PEARSON KADZVITI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 27 July & 05 August 2022

Application for leave to appeal

G Madzoka, for the applicant
R Chikosha, for the respondent

CHIKOWERO J:

1. This is an application for leave to appeal to the Supreme Court.
2. This court upheld the judgment of the magistrates court convicting the applicant of theft and the sentence of 24 months imprisonment of which 6 months were suspended for 5 years on conditions of good behavior.
3. The applicant intends to appeal against this court's judgment confirming both the conviction and sentence.
4. The judgment was handed down on 23 May 2022 under the name *Pearson Kadzviti* v *The State* HH 322/22
5. The magistrates court was satisfied that the respondent had proved beyond reasonable doubt that the applicant had, on 4 July 2013 and at Zimbabwe Electricity Transmission and Distribution Company (ZETDC) Mabelreign Depot, Mabelreign Shopping Centre in Harare, stolen a 500 KVA transformer serial number T 9 294LC14 belonging to the ZETDC which he then sold to Tirivangani Muringani, the Managing Director of Speartech Electrical.
6. It rejected as manifestly false the applicant's defence that he had moved the transformer from ZETDC Mount Hampden to Innscor in the Central Business District with the authority of his superior as a loan to Innscor.

7. This application turns on whether there is a reasonable prospect of success in the intended appeal against the conviction and sentence. In other words, whether the intended appeal has substance see *State* v *Mutasa* 1988 (2) ZLR 4 (SC).
8. The respondent's attitude to the application is reflected in a one page response filed on 14 July 2022. It contains three short paragraphs. These are:

> "BE PLEASED TO TAKE NOTICE that respondent does not intend to oppose the relief being sought.
>
> It is only fair that applicant be given an opportunity to pursue the one and only avenue now open to him in his quest for justice.
>
> Respondent suffers no prejudice if applicant is granted leave to appeal to the Supreme Court".

9. Needless to say, the response does not advert to the legal principles applicable in an application of this nature. It does not attempt to demonstrate why the circumstances of the matter justify the granting of the application.
10. I turn to consider whether there is substance in the proposed grounds of appeal
11. The first is this:

> "1. THE COURT *A QUO* ERRED IN HOLDING THAT IT WAS NOT NECESSARY FOR IT TO CONSIDER THE FIRST GROUND OF APPEAL BEFORE IT, WHILE AT THE SAME TIME HOLDING THAT THE GROUND HAD NO MERIT"

12. My view is that this contention seeks to promote form over substance. It is academic. It is founded on para 23 of the judgment sought to be appealed against , which reads:

> "23. We have already traversed the totality of the evidence on record and concluded that the conviction was justified. In the circumstances, it becomes unnecessary for us to determine whether the trial court committed an irregularity in refusing to discharge the appellant at the close of the case for the prosecution. There is thus no merit in the first ground of appeal."

13. That ground of appeal reads:

> "1. The court *a quo* erred and misdirected itself in wrongly putting the appellant on his defence after close of state case without providing any full reasons and without touching on all the evidence led during trial for its decision on the basis that more reasons would follow in the main judgment". (emphasis is mine)

14. We understood the applicant to have been contending that the magistrates court's refusal to discharge him at the close of the case for the prosecution was wrong. Since we were seized with an appeal against conviction after evidence had been adduced in defence of the applicant, the question was whether, assuming that the refusal to discharge was an irregularity, there was other evidence justifying the decision to convict. We concluded that there was such evidence. This explains why we stated that:

> "… in the circumstances, it becomes unnecessary for us to determine whether the trial court committed an irregularity in refusing to discharge the appellant at the close of the case for the prosecution".

15. In this vein, the attack on the sentence in para 23 of the judgment amounts to nit-picking. That sentence does not suggest that the first ground of appeal was not dealt with. The ground was not an attack of the failure to give full reasons for refusing to discharge the applicant at the close of the case for the prosecution. It was not an attack of the failure to take into account all the evidence adduced by the state in dismissing the application for discharge at the close of the case for the prosecution. Those two were put forward as reasons for the ground itself, to wit, that the refusal to discharge was a wrong decision. Having concluded that the applicant was ultimately correctly convicted, we found no merit in the substance of the first ground of appeal. Resultantly, there is no merit in the first proposed ground of appeal.

> THE COURT *A QUO* ERRED IN HOLDING THAT THE APPELLANT'S CONVICTION BY THE MAGISTRATE RENDERED IT UNNECCESSARY TO CONSIDER THE FIRST GROUND OF APPEAL, NAMELY THAT THE MAGISTRATE HAD ERRED IN FAILING TO PROVIDE FULL REASONS FOR THE REFUSAL OF DISCHARGE AT THE CLOSE OF THE STATE CASE.

16. The above is the second proposed ground of appeal.
17. As already pointed out, the ground of appeal was not a failure to provide full reasons for the refusal of discharge at the close of the state case.
18. Accordingly, the contention taken, not being a correct reading of the applicant's own ground of appeal, has no substance.

- THE HIGH COURT ERRED IN CONFIRMING THAT THE APPELLANT HAD UNLAWFULLY TAKEN THEREBY STOLEN COMPLAINANT'S 500 KVA TRANSFORMER (SERIAL NUMBER T 9294LC14) WITH THE INTENTION TO PERMANENTLY DEPRIVE THE COMPLAINANT THEREOF , IN CLEAR DISREGARD OF THE APPELLANT'S DEFENCE WHICH WAS CORROBORATED THAT THE TRANSFORMER HAD BEEN LOANED WITH THE CONSENT AND AWARENESS OF THE APPELLANT'S SUPERIOR

- THE HIGH COURT ERRED AND MISDIRECTED ITSELF IN HOLDING THAT THE APPELLANT HAD RECEIVED PAYMENT FOR THE COMPLAINANT'S TRANSFORMER IN THE ABSENCE OF COGENT EVIDENCE THAT THE PAYMENT HE HAD RECEIVED WAS FOR THE COMPLAINANT'S TRANSFORMER.

- THE HIGH COURT ERRED AND MISDIRECTED ITSELF IN HOLDING THAT THE EVIDENCE OF STATE WITNESSES LIKE PHILLIP MAKAHAMADZE AND DEFENCE WITNESSES LIKE JERIPHANOS SINGENDE AND GODFREY MHONDORA OF THE LOAN AGREEMENT COULD NOT BE GIVEN WEIGHT BECAUSE THEY HAD PARTICIPATED IN THE THEFT WITHOUT EVIDENCE TO THAT EFFECT.

19. These are the proposed grounds of appeal numbers 3, 4 and 5 respectively.
20. They raise one complaint namely, that this court misdirected itself on the evidence in confirming the rejection of the applicant's defence.
21. What these grounds really advocate in my view is a piecemeal process of adjudication. That is not the correct approach to an assessment of evidence. Rather evidence is evaluated as a whole. See *P J Schwikkard and SE Van De Merwe Principles of Evidence, 4th Edition* p 567.
22. This court did not disregard the applicant's defence. Neither did the magistrates court. Rather, detailed reasons were given, and upheld on appeal, for preferring the evidence of Stephen Marunga, Phillip Manditamira and Tirivangani Muringani over the applicant's defence of a loan as spoken to by Makahamadze, Mhondora and Singende. The imperfections in Makahamadze's evidence were not fatal to the State's case. There is no chance that the Supreme Court, on the record, can find differently. Indeed, the learned magistrate presided over a trial where the facts spoke for themselves. He remarked:

> "The facts of this matter really clearly speak for themselves that, the accused whilst in his position as lead Artisan at ZESA, Marlbereign identified a transformer at Mt Hampden, that transformer was the (*sic*) declared faulty and moved to ZESA Marlbereign depot instead of being taken to stores.
>
> It was then taken for testing at ZENT, and movement of it being paid by accused, it was tested and delivered at Innscor where accused then received payment for it, and that is theft.
>
> The Court had shown how the taking was unlawfully and that it was to permanently deprive complainant as evidenced by Muringani who stated in his evidence-in-chief, he paid for it and there was no loan agreement for a loan with ZESA."

23. The chain of evidence tracing the movement of the transformer from Mt Hampden to Innscor, via ZETDC Mabelreign and ZENT, with the applicant personally engaging the same transporter and footing such transportation costs, coupled with the eventual sale of the transformer to Muringani and receipt of 70% of the purchase price (all documented) could only have led to the applicant's conviction. That Makahamadze, Singende and Mhondora, who all fought in the applicant's corner, were neither prosecuted nor convicted for the same offence was immaterial in the circumstances. They all remained suspect witnesses. Their evidence could not withstand the force of that which was common cause as buttressed by the documentary evidence adduced by the prosecution. In short, the evidence against the applicant was clearly overwhelming.
24. As regards the intended appeal against the sentence, my view is there simply is no room for the applicant to think that the Supreme Court may impose a non-custodial sentence.
25. The applicant, then Acting ZETDC Mabelreign Depot Foreman, not only stole but sold his employer's transformer and pocketed the proceeds. His moral blameworthiness was high. The same reasons expressed by the magistrates' court in justifying a custodial sentence demonstrate why a non-custodial sentence was inappropriate. I am fully persuaded that the intended appeal against this court's decision to uphold the sentence is hopeless.

ORDER

26. The application for leave to appeal to the Supreme Court be and is dismissed.

Mawadze and Mujaya Legal Practitioners, applicant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners