

FUNGAI NATHAN KAHARI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU & KAMOCHA J J
BULAWAYO 7 FEBRUARY & 24 NOVEMBER 2011

S Chamunorwa for the appellant
T Makoni for the respondent

Criminal Appeal

NDOU J: After hearing the parties' legal practitioners we dismissed the appeal against both the conviction and sentence and indicated that our reasons for doing so will follow. These are our reasons. The salient facts of the case are the following.

The appellant and his co-accused were convicted by a Bulawayo Regional Magistrate of armed robbery on 3rd November 2008. They were each sentenced to ten (10) years imprisonment of which two (2) years were suspended for five (5) years on the usual conditions of future good behavior. The two were convicted after their pleas of guilty canvassed in terms of section 271 (2) (b) of the Criminal Procedure and Evidence Act [Chapter 9:07]. During their plea recording both admitted that on 27 September 2008 they had approached the complainant, a taxi driver, at the Rainbow Hotel, Bulawayo. They pretended that they were hiring the complainant's taxi for a fare. On entering the vehicle they led the complainant to a spot in parklands suburb. They ordered the complainant to stop. They suddenly produced knives and using violence managed to overpower the complainant and made off with the vehicle. The vehicle was taken to Goromonzi in Mashonaland East Province. The vehicle was being stripped at time of recovery. In essence the appellant wants the conviction to be quashed and sentence set aside so that a fresh trial takes place before a different magistrate. He is attacking the propriety of his guilty plea. This is what transpired when his guilty plea was canvassed by the learned Regional magistrate -

"Plea ... Guilty Se 271 (2) (b)

...

Facts read and explained

Marked as Annexure "A"

Q - Have you understood the facts ...

A - Yes

Q - Do you have anything in the facts

A - No

Q - Do you have anything to add or subtract

A - No

Q - Do you agree with entire facts

A - Yes

Essential Elements

Q - Correct, that on the 27th September 2008 you approached complainant at 2100 hours who was on duty and parked at Rainbow Hotel, Bulawayo?

A - Yes

Q - Correct you hired the complainant

A - Yes

Q - Correct that the complainant then drove you two to parklands, Bulawayo as you instruction

A - Yes

Q - Correct that when the complainant was along St Faith Road, you ordered him to stop

A - Yes

Q - Correct, that the complainant then stopped the motor vehicle

A - Yes

Q - Correct that accused 1 [not appellant] got out of the motor vehicle and went to the driver's door

- A - Yes
- Q - Correct, that accused 1 then produced a pistol?
- A - [Accused 1] I produced a US Walkman knife which looked like a gun ...
- Q - Accused two, [appellant] what were you doing when accused one was pointing this knife at the complainant?
- A - I was standing outside the motor vehicle just next to accused one ...
- Q - Correct that you demanded the complainant's cell [sic] phone
- A - Yes
- Q - Correct that you fought with the complainant?
- A - Yes
- Q - Correct that the two of you overpowered the complainant
- A - Yes
- Q - Correct that you pulled the complainant out of the car?
- A - Yes
- Q - Correct that you drove off the motor vehicle leaving the complainant behind?
- A - Yes
- Q - Correct, that motor vehicle was later recovered at accused one's brother's farm in Goromonzi?
- A - Yes
- Q - Correct that the complainant's motor vehicle had been stripped
- A - Yes
- Q - Why were you using the knife?
- A - To scare the complainant

- Q - What happened to the knife after using it
- A - We threw it in front of Shangani Shops [i.e. about 100 kilometres from the scene]
- Q - Correct, that you intended to rob complainant of his vehicle
- A - Yes
- Q - Correct, that the two of you were acting in common purpose to get the vehicle?
- A - Yes
- Q - Did you have any lawful right to carry the knife to complainant's motor vehicle?
- A - No
- Q - Did you have any lawful right to threaten the complainant with a knife?
- A - No
- Q - Any defence to offer?
- A - No
- Q - Is your plea of guilty a genuine admission of facts and elements as read to you?
- A - Yes"

In the face of such a question and answer dialogue between the Regional magistrate and the appellant the conviction cannot be faulted. There is no merit in the appeal against conviction. It is not surprising that the appellant initially appealed against sentence only. This plea was not induced by force, fear, fraud, ignorance or mistake – *S v Mudambi* 1995 (2) ZLR 274 (S). Has an innocent man been convicted? Or is there even any reasonable possibility that an innocent man has been convicted? The answer to these two questions is in the negative. The conviction is unassailable – see also *S v Muchamba* 1992 (1) ZLR 102 (S) and *S v Matanhire* 1992 (1) ZLR 336 (S). As regards the sentence, there is no misdirection. The sentence is slightly on the heavy side but it is within the trial magistrate's sentencing discretion. Sentence is the

province of the trial court which enjoys discretionary powers. This court of appeal is enjoined to be careful not to erode such discretion – *S v Ramushu & Ors* SC-25-93; *S v Mundowa* 1998 (2) ZLR 392 (H); *S v Mavhundura* 2002 (1) ZLR 598 (H); *S v Zulu* HB-52-03 and *S v Mangena & Ors* 2005 (1) ZLR 206 (H) at 209. *In casu*, the appellant teamed with an accomplice and robbed the complainant of his taxi motor vehicle in Bulawayo. They drove the vehicle to Goromonzi i.e. about 500 kilometres away from Bulawayo. They took the vehicle to a farm and it was fortuitously recovered when it was being stripped. The recovery was not as a result of a chance of heart by the appellant. The robbery was carried out at knife point under the cover of darkness. Whilst accepting that appellant’s youthfulness is mitigatory, unfortunately more and more young people are committing such serious offences of violence. The Regional magistrate did not misdirect herself and there is no merit in the appeal against sentence.

It is for these reasons that we dismissed the appeal against both conviction and sentence.

Kamocha J I agree

Calderwood, Bryce Hendrie & Partners, appellant’s legal practitioners
Criminal Division, Attorney General’s Office, respondent’s legal practitioners