OLEX MAMOCHE
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MANGOTA JJ
HARARE, 3 July 2014 & 28 January 2015

Criminal Appeal

B Pesanai, for the appellant
E Mavuto, for the respondent

HUNGWE J: The appellant and another were convicted of stock-theft as defined in s 114 (2) (a) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*] after a full trial. He was sentenced to 18 years imprisonment. He appeals against both conviction and sentence. His various and vague grounds of appeal, which do not meet the requirements of the rules of this court, are a feeble attempt to state that the evidence led during trial did not meet the threshold of proof beyond a reasonable doubt.

The court *a quo* found that the appellant together with his accomplice had stolen the two bovines and hired the second State witness, who owned a motor vehicle, to ferry their ill-gotten loot into Chitungwiza. He charged them US$30, 00 for the trip. He knew the appellant's accomplice. They gave him the story that they had bought meat from the farms just outside Chitungwiza but had failed to bring it home that day. They agreed to embark on the journey the next morning. Upon arrival at their destination, the second State witness, Dimmie Mabhunu, told the court that his vehicle started to overheat. The meat was contained in seven bags which were at an ant-hill. There was a river nearby so he decided to fetch water to resolve the vehicular challenges he faced. From the river he heard local villagers shout "Thief! Thief!" His clients were in trouble. He did not go back. Police picked him up later. The two clients were arrested by the locals for stock-theft. Police decided to charge the two after he explained that he was unaware that the cargo was stolen.

The court correctly observed that the second State witness, Dimmie Mabhunu, was a

possible accomplice whose evidence needed to be treated with caution. In the basic sense an accomplice witness means a witness to a crime who, either as principal, accomplice, or accessory, was connected with the crime by unlawful act or omission on his or her part, transpiring either before, at time of, or after commission of the offense, and whether or not he or she was present and participated in the crime. The word 'accomplice' has not been defined by the Zimbabwe Criminal Procedure and Evidence Act, [*Cap 9:07*]. However, a perusal of the case law appears to suggest that in Zimbabwe, an accomplice is one of the guilty associates or partners in the commission of a crime or who in some way or the other is connected with the commission of crime or who admits that he has a conscious hand in the commission of crime. It can also be said that an accomplice is one concerned with another or others in the commission of a crime or one who knowingly or voluntarily cooperates with and helps others in the commission of crime. An accomplice, in this sense, is a competent witness provided he is not a co- accused under trial in the same case. But such competency which has been conferred on him by a process of law does not divest him of the character of an accused. An accomplice by accepting a pardon under s 267 (2) of the Criminal Procedure and Evidence Act, [*Cap 9:07*] becomes a competent witness and may, as any other witnesses, be examined on oath; the prosecution must be withdrawn and the accused formally discharged under s 267(2) before he can become a competent witness. Even if there is an omission to record such discharge an accused becomes a competent witness on withdrawal of prosecution.

It will be clear from the above that Dimmie Mabhunu did not qualify to be treated as an accomplice since, arising from what the appellant must have said to the police as found by the trial court, the police decided not to treat him as part of the criminal enterprise. Although the police picked him up, or arrested him in connection with this offence, he was never formerly charged. In other words he was never treated by the police as part of the theft of the two bovines in question. The trial court was fully aware of the need to treat his evidence with caution. It mentioned that he was a "possible accomplice" thereby qualifying his status as a witness from being an accomplice in the strict sense. I am unable, therefore, to agree with the criticism by appellant's counsel that the witness's evidence ought to have been regarded as coming from an accomplice although, as in tradition, due to his closeness to the events constituting the crime charged, the court was required to treat his evidence with the necessary caution. I am satisfied that it did so.

The learned trial magistrate correctly warned himself of the apparent dangers posed by

such type of accomplice witnesses who, out of their intimate knowledge of the manner in which the crime was committed are so placed as to easily and conveniently embellish their evidence in order to divert attention from their true role by falsely heaping all blame on their fellow accomplices. See *S* v *Ngara* 1987 (1) ZLR 91 (S). As such there is need for corroboration of the evidence led from such witnesses.

The appellant argued that the court erred in disbelieving his story that he in fact had been asked by his friend and accomplice to come along and assist Dimmie Mabhunu to load certain bags of beef from the bush. The reason the beef had been left in the bush was that the place was inaccessible by vehicle. But the magistrate cannot be faulted when he rejected the appellant's version because by his own admission, Mabhunu left to fetch water for his overheating vehicle. He did not run away as appellant claims. He and his accomplices were found with the meat. It is a fact that the meat was produce of stolen cattle.

In Last Mupfumburi HH 64-15 (unreported) I said:

> "In *R* v *Mokoena* 1956 (3) SA 81 (A) at 85-86 it was laid down that the uncorroborated evidence of a single witness should only be relied upon if the evidence was clear and satisfactory in every material respect. Slight imperfections would not rule out reliance on that evidence but material imperfections would. The court stated that single witness evidence should not be relied upon where, for example, the witness had an interest adverse to the accused, or has made a previous inconsistent statement, has given contradictory evidence or had no proper opportunity for observation. However, in the latter case of *S* v *Sauls & Ors* 1981 (3) SA 172 (A) the Appellate Division stated that there was no rule of thumb to be applied when deciding upon the credibility of single witness testimony. The court must simply weigh his evidence and consider its merits and demerits. It must then decide whether it is satisfied that it is truthful, despite any shortcomings, defects or contradictions in that testimony. The approach adopted in the **Sauls** case was followed in the case of **Nyabvure S-23-88**. See also *Worswick* v *State* S-27-88, *S* v *Mukonda* HH-15-87, *S* v *Nemachera* S-89-86 and *S* v *Corbett* 1990(1) ZLR 205 (S)."

In the present case I am satisfied that the State has established proof of guilt beyond a reasonable doubt, notwithstanding the fact that the appellant had been subjected to assault by villagers. That assault ought to be subject of separate police investigations which in no way tainted the quality of the evidence adduced during appellant's trial by the court *a quo.* In the circumstances therefore the appeal against conviction fails.

As regards sentence the State conceded that because the learned trial magistrate did not give reasons for imposing 18 years for a single count of stock-theft that omission entitled

this court to interfere with the sentence. By statute, the court is obliged to impose a minimum of 9 years imprisonment per count. It could impose a stiffer sentence if the circumstances set out in s 114 (2) (e) are proved. The court did not find any special circumstances to have existed. It was obliged to impose the minimum sentence applicable. It settled for a heavier sentence without giving reasons therefor. Such a sentence cannot be allowed to stand. The appellant was convicted for the normal theft of stock or its produce. The normal sentence should follow. In light of the above therefore, the sentence imposed in the court a quo is set aside and in its place the following is substituted:

"9 years imprisonment."

MANGOTA J agrees.

IEG Musimbe, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners