant's defence counsel indicated that he had no meaningful submissions to make. A contravention of section 114 of the Criminal Law (Codification and Reform) Act attracts a minimum mandatory sentence of 9 years imprisonment unless there are special circumstances. The court *a quo* did not err in imposing the mandatory minimum sentence of 9 years.

I would accordingly dismiss the appeal against both conviction and sentence.

Moyo J …… I agree

Zvinavakobvu Law Chambers, appellant's legal practitioners
Prosecutor General's Office, state's legal practitioners