

DAVISON CHARIRWE
versus
THE STATE

HIGH COURT OF ZIMBABWE
BERE AND MATHONSI JJ
BULAWAYO 13 JUNE 2016

Criminal Appeal

K. Manika for the appellant
T. Hove for the state

MATHONSI J: The appellant appeared before the magistrates court sitting at Gweru on 24 October 2014 jointly charged with a security guard employed by Zimpost Gweru which also employed him as Postal Manager, of theft in contravention of s113 (i) (a) and (b) of the Criminal Law Code [Chapter 9:23].

Following a full trial in which the state led evidence from two witnesses, also security employees of Zimpost, the two of them were convicted and sentenced on 28 October 2014 to each a fine of \$150-00 or in default of payment, 3 months imprisonment. In addition, they were each sentenced to 3 months imprisonment wholly suspended for 5 years on condition of future good behavior.

Aggrieved by that outcome the appellant has appealed to this court against conviction. His main gripe with the conviction is that the court *a quo* relied entirely on the evidence of his co-accused who was, for all intents and purposes, an accomplice. In doing so the court *a quo* did not apply the cautionary rule to warn itself against the inherent danger of false incrimination.

The appellant's troubles started when Zimpost tried to auction what must have been a non-runner Mazda B1600 motor vehicle registration number ABP 5985 on 2 December 2012 only to discover that it had a gear box and prop shaft missing. The theft was then reported to Clever Nyavaranda, then a security officer at Zimpost who was based in Harare. Breathing fire and brimstone, Nyavaranda descended on Gweru Zimpost to investigate the matter. He says he

gathered all the guards and read the riot act to them. He says he informed them that one of them was involved in the missing parts of the motor vehicle.

It was then that one of the guards Tapera Mapfumo disclosed that while he knew nothing about the gear box, he was aware that a prop shaft had been removed by the appellant in his presence. Probed further, Mapfumo led them to a site about 45 m from where the vehicle was parked where he retrieved the prop shaft from a drain where it was hidden under some leaves. The appellant was subsequently arrested and jointly charged with Mapfumo aforesaid. At the trial none of the two state witnesses implicated the appellant. All they could say was that they acted on information obtained from Mapfumo. Only the latter implicated the appellant when he presented his defence. He stated that the appellant had advised him that he desired to remove a prop shaft from the Mazda motor vehicle to fit it on his own vehicle in Kwekwe. He went on to say that on another day, while he was on duty guarding the complainant's property at night, the appellant had come and removed the prop shaft from the vehicle before hiding it in the drain from where it was later recovered following indications made by Mapfumo. Although he acknowledged that his duties were to "safeguard company property" Mapfumo did not stop the appellant neither did he arrest him.

It is only on that basis that the appellant was convicted. In its judgment the court *a quo* proceeded headlong to accept the evidence of accused one hook, line and sinker without any regard whatsoever to the fact that he was an accomplice whose evidence was very suspect. This is what the court said on that issue in its judgment at page 6 of the record:

"In analyzing the evidence adduced the court realizes that the only evidence linking the 2nd accused (the appellant) to the offence is the first accused's testimony pertaining to the prop shaft. The 1st accused's testimony was further corroborated by the 2nd state witness who confirmed to the court that he was informed by the 1st accused that 2nd accused approached him wanting to be helped to remove the prop-shaft from the said vehicle. Supposing the 1st accused is making false allegations against the 2nd accused it has to be proved to the court that the 1st accused had such a motive. From the evidence adduced it appears there is no bad blood between the two accused persons and neither is there bad blood between the 2nd state witness and 2nd accused."

The naivety exhibited in the foregoing passage of the judgment of the court *a quo* is disarming. In the first place there was no corroboration at all. It occurs to us that what was meant to be corroborated was Mapfumo's story that the appellant had approached him while he

was on duty and requested his assistance in removing the prop-shaft and that he had subsequently removed it and hidden it. The fact that he had repeated the same story to his two superiors, Mhlanga and Nyavaranda, before saying it in court cannot, by any stretch, be taken as corroboration. It is just one story said to the investigators and repeated in court.

According to Rowland Reid 21-5-21-9, corroboration means evidence, other than that of the complainant, which is consistent with the complainant's version of facts and which tends to show the guilt of the accused. To be of evidential weight, the facts corroborated must be material ones. It is a salutary principle of our law of evidence that a witness cannot corroborate himself. Yet this is exactly what Mapfumo did in the mind of the court *a quo*. He told a story implicating the appellant in court which story he had told both Mhlanga and Nyaravanda. Having done that, the court accepted as corroboration the same story when it was told by those two merely repeating what Mapfumo had allegedly told them outside court. It cannot be corroboration.

In the second place, there is nothing to suggest that the court was alive to the fact that it was dealing with the evidence of an accomplice which is inherently suspect and must therefore be treated with caution. It did not warn itself at all of the dangers inherent in relying on such evidence. An accomplice's evidence is treated with caution because he is himself guilty of criminal conduct and is therefore badly conflicted. He may therefore lie to the court in the hope of ingratiating himself in the eyes of the court or may do so in the hope of exculpating himself shifting the blame for his own conduct onto someone else.

When dealing with accomplice evidence the court is therefore required to apply the cautionary rule and warn itself against the danger of false incrimination which exists with accomplice evidence. It must be satisfied beyond a reasonable doubt that the danger of false incrimination has been eliminated. See *S v Mubaiwa* 1980 ZLR 477. Whichever way, the conviction was improper as the court relied on the uncorroborated evidence of an accomplice, the co-accused, which was a misdirection. It cannot stand.

In the result, it is ordered, that:

1. The appeal against conviction is hereby upheld.

2. The conviction of the appellant is set aside and substituted with the verdict that the appellant is hereby found not guilty and acquitted.

Bere J agrees.....

Jumo Mashoko and Partners, appellant's legal practitioners
National Prosecuting Authority, state's legal practitioners