HB 171/17
HCA 49/16

TAFADZWANASHE CHASAUKA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA & MAKONESE JJ
BULAWAYO 19 & 22 JUNE 2017

Criminal Appeal

Appellant in person
T. Muduma for the respondent

MAKONESE J: The appellant appeared before a regional magistrate based at Gwanda on 14 April 2011 facing one count of theft of a motor vehicle in contravention of section 113 of the Criminal Law (Codification and Reform) Act Chapter 9:23). The appellant pleaded guilty to the charge and after a full trial he was convicted and sentenced to undergo 10 years imprisonment of which 3 years were suspended on the usual conditions of good behaviour. This appeal indicates that the appellant was dissatisfied with the outcome of the trial in the court *a quo.*

The appellant mounted a spirited appeal in person. He read from his handwritten notes and argued that the trial court had erred in arriving at the conclusion that his guilt was proved beyond reasonable doubt. As regards sentence, the appellant failed to advance any meaningful argument and as a result the appeal was mainly focused on whether the conviction in the court *a quo* was proved beyond reasonable doubt.

The brief circumstances of this matter are that on the 5th of January 2010 and at Beitbridge Border Post the appellant in the company of his brother (Mugovewashe Chasauka who had been convicted at the time of the trial) arrived at Beitbridge Border Post in the early hours of the morning. The two spotted a Toyota Hiace which has not been registered, parked near the exit gates. The appellant and his accomplice drove the motor vehicle through the exit gate and as they did so they were seen by some security guards manning the border post. Stones

were thrown at the moving vehicle and in the process one of the windows of this vehicle was damaged. Undeterred, the appellant and his associate drove at high speed towards Beitbridge town. Roadblocks were mounted on the major highways leading out of Beitbridge town. At around 0900 hours the appellant and his accomplice were intercepted at a police roadblock outside Masvingo Town. The appellant and his brother failed to produce any documents for the unregistered vehicle. The police details observed that the back window of the motor vehicle had been smashed. Mugovewashe Chasauka who was driving the motor vehicle was promptly arrested. In the confusion, the appellant pretended to be a passenger in the vehicle and asked to be excused to relieve himself. The appellant disappeared into the bush. The passengers in the vehicle then altered the police details manning the road block that the appellant was the one collecting the fares and that he was travelling in the company of the driver who was now under arrest.

The evidence led at the trial established that the appellant was positively identified by one of the officers at the road block. The evidence of Moffat Sakudi Tembo is to the effect that he was a police officer based at Masvingo Central Police Station at the material time. On the relevant day he was assigned to set up a road block along the Harare – Masvingo Road.

The material part of the evidence of this witness is to the effect that:

"The accused person who was seated among the passengers alighted from the vehicle and came to me where I was seated on a stone. He asked me if there was a toilet nearby to go and urinate. He asked for permission to go and urinate. I then authorized him to go and urinate. At that stage I had not yet known that accused was working hand in hand with the driver of the combi …"

Under cross-examination by the appellant the following exchange took place:

"Q How did you identify the person you saw?

A To begin with I did not know the accused before. But on the day in question after you approached me with your request, I noted your face and the pair of jean trousers you were putting on. The face has not changed at all."

It seems to me where a witness positively identified a person such as in this case the trial court would have no reason to doubt the evidence of identification. This is a case where the witness not only confirmed having seen the person, but goes on to say the person's face has not changed at all. The trial court also observed that the appellant was implicated by his own brother. In order to evade arrest appellant lied to the arresting officers and indicated that his name was Farai Tafadzwanashe Chitsain. When the appellant was taken to Beitbridge police for interviews appellant's father Raymond Chasauka then confirmed that the person they had in custody was their son and that his correct names were Tafadzwanashe Chasauka. The appellant's gripe with that evidence is that his father was not called to give oral evidence. The appellant does not seriously dispute that his father gave the police his real names and therefore not much can be made on that aspect. In any event the Investigating Officer one Sergeant Taruberekerera testified that appellant lied to him about his name. He told the arresting officer that he was known as Farai Tafadzwanashe Chitsain. Appellant's correct names were revealed by his father. Sergeant Taruberekerera's evidence was clear and to the point and the trial court properly accepted that evidence as credible and reliable. The state witnesses had no reason to fabricate a story against the appellant and the trial court concluded that they were credible, honest and truthful witnesses. It was abundantly clear that the evidence was simply overwhelming against the appellant and he was left fumbling in the dark for a defence which was patently false.

It is now a well established principle of our law that an appeal court should not interfere with the factual findings of a trial court unless it is shown that there is a clear misdirection on the part of the trial court. See the case of *S* v *Godfrey Nzira* SC-23-06.

As regards the issue of sentence, the appellant was sentenced to 10 years imprisonment with 3 years being suspended on the usual conditions. This sentence is in line with decided cases. There was no misdirection on the part of the trial court in its approach to the question of sentence. Sentencing is the discretion of the trial court and the appeal court usually interferes with the sentence of a lower court where the sentence is manifestly excessive as to induce a

sense of shock or where the sentence is vitiated by irregularity or misdirection. See the cases of *S* v *Ramushu & Ors* SC-25-93; S v *Nhumwa* SC-40-88 and *Mkombo* v *The State* HB-140-10.

In the result, the conviction is safe and must be held. It is ordered that the appeal be and is hereby dismissed in its entirety.

Kamocha J ……. I agree

The National Prosecuting Authority, respondent's legal practitioners