HB 164-18
HCA 141/16
& HCA 65/17
XREF HCA 69/16

ELIAS MUDENDA
and
AGRIPPA MLOYI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI AND TAKUVA JJ
BULAWAYO 18 JUNE 2018 AND 21 JUNE 2018

Criminal Appeal

Ms P Mvundla for the appellant
T Muduma for the respondent

MATHONSI J: The two appellants appeared before a provincial magistrate at Bulawayo charged with five counts of unlawful entry and co-relating five counts of theft. Following a full trial after they had pleaded not guilty to all the charges, on 5 April 2016 they were each found not guilty and acquitted on four counts of unlawful entry and four counts of theft. They were however each convicted of one count of unlawful entry and one count of theft. The first appellant was convicted on counts seven and eight while the second appellant was convicted on counts nine and ten. The basis of their convictions was that in those counts each appellant's finger prints where uplifted at the scene of crime. They were acquitted on the rest of the charges because the state failed to lead any evidence linking them to the commission of those offences.

The two appellants have appealed against both convictions and sentences. In their separate notices of appeal which are however worded the same the appellants complain about a lot of things: the contents of the state outline which impute bad character on their part; the inadmissible confessions they allegedly made to both the police and some of the complainants

and reliance by the court *a quo* on perceived hearsay evidence as well as the phoney indications. However, as correctly observed by the state the essence of their attack on the convictions should in fact be the finger prints evidence upon which the convictions are based. This is because all the other issues have nothing to do with their convictions as shown by the fact that they were acquitted in respect of all the other charges where the same evidence complained of was lined up by the state.

On that aspect it has been argued on behalf of the appellants that the police fabricated the fingerprints results. They suggested that the police must have uplifted their fingerprints from water bottles they were made to touch while at the police station during the course of investigations. For that reason it was submitted that having challenged the evidence of fingerprints the state was obliged to rebut their story by at least calling the attending detail who uplifted the fingerprints at the scenes of crime to come and testify. It did not, it only called the expert who analysed the fingerprints and matched their prints with those uplifted at the scenes. That line of argument suggests that the investigating team must have forwarded fake fingerprints to the expert for analysis. The question which arises is whether that explanation is reasonable as to excite some doubt in the mind of the court.

In our criminal procedure fingerprint or handprint evidence is led to show that an accused person was present at the place where the crime was committed. Indeed such evidence is damning in nature as it places an accused person at the scene of crime thereby tearing apart any *alibi* defence the accused person may proffer. It is in that regard that the appellants found themselves with a mountain to climb in the counts they were convicted of because the evidence of their fingerprints being uplifted at the two scenes of crime was damning indeed. What we have to resolve therefore is whether the fingerprint evidence was discredited.

The only meaningful argument advanced by the appellants in that regard relates to what was purely conjecture that the prints fowarded to the expert for analysis had been taken from water bottles at the police station and not at the scenes of crime. The problem with that, apart from its being speculative as noone saw the police officers doing so, is that the latent impressions uplifted at the scenes were put on tape cards, that is Forms 240, which had already been

generated by the time the appellants were arrested several weeks after the scenes were visited. Therefore, if there were fingerprints uplifted from water bottles, they are not the ones which Iscariot Chimbalanga, the fingerprint expert, examined. That defence was therefore wide off the mark.

In any event our criminal procedure only requires that where the state case rests exclusively, entirely or substantially on finger prints found at the scene, the state must call a fingerprint expert to testify as to the basis upon which he or she arrived at the conclusion that the prints belonged to one and the same person. See *S* v *Mutsinziri* 1997 ZLR 6 (H). It is not always necessary to call the detail who uplifted the fingerprints because it is not that detail whose opinion nails the accused person. In this particular case the explanation of prints being uplifted from water bottles given by the appellants were so irrational in terms of time that there was really no need to dignify it with calling the attending detail. In my view, the trial court was right to rely on the evidence presented by the state especially as Chimbalanga was an impressive witness. This is a witness who was quick to point out that although many scenes of crime were involved, he paired prints for only two scenes. Had he been given to fabrication, he would have easily claimed more. I conclude therefore that the conviction of the appellants was safe and proper in the circumstances. The appeal against conviction must therefore fail.

Regarding sentence the appellants challenged the sentences on the ground that the values of the prejudice were astronomical and unproved and that the court should have treated the pair of counts in each case as one for purposes of sentence or ordered the sentences to run concurrently. In both situations what was stolen was hard cash which was in safe boxes. The criminals had broken into business premises and used a grinder to open safe boxes before stealing the money. Witnesses testified as to the sums of money which were stolen. Their evidence on that aspect was not challenged and the court had no reason not to accept the value. This is not a case in which goods were stolen which had to be evaluated.

The value of the prejudice is a relevant factor when considering sentence. In that regard, it is within the discretion of the sentencer to assess a sentence based on the value of the

prejudice. Surely the moral blameworthiness of one who steals $2-00 cannot be equated to one who steals $50 000-00. I am unable to find any misdirection in the sentences.

Accordingly both appeals are hereby dismissed in their entirety.

Takuva J agrees……

Mutuso Taruvinga & Mhiribidi, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners