

VIRGINIA KUDZAI BARE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE & CHEDA JJ
BULAWAYO 30 SEPTEMBER & 19 DECEMBER 2002

C Hikwa for the appellant
Mrs M Cheda for the respondent

Criminal Appeal

CHEDA J: Appellant was charged and convicted by Plumtree Magistrates' Court of theft by conversion and sentenced to 18 months imprisonment with labour of which 6 months imprisonment with labour was suspended for 5 years on the usual conditions. Appellant now appeals against both conviction and sentence.

The respondent alleged that appellant, a woman aged 29 years was employed at Bunga Store, Plumtree as a storekeeper. It was alleged that on or about 14 February 1998 she stole the sum of \$7 014,96 from a cash box which was cash takings for the past six days. It was further alleged that after the theft appellant had broken a window pane, thus faking a break-in. The window in which the window pane was broken had burglar bars which were however, not broken or interfered with.

The complainant Mohan Rao Bunga gave evidence to the effect that appellant was employed at his shop as a shop keeper, she had custody of the keys, lived at the shop and was supposed to sleep at the shop all the time. On 15 February 1998 at about 7am she made a report about the break-in and theft of money which she stated was \$7 000,00 (plus).

The next witness was Detective Constable Canaan Nhliziyo a member of the police force in the Criminal Investigations Department. His evidence is largely procedural and as such nothing turns on it as his observations are not disputed.

The appellant gave evidence in which she adhered to her defence outline. Her evidence was that on 14 February 1998 she locked the shop at 6.10pm and left the cash box under the counter where it stayed. She then proceeded to her house but eventually left for one Mrs Nkala's home at 7pm where she spent the night. She discovered the "break-in" and theft the following morning. It was also her evidence that there were other girls who had knowledge of the keys and also that there was a security guard who used to work there but had left employment. At the close of her defence case appellant engaged a legal representative a *Mr Hikwa*. Despite the fact that *Mr Hikwa* appeared at the scene on the 11th hour he managed to pick out points and factors which the trial court should have diligently addressed namely:

1. that the evidence of an *alibi* raised by the appellant was not followed up to its logical conclusion.
2. The need to approach circumstantial evidence with an open mind or cautiously.
3. There was no record against which the missing amount (\$7 014,96) could be verified.
4. The possibility that any other person other than appellant could have opened the shop door since other girls and the security guard had had access to the shop keys.

The duty to prove appellant's guilt rest on the state and that position does not change at all. No onus rests on the appellant as pointed out in *R v Difford* 1937 AD 370 at 373 where his lordship GREENBERG J stated,

"... no onus rests on the accused to convince the court of the truth of any explanations which he gives . If he gives an explanation even if that explanation is improbable, the court is not entitled to convict unless it is

satisfied, not only that the explanation is improbable, 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.”

It appears that appellant’s conviction was based on circumstantial evidence. In order to convict on circumstantial evidence it is essential to do so on the basis of positive proven facts and such facts should generally be taken into consideration in totality with other relevant facts although there are certain instances where the said evidence can be inferred with practical certainty. Since circumstantial evidence leads into inference of a certain conclusion, the said inference should be the only reasonable inference a trier of facts should reach. It therefore stands to reason that reliance on circumstantial evidence in criminal cases, the facts in question should exclude every reasonable inference other than the one sought to be drawn. In *Stumbles and Rowe and Ano NNO v Royal Insurance Co. Ltd* 1975 (1) RLR 36. DAVIES J at 37G remarked;

“In a criminal case where the prosecution relies on circumstantial evidence to secure a conviction, it must establish not only that the inference sought to be drawn is consistent with all proved facts, but also that the proved facts exclude every other reasonable inference.”

The court *a quo* failed to take into account facts relating to the *alibi*, the possibility of other people other than the appellant committing the offence and that it was not clear as to how much was stolen. If the facts point to the possible guilt of another person, the court in my view, should not convict. In *Teper v R* [1952] AC 480 at 489 Lord NORMAND stated,

“circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. Joseph commanded the steward of his house, put my cup, the silver cup, in the sacks “mouth of the youngest,” and when the cup was found there Benjamin’s brethren too hastily assumed that he must

have stolen it. It is also necessary before discussing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy inference."

See also *S v Marange & Others* 1991 (1) ZLR 244 (SC).

My understanding of the authorities cited above is that while circumstantial evidence can indeed lead to a conviction, the court should aim to exclude the danger of drawing wrong conclusions which can easily result in injustice. Regard must always be had that the onus of proof beyond reasonable doubt in our criminal system remains with the state.

Simply put, the courts must at all times differentiate between inference and conjecture or speculation. The guideline for inference is objective facts before the court while conjecture or speculation is very subjective and is normally based on the courts' imagination. In the present case, there is no objective facts which the court based its finding. There is doubt that appellant committed this offence. It is therefore trite law that where there is such doubt it should be to appellant's benefit.

We find that the conviction was therefore not safe and accordingly the appeal is upheld. The conviction and sentence imposed by the court *a quo* is accordingly set aside.

Chiweshe J I agree

Nkiwane, Khuphe & Partners appellant's legal practitioners
Attorney-General respondent's legal practitioners