NORMAN GANDIDZANWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE AND WAMAMBO JJ
HARARE, 13 July 2018 & 13 February 2019

Criminal Appeal

*A*ppellant in person
R Chikosha, for the respondent

HUNGWE J: On 13 July 2018 we dismissed the appellant's appeal in an *ex tempore* judgment given in open court after listening to appellant's submissions and those of the respondent's counsel. The appellant has asked for written reasons for the purpose of filing an appeal against the decision dismissing both the appeal against conviction as well as sentence. These are the reasons.

The appellant was convicted on two counts of attempted armed robbery and one count of unlawful possession of a fire-arm after a contested trial. He was sentenced to eight years for the two counts of attempted armed robbery and 16 months for unlawful possession of a fire-arm. The two sentences were ordered to run concurrently. The metal identification document as well as the Llama pistol found on his person were declared forfeited to the State.

His grounds of appeal, which he personally drew for himself as a self-actor, amount to this, the court *a quo* erred in believing the evidence led by the State notwithstanding glaring contradictions amongst the State witnesses' evidence. In short, the appellant challenged the propriety of his conviction solely on the findings of credibility made by the court *a quo*. He questioned why the court rejected his defence of *alibi* and disbelieved his two witnesses. Against sentence the appellant complained of the harshness of the sentence and seeks its reduction in the event his appeal against conviction fails.

The facts which the court *a quo* found to have been proved at trial were as follows. The court found that the appellant agreed that he had been arrested along Samora Machel Avenue Corner Leopold Takawira Street, Harare on 14 January 2017. It was common cause that a pistol was recovered at the scene of his arrest. Appellant put in issue every allegation of fact and conclusion of law surrounding his conviction. The State called the evidence of the two complainants in the robbery charge, the Security Guard at Pearl House where the attempted robbery occurred and the police officer who arrested the appellant. The State also produced a metal identity document and the attendance register kept by the guards at Pearl House Samora Machel Avenue, the fire arm recovered at the scene and a ballistic report on the fire-arm.

The court *a quo* considered the appellant's defence and correctly analyzed it as amounting to the defence of *alibi*. The appellant denied that he was at Pearl house around 10:00 hours when the offence was committed. He claimed that he was along Leopold Takawira Street where he had taken his relative to board a Bindura bound commuter omnibus. The complainants had observed him receive US$700.00 from his relative. There were thieves who deceived him by claiming that he had dropped a metal identity document so as to pounce on him and rob him. This explains why a rowdy crowd arrested him, he contended. In his appeal grounds, the appellant contests the propriety of the findings of credibility of both the complainants and the other independent state witnesses on account of what he terms "overwhelming contradictions" in their evidence. In his view on that basis alone the convictions ought to be questioned.

The question whether a trial court erred in its judgment on questions of fact depends on what can be demonstrated on the evidence on the record before an appellant court. It should not be such a difficult matter to demonstrate on the provided evidence how the assessment of the evidence by the trial court may have been affected by material inconsistencies or inaccuracies. It ought to be possible, to show, on the basis of the evidence on record, how the trial court failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone completely wrong. A trial court always enjoys the immense advantage of having immersed itself in the atmosphere of an actual trial of fact, with the privilege of observing the demeanor of both the State and defence witnesses. It would be in the unique advantage of seeing which of the witnesses were telling the truth or falsehoods. There are many authorities of this court and

persuasive authorities from other jurisdictions on the proper approach of an appellate court to the consideration of a decision based on fact.

See *S* v *Isolano* 1985 (1) ZLR 62 (SC) @ p 63; *Walt (or Thomas)* v *Thomas* (1947) All ER 582 @ 590; *Hughes* v *Graniteside Holdings (Pvt) Ltd* S-13-84.

The reasoning in the above cases equally applies to the instant case. The magistrate made an adverse finding on the credibility of the appellant and his witnesses. That finding was based on the facts before him and his observation of the witnesses that appeared before him. An appellate court should not disturb that finding without having been shown that the magistrate's decision was wrong. I will demonstrate why in the present case it has not been demonstrated before us that the magistrate's decision on the adverse finding on credibility was wrong.

The security guards, Revai Katiyo manned the entrance to Pearl House on 13th and 14th January 2017. On both days a man identifying himself as P. Mureriwa signed in the register. On 14 January 2017 this man brought in two other men who he said were his brothers and entered the building. They all three later appeared from inside the building. The man who called himself Mureriwa wielded a pistol. The other two men were chasing him. The man wielding the pistol, was threatening to shoot anyone impeding his flight. The other two men were shouting that the pistol was not loaded and were calling on the public to help them apprehend the said Mureriwa. A police officer who was on patrol duties in the Harare Central Business District was attracted by the commotion and instinctively pursued the fugitive who ran towards Leopold Takawira Street. An alert member of the public blocked the fugitive and the man who identified himself as Mureriwa at Pearl House was apprehended.

The two police officers disarmed him of a pistol. Upon searching him at the police station they recovered a metal identity document belonging to Paidamoyo Mureriwa. The fugitive who had been in the sight of his pursuing would-be victims throughout the chase is the appellant. I pick on the evidence of the Pearl House Security guard Katiyo for the reason that he had not had any dealings with the two complainants prior to appellant's arrest. He had only dealt with appellant in the line of his duties. He could not have disputed the correctness of his identity when the appellant entered his name into the register as P Mureriwa. He had no reason to. He accepted the appellant's invitees as his brothers because the appellant identified the two complainants to him as they entered Pearl House as his brothers. He had no reason to doubt appellant's word then. Katiyo saw

appellant, who he knew as Mureriwa in flight wielding a pistol as he emerged from the building under hot pursuit by his "brothers."

Katiyo therefore places the metal identity card on the person of the appellant on 13 and 14 January 2017 at Pearl House. Katiyo also places the pistol in appellants hands in the morning of 14 January 2017 Katiyo identifies appellant as the person who fled from Pearl House. Katiyo identifies the two complainants in the attempted robbery as the men chasing appellant from Pearl House down Samora Machel Avenue.

When the court *a quo* finds that the State witnesses' evidence is credible, I find no basis to criticize the finding. When the court *a quo* finds that the appellant and his two witnesses were not being truthful and that they deliberately falsified their evidence. I am unable to disagree with the finding. It is the only finding consistent with the evidence on record. There was therefore no misdirection or error on the finding by the court *a quo* on credibility. From a thorough reading of the record, it does not seem probable that the two complainants saw the appellant receive US$700-00 from someone and decided to distract him by claiming that he had dropped an identity document simply in order to rob him of his money. It is highly unlikely that having decided to pounce on the appellant their evidence would read as well as it does in the record in respect of how they came to be inside Pearl House in January 2017. It is highly unlikely that their evidence would find corroboration from the Pearl House guard and his register if it were untrue. I find therefore that the defence of *alibi* proffered by the appellant in the court *a quo* was correctly rejected.

It is for these reasons that we dismissed the appellant's appeal against conviction on the turn. As for the appeal against sentence no submission was made at the hearing on this aspect besides the attack in his heads of argument that the court *a quo* paid lip service to the mitigatory factors submitted at the trial stage. A closer examination of the reasons for sentence does not bear out this submission. The court *a quo*, fairly in our view, took into account relevant factors in mitigation and weighed them against the aggravating features of this case. What is critical to bear in mind is the fact that the facts disclose a high degree of pre-planning accompanied by heartless execution of the criminal plot. Appellant carefully identified his victims and made sure that he scored big, if successful. He took them to an isolated and deserted empty floor. He chose the scene of the execution of the crime with clear intention to confine his victims and disappear into thin air.

Fortunately he did not succeed. The sentence imposed fits both the crime he committed and the interest of the community. There is no error in the assessment of the sentence.

Consequently we dismissed his appeal against sentence too.

WAMAMBO J agrees …….

National Prosecuting Authority, respondent's legal practitioners