

INNOCENT TIPEDZE
versus
THE STATE

HIGH COURT OF ZIMBABWE
BERE & MANGOTA JJ
HARARE, 26 June 2013

Criminal Appeal

Appellant in default
Mrs S. Fero, for the state

MANGOTA J: The appellant appeared before the court sitting at Gutu facing the charge of stock theft as defined in s 114(2)(a) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. The State allegations were that, on a date to the prosecutor unknown but during the month of October, 2011 and at Village Tipedze which is in Chief Munyaradzi's area, Gutu, the appellant stole two oxen which belonged to one Tipedze Edith Utilia. It cited Tipedze Edith Utilia as the complainant. It placed the value of the allegedly stolen two oxen at an unstated figure and it informed the court that the cattle were not recovered.

The appellant pleaded not guilty to the charge and he denied having ever stolen the complainant's cattle. He, in defence of himself, informed the court that he was not in his home area but was in Harare during the month of October, 2008.

The appellant was tried and convicted of the offence with which he was charged. He was sentenced to 11 years imprisonment, 6 months of which were suspended on condition he restituted the complainant in the sum of \$400 through the clerk of court, Gutu on or before 31 August, 2011 and a further 6 months imprisonment were suspended for 5 years on the usual conditions of good behaviour.

The appellant was, accordingly, sentenced to an effective 10 years imprisonment. He appealed against both conviction and sentence.

Prior to the appeal being heard, the respondent filed a notice urging the court to deal with the appeal in terms of s 35 of the High Court Act, [*Cap 7:06*].

The court went through the record of proceedings and concluded with little, if any, hesitation that the trial of the appellant was a thoroughly hurried one and that, in the

mentioned hurry, the State and the trial court left many matters which required to be attended to unattended. The result of the mentioned observed set of circumstances convinced the court that the appellant's conviction was a consequence of some very serious misdirection on the part of the court *a quo*. For a start, the value of the allegedly stolen cattle was not made known to the court. It was not known because the State did not submit to the trial court an outline of its own case. It is in the mentioned outline that the value of the stolen cattle would have been stated. The court was surprised when it realised that part of the sentence which was imposed on the appellant was suspended on condition that the latter paid restitution of \$400 to the complainant. It was not known how that figure was arrived at. The complainant who testified in court did not inform the court about the value of her allegedly stolen cattle.

The witnesses who caused the arrest of the appellant contradicted each other in a very material way as regards the fact of what cattle they said they saw the appellant driving through their shop or shops when he allegedly left their place of business. One witness said he saw the appellant driving two "*oxen*" and the other said he saw him driving two "*bulls*". The testimony of the two witnesses was crucial to the conviction, or otherwise, of the appellant.

The State allegations were or are that the complainant's cattle were stolen from her on an unknown date but in October, 2008. The two witnesses did not even allude to that month in their testimony. All they stated was that they saw the appellant driving two cattle in the year 2008. Whether the time that they allegedly saw him do so was in summer, autumn, winter or spring remains a matter for conjecture.

The appellant raised the defence of the *alibi* and that was left unprobed. The State did not lead any evidence to show that the appellant was at his home area and not in Harare, as he had claimed, during the month of October, 2008. He may, or he may not, have been in his home area at the material time.

It is when such matters as have been stated in the foregoing paragraphs are taken into consideration that it cannot be stated, with certainty, that the conviction of the appellant was a safe one. It is, if anything, unsafe and cannot, therefore, remain undisturbed. The respondent's concessions were properly made.

The court has considered all the circumstances of this case. It is satisfied that the appellant's guilty was not proved beyond reasonable doubt.

The court, accordingly, orders as follows:

- (a) that the appeal be and is hereby allowed

- (b) that the conviction and sentence of the appellant be and are hereby quashed and set aside
- (c) that the appellant be and is hereby found not guilty and is acquitted of the charge.
- (d) that the Clerk of Court, Gutu Magistrate's Court, be and is hereby ordered to refund to the appellant the sum of money, if any, which the appellant may have paid pursuant to the restitution order of the court *a quo*.

MANGOTA J

BERE J agrees

National Prosecuting Authority, respondent's legal practitioners