

STATE
versus
TAFADZWA MUTANDE
and
GODFREY TAFIREI

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA & WAMAMBO JJ
HARARE, 11 September 2023

Criminal Review

MUNANGATI MANONGWA: Once a court has pronounced that an accused person's story as outlined in his defence outline and evidence-in-chief is credible, it cannot then turn around and convict. In this case the court made a finding that the 1st accused person was a credible witness and that his version had been corroborated in material respects, despite such findings, the court went on to convict the 1st accused person of stock theft as charged. When a judicial officer assesses facts and make findings pertaining to those facts, such findings, must then inform the verdict without deviation. Any inconsistencies between the findings and the conclusive verdict create irrationality. Such is the scenario prevailing in this case.

This is a review matter emanating from the Magistrate Court which has been referred to this court in terms of S57 of the Magistrates Court Act. The accused persons were charged with three (3) counts of stock theft as defined in s114(2)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and two (2) counts of theft as defined in terms of Section 113(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (hereinafter referred to as ("the Act").

Both accused persons pleaded "Not guilty" to the charges but were both convicted. The 1st accused was convicted of stock theft on all three counts and acquitted on the theft charges pertaining to theft of scotch carts. The first accused person was sentenced to 4 years imprisonment with 1 (one) year imprisonment being suspended on condition of good behavior thus remaining with an effective imprisonment term of 3(three) years. The conviction of the 1st accused person is problematic as shall be dealt with below. The 2nd accused person was found

guilty on both stock theft and theft charges. The second accused person was sentenced to a total effective term of 4 years imprisonment for all the five counts. The conviction is solid given the overwhelming evidence against the 2nd accused. Accordingly, the proceedings leading to the conviction and sentence of the 2nd accused person is in accordance with real and substantial justice and is confirmed.

In reviewing the proceedings, I found that the findings of the court *a quo* are inconsistent with the ensuing conviction as regards 1st accused. The stock theft charges pertained to theft of donkeys from Chivhu and the theft charges pertained to the theft of two scotch carts. It is common cause that the donkeys and the carts were found in the possession of the 1st accused person. This accused person's defence was as follows:

He had met the 2nd accused in not so pleasant circumstances when he was panning for gold with his colleagues. The 2nd accused and his colleague were wearing police uniforms and the second accused had a firearm. The alleged police officers purported to arrest the 1st accused person and those in his company. The 1st accused pleaded that he was trying to raise money to buy pipes for his farming projects. The men ultimately paid a bribe to be released. This accused person later struck a friendship with the 2nd accused person and the latter visited the 1st accused person at his home. The 1st accused person showed the 2nd accused person his agricultural projects, wherein the 2nd accused person suggested that he could provide draught power by hiring his scotch cart as the 1st accused's family was using buckets to water the crops. The two agreed that the 1st accused would pay by way of three 50kg bags of potatoes and three 50kgs of wheat. The accused also stated that the 2nd accused showed him a disused home which the 2nd accused said was his home which he sought to revive. It is in that spirit that he received the donkeys and the scotch carts.

The accused further narrated how the 2nd accused came with his colleague once again in police uniform and assisted him in constructing a kraal for the donkeys. This accused noticed a broken part on the initial scotch cart that had been brought and the 2nd accused promised to bring a welding machine to fix it. At the same time the 2nd accused asked his colleague to give him his cart so that the 1st accused could use whilst he waited for the damaged cart to be repaired. The second cart was provided, hence, he ended up with two carts. The evidence on record shows that the 1st accused was consistent in his version and that he co-operated with the police. The 1st

accused's story was corroborated by a witness and his wife who was present when the donkeys were received. It turns out that the 2nd accused's colleague who is at large is the complainant's brother who had access to the property which was stolen. Most pertinent are the comments by the Magistrate in the court *a quo*. She acknowledged that the 1st accused's story had a ring of truth and that accused's evidence was corroborated in material respects. She even went on to find the 1st accused to be a credible witness. In her words, the Magistrate stated as follows:

"I wish to comment on first accused's credibility as a defence witness for his case. 1st accused person struck me as a credible witness. First and foremost, he gave a detailed account of how he met 2nd accused and his colleague....whilst seasoned criminals are capable of concocting all sorts of defences in a desperate bid to secure their freedom, I am convinced that 1st accused's story is credible. I need not repeat all the details but just listening to it and observing 1st accused's demeanor, one would be convinced that indeed he was telling the truth."

The court *a quo* accepted the evidence that in all instances that the 2nd accused visited the 1st accused he was wearing a police uniform. Whilst the 2nd accused denied this, his wife confirmed that the 2nd accused had a police uniform although she sought to backtrack after realizing the import of that confession. This court finds that the 1st accused had no reason to doubt the 2nd accused nor even suspect that the donkeys and the carts were not his. This is because the 2nd accused presented himself as a senior police officer with a senior rank given the stars on his uniform as testified by 1st accused.

The court *a quo* convicted the 1st accused in terms of s 114 (2) (a) which provides as follows:

"(2) Any person who—
(a) takes livestock or its produce—
(I) knowing that another person is entitled to own, possess or control the livestock or its produce or realizing that there is a real risk or possibility that another person may be so entitled; and
(ii) intending to deprive the other person permanently of his or her ownership, possession or control, or realizing that there is a real risk or possibility that he or she may so deprive the other person of his or her ownership, possession or control; or
(b).....
(c).....
shall be guilty of stock theft and liable—"

It is baffling how the court convicted the 1st accused in terms of that section. The court made a finding that it is the 2nd accused person who stole the donkeys and took them to the 1st accused person. The 1st accused person was then found in possession of the donkeys. The proper

charge against the 1st accused person would have been contravening s 114 (2) (d) which reads as follows:

“(2) Any person who—

(d) acquires or receives into his or her possession from any other person any stolen livestock or produce without reasonable cause (the proof whereof lies on him or her) for believing at the time of acquiring or receiving such livestock or produce that it was the property of the person from whom he or she acquired or received it or that such person was duly authorized by the owner thereof to deal with it or dispose of it.

It is clear that the court *a quo* ‘s reasoning proceeded as if the accused was being charged with contravening s 114(2)(d) of the Act, yet found the accused guilty of stock theft in terms of s 114(2)(a). The magistrate literally cited s 114(2)(a) and this is a misdirection. The verdict must accord with the facts and evidence at hand where an accused is to be found guilty of a competent verdict. Where there is inconsistency in the reasoning of a judicial officer leading to a wrong conclusion given the evidence at hand, a conviction cannot be confirmed or upheld. This is because flawed reasoning characterized by failure to measure facts against essential elements of an offence vitiates the proceedings. The essential elements of an offence must be proven and satisfied through the evidence led. It therefore requires a judicial officer to be conscientious and be alive to what it is that has to be proven by the state to secure a conviction. In that regard findings on the facts must then inform the verdict.

In her judgment the Magistrate quoted the provisions of s 114(2)(d) which she indicated as falling under s 114(2)(b). This creates confusion within the judgment. Having been found in possession of the donkeys the appropriate section to charge the 1st accused person under would have been s 114 (2) (d). Even so, a conviction under s 114 (2) (d) would not have been tenable given the evidence at hand.

Having found that the witness was not fabricating the story which was “corroborated in material respects” and after believing the circumstances in which the accused received the donkeys, it is inconceivable how the *court a quo* would then go ahead and convict the accused in such circumstances. To then make a finding that “1st accused did not attempt to explain whether or not and if so, why he believed that the donkeys belonged to the 2nd accused and his colleague” is without basis, given the detailed and reasonable circumstances detailed by the 1st accused person as regards why and how he received the donkeys.

There is absolutely no evidence that the accused stole the donkeys nor is there evidence that accused would have suspected that the donkeys were stolen. Accordingly, the court *a quo* misdirected itself and should not have convicted the 1st accused on stock theft charges. It cannot be said that the proceedings were in accordance with real and substantial justice. Accordingly,

IT IS ORDERED as follows:

The decision of the magistrate in relation to the 1st accused person is set aside and is substituted with the following order:

1. 1st accused is found “Not Guilty” on all three (3) counts of stock theft and is hereby acquitted.
2. The 1st accused is entitled to immediate release from prison and a warrant of liberation is hereby issued.

MUNANGATI MANONGWA J

WAMAMBO J, agrees.....