

LYSON ZIYADHUMA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 16 September, 2014

Criminal appeal

I. Gonese, for the appellant
S. Fero, for the respondent

BERE J: The appellant was convicted for contravening s 114 of the Criminal Law [Codification and Reform) Act [*Cap* 9:23], on 14 February 2013, and sentenced to the minimum mandatory sentence of 9 years after the learned presiding Magistrate found no special circumstances to warrant a lesser sentence.

This appeal is against both conviction and sentence.

In his notice of appeal the appellant has laid basically three grounds of appeal, *viz*, that the learned Magistrate failed to appreciate the existence of the defence of mistake or ignorance of ‘facts’, whatever was intended.

The second ground of appeal is given as that the learned Magistrate misdirected himself when he convicted the accused person when such conviction was not supported by evidence.

Finally, it was contended that the court *a quo* misdirected itself by failing to give reasons for the conviction of the appellant.

As regards sentence the point taken is that the learned Magistrate grossly misdirected himself in that he failed to adequately and properly explain the issue of special circumstances before the appellant was sentenced.

The learned magistrate was also attacked on his sentence for allegedly paying lip service to the appellant’s issues in mitigation and in particular in failing to properly explain the issue of special circumstances before sentence.

The respondent's position is that the conviction cannot be faulted and that it need not be interfered with.

It is on sentence that the respondent felt constrained to support it. Counsel for the respondent felt that there was merit in the argument that no special circumstances were explained to the appellant. The respondent suggested that this court considers the remittal of the case back to the court *a quo* for purposes of having the issue of special circumstances further canvassed.

It might well be true that at the time the appellant's counsel perused the court record the written reasons were not there but I find it inconceivable that the appellant's counsel would have come to the conclusion that when the Magistrate convicted the appellant he just did that with no reasons at all.

In any event the proper procedure to have adopted if indeed there were no reasons for judgement would have been for the appellants counsel to file an application for review for such a procedural irregularity. An appeal could only have been an attack on the reasons for judgement, which incidentally the appellant's counsel did which presupposes that there must have been reasons somewhere which led to the framing of the grounds of appeal.

The irony is that the reasons for judgement given by the learned Magistrate properly fit into the evidence that was led at trial making it highly improbable for one to imagine that those reasons were manufactured or created after the conviction of the appellant.

The judgement as crafted by the learned Magistrate clearly shows that the appellant crucified himself by projecting himself as the owner of the complainant's beast to whoever he interacted with.

According to the evidence of Evson Chakamba, it was the appellant who personally approached him to hire his motor vehicle to ferry the beast forming the subject matter of these proceedings.

The appellant disclosed to the witness that he wanted to sell the beast to T.M Supermarket but somehow the slaughtered animal ended up being taken to Dzonzai Butchery. No meaningful challenge was given to the evidence of this witness, meaning the appellant was substantially in agreement with the evidence of this witness.

The evidence of Blessing Chakamba corroborated that of his father Evson Chakamba in all material respects in further cementing the guilt of the appellant.

The young man's uncontroverted evidence was that the appellant claimed ownership of the beats which was subsequently slaughtered at the abattoir before the carcass was taken

to Dzonzai butchery in Chipinge. The witness confirmed that throughout, the appellant was firmly in charge of the beast.

The witness further disclosed to the presiding Magistrate that throughout his interaction with the appellant, the appellant disclosed that the beast was his. Not only that but that the appellant personally exhibited fake clearance papers for the animal.

The learned Magistrate made a very careful analysis of the evidence that was presented including the rejection of the evidence by the appellant where he attempted to paint the picture that the animal belonged to his accomplice.

In my view the learned Magistrate's finding on the guilt of the appellant was beyond reproach. It cannot be faulted and need not be interfered with by this court. The guilt of the appellant did not even need one to invoke the provisions of sections 205 and 206 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. This is so because all indications are that the attempted disowning of the beast which only assumed prominence during the defence case must have been an after-thought. This explains why this was not suggested to witnesses who actually dealt directly with the appellant. If indeed the beast belonged to his brother as he stated in his defence outline, he would have disclosed this to all the witnesses he dealt with.

On sentence, the respondent has conceded that the issue of special circumstances was not properly explained to the appellant hence the court should be at large in respect of the sentence imposed by the court *a quo*.

The court *a quo* was attacked for failing to adequately and properly explain the issue of special circumstances to the appellant before slapping him with the mandatory 9 year gaol sentence.

Counsel for the appellant's criticism of the court *a quo* in this regard was informal by the inscription by the learned magistrate that;

"Special circumstances peculiar to the case explained and understood¹."

It was argued by Mr *Gonese* for the appellant that the explanation inscribed in the record of proceedings was evidently inadequate and the learned magistrate ought to have given a more elaborate and meaningful explanation. I agree.

It is imperative in my view that where there is need to deal with the issue of special circumstances, the actual explanation given by the magistrate be recorded to avoid the appeal court having to speculate on what was explained to the appellant before sentencing. This is

¹ Page 13 of the record of proceedings.

particularly so where the issue is raised on appeal. The proper approach should be for the magistrate to explain what special circumstances are and also the consequences of a failure by the convicted person to give such special circumstances. Both the explanation given by the magistrate and the responses given by the convicted person must be recorded.

This same issue came up for consideration in the Supreme Court of this country in the case of *S v Chaeruka*² where Mc Nally JA with the concurrence of others made the following remarks;

“ I am satisfied that in the circumstances of this case the magistrate should have gone much further than he did in advising the appellant why the case had been remitted, what the minimum penalty was, and how that penalty could only be avoided by proof of special circumstances. He should have gone on to explain what special circumstances were

The following cases are also of relevance on the issue of special circumstances;

*Tracking and Construction (Pvt) (Ltd) and Anor*³ v *S, Telecel Zimbabwe v The State*⁴ and *S v Dube and Another*⁵.

The State has made a concession that there is merit in the appeal against sentence and I am more than satisfied that that concession was well made.

Accordingly, the conviction is confirmed but the sentence is set aside and the matter is remitted for a proper hearing on the question of special circumstances, after which the magistrate will impose sentence afresh.

HUNGWE J agrees

Gonese, Majome & Company, appellant’s legal practitioners
Attorney General’s Office, respondent’s legal practitioners

² 1998 (2) ZLR 226 (S)

³ HH 195-86

⁴ HH 155-06

⁵ 1988 (2) 385 (SC)