PETER DANGER KONZO
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 20 January 2015

Criminal Appeal

T.K. Hove, for the appellant
T. Mapfuwa, for the respondent

BERE J: The appellant was tried and convicted of theft as defined in s 113 of the Criminal Law (Codification and Reform) Act [*Cap 9:13*]. He was sentenced to 12 months imprisonment of which 3 months were suspended on condition of restitution and the remaining 6 months were suspended on condition of 210 hours of community service performance.

Aggrieved by both the conviction and sentence the appellant noted this appeal.

Broadly speaking the following are the notable grounds of appeal in this case.

The appellant avers that the learned magistrate erred in failing to distinguish between what was sold and what was not sold by the appellant to the complainant.

It was also contended that the appellant ought note to have been prosecuted for what appellant alleged was purely a civil case as between the complainant and the appellant, the position being that civil matters are best dealt with by the civil courts and not the criminal courts.

On sentence the contention made was that the sentence imposed induced a sense of shock if regard is had to the circumstances of this court.

To the contrary, the respondent has opposed the appeal and argued in support of the conviction but expressed reservations on the sentence imposed and implored this court to use its wide discretion in revisiting the sentence imposed because of the reasons spelt out in the heads of argument.

A proper reading of the learned magistrate judgment shows in my view a fair analysis

of the evidence that was presented to him.

The learned magistrate did not find fault in the testimony of both the complaint Enock Panganai Mutsambiwa and George Chimanyiwa. The learned magistrate made a specific finding that the two witnesses gave impressive and supportive evidence of what transpired.

The complainant's testimony was to the effect that when he bought the processing plant from the appellant it included the frame and box containing 4MCBs and a 60 metre long electric cable, the items forming the subject matter of the alleged theft.

The complainant completely denied the attempt by the appellant to try and isolate the allegedly taken items from the plant sold to him by the appellant. His uncontroverted testimony was that when the appellant showed him the plant it included all the accessories including the MCB and cable which were used as a starter to the machine which would in turn propel the whole system.

The import of the complainant's testimony was that one could not have referred to the plant without referring to the stolen items as they were an intergral part of the machine. The witness's position became clear during his cross-examination when the following exchanges took place.

> "Q. Confirm you were sold a machine by the accused?
> A. Correct.
> Q. Did you also buy the MCB together with the MCB (plant)?
> A. Yes.
> Q. I put it to you that it is wrong since its fixed to the building independent to the plant and the equipment
> A. Not correct. There is another MCB independent to the plant and is attached the building and the one in question is attached to the machine or plant". My emphasis[1].

This aspect of the complainant's testimony found firm corroboration from the evidence of another key State witness George Chimanyiwa when the following exchange took place during his evidence in chief:

> "Q. Did you witness anything in the matter?
>
> A. When I arrived at work on 21 February 2012 I discovered that the switchboard which has MCB cable together with a cable connected to the plant was also missing.
>
> ……
>
> Q. What is a plant according to you?
>
> A. It is a set, which requires the processing of sand for resale. It includes MCB, water, pumps, rollers, 6m belt (conveyer belt, 5 belt to turn the electric motors (crow plates, a washing dish, gearbox, shaft lights, electric cables, horse pipes".

Q. Anything else?

A. The first MCB propel the belt when processing the sand. The third MCB receive electricity from the meter cable and distribute electricity to the other MCB (2). Of the stolen MCB the first would facilitate the use of the water pump. When the set was sold to Konzo (the appellant) from a certain Chinese man that is the same plant which was sold to him". [1]

There can be no doubt in my mind that the items allegedly taken by the appellant were an intergral part of the plant sold to the complainant.

To cement this position, when this same witness was being cross-examined he made it very clear that he was the one who showed the complainant what was being sold to him by the appellant at the instance of the latter.

I am not persuaded by the appellant's argument that the allegedly stolen items were not part of the sold plant. To proffer an argument along those lines would mean that the complainant was purchasing a non-functional plant. Only naivety would attract such an argument.

The appellant must not be believed when he tries to peddle this argument. The appellant tried to bring decency to his argument by dragging into the proceedings one Albert Matutu a disgruntled worker who appeared to have parted with the complainant in an unceremonious way over his unpaid wages.

It would certainly be naive for one to buy into the appellant's story.

The appellant has gone to town trying to explore the basic laws of ownership. This case does not hinge on the legal principals of the law of property but rather on what was sold to the complainant.

The nocturnal visit by the appellant to the plant and the subsequent taking away of the items without even the courtesy of seeking the authority of the new owner of the property places the appellant squarely within the tradar of a thief. It only served to further compound his position and strengthened the criminal case against him.

There can be no doubt that the appellant is on slippery ground in as far his conviction is concerned. The appeal against conviction is dismissed.

I now turn to consider the appropriateness or otherwise of the sentence imposed.

It is strange and almost unbelievable that a magistrate would just pronounce a sentence without reasons. It is a serious misdirection and this court is at large.

My brother MUTEMA J could not have put it in any better way when he made the following observation:

> "I must add here … failure … to give reasons for the sentence imposed amount to a gross irregularity for how can the appellate or review court determine the justification of the sentence that was imposed".[1]

The following observations in this case are common cause.

Firstly, the complainant testified that the cable and the 3 MCBs were recovered and that he did not know the value of he recovered items. (See p 18 of record).

Secondly the second state witness at p 26 of the record of proceedings stated that all the stolen items were recovered but that he did not know the value of that property.

Thirdly, the appellant, whilst conceding that the items were recovered and given back to the complainant gave their cumulative value as $85-00.

Given this evidence in the record of proceedings it was certainly not competent on the part of the presiding magistrate to order restitution of the recovered items.

The sentence will accordingly be altered to take this anomaly into consideration. The first part of the sentence is amended to read as follows:-

> "12 months imprisonment of which 6 months imprisonment is suspended for 5 years on condition the accused does not during that period commit any offence involving dishonesty and for which upon conviction he is sentence to imprisonment without the option of a fine."

Reference in the sentence to restitution is set aside and the other aspect of sentence referring to community work is confirmed.

HUNGWE J agrees …….

T.K. Hove and Partners, appellant's legal practitioners
Attorney-General's Office, respondent's legal practitioners