

SAMSON MURIRE
and
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU AND CHIKOWERO JJ
HARARE, 7 & 10 November 2022

Criminal Appeal

P Charumbira, for the appellant
K H Kunaka, for the respondent

CHIKOWERO J:

[1] This is an appeal against both the conviction and sentence.

[2] The appellant and four others were convicted after a protracted trial on a charge of tampering with apparatus for the supply or generation of electricity as defined in s 60A of the Electricity Act [Chapter 13:19].

[3] The Regional Court sitting at Karoi having found no special circumstances, sentenced each to the mandatory minimum 10 years imprisonment.

[4] The trial court found that the appellant, who was the fifth accused, had been involved in the removal of 333kg of aluminium conductor cables from the Zimbabwe Electricity Transmission and Distribution Company's poles.

[5] The first, second, third and fourth accused actually removed the cables from the poles. The taxi driver was Professor Tadyanemhandu. He had been hired by the first accused to ferry the quartet to the scene of crime and thereafter to accompany them to Harare for disposal of the cables.

[6] The appellant was a serving member of the Zimbabwe Republic Police based at Karoi Police Station. He would take over the steering wheel from Tadyanemhandu in Karoi for the trip to Harare. The appellant was the Officer-in-charge of crime at Karoi Police Station. By driving Tadyanemhandu's vehicle to Harare while clad in police uniform, the plan was to facilitate ease of passage to Harare. The strategy was meant to ensure that law enforcement officers would not search the vehicle and hence obviate detection of the crime.

[7] It so happened that Tadyanemhandu informed two members of the Criminal Investigations Department of the whole criminal enterprise before it was executed. The latter testified as State witnesses, as did the former.

[8] The two plainclothes police officers laid an ambush on a road in Karoi. The intention was to arrest the first, second, third and fourth accused as they carried the cables in Tadyanemhandu's vehicle.

[9] It appears that the appellant got wind of the fact that the police had been informed that a crime had been planned and were prepared to apprehend the perpetrators. Around midday, the appellant sent a text message to the first accused, Lovemore Madzande. It reads:

“Cancel deal with Professor immediately and engage iye kana muchida kuenda Harare.”

[10] Professor is Tadyanemhandu's forename. The whole text message translated into English would read:

“Cancel deal with Professor immediately and engage him if you want to go to Harare.”

[11] The deal with Tadyanemhandu was that this witness would be paid US\$25 for fuel for the entire trip and US\$100 after the cables were sold.

[12] The text message merely occasioned a moratorium in the commission of the offence. Tadyanemhandu had already been paid the US\$25 by the first accused by the time that the message saw the light of day. The witness had already purchased the fuel. Tadyanemhandu updated the two detectives that the gang had not come back to him. The ambush, in the form of a roadblock, was dismantled.

[13] However, it was mounted again on the following day. Tadyanemhandu kept the detectives up to date over the phone, on the gang's every move. This resulted in the arrest of the first, second, third and fourth accused, and, to protect the informer, of Tadyanemhandu himself. The police recovered three roles of the cables, whose total weight was 333kg. These were covered in black plastic paper. This could only have been to ensure that mere sight of the packaging, without more, would not reveal the contents. Also recovered from Tadyanemhandu's vehicle were a bolt cutter and a blue ZETDC jacket. The former was used to cut the cables from the poles. The first accused, an ex-ZETDC line employee, wore a ZETDC bottom worksuit while the second accused, a then ZETDC line worker, wore the ZETDC work jacket. Clearly, the work apparel was designed to create the false impression

that accused 1, 2, 3 and 4 were ZETDC line workers lawfully cutting and removing their employer's cables from the poles.

[14] On realizing that the game was up, so to speak, the second appellant blurted out words to the effect that he knew about "this case", that it was always his intention to appear at the police station to inform them and that the detectives had done well to detect the commission of the offence.

[15] Without knowing that his partners in crime had been arrested, and their cellphones confiscated by the police, the appellant send two more messages to the first accused. They read in that order:

"Madzande hanzi pane zviri kuitika pablock reChinhoyi. Ngatisimukei na12 midnight" and "kune operation yemota dziri kutakura vanhu. By 12 tinge tasimuka please."

[16] The one message simply conveyed information obtained by the appellant that there was some activity at a roadblock in Chinhoyi. He was imploring the first to fourth accused persons to ensure that they would have departed for Harare, in the appellant's company, by midnight in view of the activity at the roadblock at the time that the text message was send.

[17] The other message alludes to vehicles being searched by the police and reiterates the plea that the gang, the appellant included, should depart for Harare by midnight without fail.

[18] These messages were sent and received at 15.17 hours and 16.22 hours respectively. By 1700 hours the appellant had been arrested.

[19] Tadyanemhandu was later released.

[20] The trial court found that he was a credible witness. It found that the two detectives corroborated him. He was the informer. The information that he provided turned out to be true for it led to the arrest of the first, second, third and fourth accused as well as the appellant. It led too to the recovery of the exhibits in the form of the cables, the bolt-cutter and the ZETDC worksuit. To cap it all, Tadyanemhandu was telling the truth in stating that the first accused, being the hirer, had indicated that the appellant would take over the driving of the witness's vehicle from Karoi to Harare. The appellant's active involvement in the commission of the offence, despite not having appeared at the scene of crime, was buttressed by the three text messages. He was gathering and disseminating information to ensure that the whole gang would not be intercepted before the cables were sold in Harare.

[21] There is no merit in the contention that Tadyanemhandu was an accomplice witness. There was no need for the trial court to administer the accomplice's warning on him. The

witness was simply an informer. Even before the offence was committed, he had already informed the detectives that the five accused persons had hatched a plan to cut and remove electricity cables and sell the same in Harare. They had hired him as the transporter. Thereafter, throughout the criminal enterprise, Tadyanemhandu kept the police updated. This led to the arrest of the quintet.

[22] We have no basis for upsetting the factual findings of the trial court. They are not only predicated on the correct assessment that all the witnesses for the prosecution were credible and corroborated each other but also on the text messages and the recovered cables, bolt-cutter and worksuit.

[23] It is not unusual that members of a criminal gang play different roles in the commission of an offence. The appellant is not excused from criminal liability by dint of not having been the hand that cut and removed the cables. He was involved in the planning of that offence. He was involved in the planning of the transportation of the spoils of the crime. He sought and communicated information to assist in avoiding detection of the crime. But for the fact that all five were arrested before his gang members arrived where he was, he was earmarked to drive the taxi to Harare where the cables were to be sold. His defence that he had nothing to do with the “deal” that the other four had struck with Tadyanemhandu was correctly rejected. He testified that he did not know what the deal was. Yet he sent a message to accused one to cancel the deal. He sent two more messages designed to avoid police roadblocks. To do this he impressed upon the first accused, not once but twice that the criminal gang, of which he was a member, had to depart for Harare under cover of darkness, at midnight. A whole officer in charge of crime would not have any business in directing criminals on how to avoid the long arm of the law unless he was counted among them.

[24] The other grounds on which the conviction is attacked are misplaced. Further, considering the appellant’s defence, they do not, strictly speaking, arise at all. In any event, they are wanting in merit. They read:

“The court *a quo* erred at law

- (a) for concluding that property abandoned for about sixteen (16) years could be stolen;
- (b) for concluding that the circumstantial evidence adduced on behalf of the State had one reasonable inference of theft.”

[25] The ZETDC employee testified, and was believed, that the cables were not abandoned. The deceptive circumstances under which the cables were cut and removed confirm that they were not abandoned. Disuse of the electricity line in question is not abandonment. In any

event, the ZETDC employee correctly underscored that the cables were ZETDC property and it was the prerogative of his employer to decide whether to maintain the line or remove the cables for installation and use elsewhere.

[26] The charge was not theft.

[27] Considering that the appellant's defence was that he was not involved in the cutting and removal of the cables, it should not matter, in any event, whether the cables were stolen, assuming that the charge was theft (which it was not).

[28] The appeal against conviction is unmeritorious.

[29] So too is the attempt to find special circumstances through the back door. Having found that the cables were not abandoned, there was no way that the trial court could have contradicted itself by finding that what the appellant had done was to simply steal abandoned property, and that this was a special circumstance.

[30] In the result, the appeal be and is dismissed in its entirety.

ZHOU J, agrees:

Kadzere, Hungwe and Mandevere, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners