KERINA DURI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA, KWENDA JJ
HARARE, 6 June, 4 July 2019 & 18 October 2021

Criminal Appeal

B Mtetwa, for the plaintiff
W Badalani, for the defendant

CHATUKUTA J: The appellant was convicted after contest of contravening s 116 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. She was sentenced to pay a fine $50.00 and in default of payment to undergo 30 days imprisonment. Aggrieved by the conviction, the appellant launched the present appeal.

Background

The State called Michael Chinamhora (the complainant) as its sole witness. The appellant was the sole witness for the defence. The facts before the court *a quo* derived from the evidence of the two witnesses and relevant to the determination of this appeal are largely common cause. These were as follows: On 9 December 2017 and at around 2000 hours, the appellant and the complainant were involved in a car accident at the intersection of Teviotdale Avenue and Lanner Avenue, Vainona, Harare. A physical altercation ensued as to who was responsible for the accident. The appellant sustained injuries during the altercation and received medical attention. She lost at the scene her car keys, reading glasses and earrings. The complainant lost his wrist watch and a wine glass (property). The police attended the scene the very evening. The complainant however had left the scene before the arrival of the police. The police assisted the appellant in recovering her keys. During the search she picked the complainant's property. She did not hand over the property to the police at the scene. She took it to her house. The following day on 10 December 2017, both the appellant and the complainant returned to the scene of the accident independently but at the same time looking for their lost property. During the discussions between the two, the appellant advised the complainant that she was in possession of his property being the wrist watch and the wine glass.

The complainant apologised to the appellant for the previous evening's incident. He offered to repair the complaint's vehicle and meet any medical expenses she had incurred as a result of the accident and the assault. The two agreed to meet at 1600 hours at the scene so that the appellant would give him his property. He went to the scene at the appointed time but the appellant did not turn up. The appellant made a report to the police on 10 December 2017 against the complainant for the accident and assault. She did not take the complainant's property to the police. Some days later she advised the police that she had in her possession the property. The police directed her to give the complainant his property. After taking legal advice from her legal practitioner, the appellant refused to do so. The complainant admitted to a charge of driving without due care and attention at Borrowdale Police Station. He paid an admission of guilty fine. He was subsequently convicted after contest of assaulting the appellant. The payment of the fine and the conviction were before commencement of the trial in this matter. The appellant retained the complainant's property and only produced it during the trial *a quo*. The complainant lodged a complaint of theft against the appellant with the police when he failed to get his property back.

Proceedings before the court *a quo*

The appellant was charged with contravening s 116 of the Criminal Code. The allegations against the appellant were that she had unlawfully taken possession of the complainant's property without the complainant's consent with the intention of temporarily holding or using same knowing that the complainant was entitled to own, possess or control the property or realising that there was a real risk or possibility that the complainant was entitled to own, possess or control the property.

The complainant testified that he looked for his property at the scene of the accident and made follow ups with the police if the appellant had surrendered the property once he became aware that the appellant was in possession of the property. He later went to the police asking and was advised that she had not done so. He made then made a report against the appellant.

The cross examination of the complainant by the appellant's counsel concentrated on the accident, the assault on the appellant, the complainant's sobriety on the night in question, why he reported the theft of his property on 18 December 2017 instead of 10 December 2017. The complainant's evidence on what transpired on 10 December 2017 at the scene when he met with appellant was not controverted. The appellant did not challenge that the two had agreed to meet at 1600 so that she would give the complainant his property.

At the close of the State case, the appellant applied in writing for discharge on the following basis: The charge sheet was defective in that it did not disclose how the appellant came to have "effected the unauthorised borrowing or alleged use of the property" when the items were recovered at the scene and not at the complainant's house. The charge did not set out how the items came to be in the possession or control of the appellant. The other issues were a criticism of how the police conducted themselves by not investigating her complaint and only did so when the complainant had filed a complaint 9 days after he lost his property. The appellant also raised questions relating to the complainant's state of sobriety on the date of the accident. It was contended that the complainant contradicted himself and the above factors rendered the complainant's evidence not credible. The onus having been on the prosecution to prove the essential elements of the charge, there was no evidence led to prove the essential elements. The State had therefore not made out a *prima facie* case against the appellant.

The application was dismissed and the appellant was put to her defence.

The appellant's defence case (as per defence outline and evidence) was that on the day of the accident she did not know who the other party was as he had fled from the scene before the arrival of the police. She took the complainant's property so that she would have finger prints picked from the property so as to identify who the other party was. The glass had some wine and the complainant was drunk. Upon obtaining legal advice from her lawyer, she refused to release the items when directed to do so by the police. Acting on that legal advice, she believed that the police ought to have directed her to submit to the property to them as exhibits. She was therefore entitled to keep the property and would produce it in court as exhibits. She was not guilty of unauthorised borrowing because she did not "borrow" or take the property from the complainant's house. She recovered it at the scene of the accident.

The court *a quo* held that the essential elements of the offence had been made. The appellant took temporary possession of the property to use it as an exhibit where she did not have a lawful right to do so.

Proceedings before this Court

The appellant raised essentially the following two grounds of appeal, that the court *a quo* misdirected itself when:

a) it failed to give reasons for dismissing the appellant's application for discharge at the close of the state case;

b) it made a finding that the recovery of property at a scene of a crime with the intention of using it as an exhibit amounts to unauthorised borrowing and therefore a contravention of s 116 of the Criminal Code.

The appeal was opposed with the respondent contending that the court *a quo* did not misdirect itself.

Failure to give reasons for dismissal of application for discharge at the close of the State Case

Mrs *Mtetwa*, for the appellant, submitted that the court *a quo* did not give reasons for discounting the submissions made by the appellant in her application for discharge. It did not make any findings why she believed a *prima facie* case had been established by the State. The trial court cursorily dismissed the application. It grossly misdirected itself when it dismissed the appellant's application and placed her on her defence.

Miss *Badalane*, for the respondent, conceded that the trial magistrate ought to have given reasons for dismissing the application for discharge.

A court is enjoined to consider and make a finding on the submissions made by the parties. In *S* v *Mutero & Others* 2014 (2) ZLR 139 (H) UCHENA J (as he then was) remarked at 154 E that:

> "Justice cannot be seen to have been done if a judicial officer pronounces his judgment without giving reasons as to how he came to that conclusion. A judgment in the mind of a judicial officer cannot satisfy a litigant. It does not enable a reviewing judge to determine whether or not real and substantial justice was done."

The following is the ruling by the court *a quo*:

> "This s an application for discharge at the close of the state case. The state then opposed the application.
> An analysis of the evidence, the court is satisfied that the state managed to prove a prima facie case. Therefore the accused must be put to her defence such that she may justify as to why she took the property."

The court *a quo* indeed misdirected itself. The above ruling falls short of what was expected of the trial magistrate. The trial magistrate did not make any reference to the submissions made by the applicant in support of her application for discharge neither did she analyse the evidence adduced by the State.

However, that being said and as rightly submitted by the Miss *Badalani*, this court must further consider whether there was no evidence adduced by both the State and the appellant

justifying a conviction at the end of the trial. It stated in *S* v *Kachipere* 1998 (2) ZLR 271 (SC) at 276 D that:

> "However, I think there is good sense in the approach that a refusal to discharge the accused upon the conclusion of the State case is not in itself a sustainable ground for appeal against an ultimate conviction. At the stage the appeal is heard, and in order to decide whether the conviction was justified, it would be absurd for the appeal court to close its eyes to any evidence led on behalf of the accused, or a co-accused, which, taken in conjunction with the State evidence, had been held correctly by the trial court to prove guilt conclusively……
> ……
>
> 280H -281A It follows that if the totality of the evidence allows of no reasonable possibility of the appellant's innocence in the crime, the irregularity in failing to discharge her at the close of the case for the prosecution will be of no consequence and is to be ignored by this court." (See also *S v Hunzvi* 2000 (1) ZLR 540 (S)).

Further, regard should also be had to s 38of the High Court Act. The section provides:

> **"38 Determination of appeals in ordinary cases**
>
> (1) Subject to this section and section *thirty-nine*, on an appeal against conviction the High Court shall allow the appeal and quash the conviction if it thinks that the judgment of the court or tribunal before which the appellant was convicted should be set aside—
> (*a*) on the ground that—
> (i) it is unreasonable; or
> (ii) it is not justified, having regard to the evidence; or
> (*b*) on the ground of a wrong decision on any question of law; or
> (*c*) because on any other ground there was a miscarriage of justice;
> and in any other case shall dismiss the appeal.
> **(2) Notwithstanding that the High Court is of the opinion that any point raised might be decided in favour of the appellant, no conviction or sentence shall be set aside or altered unless the High Court considers that a substantial miscarriage of justice has actually occurred**." (own emphasis)

This court must therefore be satisfied that a miscarriage of justice occurred in placing the appellant on her defence. This must, as observed in *S* v *Kachipere* (*supra)* be looked at in light of the totality of the evidence adduced by both the State and the appellant.

Application of the Law to the facts

As observed at the onset, the facts of the matter are largely common cause. It is not in dispute that the appellant took possession and control of the complainant's property. The first point raised was that the charge sheet was defective in that it did not disclose how the appellant came to have "effected the unauthorised borrowing or alleged use of the property" when the items were recovered at the scene. It was contended that the charge did not set out how the items came to be in the possession or control of the appellant. It is not necessary to dwell on

the issues at length. It suffices to observe that the question whether a charge is defective is raised by way of exception in terms of s 180 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. An exception is raised at the commencement of a trial. (*R* v *Menses* 1957 R & N 307 (SR)). It cannot therefore be raised at the close of the State case. The appellant did not except to the charge at the commencement of the trial.

In any event, the charge was sufficiently particularised to inform the appellant of the nature of the charge. She was advised of the date and place where the offence was alleged to have occurred. She was further advised of the identity of the complainant and the items that she was alleged to have taken and with what her intention. The particulars as to how the appellant came to be in possession of the property were matters of evidence that were sufficiently set out in the state outline and adduced in oral evidence.

The second point raised was that the State did not lead evidence on how the appellant came into possession of the items, whether the items were picked by the police and handed to her or she picked the items and was allowed by the police to retain them. The appellant went to great detail speculating what the consequences of how the appellant came into possession of the property were. The State outline was clear that it is the appellant who picked the items at the scene. The complainant's evidence was equally clear that the appellant advised him that she had picked the items at the scene. The appellant accepted in her defence outline that she picked the property at the scene. How she came into possession of the items was therefore common cause.

The appellant having accepted taking possession or control of the, the State was expected to prove that the complainant had possession or control of the property with the intention of using the property. The appellant's defence case was consistent throughout that her intention was to use the property as exhibits. She produced the property as part of her defence case and the property was marked as exhibit 3. She therefore answered in the positive the question whether or not she wanted to use the property.

While the court *a quo* misdirected itself in not giving detailed reasons for its dismissal of the application for discharge, its decision that the state had established a prima facie case cannot be faulted.

The only question which remained to be answered emanates from the second ground of appeal and that is whether the recovery of the property at a scene of a crime with the intention of using it as an exhibit amounts to unauthorised borrowing and therefore a contravention of s 116 of the Criminal Code.

Whether the recovery of property at a scene of a crime with the intention of using it as an exhibit amounts to a contravention of s 116 of the Criminal Code.

At the first date of hearing, the court directed the parties to file supplementary heads of argument, and which were duly filed, on the relevance of sections 118,119 and 236 of the Code to the appeal. It was common cause that the appellant had in her possession the complainant's property from the period soon after the accident up to the date of hearing of the appeal. It was also common cause that the complainant did not at any time give the appellant authority to keep the property. The appellant's defence was that she genuinely believed, following legal advice by her lawyer, that she was entitled to keep the property as exhibits. Given these common cause facts, and the appellant's defence, it is the court's view that the second ground of appeal can be resolved by recourse to those sections.

Section 118 provides for defences available to an accused charged with unauthorised borrowing. The section reads:

> **"118 Mistake of fact in cases of theft, stock theft or unauthorised borrowing or use of property**
> (1) It shall be a defence to a charge of theft, stock theft or unauthorised borrowing or use of property that the accused took the property concerned, genuinely but mistakenly believing that-
> (*a*) the owner of the property, or the person entitled to possess or control it, had consented to the taking or would have consented if he or she had known of the circumstances; or
> (*b*) the property was his or her own property and no other person was entitled to possess or control it; or
> (*c*) the property had been finally and absolutely abandoned, that is, that the owner had thrown it away or otherwise disposed of it intending to relinquish all his or her rights to it:
> Provided that such a belief shall not be a defence to a charge of theft of lost property unless-
> (i) regard being had to the nature and value of the property and the circumstances of its finding, the belief was reasonable; or
> (ii) the accused took all reasonable steps to find the owner of the property and reported his or her finding of it to the police or other appropriate authority."

Section 119 provides for defences that are not available to an accused person charged with *inter alia* unauthorised borrowing. The relevant portions of the section read-

> "**119 Unavailable defences to charge of theft, stock theft or unauthorised borrowing or use of property**
> (1) It shall not be a defence to a charge of theft, stock theft or unauthorised borrowing or use of property that the person charged-
> (*a*) took the property concerned in circumstances other than those described in subsection (1) of section *one hundred and eighteen*, genuinely but mistakenly believing-
> (i) that he or she had a legal right to take the property on his or her own behalf or on behalf of someone else; and

> (ii) in the case of a charge of theft, that he or she had a legal right permanently to deprive the person from whom he or she took the property of his or her ownership, possession or control of it; or
> (*b*) did not intend to gain any personal benefit from the property concerned; or
> ……

(3) A court may regard the factors referred to in paragraphs (*a*), (*b*), (*c*) and (*e*) of subsection (1), and subsection (2), as mitigatory when assessing the sentence to be imposed upon a person convicted of theft, stock theft or unauthorised borrowing or use of property.

Mrs *Mtetwa* submitted as follows: Section 118 requires a court to take into account the circumstances of a case. The circumstances of the present case were that the appellant did not intend to personally benefit from the property. She merely intended to hold the property temporarily and produce it as an exhibit. At the time she found the property the question whether the complainant consented to the taking of the property did not arise as the complainant was not present. The complainant was not in control of the property. The appellant had every right to hold onto the property because of an unlawful decision by the police directing her to release the property to the complainant. She acted, as she was entitled at law to do, on the legal advice of her lawyer.

Ms *Badalane* submitted that the appellant's defence did not fall within the defences set out in s 118. The complainant never consented to the appellant taking and holding the property. In the circumstances of the case, the appellant could not be said to have genuinely or mistakenly believed that the complainant had consented to the taking of the property. The property was not abandoned. The complainant went to the scene looking for his property. He went to the police to check if the appellant had surrendered the property. The appellant disregarded lawful order by the police to surrender the property to the complainant. She ought to have relied on the order of the police as opposed to the legal advice from her lawyer.

The defences available to the appellant under s 118 for contravening s 116 were therefore that she mistakenly believed that:

(a) the complainant had consented to the taking of the property;
(b) the property was hers; and
(c) he complainant had been intentionally abandoned the wrist watch with the intention of relinquishing all his or her rights.

All the three defences were clearly not available to the appellant. She did not have the complainant's consent neither did she believe that the property was hers. The third defence would have been available had she raised it in her defence outline or evidence. Her defence throughout the trial was never that the property had been abandoned. The question of abandoned was only raised in the supplementary heads of argument before this court. The court *a quo* would therefore not have made a determination and misdirected itself on a defence not raised before it.

In any event, at no time did the appellant intentionally relinquish ownership of the property. This is evidenced by the fact that he went back to the scene of the accident the following morning after the accident to search for the property. He made follow ups with the police and reported the theft only after he had been told by the police that the appellant had refused to hand over the property. The appellant took the property in circumstances other than those described in s118 (1).

Her defence that she genuinely believed that she was **entitled at law** to retain the property is excluded under s 119(1)(a)(i). Such defence will only be considered as mitigatory as per the proviso to s 119(3).

The parties were referred to s 236 because it relates to instances where one raises the defence that he or she committed the offence acting on advice of another person. However, the advice must have been from a government official who is primarily responsible for the administration of the particular statute to which the matter relates.

See *S* v *Davy* 1988 (1) ZLR 386 at 400 D-G and *S* v *Zemura* 1973 (2) ZLR357 at 377E-G

The relevant official in the present matter would have been the police officer who directed her to surrender the property to the complainant. The section does not include advice from a lawyer because the lawyer does not administer any statute. The appellant shunned the advice of the police officers who are envisaged in the Criminal Code.

Even assuming that the appellant was entitled to retain as exhibits, her defence case was two-fold. She stated that she took the property because she did not know the identity of the person she had been involved in the accident with. She wanted the police to pick prints from the wine glass and identity the other party. The second defence was that she wanted to use the property as proof of the assault and also that the complainant was drunk at the time of accident. With regards to the first explanation, the appellant became aware of the complainant's identity the following day after the accident when they met at the scene. It was therefore not necessary to keep the property for purposes of identifying the complainant. With regards to the second

defence, once the complainant paid the admission of guilty fine for the traffic transgression and a fine for the assault charge, there was no basis for retaining the property. When the trial commenced, the complainant had been held accountable for the offences he had committed. The property was not relevant in her prosecution under s 116 of the Code.

The court *a quo* therefore did not misdirect itself when it held that the State had proved the essential elements of s 116 of the Code. It is unfortunate that the appellant was led down the garden path by her lawyer resulting in her defending the indefensible and appealing against the unappealable. The appellant was not entitled at law to retain the complainant's property. The appellant was in fact advised by her/his lawyer to take the law into her hands.

In light of the above the appeal does not have merit.

The appeal is accordingly dismissed.

KWENDA J agrees……

Mtetwa and Nyambirai Legal Practitioners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners