

STATE
versus
EVANS MUNOTUMAANI

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 5 February 2019

Criminal Review

MUZENDA J: On 12 January 2019, three accused Thabane Ngwazani, Evans Munotumaani and George Ndimani being accused 1, 2 and 3 respectively appeared before the Provincial Magistrate sitting at Mutare facing stock theft charges as defined in s 114 (2) (d) Criminal Law (Codification and Reform) Act [*Chapter 9:23*], where the State alleged that on 31 December 2018 and at Village 12 Nyamajura, Odzi, THABANE NGWAZANI, EVANS MUNOTUMAANI and GEORGE NDIMANI, one or all of them unlawfully took a brown heifer which was stray, the owner of which is yet to be established, knowing that the stock was stray or realising that there was a real risk or possibility that the stock might stray (sic) and intending to deprive permanently the unknown owner.

The State outline was structured as follows: the complainant in this case is the State represented by Maxwell Nyamavanga, a male adult aged 36 years residing at Village 12 Nyamajura, Odzi and he is not employed. Accused 1, is a male adult residing at Nyamatsine Business Centre, Odzi and he is not employed. Accused 2, is a male adult residing at Plot 45 Alma Farm, Odzi and he is employed as general worker at Plot 45 Alma Farm, Odzi. Accused 3, is a male adult residing at Village 12 Nyamajura, Odzi and he is not employed.

On a date to the prosecutor unknown but during the month of August 2018 at Plot 45, Alma Farm, a brown stray heifer joined herd of cattle being herded by accused 2. Accused 2 advised his employer Lovemore Manyati and other local neighbours namely Fidelis Mutupe and Shephard Khaza. Accused 2 and his employer decided not to register the brown stray heifer as a found stock with the police.

Accused 1 approached accused 3 looking for a buyer of a brown heifer. Accused 3 found a buyer. On 31 December 2018, accused 2 took the heifer to accused 3's kraal in village 12 Nyamatsine, Odzi. Accused 1 sold the brown heifer to the buyer brought by accused 3. On 2 January 2019, Maxwell Nyamavanga reported the case at ZRP Odzi and

accused 1 knowing that a case was reported went to the person who had bought the heifer, repossessed the heifer and returned it to accused 2's homestead on 8 January 2019. The value of the stolen heifer was \$600-00 and was recovered.

Accused 1 and 3 pleaded not guilty and accused 2 pleaded guilty. There was a separation of trial and the trial court put the following questions to the accused after facts had been read to him.

- “Q. Understand and agree with the facts?
A. Yes.
Q. So is it correct that on 31 December 2018 at Village 12 Nyamajura, Odzi, you took a stray cattle as alleged?
A. Yes.
Q. You had the owner's consent to take it?
A. No.
Q. You intended to deprive the owner permanently of the cattle?
A. Yes.
Q. You knew that your conduct was unlawful?
A. Yes.
Q. Any defence?
A. No.”

Verdict: Guilty as charged.”

The learned Provincial Magistrate in his reasons for sentence indicated that there were special circumstances in that a stray bovine which the accused was keeping and the accused decided to sell it after the death of his father so he had urgent need for money to attend to his father's funeral. He concluded that the circumstances are special because there was a huge temptation on accused to dispose the bovine which he was keeping but whose owner he did not know.

Accused was sentenced to 4 years' imprisonment of which 1 year imprisonment was suspended for 5 years on condition within that period accused does not commit any offence involving dishonesty and for which accused will be sentenced to imprisonment without the option of a fine.

The facts of this matter raise a number of issues which render the conviction open to attack. I am not satisfied with the propriety of the conviction of the accused. The charge sheet shows that the owner of the heifer is yet to be established and the charge ends alleging that the accused intended to deprive permanently the unknown owner. The State outline states that complainant is the State represented by Maxwell Nyamavanga. Maxwell Nyamavanga is the one who filed a report of stock theft at Odzi Police Station, the pertinent question is, can that make him the complainant? If he was the complainant why did the State allege on the charge

sheet that the possessor or the owner was unknown and why did the State not allege that the heifer belonged to the State? At the time the heifer was allegedly stolen, who was the owner or possessor of that heifer?

The State outline shows that accused, Evans Munotumaani was employed by Lovemore Manyati. Thabane Ngwazani is the one who sold the heifer and met Evans. Evans Munotumaani delivered the heifer to George Ndimani. When the matter was reported to the police, Thabane Ngwazani repossessed the heifer from the buyer, drove it and dumped it at Evans Munotumaani's place of employment on 8 January 2019. It is obvious that Thabane Ngwazani did that to avoid arrest by the police since he was the one who sold the bovine beast. It is not clear as to when Evans sold the beast to fund his father's funeral, the issue of funding the funeral surfaces when the learned trial Magistrate was dealing with special circumstances.

It is not clear on the facts nor on the encompassing of the essential elements for stock theft as to when Evans committed the crime. It is trite law on special circumstances that they should not be peculiar to the offender but extra ordinary to the crime. It is not out of reach to conclude that the trial court sweated to find special circumstances because it was aware that the conviction was not proper so had to pass a lenient sentence.

It is also possible that Evans Munotumaani was sacrificed by the employer and implicated to protect Mr Manyati. How could an employee sell a beast without the owner of the herd's knowledge? These issues could have been exposed if the essential elements were well traversed.

In the matter of the *S v Machokoto* 1996 (2) ZLR 190 (H) GILESPIE and CHINHENGO JJ were confronted with virtually an identical situation as in this case and p 201 G H his Lordship GILLESPIE J had this to say:

"In Hunt South African Criminal Law and Procedure Vol II Common Law Crimes 2nd ed by Milton at p 602, theft is defined as the unlawful *contracratio* with intent to steal a thing capable of being stolen. This definition is accepted as accurately embodying the cardinal elements of the offence. It involves four essential elements – the taking, the unlawfulness, the intent and the fact that the property was capable of being stolen. Obviously, these four elements can be and most frequently are, explained to the accused by three questions:

6. Q. Did you take this property?
Q. Did it belong to the complainant?
Q. By doing so did you intent to deprive him permanently of his ownership?

A fourth question

- Q. Did you have any right to do so?

is usually and often unnecessarily added. These questions, it must be said, by no means necessarily constitute a proper explanation of the essential elements in all possible circumstances in which a theft might be committed and charged. Had the magistrate used this formula, however, he would surely have stumbled upon the defect in the charge which is mentioned by Chinhengo J, namely the unstoppable averment that the alleged stolen animals were the property of the state. However leaving aside that point, which needs no further remark by myself, these questions even had they been put, are by no means such that they would have constituted adequate explanations of the essential elements of this particular charge. The facts of this case provide an exemplary lesson in the need to adopt one's questioning by way of explanation of the charge, to the individual circumstances of the case."

On 31 December 2018, Evans Munotumaani did not sell the heifer to the buyer. It is not clear as to when Evans sold the beast to Thabane Ngwazani, and it is not explained to the accused, Evans, why Thabane Ngwazani returned the heifer to Evans Munotumaani. All this explanation ought to have been sought during the covering of the essential elements to the charge, had the court *a quo* exhaustively explained all these aspects to Evans the court would have detected the problem. Evans Munotumaani heralded to the neighbours about the heifer, his employer kept it openly and moreso where the State alleged that the owner was not yet established, possession by the accused was *bona fide*. It cannot be ruled out that the heifer could have been abandoned, see *S v Machokoto (supra)* on 9 203 A-C. In any case if the facts clearly pointed to the guilty of Evans Munotumaani, the question is why did the State decide to join the other 2 accused? What was it that they did to be implicated and since the accused, Evans was not legally represented this aspect was supposed to be clarified by the trial court. On p 204 B in the *Machokoto (supra)* the court concluded:

"It follows that if the accused genuinely, even if wrongly, believes an animal to be abandoned or without owner, then he may assert a claim of right as a defence to the charge of theft. More than that, if such was his state of mind, than he is properly to be regarded as a *bona fide* possessor of the animal and thus entitled to its fruits. This provides a defence to the charge relating to the second of progeny of the first, the defence here is not based so much on a claim of right but on the circumstances that the animal cannot be stolen, since it is properly that of the accused," (my emphasis).

The accused was but an employee at Plot 45 Almar Farm and this was public knowledge even to the co-accused. The court wonders why the employer was not charged as well if the conduct of this employee was blemish. It is apparent to the court that there are a number of grey areas which clouds the conviction of the accused in this case and the charge as well as the facts are fatally defective. Setting aside the conviction on the charge ought to be regarded as an acquittal on the merits. The conviction should be set aside on this basis and substituted by the following:

Accused is found not guilty and acquitted.

A warrant of liberation is hereby issued.

MWAYERA J agrees _____

Mutungura & Partners, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners