

ANGIRAYI SANDO
versus
THE STATE

HIGH COURT OF ZIMBABWE
UCHENA J AND PATEL J
HARARE, 14 June 2007

Criminal Appeal

Mr *Nyakunikwa*, appellant's legal practitioner
Mr *Chikosha* respondent's legal practitioner

Uchena J: The appellant was charged with and convicted on one count of stock theft. He had pleaded not guilty to the charge. The brief facts of the case are that the appellant is alleged to have connived with five others to steal the complainant's two oxen from farm Number 195 Rowa West Zimunya, Mutare. He is alleged to have hired Antony Chinyamutangira to transport two slaughtered oxen from the Zimunya area, to his house. He is alleged to have taken Wedzerai Masunda, Charles Masvosva, Alfred Sando Louis and Paul Feausi to Antony Chinyamutangira's house in Chikanga. Antony Chinyamutangira and the four then proceeded to farm number 195, Rowa West Zimunya where they parked his Peugeot 504 pick up truck in the bush while the four proceeded to the complainant's cattle pen armed with knives and an axe. They drove out two oxen to the parked motor vehicle. They slaughtered them and loaded them on to the motor vehicle. On their way to Mutare they were stopped by the police. The four who had accompanied Chinyamutangira to the farm jumped off the motor vehicle. Chinyamutangira stopped the motor vehicle and attempted to run away but was arrested, leading to the arrest of Wedzerai Masunda, Charles Masvosva and Alfred Louis.

The State led evidence from Antony Chinyamutangira who told the court that he was hired by the appellant to transport his slaughtered

oxen from Zimunya. He parked his motor vehicle in the bush while the men who had accompanied him brought the oxen to the motor vehicle. He realized he was being involved in a theft but did not leave as his motor vehicle did not have a starter. When they came back and slaughtered the oxen he cooperated because he wanted to be paid after delivering the slaughtered oxen to the appellant. He was clearly an accomplice to the commission of the offence but the prosecutor did not advise the Magistrate of the witness's status and he was allowed to give evidence without being warned in conformity with the directive given in *Simakonda v S* 1956 R & N 463 (SR) at 465 B-C. The state led no other evidence to prove its case.

The appellant gave evidence in his own defence denying any involvement in the commission of the offence. He called three defence witnesses, Wedzerai Masunda, Charles Masvosva and Alfred Louis, who all said the appellant was not involved and did not take any part in the commission of the offence. They were part of the team which was stopped by the Police and were subsequently arrested. Charles Masvosva told the court that the Police assaulted him forcing him to implicate the appellant. His evidence was not challenged by the state.

In his grounds of appeal the appellant's counsel pointed out the following irregularities, and misdirections;

- 1) That the Prosecutor did not inform the Magistrate that the witness was an accomplice and that the trial Magistrate did not warn the state's witness even though he was an accomplice in the commission of the offence.
- 2) The court misdirected itself by convicting on the uncorroborated evidence of an accomplice.
- 3) That the state did not lead evidence to prove the commission of the offence.

- 4) That the state did not lead any evidence to counter Charles Masvosva's evidence that the Police assaulted him so that he could implicate the appellant.
- 5) The court misdirected itself by failing to accept the evidence of defence witnesses who were exonerating the appellant.

These irregularities and misdirections were repeated in the appellant's Heads of Argument and in the appellant's counsel's submissions during the hearing of the appeal. Of significance, were, the state's failure to inform the court that its witness was an accomplice in the commission of the offence; and its failure to lead evidence to satisfy the provisions of section 270 of the Criminal Procedure And Evidence Act [*Chapter 9:06*]. Section 270 provides as follows;

" Any court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment, summons or charge under trial on the single evidence of any accomplice;
Provided, that the offence has by competent evidence other than the single and unconfirmed evidence of the accomplice, been proved to the satisfaction of such court to have been actually committed."

Section 270 requires that corroboration be sought for the accomplice proving the commission of the offence. If no other independent evidence from that of the accomplice proves the commission of the offence the court can not convict on the single evidence of an accomplice.

Mr Chikosha for the respondent conceded that the state did not lead evidence to prove the commission of the offence in spite of the appellant having denied knowledge of the commission of the offence and how the accomplice and others where arrested at a Police Road Block. He also conceded that the accomplice witness was not warned and that the evidence of one of the defence witnesses that he was assaulted by the Police to force him to implicate the appellant was not countered. I am satisfied that Mr Chikosha for the respondent properly conceded that the conviction can not be supported and it should be set aside.

I am however concerned that this court's time was wasted in the preparation and hearing of an appeal which was being conceded in spite of the existence of the provisions of section 35 of the High Court Act [*Chapter 7:06*], which could have been used to convert the appeal into a chamber appeal. Out of the four appeals set down for this week three were conceded and could have been dealt with in terms of section 35 if the respondent's counsels were aware of section 35 and gave the appropriate notices to the registrar instead of making concessions in their Heads of Arguments. We would have been saved the need to prepare and sit for the appeals. Counsel for the parties would have been saved the need to appear before us to argue these appeals. The unnecessary expenses incurred by both parties and the court could have been saved. Section 35 provides as follows;

“ When an appeal in a criminal case other than an appeal against sentence only, has been noted to the High Court, the Attorney-General may at any time before the hearing of the appeal, give notice to the registrar of the High Court that he does not for reasons stated by him support the conviction, whereupon a judge of the High Court in chambers may allow the appeal and quash the conviction without hearing argument from the parties or their legal representatives and without their appearing before him”.

The procedure created by section 35 in respect of appeals other than those against sentence only is simple. It requires the Attorney-General or his representative to,

- a) Peruse the appeal record and decide whether or not he supports the conviction.
- b) If he does not support the conviction he should give notice of his decision to the registrar of the High Court together with his reasons for that decision.
- c) He can give such notice at any time before the hearing of the appeal.

The next stage is for the registrar to place the appeal record, the Attorney-General's notice and reasons before a judge.

The judge will peruse the Attorney-General's notice and reasons together with the appeal record. If he is satisfied that the conviction can not stand he will allow the appeal and quash the conviction without hearing argument from the parties or their legal representatives. The appeal will be allowed without any further participation of the parties.

In view of the respondent's concessions which I am satisfied were properly made the appellant's appeal is up held. His conviction and sentence are set aside. He is found not guilty and is acquitted.

PATEL J, agrees-----

Mugadza Mazengero and Dhliwayo, appellant's legal practitioners.

Attorney-General's Criminal Division, respondent's legal practitioners.