

PATRICK KUPENGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MUSHORE JJ
HARARE, 27 June 2017 and 30 August 2017

Criminal Appeal

T Maanda, for the appellant
E Makoto, for the respondent

MUSHORE J: Appellant was convicted of one count of theft of property which belonged to a partnership, which property was worth US\$59, 000-00. He was sentenced to pay a fine of US\$600-00 or in default of payment, to serve a term of 6 months imprisonment. A further 6 months imprisonment was wholly suspended on conditions of good behaviour.

The facts were that sometime in 2008 appellant and complainant entered into an oral joint-venture partnership agreement for the purpose of operating a timber processing business. It was agreed by them that each of them would contribute equipment to the partnership which was to be used by the partnership on a profit-making basis. It was common cause that the appellant contributed in two machines, a jack saw and a re-saw and that the complainant contributed his premises and the bulk of equipment, all of which was necessary for the intended timber processing business to be operational. From the inventory which was annexed to the State Outline, it is plain to see that complainant put in 16 machines and complainant contributed two. Complainant and appellant also contributed their industry with complainant describing himself as the think-tank, and appellant describing himself as the man on the ground as he did more of the day to day running of the operation. When the partnership was losing money, complainant injected cash from his other companies for the payment of expenses and salaries and the like.

It was common cause that the partnership was experiencing financial difficulties at the time that the offence was allegedly committed. It was the State's case that on the 29th June

2014 at about 0800 hours, appellant arrived at the partnership premises at Matan Holdings, 5 New Castle Road, Mutare with two 30 tonne trucks which were to be used to transport the equipment; and a forklift which he intended to use to “*clear the way*” [appellant’s evidence, record p 256]. It was not disputed that appellant was accompanied by his son, one Jeffrey Kupenga on the day in question and a workman crew of five men. The State alleged that when the appellant took the property, he did so with the intention to permanently deprive the complainant of the property and that it was clear that the appellant acted with *animus turandi* by his proceeding to remove the property in question without informing his business partner (complainant) first. In its Heads of Argument, the State submitted that the fact that he had gone onto the property over the weekend, (not during an ordinary working day, showed that his actions were underhanded and most probably unlawful. It is common cause that the security personnel who were at the premises on the day in question and who observed appellant in his actions, alerted the complainant and the Police during the removal whereupon appellant was arrested. Whilst appellant was in detention, his accomplices broke the gate with the forklift to make an exit after which they took the property with them.

Appeal is appealing against conviction but not sentence.

The grounds of appeal went as follows:-

record p 4.

“GROUNDS OF APPEAL.

1. In view of her finding that the partnership was in existence and that the property belonged to the partnership at the material time, the learned magistrate misdirected herself and erred in that she did not apply her mind to the defence proffered by the appellant that he was moving the operations of the partnership to premises with electricity.
2. She erred in that she did not consider the defence raised by the appellant which if she did would not have found it to be false beyond reasonable doubt. (Sic) The explanation given by the appellant for removing the property could not objectively be dismissed as false and false beyond reasonable in light of the fact that there was no electricity at the premises where the partnership was operating from.”

What the appellant is suggesting is that he was lawfully entitled to unilaterally decide to remove the goods from the partnership premises, arising from the fact that the property is partnership property. He is also suggesting that the court *a quo* misdirected itself in convicting him of theft of the property in question, and that his unilateral decision to remove the goods from the partnership premises was justified because it was taken in the interests of the partnership continuing.

But that is not what the law suggests. By law, one partner is not entitled to exclude another partner from control of the partnership property. See: *Munro v Ekerold* 1949 (1) SA 584 9SWA) pp 589. The property of a partnership is, whilst the partnership is in existence, owned by the partners in undivided shares. See: *Sacks v Commissioner of Inland Revenue* 1946 AD 31 pp 40, and in appropriating; and/or divesting and/or moving the property, both partner's consent is required for such an action to be regarded as lawful.

In the present matter, it is common cause that appellant made a unilateral decision to remove the partnership property from no 5 Castle Road. He testified *a quo* that he did not require complainant's prior approval. He insisted that his actions were lawful. He stated that because of the lack of electrical power at the premises, he "*made a decision to relocate and look for premises which had the electricity hence my decision to remove the goods unilaterally*". The law does not support his actions.

Partnership property is also called 'common stock' because by its very nature partnership property is common to the parties. Such property does not carry the label of 'partnership property' in the legal sense because a partnership is not a legal entity and by such lack, it is incapable of owning property. Thus the right which appellant felt he had to unilaterally decide to move the property from point A to point B, for whatever reason, simply did not accrue to him to the extent that he could justifiably remove the partnership property from the partnership premises, without complainant's knowledge and consent. See: *Wolfsohn v Taylor* 1928 TPD 99.

Further a partnership is a contract *uberrimae fidei* with each party being entitled to full disclosure of information relating to the partnership. As WESSELS J stated in *Wegner v Surgeson* 1910 TPD 571 pp 579, "*During the continuance of a partnership, one partner cannot overreach the other partner, nor can he dissolve the partnership with such intentions and yet retain the benefits that flow from such an act*". The partnership relationship can be likened to a relationship between two brothers. If the trust and mutual confidence of a partnership is destroyed, a court will order a dissolution of the partnership.

In the present matter, whilst the partnership existed, appellant would have required complainant's prior before depriving consent to deprive the complainant from the use and control of the property. It should be noted that if the partnership had been dissolved, appellant would only have been entitled to remove the property which he contributed into the partnership because upon dissolution of a partnership, ownership reverts to the contributors.

Additionally, we note that after appellant removed the property from the partnership premises, it was never used again for partnership purposes. The appellant did not cooperate with the Police in locating the property. It took the Police five days to find some of the property. Some of the property was still missing at the trial of the matter. Appellant's justification for having removed the property was insincere. The court *a quo*'s determination that appellant intended to permanently deprive the complainant of the partnership property cannot be faulted and thus the essential elements for the crime of theft were established by the State.

We take judicial notice of the uncontroverted evidence that the property was removed by force using a forklift over the weekend when business would have been quiet, making appellant's actions on that day all the more suspicious. Added to this, appellant anticipated using force to obtain the property by ensuring that he brought along a forklift with him on the day in question. It is also our finding, that the appellant acted against the interests of the partnership continuing when he applied for a dissolution of the partnership in case number HC 5444/14 after removing the property from partnership premises.

The court *a quo* acquitted itself well in convicting the appellant of theft. There is no error or misdirection apparent from its ruling.

Accordingly we rule as follows.

"The appeal is dismissed."

HUNGWE J agrees:

Maunga, Maanda and Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners