

THE STATE
versus
FISHER MATURA

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 10 OCTOBER 2016 AND 9 MAY 2017

Criminal Trial

W Mabhaudhi for the state
A Rubaya for the accused

MOYO J: The accused in this matter faces three charges as follows:

- 1) Unlawful possession of or dealing in gold without a licence or permit as defined in section 3 (1) as read with section 3 (3) of the Gold Trade Act, [Chapter 21:03].
- 2) Smuggling as defined in section 182 (1) of the Customs and Excise Act [Chapter 23:02]
- 3) using any vehicle with secret or disguised places whatsoever adopted for the purposes of concealing goods as defined by section 188 (4) (a) as read with section 188 (5) of the Customs and Excise Act [Chapter 23:02].

The allegations faced by the accused person are that on 25 September 2015, the accused person drove a hyundai H1 motor vehicle registration number ADR 5228 through Plumtree border post enroute to Botswana. He was arrested at the exit gate after going through the border formalities. He had not declared any gold at the customs desk. His motor vehicle was stopped and searched by three police officers at the exit gate leading to the motor vehicle being taken to the pit for a further search. Two compartments were then discovered during the search that was conducted at the pit and in one of the compartments 11,476 kgs of gold in the form of bars and cones were found.

There are disparities in the state case as to what transpired after the accused had been stopped by the exit gate, but however, that gold was later discovered in a compartment

underneath the motor vehicle is common cause. Even the accused person in his defence does not dispute this. The accused person in his defence, denies any knowledge of the presence of the gold. He avers that he had borrowed the motor vehicle in question from one Nevison Zvizhinji who is the owner (having bought it from the accused person prior to that date.) He avers that he was going to Botswana to buy motor vehicle spare parts for his business and that he never at any stage got to know that he was in fact carrying gold underneath the motor vehicle until such time that the police officers who arrested him discovered it.

The State case

First to testify for the state was Detective Constable Sando. I will not regurgitate what this witness told the court but I will simply highlight the pertinent aspects of his testimony. He confirmed the facts that are common cause, that is, that accused did attempt to exit the border, was stopped, searched and gold was then discovered by the pit hidden in the secret compartments.

He told the court that accused was asked about the contents of the secret compartments but he professed ignorance. He later changed to tell the court that the accused had informed them that there is gold in the secret compartments after being placed under intense interrogation by Detective Sergeant Chidakwa.

He initially told the court that the accused had been informed of the arrest before gold had been found but later changed to say accused was never in his presence informed of his Constitutional rights as contained in section 50 of the Zimbabwe Constitution. He also told the court that the accused failed to open the compartments and he himself did open them. This witness's evidence was markedly different from that of Detective Sergeant Chidakwa. In fact this witness conceded that there was no evidence to prove that the accused person was aware of the existence of the gold in question apart from the fact that he drove the motor vehicle in question and was therefore in charge of it.

Detective Constable Chabata

He confirmed the facts that are common cause. He also confirmed that the accused person professed ignorance of the existence of the gold. He also told the court that he did not hear the

accused person being informed of his constitutional rights. He also said he did not witness the entire interaction with the accused person as he was being sent on errands. He also conceded that he had no proof that accused had actual knowledge of the existence of the gold.

Third state witness

Detective Sergeant Chidakwa

He confirmed the facts that were largely common cause. He differed from the other two state witnesses by telling the court that in fact it was the accused person who opened the secret gold compartments. He said the accused person then said the gold belonged to one Obert Bote. The other two state witnesses did not tell us about this. He also differed with the other two witnesses when he said the accused was informed of his rights in terms of section 50 of the Constitution of Zimbabwe. He denied the intense interrogation of the accused as had been averred by the first state witness, Constable Sando. He told the court that he got to know about Nevison Zvizhinji on 22 February 2016 when he received a letter from Zvizhinji's lawyers claiming the gold and the motor vehicle. This witness told the court that to prove ownership of the motor vehicle, Nevison Zvizhinji produced an agreement of sale between himself and the accused person, dated 31 July 2015.

He also produced a certificate of registration in respect of Shamva 201 mine in Nevison Zvizhinji's name. He also produced a return of output of precious metals dated 15 September 2015.

He told the court that he investigated Nevison Zvizhinji over this matter and compiled a docket which was never submitted to the National Prosecuting Authority. Nevison Zvizhinji was admitting in his warned and cautioned statement that he is the one who created the false compartments. He also admitted to concealing the 11,476 kgs of gold in that secret compartment and that nobody else knew of this. Nevison Zvizhinji said that the motor vehicle in question had been cleared by ZRP Southerton for the change of ownership.

From the evidence of the three state witnesses, the court cannot, as a matter of fact, make a finding that the accused did create the secret compartments and did hide the gold in question in them. The other two state witnesses render the factual basis for such a finding flawed. In fact, this court is baffled by the conduct of the police witnesses in this case, either they are not sure of

the manner in which they should conduct investigations and also how evidential issues are to be presented in possession cases, or they deliberately threw spanners into the works so that the state case is crippled.

At the close of the state case, defence counsel applied for discharge, the accused person was put on his defence solely for the reason that the issue of whether or not he had knowledge of both the compartments and the gold, was an issue to be told to the court by him as it was common cause, that, despite the disparities in the evidence of the state, he was indeed found in the possession of gold in circumstances that could indeed be culpable depending on his defence. Again the court had felt that the issues of credibility would be dealt with at the end of the trial. That was the basis upon which the court decided to put the accused person on his defence. Accused's defence was simply that he had borrowed the car from Nevison Zvizhinji through his foreman Victor Dzimba, as Nevison Zvizhinji himself had not been around. He was not aware of both the compartments and the gold. Nevison Zvizhinji came and supported the accused's version of events. He produced an agreement of sale to prove that accused and himself had indeed entered into an agreement of sale regarding the same motor vehicle. He also tendered evidence to show that he is a licenced gold miner and dealer, and that about the same period he did mine a similar amount of gold from his mine in Shamva. He also confirmed that accused had no knowledge of the compartments and the gold. He told the court that he went to Plumtree soon after the accused was arrested and released on bail, but that he was made to move from pillar to post until such a time that he engaged lawyers in February 2016 as the police were not forthcoming about his claim for the gold and the motor vehicle. He told the court that the secret compartments were to hide his gold before sale as he had suffered from theft before.

Victor Dzimba, confirmed that he worked for Nevison Zvizhinji as a foreman and that he indeed lent the accused his boss's motor vehicle as that was the custom and his boss had given him a running instruction to assist the accused whenever he could, even if Nevison Zvizhinji was not around.

It is the view of this court that there is just one issue for determination by it. The issue of knowledge by the accused person of the existence of the gold. I say so because it is common cause that the accused person drove the motor vehicle on the day in question and it had secret compartments that contained gold.

The first count of possession of or dealing in gold therefore hinges on the accused persons' knowledge of the existence of the gold. Count two of smuggling hinges on count one for if accused knew that there is gold then, he would be smuggling it for him to cross the border without doing the appropriate declarations in relation to the gold. The third count of knowledge of the secret compartments also hinges on the first count in that, once he knew about the gold, then he knew about the secret compartments as well.

There is therefore the issue of the accused's mental state at the material time, can this court find that the accused person knew that he was carrying gold?

In possession crimes, the mental state of the accused person, that is his knowledge or otherwise of the possession is a crucial point to canvass in determining an accused person's culpability. In the case of *Papp v The Queen* 1989 2 SCR 120 at 138, DICKSON J had this to say:

“There rests now, at the foundation of our system of criminal justice, the precept, that a man cannot be adjudged guilty and subjected to punishment unless the commission of the crime was voluntarily directed by a willing mind.”

This concept is summoned up in the latin maxim “*Actus non facit reum nisi mens sit rea*” which means “An act does not make a man guilty of a crime unless his mind is also guilty.”

The first question to be asked is do we have any direct facts which prove accused's knowledge? From the record we clearly do not have such direct facts, even the state counsel concedes to this fact. We have a torn apart state case, with Detective Sergeant Chidakwa saying accused knew about the gold, he is the one who opened the compartments and he told the police that the gold belonged to one Obert Bote. The court cannot find this as a fact for the simple reason that Constable Sando, and Constable Chabata do not align themselves to these facts and yet they were present at the material time. The court is unable to throw away their versions in favour of Chidakwa's as the court does not know who is telling the truth and who is lying. The court will thus give the accused person the benefit of the doubt that there is no factual basis upon which a finding can be made that the accused person indeed knew of the existence of the gold.

The state counsel while conceding to this fact then suggests that this court should employee circumstantial evidence principles in resolving the issue of knowledge.

Circumstantial evidence was aptly dealt with in the case of *S v Blom* 1939 AD 188 wherein the learned judge stated thus:

- “a) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- b) The proved facts should be such that they exclude every reasonable inference from them save for the one to be drawn. If they do not exclude other inferences, then there must be doubt whether the inference sought to be drawn is correct.”

The state counsel suggests that there is one proved fact, that the accused did not mention Nevison Zvizhinji upon arrest, together with Victor Dzimba. And that throughout the whole trial it never came out that the accused ever protested his innocence.

Let us go through these facts that the state counsel says are proven

- 1) That the accused did not mention Nevison Zvizhinji upon arrest.

I do not find in the court record the facts that prove this as the first two state witness told the court that the accused denied any knowledge of the gold and that they did not have any evidence to that effect. Detective Sergeant Chidakwa is the only one who mentions this fact, so it cannot be held to have been proven yet the other witnesses do not state it from the state case, it is not clear what the police officers exchanged with the accused, what they said to him and what he himself said or did not say, as the state has two versions on this aspect.

One by Sando, partly supported by Chabata and one by Chidakwa. The accused person himself told the court that he told the police that he did not know of the compartments and the gold and that in fact the motor vehicle no longer belonged to him. His version facing a torn apart state case cannot be thrown away as the court clearly does not have factual circumstances on the occurrences of that day. It therefore cannot be held to be a proven fact that accused said or did not say certain things to the police, given their diverse versions. The state case is clearly unreliable.

The same finding applies to the mention of Victor Dzimba. As clearly stated by the state counsel, the court should draw inferences from proved facts and clearly those facts were not proven by the state. Even if it were to be proved that the accused did not mention these issues to the police at the material time, I hold the view that it would still be difficult for the court to draw an inference using only those facts and totally ignoring the other facts as presented in the defence

case. There are numerous other facts presented by the defence that the state failed to disprove and in fact Chidakwa confirms their existence.

The following facts are proven in the court record:

- 1) That the motor vehicle was sold by accused to Nevison Zvizhinji in July 2015.
- 2) That a change of ownership application was made at Southerton police station in August 2015.
- 3) That accused and Zvizhinji would occasionally lend each other items like a tractor and a motor vehicle.
- 4) That Nevison Zvizhinji is a licenced miner ad a registered dealer.
- 5) That Nevison Zvizhinji did mine at the material time an amount of gold similar in size to the one that was found with accused.
- 6) That Chidakwa did investigate those facts and indeed established them.
- 7) That Chidakwa then prepared a docket against Zvizhinji on the creation of false compartments but did not submit the docket to the National Prosecuting Authority.

At this juncture I would like to comment that failure by Chidakwa to submit this information to the National Prosecuting Authority, shows that he was biased in his investigations, he wanted the case to go a certain direction and would thus not present to the state certain facts that he believed were adverse to the state case.

It would then be folly for the court to ignore all these other proved facts and simply look at the ones suggested by the state. That is not the spirit of circumstantial evidence as it clearly demands that the court uses all the proved facts in making an inference. This court cannot choose the facts it wants and turn a blind eye on the rest of the proven facts as such an act would result in the misapplication of the rules of circumstantial evidence and thereby clearly coming to a wrong conclusion with an undesirable and unjust result.

I will hasten to point out that the burden of proof in criminal matters rests on the state. Has the state in this matter adduced sufficient evidence that satisfied both the physical and the mental aspects of the law of possession. The physical aspect is common cause but the next question to be asked is has the state adduced sufficient evidence and proof that the accused indeed had knowledge of the existence of the gold and the compartments? I do not believe so,

for the two state witnesses, told the court that even themselves conceded that they do not have the evidence to prove the mental element of the offence

On the other hand the accused person, who has no burden to prove his innocence at all, has adduced uncontroverted evidence to the effect that he was not aware of the existence of the gold. For the state to succeed, the court must throw away the accused person's version and the court must justify its reasons for doing so. Even the state counsel himself, in the closing submissions did not point out to any crevices in the defence case which would allow the court to dismiss the accused's version is not being reasonably true? We have a torn apart state case, facing a defence case that has not been controverted in any way how then can this court make a finding that the accused's version is not reasonably possibly true? For all the accused person needs to do, is to present a version to the court that is reasonably possibly true. Refer to the case of *S v Makanyanga* 1996 (2) ZLR 231 where it was held thus:

“Proof beyond reasonable doubt demands more than that the complainant be believed and the accused disbelieved. It demands that a defence succeeds wherever it appears reasonably possible that it might be true.”

The court has proven facts by the defence already alluded to herein, facts which the state has not presented any evidence to counter. Such facts are *inter alia* the following:

- a) that the accused and Zvizhinji sold the motor vehicle in question to each other in July 2015.
- b) that they applied for a police clearance and change ownership in August 2015.
- c) that they would occasionally lend each other cars etc.
- d) that Zvizhinji created the secret compartments after buying the motor vehicle to hide his gold.
- e) that Admire Dzimba gave the car to the accused in the absence of his boss and that he did not know of the gold.
- f) that the accused person was on a mission to Botswana to buy spares.
- g) that Nevison Zvizhinji owned the gold in question as he is a registered miner and gold dealer and he had recently mined a similar amount of gold.

Whilst it is difficult to believe from a common sense approach that the accused person did not know about the gold, and whilst a deep seated suspicion remains in our minds, this court

uses tangible evidence and proven facts to infer guilt. Such facts are unfortunately not before court. I hold the view that the state failed to prove its case beyond a reasonable doubt. I also hold the view that the accused person's defence has indeed rendered porous the state case, which in any event was limping from the outset due to the different versions given by the police officers. In the circumstances the court has no choice but to give the accused person the benefit of the doubt. The accused person is accordingly found not guilty for the reasons enunciated herein and is accordingly acquitted on all three counts,

National Prosecuting Authority, state's legal practitioners
Rubaya and Chatambudza, accused's legal practitioners