THE STATE
versus
TENDAI KUDERERA
and
LEEFORD ZIMBUDZI

HIGH COURT OF ZIMBABWE
BACHI-MZAWAZI J
HARARE, 6 June & 7 July 2022

Criminal Review

BACHI-MZAWAZI J:

Introduction

The two accused persons where charged and convicted of theft in terms of s 113 (1)(a) and (b) of Criminal Law Codification and Reform Act [*Chapter 9:23*]. Each accused person was sentenced to four years with two suspended on the usual conditions and restitution. They are serving an effective two year imprisonment term.

When the record was initially placed before me for automatic review, I queried why the Trial Magistrate did not explicitly state the effective prison term. The manner he had couched his sentence was incomprehensible to anyone outside the Magistracy. The trial court responded and clarified the position. I am of the opinion that it is prudent to explain in clear terms the period the accused person has to serve to avoid ambiguity in interpretation.

However, after a thorough analysis of the review record I am of the view that the conviction and sentences of both accused persons are not in accordance with real and substantial justice. As such, it will be a miscarriage of justice on my part, as well as an abrogation of the court's duty as an ambassador of justice, if I turn a blind eye and not intervene Moreso, when this court has observed that crucial pieces of evidence were not investigated, produced, explored and interrogated.

Upper Courts Review Mandate and the Law

In *S* v *Mutero* and *Ors* 2014 (2) ZLR 139 (H) it was highlighted that judges of the High court have Constitutional mandate to supervise the magistrates courts and other subordinate courts.

Section 171(1)(b) of the Amendment Act No. 20 of 2013, the Constitution of Zimbabwe reads:

"1(b) The High Court has the jurisdiction to supervise magistrates courts and other subordinate courts and review their decisions."

In *S* v *Mhondiwa* HB 193-11 at pages 4 to s it was highlighted:

"The reviewing judge and the trial magistrate are a tag team serving the same purpose namely to ensure that justice is one and accused persons receive fair treatment. The reviewing judge may decide that the sentence is excessive and should either be quashed or substantially reduced."

Section 70 (5) of the Constitution, Amendment Act No. 20 of 2013 provides that:

"Any person who has been tried and convicted of an offence has the right subject to reasonable restrictions that may be prescribed by law to-
(a) Have the case reviewed by a higher court."

Sections 57, 58 and Section 27 to 29 of the Magistrates Court Act [*Chapter 7:10*] and High Court Act [*Chapter 7:06*], are all statutory mechanisms provided to ensure that accused persons, particularly the undefended have a second chance at justice before an upper court. *See*, *Shava* v *Primrose Magomere N.O. & Anor* HB 10019 of 2017 and *Mukwenu* v *Magistrate Sanyatwe N.O. & Anor* 2015 (2) ZLR at 417 CH).

The above considerations are within the backdrop, that as a general rule courts are reluctant to interfere with the sentencing discretion and decisions of the lower courts, be it on appeal, review or unterminated proceedings. However, there is an exception to every general rule. Some of these exceptional circumstances are where there the lower court's exercise of its discretion was erroneous, or in circumstances where it acted on a wrong legal principle or it took into account extraneous matters or it did not take into account relevant considerations or was mistaken about the facts. These sentiments where expressed, in *Charuma Blasting and Earthmoving Services (Pvt) Ltd* v *Njainjai & Ors* 2000 (1) ZLR 85(S), in relation to appeal.

S v *Gumbura & Ors* SC10/22, though specifically dealing with unterminated proceedings of a lower court highlighted the reluctancy of upper courts to interfere with the decisional autonomy of a competent judicial functionary unless there is gross miscarriage of justice prejudicial to the accused person. Having said that, the facts of the case are summarised below.

A Brief Summary of Facts

The two accused persons are said to have connived and stole a blanket trapping piece used to trap gold nuggets from inside a Gold Stump mill. They denied the charge and were

convicted after a fully-fledged trial on the evidence of a single witness. The single witness testified that he saw both accused persons stealing the blanket in question.

He stated that on the day in question between midnight and early morning he saw the two accused persons stealing the blanket but it was the second accused who then threw the loot over a precast wall. He further stated that when he accosted the second accused he was offered a bribe which he turned down. He claimed that he was at a considerable distance when he saw the two committing the offence but did not want to disturb or interrupt them. The witness was working as a security guard who had been nicely engaged.

First Accused's Defence

The first accused person raised a defence of an *alibi*. He told the court that on the night in question he was not on duty but at his home resting. He testified in his defence that the gold trap was in a secured area and always under lock and key. He said that when he was called from his homestead to witness the theft, he noticed that there was evidence of a break in. He in turn queried the person who was in charge of the keys who then stated the keys had been lost.

The first accused person also quizzed that if the blanket trap had been cut as pointed out by the first witness then that should have been detected by those working on the night shift. He further argued that the cutting of the blanket was bound to attract attention from the workers on shift. As such why was there no one called to testify, as there is bound to be someone that should have heard or witnessed the cutting or the break-in. He also alluded to the fact that there were CCTV cameras at the place where the theft is said to, have taken place but that evidence was not produced when he was implicated in the offence and upon challenging the non-production of the CCTV video clips.

The Second Accused Person's Defence

The second accused person stated that he only discovered that the gold trap was missing when summoned by both the manager Ngonidzashe and the witness, the security guard on their routine check of the gold ore. He told the court that he asked Ngonidzaishe to view the CCTV Cameras to see who the culprit was but was informed that the only person who could operate the cameras was in Harare. The second witness further testified that Ngonidzashe proceeded to assault the state witness, the security guard. He further asserts that it was the assault that led the witness to mention him as co-accused. He also stated that the state witness had been recently engaged by the complainant company but had left his former employment over allegations of theft.

In his evidence the second accused person maintained his innocence and stated that the statement he gave to Ngonidzashe after he assaulted him and that he gave to the police after further assaults did not change. The second accused denied acting in connivance with the first accused to commit the offence or any other offence.

Analysis of Facts

The state case is made up of one witness, a security guard employed to guard the premises of the complainant against theft. The evidence led in court revealed that at the time the theft was discovered there were a number of people working within the complex and in the proximity of the mill. It was not rebutted in evidence that the place where the blanket was stalled was in a secluded area and under lock and key. It was not controverted that there were CCTV cameras within the vicinity of the scene of the crime. Another interesting aspect is that there was a person who was responsible for the keys of the place where the blanket was kept at all material times, whose name is Ngonidzashe. This witness was not called to give evidence.

The trial court was told that the gold blanket was always muddy and wet. This meant that there was bound to be a trail of muddy and wetness evidence on the persons who had committed the offence and on the foot path that led to the precast wall and beyond.

There is nothing on record that shows that both accused person had evidence of recent interaction with anything wet or muddy. There were no foot prints taken matching those of any culprit or the accused persons.

The whole state case was made up of a single suspect witness whom the two accused person pointed out as having a vendetta against them. This witness did not dispute the presence of other workers at all the material times, at the time of theft and its discovery. It cannot be ruled out that any other person could have committed the crime. Further, the witness stated that he watched the theft unfolding but did not take any action. He even inactively allowed the first accused to vacate the premises. He then watched like in a drama the second accused person throwing the stolen loot over the durawall but did nothing. He failed to state why he failed to raise an alarm from the onset as there were several workers working during that time so that the thieves could have been apprehended red handed on the spot.

The witness abandoned the statement he told the police at the docket preparation stage, that of bribery and substituted it with that of a fear of being assaulted but the accused persons as reasons for his inaction since this was the sole key witness it was important that his evidence be consistent. Such inconsistency dented his credibility.

APPLICATION OF THE LAW

Single Witness Evidence

The accused persons were convicted on the basis of single witness evidence. Although there was mention of other people who were in the vicinity at the material time and some who played active supervisory role and had vital information of the place and the commission of the offence these people were never investigated nor called to testify. The evidence by the accused persons that the single witness who was the security guard of the same premises was not challenged or rebutted. This meant that the witness became both single and suspect. In such scenarios the law dictate that special evidential rules must be applied. *John Reid Rowland'* Criminal Law in Zimbabwe', 18-25 "Single Witness Evidence."

In our jurisdiction in terms of section 269 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], a conviction can be made on the basis of a single competent, credible and reliable witness. In *Zimbowora* S-7-92, the Supreme Court noted that although it was competent for a trial court to convict a person on the evidence of a single witness it was necessary that such evidence be clear and satisfactory in every material respect. It was noted that where the witness has an interest to serve, his/her evidence should be approached with caution and corroborating evidence should be called. *See - S* v *Kasukuwere* 1981 ZLR 375 (S) at 378.

The case of *S* v *Chingurume* HH 454/14 it was highlighted that, in single witness evidence the possibility of deception cannot be eliminated and always there is cogency in testimonies of more than one witness. The more they are the more room to check and test their evidence against each other.

Professor, Geoff Feltoe, Magistrates Handbook 2021 edition on Common Problems of Single Witness Evidence on page 283 to 287, states that there is obviously a risk which attaches to convicting the accused on the basis of the uncorroborated evidence of a single witness. There will be a paucity of evidence and the testimony of the single witness is the sole proof of the accused's guilt. Some of the dangers inherent in the evidence of a single witness are poor observation, faulty recollection, reconstruction of evidence, bias, amongst several other factors. *See - S* v *Mubvumba,* HH 318/18.

In casu, the witness was the night security guard on watch. He had a duty to accost, stop, interrupt, and intercept intruders and thieves. He acted contrary to his duties. He failed to intercept the culprits at the breaking in, cutting, uplifting and disposal of the loot stage. He

allowed the first offender to vacate the premises and then accosted the second accused alone at a later stage. The inexplainable part is why the inaction? It only further dents his credibility.

Lack of Corroboration

Secondly, the court was told that there were workers on night shift in the vicinity and within the area where the theft took place. No logical explanation was given as to why an alarm was not raised at any of the several stages in the commission of the offence.

Evidence was placed on record that the witness had to be slapped in order for him to name the two accused persons. The single witness gave two explanations for his inaction which are at variance. In the first statement which is in the summary of the state case but was not pursued in oral evidence is that he was offered a bribe. The version later changed to the fact that the accused persons were violent and had threatened to assault him. At which stage this was done is not clear from the record. For a single witnesses' evidence to be acceptable it must be solid and consistent as the innocence or guilt of the people on trial hung on it. Such evidence must be beyond reproach and smooth sailing.

In S v *Mupfumbira* HH 64/15 it was highlighted by HUNGWE AND BERE JJ that:

> "The courts have pointed out that proper investigation of criminal cases will usually uncover corroborating evidence and it is seldom necessary to rest the entire state case upon single uncorroborated testimony. The courts have exhorted police officers and prosecutors not to be content with the production of evidence from a single witness. However, where it appears to a court there are other witnesses who may be called, if has the power to call these witnesses itself in appropriate cases."

I find it very difficult that the trier of facts found this witness credible especially when he could not refute the averments by both accused persons that he had a criminal record which had led to the loss of his previous employment. This compounded by the fact that he failed to act where a genuine security guard ought to have reacted and to raise an alarm in a place where there were a lot of other workers on duty at the time.

Having noted the above, there was one crucial witness mentioned by name who was neither investigated nor called to testify. No independent corroborative evidence was placed before the court aquo to buttress that of the single witness. The manager or supervisor, Ngonidzashe who was mentioned by both the accused and the witness who played an active role in the discovery of the theft and privy to the circumstances surrounding the arrest of the two accused persons was not called to testify. It is this witness who had the keys to where the blanket gold trap was kept. He only revealed that those keys had been lost but he did not explain why he did not make a report to the superiors. He is the person who was challenged to

open the CCTV footages so as to see the real culprits but gave an excuse that the operator of the camera was in Harare. Thereafter, this key person took no other action to verify the truth from the CCTV cameras after the accused had been arrested. Ngonidzashe was on duty on the day and time. This takes us back to why the first witness failed to signal him during the time of the commission of the offence. It is the same person who would have assisted the state case to rebut that the witness had name the accused persons after he had assaulted him. This was a witness of great significance. He saw the second witness before he had had time to have a change of clothes. We are told that the gold trapping was wet and muddy. This witness would have informed the court of the state of that accused's attire as to link him to the offence as it was said he is the one who carried the wet, muddy blanket and threw it over the perimeter wall. Why the police did not investigate him is puzzling. It is even more incomprehensible why the prosecution failed to call such a significant witness.

Unexploited Independent Evidence

Further, the most important piece of corroborative evidence whose existence was acknowledged by the witness but never interrogated is the CCTV footage. No reasonable explanation was given as to why the footage was not requested by both the police and the State. This could have acted as independent, corroborative and fool proof evidence to buttress or discredit the single witness evidence. The acronym CCTV means a closed-circuit television. It is a system in which signals are not publicly distributed but are monitored for surveillance and security purposes. Had it been testified that it was malfunctioning then there would have been need to ignore that fact, but it was functioning and recording events of that day but its footages never placed before the court.

Not only that, there was no footprint evidence extracted or led from the place where the gold trappings were stolen, trailing to the durawall and beyond. Logically, in light of all the above lingering questions was there sufficient evidence to convict the two accused persons.

Reasonable Doubt

Did the state manage to prove its case beyond a reasonable doubt?

The law, as espoused in *the locus classicus* case of *Difford* 137 ad9 at 370 -3 is very clear.

In this case JA GREENBERG, a succinctly noted:

> "No onus rests on the accused to convince the court of the truth of any explanation, the court is not entitled to convict unless it is satisfied , not only that the explanation is improbable, but it is false. If there is any reasonable possibility of his explanation being true then he is entitled to his acquittal."

In the case of *Solano* 1985 (1) ZLR 62 proof beyond reasonable doubt is expressed at page 64 - 65 as:

> "The state is required to prove the guilt of the accused beyond reasonable doubt, proof beyond reasonable doubt requires more than proof on a balance of probabilities. It is not however, proof to an absolute degree of certainty or beyond a shadow of doubt .When there is proof beyond reasonable doubt no reasonable doubt will remain as the guilty of the accused. If a reasonable person will still entertain a reasonable doubt as to whether accused is guilty, the accused is entitled to be acquitted. Fanciful or remote possibilities do not introduce a reasonable doubt."

The same dicta resonated in the cases *Kombayi* v *State* HH 27/04; *S* v *Dube* 1997 (1) ZLR 221; *Kapende* v *S* HH 157/02 THAT:-

> "All the accused needs to do is to put forward a case which is reasonably true… if there is doubt then then benefit of the doubt should go to the accused."

The state case is riddled with loopholes, areas that were not investigated. It thus cannot be said that the conviction was based on proof beyond reasonable doubt. The accused persons gave reasonable explanations. According to the law pronounced in the above authorities, they were entitled to the benefit of the doubt and to an acquittal.

Extraneous Evidence

The trial court delved at length into the description of the wet blanket, how it was secured and how it functions. Such evidence is not within the four corners of the record of the trial. No witness gave such evidence in court. It seems as if the court did go for an one man band, *inspection in loco,* as its descriptions were those of a person who visited the scene or got a briefing from someone else. This information is the one that greets the reader of the record as part of the reasons for both conviction and sentence. In my view, this is grossly irregular. See, *Charuma Blasting, above.* It is evident that the court was not convinced on what was before it and had to resort to information outside the parameters of the record and the courtroom.

What is also of concern is that no witness was called to testify that at the time of the discovery of the theft there was gold ore and the quantity thereof. There is an assumption that there was gold, but no one saw the gold nor the amount of gold. It is not clear whether at the time the blanket trap was stolen it had gold are or not. The possibility of the theft having been committed by other persons other than the accused persons cannot be ruled out, given the fact that there were people working on the premises. The accused persons where given a penalty to pay restitution based on an estimation of a non-existent quantum of gold. It is illogical that an identical quantity of gold is mined on each day. The estimation was done from previous

gold daily takings, which in my opinion cannot be consistent. With all these obvious gaps in the state case was there sufficient evidence to convict either of the accused persons?.

In my view, the benefit of the doubt should have been accorded to the accused persons. The investigating officers did not do much. It is the duty of the Prosecution set down office to call for more investigation and not rest their case only on circumstantial evidence that does not add up. An undefended accused person especially one who is not legally trained and unfamiliar with the court environment and the legalese there in is confronted with what one author referred to as legal "minefield". Dean Erasmas, `Procedural Explanations and Choices: "The Undefended Accused in a Minefield", Juta year 2006. It is in the interest of justice that those who are tasked with the duty to investigate matters do so committedly without fear nor favour. A well investigated case makes the job of all the other stakeholders easier and ensures efficient justice delivery. It seems that *in casu*, the presumption of innocence as espoused in the Supreme law of the land was negated and lost once the accused person went into the dock. *See S* v *Mupfumbira* HH 64/15.

In the present case, I associate myself with the reasoning in th***e*** *Mupfumbira* case above and find that both the conviction and the sentence where not in accordance with real and substantial justice. These were fairly young first offenders, who had no history of any brushes with the law. The value assigned to the stolen gold trapping was an estimation in the absence of any previous weighing. There was an order for restitution of quite a considerable amount of money given the financial circumstances of the accused persons. Against that background community service should have been considered within the context of the modern sentencing patterns and the need to correct, rehabilitate and reform first offenders, assuming the conviction was correct.

See *S* v *Square Zondo* HB 210/17. *S* v *Milo* HB 18-08; *S* v *Manuwere* HB 38-03; *S* v *Gumbo* S 30-9; *S* v *Mtawan*a S 20-82 and *S* v *Ngulube* HH 48-02 among others.

Accordingly, I find that the proceedings were not in accordance with real and substantial justice, both the conviction and sentence are set aside. I have also taken into account the months the accused persons had served pending this Review.

Thus, it is ordered as follows:

1. The conviction is quashed
2. Accused person are found not guilty and acquitted
3. The sentence is set aside

4. The Criminal Registrar be and is hereby directed to issue a warrant of liberation for both accused persons fort with.

BACHI-MZAWAZI J:……

CHINAMORA J: Agrees……..