

LEONARD ZINYEMBA

Versus

THE STATE

HIGH COURT OF ZIMBABWE

MUZOFA & BACHI-MZAWAZI JJ
CHINHOYI 29 May & 31 May 2023

Criminal Appeal

I. Muchini, for the Appellant

C. Teveraishe, for the Respondent

BACHI-MZAWAZI J: This is an appeal against both conviction and sentence. Appellant was convicted of theft of a motor vehicle in contravention of section 113 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], following a full trial after pleading not guilty. He was sentenced to 36 months imprisonment, with 12 months suspended for 5 years, on condition that, he does not commit similar offences involving dishonesty and theft, upon which if convicted will be sentenced to an imprisonment term without an option of a fine. An effective 24 months jail term remained.

The summarised facts are that, on the day in question the appellant and his girlfriend were the first people to board a parked passenger ferrying unregistered Honda Fit vehicle, at D and R bus stop rank, in Chinhoyi central business area. They occupied the front seat next to that of the driver which was empty up until the time the vehicle had been filled with passengers.

A visibly drunk stranger then sat on the driving wheel prompting a tout, or rank marshal outside the vehicle to quiz the passengers as to why they were allowing themselves to be driven by an inebriated person. Soon after the said comment the appellant took charge of the driver's seat and the steering wheel and drove off after exchanging seats with the drunken man who then sat at the back.

In his defence, the appellant stated that, the tout did not end in making the said observations but actually directed him to drive which he impulsively did having had the impression that the drunken person was the owner. In contrast the state case was to the effect that no such instructions were given by the tout who was later on called to testify. The owner of the vehicle is said to have been outside the vehicle waiting for touts to load his car.

The discovery that neither the appellant, the drunk or any other passenger was the owner of the vehicle was made when the passengers collected the transport fees and handed them to the appellant. He in turn refused to accept the money directing that it be handed to the said drunk and co-accused, who in turn referred the money back to him. No one accepted the cash upon realization of the fact that the owner may have been left behind.

The vehicle was driven for a considerable distance amidst the chaos, only to be accosted at a roadblock which had been launched at the behest of the complainant.

The appellant, his girlfriend and the drunk where all charged of theft of motor vehicle in that they connived and acted in common purpose to steal and permanently deprive the owner of his vehicle. However, charges against the girlfriend where withdrawn but the appellant and the other co-accused were convicted.

It is the appellant's defence that, he acted under a genuine mistake of fact that the drunk was the owner of the vehicle as he too had asked him to take over the steering wheel after the tout's remark. He only learnt that he was not the owner much later during the course of his driving. He advanced that he did not steal the car nor had he the intention of stealing the car and never acted in common purpose with the drunk who was a total stranger to him.

The State's argument in the trial court and on appeal is that, the fact that he drove for all that long distance after learning that neither of the people in the car was the owner of the vehicle meant that he had the intention to steal and deprive the owner of his vehicle. They state that had he not been intercepted by the police there is no likelihood that he would have stopped.

The trial Court dismissed the appellant's defence on the basis that the persons he claimed had given him authority to drive denied the same in Court. One of them was a mere tout. He concluded that there was no mistake of fact and that the appellant knew that he wanted to steal

and went on to do the same. He made a finding that they had the intention to permanently deprive the owner of the vehicle or realised the real risk and possibility of doing so.

To begin with, the appellant attacked the lower court's findings on two grounds that it failed to believe that the appellant acted on a genuine mistake yet he gave a probable explanation and no onus rested on him to authenticate or prove the veracity of his explanation. Further, that the court erred in convicting the appellant on theft of a motor vehicle when the facts reveal unauthorised driving.

It is trite that, for an upper court to interfere with the decision of the lower court there must be some glaring error and, or gross misdirection or for the furtherance of the interests of justice. See, *Zimbabwe Platinum Mines (Private) Limited v Ronald Geddes* SC17/14 and *Barros Chimponda* 1999(1) ZLR 58 at 62.

An analysis of the evidence led in court, extracted from the Magistrate's reasons for judgment is that the tout, Caleb, never denied that to begin with there was a person other than the owner of the vehicle sitting at the driver's seat. His testimony in court was to the effect that he quizzed the passengers on board on the efficiency of allowing such a drunk to drive them. In our considered view though the tout cum witness denied in Court that he actually directed the appellant to drive, his mere admonition of passengers indicate that it was not the appellant who was initially on the driving seat, and that he took over from someone who in his own mind was the driver and owner of the vehicle.

Once the Court believed the tout's evidence and made the observation that firstly, indeed the other accused person was drunk. Secondly that he was seated at the driver's seat at some stage and lastly that the rank marshal admitted to making the said comment to the passengers then he should also have considered the appellant's explanation as probable. It also means to some extent the tout corroborated the appellant's averments up to the point of departure that of giving instructions to drive.

Not only that, it is illogical that a car thief who indisputably, was the first to enter the vehicle will choose to steal a passenger laden automobile thereby in essence, stealing both. Had the appellant intended to steal the vehicle he would have done so at the slightest opportunity before the vehicle had loaded.

Further, from a holistic perspective, there is irrebuttable evidence that there was a wrangle as to who should collect the transport money collected from passengers. Surely, the dictates of common sense say that if ever the appellant had intention to steal he would have posed as the owner and silently accepted the payments but he did not. He attested that he referred payments to the co-accused who was the drunk in question, who in turn refused to accept the cash. Are these actions synonymous with thieves, acting in connivance and common purpose to steal a vehicle?

The trial court acknowledges on page 9 of the record, that the appellant may have been mistaken in the first instance involving instruction to drive but still made a finding that the issues of the passenger transport fees makes the appellant culpable. It is not plausible. The fact that the appellant did not accept the money and directed it to be given to a person whom he believed was the owner of the vehicle speak to the honesty of the appellant. If he had paused as the owner, as already highlighted, he would have gladly accepted the money collected under such pretext but he did not.

It is this incident that struck a bell on all passengers including the appellant that the owner of the vehicle may not be in the vehicle. There were passengers in this vehicle who were never called to testify. In our view, the burden of proof lay on the state to rebut the explanation by the appellant.

The oft quoted passage in the *locus classicus* case of *R v Difford* 1937 AD is instructive. It states, "... no onus rests on the accused to convince the court of the truth of any explanations he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but beyond reasonable doubt false, if there is any reasonable possibility of his explanation being true, he is entitled to his acquittal"

In, *S v Mapfumo and Others* 1983 (1) ZLR 250 (SC) it was held that, "There is no onus on an Accused person to establish his defence. Once there is some evidence suggesting a defence the court must consider this defence."

We subscribe to the learned sentiments in the above authorities. In that regard, we are convinced that the court erred in making a finding that the state had proved all the essential elements of the offence of theft of motor vehicle against the appellant beyond a reasonable doubt. From the totality of evidence on record, the appellant gave a probable defence. See, *Kombayi v State* HH27/04, *Kapende v S*, HH157/02 and *S v Dube* 1977(1) ZLR 221.

That be is as it may, inasmuch as the appellant is entitled to an acquittal on the charge of theft of motor vehicle, we have taken note that an offence was nevertheless committed and he can not be allowed to go scot free. As per one of appellant's own grounds of appeal, there is an admission, correctly made, that the facts disclose driving without the owner's consent or authorisation. When he drove, the vehicle believing he had received consent from the owner whom he presumed was the drunk later co-accused following the remarks of the tout he may be exonerated as having acted under mistaken belief of facts, foolishness and impulse synonymous with the immaturity as he was only 23 years.

However, his offence of driving without the consent of the owner started the moment he realised that the owner was not in the vehicle when the issue of passenger payments transmission arose. From that moment onwards, his continued driving and enjoying the joy ride without taking steps to stop the vehicle or raise alarm meant he committed an offence of unauthorised driving.

Having noted that the competent verdict under s113 is that of unauthorized borrowing or use of property, as provided for by s275 of the 4th schedule to the Criminal Law Code, [*Chapter 9.23*], the court tasked both the state and defence counsels to research and address on the competency of invoking the provisions of s57 of the Road Traffic Act Chapter 13.11 as a permissible verdict in this context.

The State made submissions that since unauthorised borrowing is a competent verdict to theft, and one of its permissible verdicts is a contravention of the said Act then it follows that the appellant be convicted of contravention of the Road Traffic Act.

In turn, the defence submitted that the route proposed by the state is circuitous as the Road Traffic Act, [*Chapter 13:11*] makes it a point that one can be convicted in terms of its provisions if convicted in offences under the Criminal Law Code in respect to theft.

The court had the of opportunity of going through the mentioned Act, as it had also raised the propriety of making another statutory provision as a competent verdict of the other. It discovered that s57(2) of the Road Traffic Act [*Chapter 13:11*], which reads, "A person charged with stealing or attempting to steal a vehicle may be found guilty of an offence in terms of subsection (1), if such facts are proved," was the more appropriate route.

In casu, s57 ss (1) (b) as read with ss (e), which applies to the facts of this case, stipulates that, “A person who ,without the consent of the owner or person in lawful charge of a vehicle, drives or rides in the vehicle shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for period not exceeding two years or both such fine and such imprisonment”

Interesting as the state’s proposition maybe for a conviction on a competent verdict of another competent verdict, we find the appellant not guilty of theft as charged but of contravening section 57(1) (b) of the Road traffic Act, [*Chapter13:11*].

The sentence is also automatically set aside. Indeed, it was unduly harsh. No consideration was given to Community Service which is also a misdirection See, *State-v-Chikanga* HH233-2022.

Accordingly, the trial court’s conviction and sentence are both set aside and substituted as follows;

- a. Guilty of contravening of contravening section 57(1) (b) of the Road traffic Act, [*Chapter13:11*].
- b. The appellant is sentenced to 18 months imprisonment of which 12 months imprisonment is suspended on condition the accused is not convicted of an offence involving the driving of a motor vehicle without the owner’s consent or of any person in lawful charge of the vehicle upon which if convicted is sentenced to imprisonment without an option of a fine. The remaining 6 months imprisonment is wholly suspended on condition of performance of Community Service.
- c. The matter is remitted to the court a quo for placement on Community Service.

Honourable Justice Muzofa J agrees.