

KNOWLEDGE KASHIRI

Versus

THE STATE

HIGH COURT OF ZIMBABWE

MUZOFA & BACHI-MZAWAZI JJ

CHINHOYI, 29 May 2023 & 15 June 2023

Criminal Appeal

F. Murisi, for the Appellant

K. Teveraishe, for the Respondent

BACHI MZAWAZI J: The appellant was charged and convicted in a contested trial, of contravening s60 A of the Electricity Act [*Chapter 13:19*]. He was acquitted on the alternative charge of contravening s60 A (3a) (b) of the same Act. He was sentenced to the mandatory 10-year jail term prescribed by the Act.

He has approached this court, on appeal against conviction only.

Initially there were four grounds of appeal but two were abandoned by the appellant's defence counsel as superfluous. We need not bother repeating them. The remaining three revolve around mistaken identity, possession and alibi.

THE FACTS

The facts are that, on the 29th of June 2022, at Victory farm Mhangura, it is alleged that the accused in the company of three or so others, vandalized a 200KVA transformer after tying and incapacitating the security guard on the premises. They made away with the copper windings from the vandalized transformer after tying and incapacitating the security guard. The security guard later freed himself after they had left and informed his employer who in turn made a police report. The accused was arrested at a police roadblock on the 2nd of July 2022 in a vehicle with three other occupants and had copper windings recovered from its boot.

THE EVIDENCE BEFORE THE TRIAL COURT

To prove its case the state relied on the evidence of a Zimbabwe Electricity Distribution and Supply Authority Officer who identified the wires as those belonging to the Authority and as copper wires. He also testified that he was in the company of the police when indications were made by the appellant. He has no paper qualifications in identifying copper or its elements, but depended on his experience in the field.

An investigating officer, who arrested the accused persons also testified to that effect. He alluded to the fact that the appellant was amongst those arrested in the vehicle where copper windings had been recovered. He also attested that a seizure receipt was completed which included the appellant and his colleagues' signatures. Of note, the recovered copper wires were not produced in court as evidence.

Evidence was led from the third witness Tichaona Makanya, the security guard who testified that he knew the appellant prior to this incident and he saw him on this particular day as he came close to him by the fire and talked to him. He said that the appellant used to fish at a nearby dam with his brother.

It is on the basis of the evidence of the third State witnesses that the appellant was convicted. The trial court's reasons being that he had prior knowledge of the appellant including his surname therefore he could not have mistaken him. Further, that this witness had flashed his torch a distance from the intruders meaning he had an opportunity to see this familiar face.

Notably, on assessment, the evidence of this witness is a bit shaky, his evidence in chief differs materially with that under cross examination. Under the latter, he attested that he only flipped the torch on and off when the people who were approaching him were at a distance, not close to him. He further disclosed that as soon as they arrived where he was, they put off the fire and the grappling commenced. Earlier on, he had given the impression that the appellant came and stood beside him and chatted with him whilst the fire was on.

The events took place in the middle of the night. There was no mention of the moon or illuminated atmosphere. He said he only knew the surname of the brothers who came to fish but could not dispute that the appellant had brothers who were fishermen and also known as Kashiri and he was not a fisherman. His report to the police which was made after the appellant had already been arrested at the road block and names taken by the police. He had not initially mentioned any names to the police on the first day of scene attendance.

His second report was recorded on the 3rd of July 2022 when the appellant had already been arrested at the road block and in police custody. The probability that the name Kashiri featured after the arrest cannot be dispelled. The trial court relied on the identification

evidence of this witness as a basis for conviction. This is the point of departure with the defence which alleges the court erred both in fact and in law as the identification evidence of this witness was not credible.

The last piece of evidence placed before the court as an exhibit was the seizure confirmation receipt allegedly signed by the appellant. The receipt acknowledged that copper windings were found in the vehicle where the appellant was amongst four of other occupants.

THE ACCUSED'S DEFENCE

In his defence the accused stated that the defence of innocent association and that of an alibi. He asserts that on the day of his arrest, he was an innocent passenger who had hiked the vehicle which had other passengers whom he did not know. He did not know or had no knowledge of the vehicle's luggage on contraband. Further, on the alleged date the offence was committed he was at his house in bed with his wife. He also stated that he is the person who informed the police after he had only been given a lift.

His defence of an alibi was corroborated by his wife who was called to testify. He had also told the police at the onset of this alibi giving them ample time to investigate.

The police officer did not deny that upon the arrest of the appellant who was in the company of others there was mention of one who had only boarded the vehicle as a lift, but said the accused was not the one as he uttered self-incriminating utterances upon arrest.

THE LOWER COURT'S FINDINGS

The trial court was convinced that what was recovered was copper wire from the evidence of the investigating officer and the loss controller officer with ZETDC. He stated that there was no need for forensic examination of the copper wires as that evidence was sufficient. It also noted that the seizure receipt which also acknowledged that what was seized was copper windings corroborated that aspect.

He found the identification evidence of the security guard beyond reproach in that he knew the appellant from previous encounters, and the illumination from the torches that both accused and himself had.

In addition, he justified the element of possession by stating that the seizure report and the presence of the appellant in the car confirmed the accused was in possession of copper windings and that the accused uttered incriminating words. Lastly, he rejected the alibi defence on two grounds. Firstly, that the identification evidence flies in the face of the alibi evidence. Secondly, that the appellant's alibi defence was discarded on the basis that it was aimed at absolving the appellant who was the husband of the defence witness.

THE STATE'S SUBMISSIONS

The state submitted that the court did not err both in fact and law, as the first two state witnesses correctly identified the copper windings as copper. As such, the elements of the charge were met and the appellant was appropriately charged and convicted. It agreed with the court that it does not take a rocket scientist to see whether what was recovered was copper or not as the ZETDC officer was experienced in that area though not an expert. They also agreed with the court's finding that the seizure confirmation receipt which confirmed that what was recovered were copper windings is sufficient evidence of copper windings.

In addition, they also stated that for reasons already highlighted in the court's findings the identification was foolproof as, there was prior knowledge of the appellant and the use of the torch on the day in question further buttress the identification. On the issues of possession, the state argued that the appellant made indications leading to the scene of the crime coupled with the fact that he signed the seizure receipt.

As regards, the defence of alibi, the state stated that the findings of the court a quo cannot be faulted as it took into account all the evidence holistically and was justified in rejecting the defence witnesses' testimony.

ANALYSIS

An interesting point had been raised on the first relinquished ground of appeal warranting comment in passing. This is on whether or not what was recovered was copper wire, if it was not then the charge was not sustainable and the conviction improper?

We are of the view that the significance of this ground is that there is need,

- a) To produce evidence before the court of exhibits of offences of this magnitude.
- b) It is not enough to produce a receipt of seizure confirmation when the seized goods of this nature are not brought to court to authenticate the contents of the receipt.
- c) There is also need for expert evidence to establish that indeed copper was recovered or elements of copper were present in the wires recovered.

This is so, because, there is an increase in offences in contravention of the Electricity Act which are very serious, attracting a very harsh mandatory imprisonment term upon conviction. Innocent scrap wire dealers are caught in the net. The legislature though intending to curb the rampant vandalization and theft of copper wire and the subsequent disruption of essential services did not envisage a situation where innocent petty offenders can be visited

with such harsh punitive penalties. As such, expert evidence must be produced to eliminate wrong convictions on wires that do not fall within the ambit of the Act.

As already stated, *in casu*, the defence abandoned this ground therefore it is not necessary to make a ruling on. Notably, in offences that attract such harsh penalties of lengthy mandatory prison terms there is need for exhaustive investigation and water tight evidence.

On the second aspect of identification. We are of the view that no proper identification was made from the contradictions of the witness's evidence in this case. He gave two contrasting statements as to the distance upon which the torch was lit and the light of the fire. He stated that the intruders came to the fire to warm themselves, but under cross examination he said they destroyed the fire as soon as they arrived at the spot where he was. He admitted to having switched the torch on and off when the assailants were still a good distance from him. It was around 11pm, dark and raining as per the evidence. In these circumstances visibility is a challenge. The court in its findings stated the existence of two torches, one lit by the accused. We failed to locate such evidence from the record of proceedings.

The precautionary rule governs identification evidence as it is prone to error.

The case of *Mutters & Anor S-66-89*, outlines what needs to be considered in identification evidence. In summation, these are the duration under observation, the distance between the parties, the lighting and general weather conditions the presence of any obstructions and objects hindering clear view, the quality of the witnesses eyesight, and what part of the human body did the witness clearly see, any particular outstanding facial or physical features, voice slurs or mutterings, limps, clothing or attire and whether the witness had previous knowledge of the person under scrutiny and how well he knew the person. See *State-v-Dhliwayo & Anor 1985 (2) ZLR 101 (SC)*, *State-v-Ndhlovu & Ors 1985 (2) ZLR 26 (SC)*, *State-v-Mthetwa 1972 (3) SA 760 AD* and *State-v-Nkomo 1990 (1) SACR*.

In the present case, we are inclined to believe that it cannot be ruled out that, the name 'Kashiri' was brought to the attention of witnesses at the police station as the appellant was the first to be arrested and the witness's statement was made after the arrest. Further, the witness did not rebut that there are two of the appellant's brothers who fish and frequent the area in question. So, the issue of mistaken identity was not explored and exhausted, according the appellant the benefit of the doubt. The witness did not at any point mention the appellant's name to the police. If he knew the appellant he could have indicated so at the outset. The appellant was not arrested on the witness' evidence to the police but at a roadblock.

We are thus of the view that the court erred in relying on this identification witness.

Lastly, at law once it is established that an accused person introduced his Alibi defence from the onset, to the police and the police had ample time to do the necessary investigation on that note then it's the State's duty to disprove that defence. See *Mpofu-v-SCA0197/2017 [2018] AGD 3 HC 26/2-18*. In *Munyaradzi Kereke-v-Francis Maramwidze & Anor SC86/21*, the court citing,

R-v-S Hlongwe 1939 (3) SA 338 (AD) pronounced that the test to be used in considering the plausibility of the defence is as follows;

“The legal position with regard to an alibi is that there is no onus on accused to establish it, and if it might be true, he must be acquitted. In *R-v-Biya 1952 (4) SA 514 (AD)* state that the alibi must not be considered in isolation.”

Simply put, under Criminal Law, an alibi is a legal defence strategy where the accused provides evidence that they could not have committed the crime because they were elsewhere at the time the crime was committed.

In *Mhlongu-v-S (AR 300/13) [2014] ZLR PHC 27 16 of 2014* it was noted that:

“Where a defence of an alibi has been raised and the trial court accepts the evidence in support thereof as being possibly true, it follows that the trial court should find that there is a reasonable possibility that the prosecution evidence is mistaken, or false. Those cannot be a reasonable possibility that the versions are both correct.”

It is also a well-established legal principle that where an alibi is raised by an accused, there is no onus on him to prove his alibi.

In casu, whilst the trial court accepted the credibility of the defence witness, it simply rejected her evidence because of the husband and wife relationship. The question is why entertain her evidence in the first place? In such cases the benefit of the doubt goes to the accused person. See *R-v-Difford AD 1937*.

In *R-v-Biya 1952 (4) SA 514*, the test was laid then as it still stands now that:

“If there is evidence of an accused person's presence at a place and at a fire which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that his alibi evidence is true it means that there is the same possibility that he has not committed the crime.”

DISPOSITION

We are of the view that the court overlooked the observations we have made on the identification evidence which is shadowed with several doubts. At law once there is doubt, then that doubt should be in favour of the accused person. So, the court erred in this regard.

It also erred in dismissing the alibi defence by discrediting the credibility of the witness mainly because she was a spouse of the appellant with a quest to save her husband at all cost. The State through their investigative arm, the police, should have investigated further on the veracity of the appellant's whereabouts on the day to rebut his alibi.

Since the court had discharged the appellant on the alternative charge in which possession is an element, from our above analysis of evidence, there is no evidence linking the accused to the offence in the main charge. Therefore, it follows that the State did not place sufficient evidence of the commission of the main charge by the appellant before the court.

Accordingly, the decision of the trial court is set aside and substituted by a verdict of not guilty and acquitted.

Honourable Mrs. Justice Bachi-Mzawazi

Honourable Mrs. Justice Muzofa – I Agree