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Judgment No S.C. 47\2002
Crim. Appeal No 212\2001

GODFREY ZHUGA v THE STATE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, EBRAHIM JA & SANDURA JA
HARARE JANUARY 28, 2002

G.M. Mabuye, for the appellant

M. Nemadire, for the respondent

CHIDYAUSIKU CJ: At the conclusion of submission by counsel we dismissed this appeal and indicated that the reasons for judgment would follow.

The following are the reasons for judgment.

The appellant appeared before a Mutoko Magistrate, facing a count of theft of some 20 litres of diesel from his Zimbabwe Republic Police workplace. The appellant, after a full trial, was convicted of the offence charged and sentenced to a fine of $2 000 or, in default of payment, 6 months' imprisonment with labour; in addition he was sentenced to 6 months' imprisonment with labour all of which was suspended on certain conditions.

The appellant appealed to the High Court against conviction. The appeal was dismissed by the High Court. He now appeals to this Court against that judgment.

The appellant appeals to this Court on the following two grounds set out in the notice of appeal:-

> "1. The Honourable Judges misdirected themselves by holding that the trial Magistrate did not err by admitting Appellant's unconfirmed statement. The statement should have only been used and admitted as a previous inconsistent statement, to discredit accused.
>
> 2. The Honourable Judges misdirected themselves, by holding that there was overwhelming evidence in support of the conviction after disregarding Edmore Phiri's evidence. The evidence was inconclusive and insufficient to support conviction."

The above grounds of appeal are essentially the same grounds of appeal raised by the appellant in his appeal to the High Court against the judgment of the learned trial magistrate.

Firstly, I would like to deal with the first ground of appeal, namely, that the appellant's unconfirmed Warned and Cautioned statement should not have been admitted in evidence. Even if I were to accept, which I do not, that there was substance in this ground of appeal, the record reveals that there is sufficient other evidence, apart from the confession, to sustain the appellant's conviction. Be that as it may in my view there is no substance in the submission that the Warned and Cautioned statement should not have been admitted.

The manner in which the statement was admitted as evidence appears on pp 29-30 of the record. The following exchange between the appellant and the prosecutor appears on the record:-

"Q. So you were carrying paraffin.

A. Yes that is what I said.

Q. You gave a Warned and Cautioned statement on this case and the statement was recorded from you by Sergeant Musongwe.

A. Yes, I did.

Q. Do you still recall what you told the Police in that statement.

A. Yes I do still remember.

Q. I want you to have a look at this statement (prosecutor hands accused the statement). Is that your statement which you gave to the Police.

A. Yes it is the very one.

Q. I want you to read it loudly to the Court.

A. (He starts reading)"I do not admit to the charge: The diesel I transported with the defender Truck was mine. I got it from Panya Chigayo who stays in Murewa. He sent me 20 litres of diesel which was brought by his friend whom I cannot remember his name. The 20 litre of diesel was brought on 17/09/00. Panya Chigayo is employed at Hwamuka Hotel in Murewa.

Q. Can you tell the court what you meant in that statement.

Q. You are a liar.

A. No."

Thereafter the following exchange of questions and answers between the appellant and the court appears:-

"Self re-examination - None.

BY THE COURT TO THE ACCUSED.

Q. The Statement you read you do confirm it is the one you gave to the Police.

A. Yes I confirm.

Q. Do you have any objections to its production to the Court?

A. No, the Court can have it.

BY COURT - The Statement is taken and marked exhibit I."

It is quite clear from the above exchange between the prosecutor, the court and the appellant that the submission by Mr *Mabuye*, for the appellant, that the statement should not have been admitted is ridiculous. The appellant is a police officer who consented to the admission of his extra-curial statement. If any undue influence had been brought to bear upon him to make the statement he would have said so. In any event the statement is exculpatory. Why would anybody force someone to make an exculpatory statement. I am therefore satisfied that there is no substance in this ground of appeal.

Turning to the second ground of appeal that there was insufficient evidence to convict the appellant of theft. In this regard the following two issues fall for determination:

(1) did the State establish the theft of the 20 litres of diesel; and

(2) if so, was the appellant identified as the thief.

An audit of the diesel was carried out on 18 September 2000. It was established through this audit that there was a shortfall of 40 litres of diesel. Assistant Inspector Phiri's evidence was that he ordered the audit that revealed the shortfall. When the shortfall was discovered he ordered an investigation. The fact of the shortfall was never an issue at the trial. It was never suggested in cross-examination that in fact no diesel was missing or stolen. The appellant's cross-examination centred on his contention that his 20 litre container had paraffin and not diesel. On this basis I am satisfied that the State established beyond reasonable doubt that there was a shortfall in the diesel which was caused by theft of the diesel.

The next issue that falls for determination is whether the appellant stole all or some of this diesel. The starting point to this enquiry is that it is common cause that the appellant had a 20 litre container that was full of some substance. Was that substance diesel or paraffin? The appellant, in his defence outline and in his evidence in court maintained that the container in his possession on 19 September 2000 contained paraffin and not diesel. At p 23 of the record he asked Inspector Phiri the following question which attracted the following answer:-

> "Q. I put it to you my 20 litre contained paraffin and not diesel.
>
> A. I cannot comment on that as I did not see you carrying the container but when I first confronted you, you told me you'd been carrying diesel sent to you from Murewa."

The evidence of Inspector Phiri was that when he asked the appellant about the theft of the diesel the appellant admitted that the 20 litre container he had on 19 September 2000 contained diesel which he, the appellant, had received from one Chigayo from Murewa. The appellant maintained this stance in the Warned and

Cautioned statement, exhibit 1, which was recorded on 29 September 2000. Mr Mlambo, who the trial court found to be a credible witness, stated that he actually saw the appellant leave his residence with an empty 20 litre container and proceeded to the diesel shed where he filled it with diesel. The appellant thereafter took the diesel to his house.

Another Police officer, Tafira, also met the appellant carrying a yellow 20 litre container full of diesel. It was the appellant who told this witness, according to the witness's evidence, that the container had diesel which the appellant intended to sell. The court found this witness to be a credible witness. There is nothing on the record to suggest that this finding is flawed.

There is also the evidence of Panya that the appellant had telephoned him requesting that he should tell the police that he, Panya, had supplied the appellant with diesel. Panya declined the appellant's request and indeed told the police the truth, namely, that he never supplied diesel to the appellant. It is quite clear from Panya's evidence that the appellant had banked on co-operation from Panya and in anticipation of that co-operation stated in the Warned and Cautioned statement that he had received the diesel seen in his possession from Panya Chigayo. When Panya Chigayo refused to co-operate the appellant decided to change his defence.

The evidence that the appellant had diesel and not paraffin in the 20 litre container in his possession on 19 September 2000 is simply overwhelming. The appellant has not offered an innocent explanation or source of the diesel. Consequently the conviction for theft of the diesel is well founded on the evidence.

The appeal is completely devoid of merit and it was for the above reasons that we dismissed the appeal.

EBRAHIM JA: I agree

SANDURA JA: I agree

Mabuye and Company, appellant's legal practitioners