

GESHEMU MLAUZI
and
SHADRECK MUSIWARWO
and
BLESSING CHISAMBA
and
RONNIE GURUDZA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU AND CHIKOWERO JJ
HARARE, 16 January and 9 February 2023

Criminal Appeal

T Muzana, for the appellants
C Muchemwa, for the respondent

CHIKOWERO J:

[1] This is an appeal against both conviction and sentence. It was triggered by the conviction of the appellants on a charge of theft as defined in s 113(1)(a)(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and the sentence of 5 years imprisonment passed on each of them of which a total of 3 years imprisonment was suspended on the usual conditions of good behaviour and restitution to leave an effective sentence of 2 years imprisonment.

[2] Five other accused persons, who are not before us, were similarly convicted and sentenced.

[3] The appellants were found to have, between July 2020 and October of the same year, stolen 2 500 litres of diesel, 4 conveyor belts, 2 x 295/80R22.5 O'Green tyres, 2 x size 14 tyres, 2 Nissan alternators, 1 Nissan Twin Cam alternator and 50 litres engine oil from an institution called Friendly Environment Services.

[4] We are satisfied that the conviction is not justified having regard to the evidence. See S 38(1)(a)(ii) of the High Court Act [*Chapter 7:06*].

[5] No adequate evidence was placed before the court that the complainant owned, possessed or controlled the property in question in the first place. All that there is on record is the complainant's assertion that it owned, possessed and controlled this property before the offence was committed.

[6] Indeed, there was no evidence of the theft itself. Because the offence was alleged to have been committed over a period of time by employees and an electrician hired by the complainant, what the prosecution was effectively alleging was a theft in the nature of a general deficiency. In the circumstances, the best evidence rule required that the complainant's records be produced to enable the court to decide whether those records reflected that the property was now missing. See *S v Chikasha* S 94/94. All that the complainant did, under cross-examination, was to claim that it had conducted an audit, the record of which spoke to the theft, but without producing the audit report. Similarly, the complainant did not produce an asset register.

[7] The second appellant sold 4 x 30 litres of diesel, which was dirty, to a State witness called Wilmore Chitambo. The transaction was not done in broad daylight. The witness did not know the source of the diesel. Chitambo was declared hostile but even when subjected to cross-examination by the prosecution his evidence was of no assistance to the State. At the end of the day, the trial court only went as far as observing that this witness was unstable and appeared to have something which he was concealing. There was no evidence that the 4 x 30 litres was part of the 2 500 litres which the complainant claimed to have been stolen. We do not see anything on record which disproved the second appellant's explanation that he bought the 4 x 30 litres of diesel from his uncle, who had drained it from a vehicle into some containers, hence it became dirty. The law does not require that the second appellant should have proved the truthfulness of his explanation. *S v Makanyanga* 1996(2) ZLR231(H); *S v Moyo* HB 139/15.

[8] As for the rest of the appellants there was no evidence linking them to the alleged theft of the complainant's diesel. Nothing was recovered from them, neither was there direct nor circumstantial evidence relating thereto.

[9] As for the tyres, Jube Chisoro testified that the first appellant gave him an 11R 22.5 tyre as part-payment of a debt. That evidence was irrelevant. The charge sheet, State outline and the testimony of the complainant related to 2 x 295/80R 22.5 tyres. These were admitted by both Chisoro and the complainant to be of a different size from that which the former received from the first appellant. In short, the 11R 22.5 tyre recovered from Chisoro was neither shown to have been owned, possessed nor controlled by the complainant. It was not the subject of the charge.

[10] There was no evidence that the appellants stole the complainant's tyres.

[11] The court convicted the first appellant of theft of the alternators simply because he was an auto-electrician and hence had the expertise to remove alternators from a vehicle. But he was not the only auto-electrician on site at the relevant time. We observe in passing that the only person linked to the recovered alternators was the eighth accused, who is not before us. All the appellants were not proved to have stolen the complainant's alternators. Therefore, it is unnecessary for our purposes to determine whether the trial court correctly found that the recovered alternators belonged to the complainant.

[12] Besides the stolen property list, the record is devoid of any evidence of theft of the four conveyor belts and the 50 litres engine oil. There is nothing to indicate when, how and by whom the theft was committed. There is no evidence of recoveries. There was a functioning closed circuit television system at the stores where the engine oil was kept. The footage, which was not produced as an exhibit, did not capture the theft. This was the complainant's evidence.

[13] The court fell into error in relying on the evidence of the investigating officer that the appellants admitted that they committed the offence with which they were charged and, in the process, that they implicated each other. The said admissions, if they were made at all, were extra-curial statements. All the appellants, minus the first appellant, were unrepresented at the trial. The learned magistrate allowed the investigating officer to give evidence about the making of admissions by the appellants and to reveal the contents of those oral statements without those statements having been proved to have been made freely and voluntarily and without undue influence. Consequently, that evidence was irregularly admitted. Being inadmissible, we exclude it in determining this appeal. See S 256 of the Criminal Procedure

and Evidence Act [*Chapter 9:07*]; *S v Nkomo* 1989(3) ZLR 117(S); *S v Mazano & Anor* 2000(1) ZRL 347(H).

[14] We agree also with Mr *Muzana* that there was no evidence of connivance on the part of the appellants. It seems to us that there could be no such evidence in the absence of evidence that the appellants committed the offence in the first place. In other words, there could not have been proof of the appellants acting in common purpose in committing the theft when, to begin with, the prosecution failed to establish what role each of them played in the theft. As already demonstrated, the offence itself was not proved to have been committed.

[15] Yet another piece of evidence was irregularly admitted. This was a whatsapp message wherein the author was telling the complainant that the latter's employees were stealing from the complainant. The exhibit is in the Shona language. The official language in proceedings before the magistrates court is English. Since the exhibit was not translated into the English language, we also exclude that piece of evidence in determining the appeal.

[16] At the end of the day, the magistrates court convicted because it not only relied on inadmissible evidence but also refrained from analysing the admissible evidence placed before it. All that the court did, so it seems to us, was to recite the charge, the State and defence outlines, the evidence and, without any further ado, pronounced the guilty of the appellants. If an assessment of the correctly admitted evidence had been undertaken, the court would have found that the evidence adduced by the prosecution was inadequate to prove the theft, let alone that it was the appellants who had committed it.

[15] In the result, the following order shall issue:

1. The appeal be and is allowed.
2. The judgment of the magistrates court convicting the appellants be and is quashed and the sentence imposed on each is set aside. The following is substituted:

“The first, second, third and fifth accused persons are found not guilty and are acquitted.”

CHIKOWERO J

Tapera Muzana and Partners, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners