HH 555-17
CA 521-14

COURTNEY BUNTING GREY
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIWESHE JP AND BERE J
HARARE, 18 and 25 June 2015 and 30 August 2017

Criminal Appeal

B Museva, for the appellant
I Muchini, for the respondent

BERE J: After his trial on 9 June 2014 and at Mbare Magistrates Court, the appellant was convicted of theft in contravention of s 113 (2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and sentenced to 30 months imprisonment of which 12 months imprisonment were suspended for 5 years on condition of future good conduct with the remaining 18 months being suspended on condition of restitution.

Aggrieved by both the conviction and sentence, the appellant noted an appeal against both and approached this court for relief.

The appellant's concern on his conviction was that the court *a quo* erred and misdirected itself in its assessment of the evidence surrounding the identification of the trailer which was the subject matter of the proceedings. It was the appellant's contention that the court *a quo* improperly disregarded the evidence of the appellant in the identification of the trailer.

As against sentence, the contention by the appellant was that in ordering the appellant to pay restitution to the complainant in the sum of US$16 948-00 the court *a quo* had not properly applied its mind to the true value of the trailer in issue.

The appeal was strenuously opposed by the respondent. Counsel for the respondent felt very strongly that both the appellant's conviction and sentence were unassailable. Counsel's overall assessment of the whole appeal was that it was devoid of merit and should be dismissed.

As the appeal court we have had the privilege of thoroughly examining the judgment of the court *a quo* in the light of the evidence that was adduced in the lower court. We have been able to look at that judgment in the light of the issues raised by the appellant in his appeal.

The main criticism raised against the trial magistrate is that he/she did not call for sufficient evidence to ensure that the trailor shown to the court during an inspection *in loco* did not belong to the complainant as alleged by the appellant.

Our view is that the criticism leveled against the court *a quo* was clearly without any justification. The learned magistrate properly assessed the evidence that was presented to the court and made a specific finding that the complainant was quite a credible witness and a better witness than the appellant whose lies were exposed even by his own witness John Mupunga who was honest enough to tell the court that the appellant had actually told him most of the things he told the court.

Such high levels of dishonesty did not project the appellant in good light.

The appellant's stout effort to mislead the court *a quo* was evident throughout the proceedings. He gave several false accounts and was not prepared to tell the court the information pertaining to the whereabouts of the trailer. At one stage he admitted to having sold the trailer and this vital piece of evidence was confirmed in the video recording.

The record of proceedings shows that even when he was specifically asked by the prosecutor in cross-examination he was still determined not to reveal the whereabouts of the trailor as evidenced by the following exchanges:

"Q: Where is the trailer?

A: It is parked in a yard in Graniteside.

Q: Where exactly?

A: I will not divulge the information. I have had some trailors parked there and on several occasions we have had property removed illegally'

Q; Are you doubting that the complainant is the owner of the trailer.

A: No."[1] (my emphasis)

It is such shocking levels of dishonesty that characterized the conduct of the appellant in the proceedings in the lower court.

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[1]. Record p.29

With respect to the appellant's legal practitioner this is not the kind of case which McNALLY JA had in mind when he coined the term the "boxing match approach' cases"[2]

The complainant's case was corroborated by none other than the appellant himself as well as appellant's witness. In any event it is proper in our jurisdiction as informed by s 269 of the Criminal Procedure and Evidence Act[3] to secure the conviction of an accused person on the strength of a single witness as long as the witness is competent and credible. This position of our law is trite.

Commenting on the sufficiency of a single witness GUBBAY CJ had this to say:

> "---- In *S* v *Nyati* 1977 (2) ZLR 315 (A) at 318 E-G, LEWIS J P warned that the test in *R* v *Mokoena* 1956 (3) SA 81 (A) is not to be regarded as an inflexible rule of thumb. There is no magic formula which determines when a conviction is warranted upon the testimony of a single witness. His evidence must be approached with caution and the merits thereof weighed against any factors which militate against its credibility. In essence, a commonsense approach must be applied. If the court is convinced beyond a reasonable doubt that the sole witness has spoken the truth, it must convict, notwithstanding that he was in some respect unsatisfactory. See also *S* v *Nathoo Supermarket (Pvt) Ltd* 1987 (2) ZLR 136 (S) at 138 D-F".[4]

The learned magistrate who dealt with this trial had his work cut out for him by the appellant.

The porous nature of the story told by the appellant could only have been read as corroboration of the complainant's case. The conviction in this case was indeed unassailable. It must not be disturbed.

I now move to consider sentence.

It is very ironic that the complainant would have the guts to express doubt about the true value of the trailer in issue. Given his unreliability demonstrated in court, the appellant could not have been the person to value the trailer in question. It was only reasonable for the court *a quo* to accept the value given by the complainant via the various quotations which informed the order for restitution.

Given the gravity of this offence the appellant was extremely lucky to escape with a non-custodial sentence. This court is unable to interfere with the discretion exercised by the lower court on sentence.

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[2]. S v Temba S -81-91

[3]. Chapter 9:07

[4]. S v Banana 2000 (1) ZLR 607 (S) at 615 E-F

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

CHIWESHE JP agrees……

Muzangaza Mandaza and Tomana, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners