

EPHRAIM KANJAWALA
and
TAURAI CHIMBANGU
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 18 November & 3 December 2014

Criminal Appeal

L Ziro, for the appellant
F Kachidza, for the respondent

HUNGWE J: The appellants allegedly stole certain irrigation pipes and were convicted of theft as defined in s 113 (1) of the Criminal Law (Codification & Reform) Act, [Cap 9:23]. They were each sentenced to 3 months imprisonment which were wholly suspended on condition they made restitution to the complainant through the Clerk of Court, Goromonzi, in the sum of US\$160-00. They appeal against conviction and sentence.

The appellants in their grounds of appeal state that the court erred in failing to find that there was consent to the taking of the pipes therefore there was no intention to deprive the complainant of the same. They argue that as there were discrepancies regarding the number of pipes stolen, that discrepancy entitled them to an acquittal. The ground of appeal against sentence was in valid and therefore nothing turns on the sentence imposed.

The appellants argue that there was consent to the taking of the pipes. However, a perusal of the reasons for judgment indicated that the trial court dealt with this aspect at length because the appellants raised it at the trial. In the detailed reasons the court found that the appellants knew that there was a dispute between their employer and the complainant. The complainant had refused to unlawfully connect their employer to the electricity grid. This was the source of friction between the two. When the appellants approached the

complainant's employee, Clemence claiming that they had been sent to collect irrigation pipes, Clemence then advised them that they had no pipes belonging to their employer. He asked them to check. They interpret the permission as permission to carry away the pipes in issue. In assessing the testimony of the witnesses on this issue, the court *a quo* concluded that the appellants clearly knew that Clemence did not consent to the taking of the pipes since he telephoned the complainant who advised him to make a police report.

Had he consented to the taking, there was no reason for him to have reported the matter to his employer, the complainant. Consequently the court rejected this defence of consent to the taking. In my view, there is no basis upon which to attack this finding as it is supported by the evidence. In the result therefore this ground fails. As for the intention to deprive the owner permanently, it follows that upon finding that there was no consent, the only inference was that the appellants intended to deprive the owner permanently of his pipes. The court dealt in detail with the issue of the number of pipes stolen. Clemence told the court that from the homestead 3 pipes were taken. From the field, 13 pipes appear to have been taken, making the number 16. 14 pipes were recovered from the appellants. From this, the court concluded that 16 pipes were stolen and proceeded to convict. I agree with the findings regarding the number of pipes stolen. In my view, even if the issue went unresolved, one would have to proceed on the admitted number of 14 recovered pipes to convict and sentence. Even then, that would only have affected sentence since the taking of the 14 pipes is admitted.

In the result the appeal against both conviction and sentence is dismissed.

The wording of the sentence however calls for attention. The condition of suspension is worded merely on condition they make restitution. The period within which to make restitution is not given. It ought to have been given so as to provide clarity as to when the alternative of imprisonment should be activated. There is need to have a date by which such restitution ought to be made good. The prisoner should know when he can take advantage of restitution. In this regard therefore, an amendment of the sentence to reflect this is in order. The sentence is amended by the addition of the words "on or before 31 December 2014."

The sentence is amended to read:

"3 months imprisonment wholly suspended on condition the accused makes restitution in the sum of US\$160,00 to the complainant through the Clerk of Court, Goromonzi, on or before 31 March 2015, the one paying, the other to be absolved."

Bere J agrees:.....

WOM Simango & Associates, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners