YUSUF THOMAS MAILOS
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU and CHIKOWERO JJ
HARARE, 21 and 25 March 2022

Criminal Appeal

L Mauwa, for the applicant
F I Nyahunzvi, for the respondent

ZHOU J: This is an appeal against the conviction and sentence imposed upon the appellant following his conviction on two counts of theft of trust property as defined in s 113(2)(d) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and theft of a trailer as defined in s 113 (1)(a) of the same Act. For count one the appellant was sentenced to 4 years imprisonment; for count two he was sentenced to 5 years imprisonment of which 2 years imprisonment was suspended on condition that he restitutes the complaint in the sum of US $15 000 through the clerk of court, Mbare Magistrates' Court. The remaining 7 years imprisonment was to be effective.

The facts which were found to have been proved beyond reasonable doubt by the court *a quo* were as follows:

In respect of count one, the appellant went to the premises of the complainant, an entity that is in the business of hiring out motor vehicles. He was accompanied by another person. Appellant and his colleague hired a Toyota Hilux which they never returned to the complainant. In respect of count two, the appellant was found to have stolen a trailer belonging to the complainant.

The appellant's defence, as set out in the defence outline, was that in respect of count one he merely accompanied one Tawodzera Mahachi who hired the motor vehicle from the complainant. In respect of the second count, the appellant's defence was that he was approached by one Raymond Phiri and another person called Steven who asked to hire his truck to bring in some groceries from South Africa. He advised them that his truck had no trailer. They offered to hire one themselves, which they duly did. The trailer together with his truck were attached in Malawi at the instance of a company owned by one R. Gafah who had been supplied with information about its movement by Raymond Phiri.

The court *a quo* convicted the appellant after a thorough analysis of the evidence tendered on behalf of the state and having come to the conclusion that the evidence proved the guilt of the appellant beyond reasonable doubt. The court a quo rejected the appellant's version in respect of both counts; it disbelieved the appellant.

The position of the law is settled, as was held in the case of State v Shoko SC 118-92:

> "A count (of appeal) will not interfere with the trail court's assessment of credibility lightly. There has to be something grossly irregular in the proceedings to warrant such interference. This is so because the trial court by having the witness before it is better able to consider all other factors relevant in assessing credibility. The appeal court on the other hand, is confined to the record."

In other words, this court does not readily interfere with conclusions in respect of the credibility of witnesses reached by the court a quo in the absence of evidence of an irregularity or a misdirection affecting that assessment. In this case we do not find any such misdirection or any irregularity afflicting the manner in which the credibility of the witnesses was assessed.

The appellant's first ground of appeal in respect of count one is that the court *a quo* convicted him in the absence of evidence of a trust agreement. In this respect the appellant's case is based solely on the fact that the written car rental agreement recorded the renter of the motor vehicle as Tawodzera Mahachi. But that memorandum does not purport to be the whole agreement between the parties. The court *a quo* correctly, in our view, considered it not in isolation from but together with all the other evidence which was led on behalf of the state. The first state witness Tsungirayi Gwaze testified that the appellant who represented himself as Joseph Mahachi was the one who actually presented himself as the person who wanted to hire the motor vehicle. Tawodzerwa Mahachi was less active in the deliberations. His name was only written on the written memorandum because he was the one who held the driver's licence and was going to be the driver of the motor vehicle. Tsungirayi Gwaze stated that she enquired as to who was responsible for the hire and the appellant advised that it was his responsibility. His fake name was conveniently written as the next of kin on his instructions. The appellant referred to his accomplice, Tawodzerwa Mahachi, as his brother. Appellant also gave the Telecel mobile number which was recorded against the name of Joseph Mahachi. That is the number that was used by the investigating officer to track him until his correct identity was finally established. Appellant stopped using the Telecel line when he realised that the complainant was now checking on the whereabouts of the motor vehicle. The witness was consistent in her evidence that the appellant

was the one who walked into her office asking to hire a motor vehicles. He was not merely accompanying Tawodzera Mahachi but was the one who first approached the complainant looking for a motor vehicle to hire.

The appellant, in the second ground of appeal, takes issue with the failure to call the service providers or an expert to prove that the Telecel line was being used by him. The mobile number in question was given to the complainant by the appellant. He did not challenge this piece of evidence. He sought to state in his evidence that he had forgotten the Telecel number that he was using. But that number was already recorded in the car rental agreement. There was therefore no misdirection in the acceptance of the evidence of the investigating officer that he was able to link it to the applicant by confirming with the persons whom the applicant had called using that number. Clearly, the appellant only discarded the number in order to avoid being located by the complainant. The second ground of appeal is therefore without substance.

The third ground of appeal suggests that the court *a quo* erred by convicting on the basis of evidence of identification by a witness who had seen the appellant once in a period of three years after the commission of the offence. This ground of appeal is misplaced, because the identity of the appellant was never in issue. It is common cause that the appellant went to the premises of the complainant on 14 May 2013 in the company of another man. It is also common cause that the visit was for the purpose of hiring a motor vehicle. The only issue, arising out of the appellant's defence, was whether the appellant was also involved in the hiring of the motor vehicle.

In respect of count two, it is common cause that the complainant's trailer was pulled by a truck belonging to the appellant. He states that the truck which was pulling the trailer was attached in Malawi and, presumably, sold at the instance of appellant's creditor. The only issue was whether the appellant was involved in the theft of the trailer or, as he alleged, persons who had allegedly hired his truck are the ones who stole the trailer. The court *a quo* found against the appellant that his deliberate avoidance to explain the whereabouts of the trailer means that he had committed the theft himself. The trailer was reported to the police in Zimbabwe as having been stolen. This means that both the police and the complainant were looking for it. The appellant himself suggests that he was in Zimbabwe when the trailer was stolen. His claim that he believed that Raymond Phiri and Steven had hired the trailer is evidently false, and was correctly rejected by the learned Magistrate. The truck which was pulling the trailer was being driven by the

appellant's driver. The court *a quo* observed that for the trailer to cross the border one would have had to produce proof of its registration. Appellant does not explain what kind of documentation was produced to enable his truck to cross the borders with the complainant's trailer. These unsatisfactory features of the appellant's case made the Magistrate find that the appellant was guilty of the theft. We find no misdirection in the conclusion reached by the Magistrate.

For the record, it is noted that the respondent had filed a notice in terms of s 35 of the High Court Act [*Chapter 7:06*]. Having considered the grounds upon which the concession was based, the court was of the view that the appellant should address it on the merits of the appeal. We do not accept that the Magistrate's reasoning can be faulted for the reasons outlined earlier on.

On the sentence, the appellant's case is that the sentence imposed is so excessive as to induce a sense of shock. The second ground is that the court *a quo*'s sentence of 4 years imprisonment is too harsh when consideration is given to the fact that the complainant has been restituted. Sentencing is a matter within the discretion of the trial court. The appellate court only interferes with the exercise of a discretion where such discretion was not exercised judicially.

Th e court *a quo* noted that the complainant in count number one had invoked civil remedies to recover his loss. There is no evidence that full restitution had been rendered pursuant to such civil proceedings. However, clearly the court *a quo* was alive to that issue that restitution could be rendered when it imposed the sentence. However, there were other factors which the court *a quo* weighed against the mitigating factors. These included the considerable value of the property involved and the seriousness of the offence. To these must be added the careful planning involved as well as the manner in which the offence was executed. In both counts, the thefts were executed in such a way that the complainant would not recover the stolen property. When these factors are considered it cannot be said that the overall sentence imposed induces a sense of shock.

In the result, the appeal is dismissed in its entirely.

CHIKOWERO J agrees……

ZHOU J ……..

Mauwa and Associates, Appellant's legal practitioner
The National Prosecuting Authority, Respondent's legal practitioners