HB 249/16
HCA 269/14

JOHN SITHOLE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
BERE & MATHONSI JJ
BULAWAYO 19, 22, 27 & 29 SEPTEMBER 2016

Criminal Appeal

L. Mcijo for the appellant
Ms N. Ngwenya for the respondent

BERE J: The facts in this case have been properly summarised by my brother MATHONSI J and it is not my wish to re-state them.

After analyzing the facts and the evidence my brother Judge was inclined to dismiss the appeal, a decision which with due difference I could not reconcile with my own analysis and perception of the evidence as recorded.

My position has been prompted by the following considerations which factually cannot be disputed. The first observation which I find to be compelling in this case is that on the alleged commission of the offence in question this was a case where largely speaking the court had to rely on the evidence of one key state witness *viz*, Emmanuel Zvawanda (who is the only one who claimed to have seen the accused committing the alleged offence) and the appellant who vehemently denied the story as put forward by the key state witness. It is common cause that Makanganise Maunganidze (as confirmed by his own testimony – record page 35 under cross-examination did not see the appellant committing the offence.

If my observation is correct that this case was one in which the trial court had to rely on the evidence of one state witness against the appellant, then the provisions of section 269 of the Criminal Procedure and Evidence Act[1] must be triggered. In a recent case of *S* v *Chingurume*[2] I had occasion to deal with the interpretation of the section in question and my position as captured in the head note of that judgment is put as follows:

> "There is need to exercise extreme caution when one has to rely on the evidence of a single witness in order to guard against possible deception in the whole process. The right to convict on the evidence of a single credible witness, stated without qualifying words in s 269 of the Criminal Procedure and Evidence Act [Chapter 9:07], should not be regarded as putting the evidence of one witness on the same footing in regard to the cogency evidence of more than one[3]."

The point is that there is always a safety valve in corroborative evidence. As I will demonstrate later in this judgment, there was no corroboration in this case and for that reason the conviction of the appellant remained unsafe in this case.

My second observation which has further strengthened my attitude to lean towards non-confirmation of the appellant's conviction in this case stems from the concession made by the state counsel during argument in the appeal hearing in this case that given the competing stories told by the key state witness and the appellant which practically made it impossible for the trial magistrate to justify the rejection of the appellant's evidence in preference of the sate witness (es)' evidences she was not on firm ground in supporting the conviction of the appellant.

My third observation is that if it is accepted that the trial magistrate heavily relied on the evidence of the single state witness in finding the appellant guilty (which should be the correct position given the nature of the evidence in the lower court), then I am reminded of the inherent dangers of the "boxing match approach" to criminal matters lamented by MCNALLY JA in the case of *S* v *Temba*[4].

1. Criminal Law Procedure & Evidence Act [Chapter 9:07]
2. 2014 (2) ZLR 260 (H)
3. 2014 (2) ZLR at p 260 (D-E)
4. S.C. 81/91 @ pp 1 – 2 of cyclostyled judgment

In this case the full bench of the Supreme Court condemned the approach in criminal matters where a magistrate throws into the ring as it were the accused and the complainant and then "at the end of the bout the magistrate awards points for demeanour and probability and names the winner …"

The point that I make it more illustrated in this appeal by making reference to the judgment of the court a quo where the analysis of the evidence was given as follows:

> "The state witnesses were very credible and corroborated each other in a material way. Their evidence was also supported by the production of Exhibits particularly the tools (that is the shovel and pick) which were recovered from the site or scene. The first state witness's explanation that he could not forgive accused as he had warned him sometime in December 2013 is believed as accused could not dispute it. Also that fact that all parties could not hint on the possibility of anyone having been seen at the site makes it highly improbably that accused was the only man "at work". On the other hand accused's defence that he was just arrested whilst walking along the road is very improbable. It boggles the mind what would motivate the security guard to arrest a mere passers-by. In the absence of any imaginable incentives accused's defence cannot be sustained. In addition, the fact that all parties denied any existence of bad blood amongst themselves rules out chances of false implication[5]".
>
> The state evidence taken as the whole leaves no doubt that accused was caught in action.

With respect the analysis of the evidence does not explain why the appellant's explanation was rejected in favour of that of the state evidence. A simple perusal of the court proceedings shows that although the appellant was not legally represented in the court *a quo* he was able to effectively put his innocence to the two state witnesses through cross-examination. Through cross-examination of the witnesses and even when he was being cross-examined by the state prosecutor, he denied having given any apology to the witnesses or having been found committing the offence in question.

Further, under cross-examination he stated that he suspected the two witnesses hated him and that he did not know why that was so.

5. Record page 17

To me, an unrepresented accused person who is able to put up such a brave fight speaks to volumes of his credibility as a witness. Such a witness's story cannot merely be rejected without good reasons. It is ironic that the trial magistrate was quick to comment on the credibility of the state witnesses and chose to be mute on the demeanour and credibility of the appellant. It was not enough for the court *a quo* to merely indicate that he found the appellant's explanation "very improbable".

To the contrary the approach adopted by the trial magistrate seems to run contrary to the long, tried and tested principle in dealing with the evidence of an accused's evidence in criminal proceedings. In *Rex* vs *Difford,* WATERMEYER AJA aptly summed up the correct legal position *inter alia* as follows:

> "It is not a question of throwing an onus on the accused … It is equally clear that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation even if that be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal …"[6]

In a case that was decided after *Rex* vs *Difford, vis, Rex* v *M,* DAVIES AJA put the icing on the cake when he remarked as follows:

> "And, I repeat, the court does not have to believe the defence story; still less has it to believe it in all its details, it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true."[7]

In this case before us, the appellant's defence was fairly simply. The accused stated that he was coming from his place of residence at Madala Site compound Queens Mine, Inyathi and on his way to Macibi Plot when he met the first state witness who stopped him and alleged that he was the one prospecting for gold at a site where people used to pan for gold. The appellant went on to allege that he denied the allegations and the security guard drew out his gun and threatened to shoot him for denying the allegations.

6. 1937 AD 370 @ 373
7. 1946 AD 1023 @ 1027

What then followed according to the accused was him being forced to collect a pick, shovel and the ore which the witness alleged belonged to the accused.

That there was clear evidence that there was a serious dispute between the appellant and the first witness is demonstrated by the first witness having to call for reinforcement. This act of calling for reinforcement does not make sense, if one accepts that the appellant merely apologised and asked for forgiveness.

The second state witness is incapable of corroborating the first witness's story because when the dispute between the first state witness and the appellant arose, he was not there.

In any event, the apology which the trial magistrate triumphantly commended upon may not have been properly admitted into the record of proceedings if one considers the position taken by MCNALLY JA in the much celebrated case of *S* v *Nkomo* where the learned judge eloquently puts the legal position as follows:

> "Sometimes I wonder whether police officers and prosecutors labour under the mistaken belief that "a statement" is only "a statement" when it is written down. Therefore they may think, the rules about admissibility apply only to written statements. If that is the general belief, it is necessary to say firmly that it is wrong. No statement to a person in authority by an accused person, made outside the court room, may be produced (if it is in writing) or quoted (if it was oral), unless the rules have been observed, that is to say, unless is satisfied that it was made freely and voluntarily and without undue influence being brought to bear. That is what s 242 (1) of the Criminal Procedure and Evidence Act means"[8]. (my emphasis)

In this case, there can be no denial that the first state witness who was employed as a security guard by Fawcett Security Company was a person in authority and that it may have been improper for the magistrate to have accepted the appellant's alleged apology without first satisfying the rules of procedure. The evidence as regards the apology may have been smuggled into the court record and reliance on it may have been improper in this case.

8. 1989 (3) ZLR 117 (SC) @ p. 124F-G

As I write this judgment, I am unable to imagine how else the accused in this case could have prosecuted his case to justify his acquittal. Equally true, I am unable to conclude, as the magistrate did, that the appellant's story as it appears on the record of proceedings was false to warrant his conviction. My firm view is that it was simply not possible for the magistrate to have convicted the appellant on the strength of the two diametrically opposed versions given by the appellant and the first state witness. There was virtually nothing to choose between those conflicting versions and in such situation the appellant should have been given the benefit of doubt.

In conclusion, I find myself having to re-state what I stated in *S* v *Chingurume (supra)* that:

> "… it is easy to glorify the credibility of a witness in the witness box and the temptation might be difficult to resist for many magistrates, particularly where one has to determine the outcome of a case based on the evidence of a single witness. One suspects that the unspoken reasoning behind all this is because it is the easy way out for a magistrate who is conscious of his vantage position at that stage of the proceedings. The magistrate is fully conscious at this stage that he or she occupies a unique position in dealing with the witness and that the review or appeal court will not be able to enjoy that same opportunity as he or she had. The temptation therefore to abuse that opportunity is great."[9]

Without attempting to cast aspersions in this case, it is difficult for me to understand why the trial magistrate rejected the story told by the appellant that he was merely framed by the first state witness, neither can I say that the story told by the accused was not reasonably possible.

I note, that my brother, MATHONSI J was persuaded to confirm the conviction by *inter alia* the manner in which the appellant responded to the sampled questions and answers that appear on page 3 of his judgment and also by the evidence proffered by the appellant in mitigation of sentence before one was passed.

9. *S* v *Chingurume (supra*) p 266

With respect, I read the answers given by the appellant to the sampled questions as being consistent with the appellant's innocence and those responses read very well with his own questions in cross-examination of the state witnesses. The appellant could not have been convicted because of his failure to proffer reasons why the state witnesses were lying against him. See *Joseph Mbanje* vs *The State*.[10]

I do not think there is much that turns on the appellant's evidence in mitigation of sentence. After conviction the appellant's fate had already been sealed and under normal circumstances one is not expected to continue protesting his innocence after the verdict of guilt has been pronounced. One has to mitigate in acceptance of the court's verdict and if one has qualms with the conviction he has to deal with that on appeal like what the appellant has done in this case.

It is for these reasons that I come to the conclusion that the appeal should be upheld.

Mathonsi J …….. I agree

Liberty Mcijo & Associates, appellant's legal practitioners
Prosecutor General's Office, respondent's legal practitioners

10. SC-75-89 @ page 4