Judgment No. HB 48/2003
Case No. HCA 34-5/2001
CRB 255-6/2000

COSMAS NDUNA

And

TRYAGAIN MAPOPE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA & NDOU JJ
BULAWAYO 3 APRIL 2003

R Moyo-Majwabu for the applicants
Mrs M. Moya-Matshanga for the respondent

Criminal Appeal

CHEDA J: Appellants were convicted by the Regional Magistrate on 14 February 2001 and were sentenced to 6 years imprisonment of which 2 years imprisonment was suspended on the usual conditions. It is that finding that they now appeal against.

Appellants were members of the Zimbabwe Republic Police attached to the Support Unit Branch, based at Fairbridge, Bulawayo. During the months of December 1998 they were deployed along the Zimbabwe/Botswana border in order to crack down on the rampant robberies, rapes and border jumping. One of them was armed with a CZ pistol. Whilst on patrol they came across the complainant whom they robbed of six hundred dollars (Z$600), two hundred and fifty pula (P250) and a few items which he had bought from Botswana. They both pleaded not guilty.

The thrust of their appeal is that there were discrepancies in the state's case which discrepancies should not have been ignored by the trial court and also by

making a finding that the single evidence rule was enacted in section 270 of the Criminal Procedure and Evidence Act [Chapter 9:07] yet it is in fact in section 269 which reads;

"Sufficiency of one witness in criminal cases, except perjury and treason

It shall be lawful for the court by which any person prosecuted for any offence is tried to convict such person of any offence alleged against him in the indictment, summons or charge under trial on the single evidence of any competent and credible witness:

Provided that it shall not be competent for any court –

(a) to convict any person of perjury on the evidence of any one witness as to the falsity of any statement made by the accused unless, in addition to and independently of the testimony of such witness, some other competent and credible evidence as to the falsity of such statement is given to such court;

(b) to convict any person of treason, except upon the evidence of two witnesses where one overt act is charged in the indictment or, where two or more such overt acts are so charged, upon the evidence of one witness to each such overt act;

(c) to convict any person on the single evidence of any witness of an offence in respect of which provision to the contrary is made by any enactment."

This section if my understanding is correct gives the court power to convict on the single evidence of any competent and credible witness. The issue therefore, is are the discrepancies in such witness' testimony fatal. This is what should be addressed first. It is quite common to find discrepancies in evidence but such discrepancies are not necessarily an indication of falsehood on the part of the deponent. I fully associate myself with the approach in *R* v *Juwaki and anor* 1665 (1) SA 792, in which QUENET JP at 606C-D stated;

> "Where there are imperfections in the evidence of an accomplice and there is no corroboration of his evidence implicating the accused, the question remains whether there are other features which reduce the danger of false incrimination and, if there are, whether they reduce it to the point where there is no reasonable possibility that the accused has been falsely implicated. Indeed, that was the manner in which CLAYDEN CJ approached the question of the correctness of the second appellant's conviction in *Lembikani*'s case (1964 R & N 7). And may I say that, in considering whether the danger of false incrimination has been satisfactorily removed, the need that the other features

> should be strong and significant must, in each case, be related to the quality and character of the accomplice's evidence and the degree of its imperfection."

This principle was referred to with approval in *S* v *Lawrence* 1989 (1) ZLR 29 (SC).

Discrepancies in a case must be of such magnitude and value that it goes to the root of the matter to such an extent that their presence would no doubt give a different complexion of the matter altogether. In my view discrepancies whose presence do not usher in that change should be regarded as immaterial and as such of no value in the determination of the truth or otherwise of the matter at hand. In *S* v *Makandigona* 1981 ZLR 408 where the witness had made a previous inconsistent statement, BARON JA at 411D-E stating the proper approach to evidence where there were inconsistencies said:–

> "Even without a previous inconsistent statement, and ignoring also that she was an obvious accomplice with an obvious interest to support the appellant, the proper approach of the court was to consider the evidence of all the witnesses, whether called by the prosecution or the defence, and to decide where the truth lay."

In the present case the evidence adduced before the court clearly points to the fact that appellants were involved in the robbery of the complainant. In the present case the inconsistencies referred to by appellants' legal practitioner are far much outweighed by the corroborative evidence by the appellants themselves for example the indications and the description of their clothes on the day of the commission of the offence.

The next question then is to decide whether or not the reference to a wrong section *per se* by error should result in the acquittal of the appellants.

I agree with appellants that the trial magistrate referred to the provisions of

section 270 which deal with evidence of an accomplice. However, in my view, the matter can not just end there. Section 270 of the code refers to single evidence of an accomplice. While the magistrate referred to this section he, however, proceeded to deal with this case with the application of the provisions and requirements of section 269 which deals with the sufficiency of evidence of a single competent and credible witness. This is confirmed by his reference to the case of *Zimbawora* v *The State* SC-7-92 where EBRAHIM JA at page 2 of the cyclostyled judgment stated;

> "The court *a quo* was entitled to convict the appellant on the single evidence of the complainant but it was necessary for such evidence to be clear and satisfactory in every material respect. See *R* v *Mokoena* 1932 OPD 79 at 80; *R* v *Ellis* 1961 R & N 468; *S* v *Bwindura* SC-125-82; *S* v *Murenda* SC-86-84; *S* v *Jabangwa* SC-25-89; *S* v *Corbett* SC-33-90; *S* v *Shoko* SC-88-90; *S* v *Mpofu* SC-161-90 and *S* v *Gwanzura* SC-44-91."

Reference to the principle stated above is, in my view, an indication that the learned trial magistrate was live to the caution necessary in dealing with evidence from a single competent and credible witness. I could not see in the papers before me any indication that the complainant was an accomplice. It is clear that he was treated as a complainant throughout the trial. The fact that he is a confessed border jumper which is a crime in its own way does not *per se* qualify him to be an accomplice. His evidence in relation to the present matter has nothing to do with his unlawful conduct as a border jumper, if anything it adds credence to his credibility in that he made a clean breast of his travel status.

I hold the view that mere reference or wrong citation of a section on its own without corroborative evidence that in addition to the wrong citation, the judicial officer proceeded and continued to treat the matter under the wrong section is not enough reason to treat such an error as being fatal to his decision. It would be entirely different if, in addition to the wrong citation he continued to labour under the same

mistake, for that would clearly result in the wrong conclusion.

Section 269 entitled the court to convict a person on the single evidence of any competent and credible witness except where the person is charged with perjury, treason or of an offence of which in respect of which provision to the contrary is made by an enactment. I therefore do not agree with appellants' legal practitioner's argument on his understanding of the learned trial magistrate's reasoning.

As pointed out in *Zimbawora's* case the evidence of a single witness has to be clear and satisfactory. The complainant gave his evidence very well and was consistent throughout. He had no reason to lie about the appellants and he indicated the spots where he was taken to by the appellants and they did not deny having been with him on 24 December 1998. The court *a quo* understood this evidence in its clearest form and was duly satisfied with it, I also agree with him that the evidence presented was not only clear but satisfactory in all material respects.

Appellants have queried the sentence imposed as that which induces shock because of its harshness. The appellants were members of the police force who were officially armed and were deployed to deal specifically with robbers along the Zimbabwe/Botswana border. Instead of protecting members of the public and eliminating crime they, to the contrary of their duties went out to commit the very crime they were supposed to prevent. What more cheek would a police officer have than this type of behaviour. They saw the complainant who was a border jumper whom they should have arrested, but instead chose to rob him of his property. They are indeed first offenders but I believe that this is one of the cases where the courts should send a clear message to those in authority that such brazen abuse of power will not be tolerated by these courts. Appellants can therefore not escape being

used as guinea pigs in this matter.

I therefore find that the conviction and sentence is proper and this appeal must accordingly fail.

Ndou J …….. I agree

Messrs James, Moyo-Majwabu & Nyoni appellants' legal practitioners
Criminal Division of the Attorney-General's Office respondent's legal practitioners