STATE
versus
MIKE TAMBO

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE , 12 July 2007

Criminal Review

UCHENA J: The accused person was jointly charged with another on one count of theft of newspapers. They pleaded not guilty but the accused was convicted after a trial. His co accused was acquitted at the end of the trial. The accused was sentenced to 6 months imprisonment of which 3 months were suspended on conditions of good behaviour and the remaining 3 months on condition he performed 105 hours of community service, which was to commence on 4 August 2006 and be completed within three weeks of that date.

The facts leading to the charge are as follows. The accused person worked in a newspaper printing factory. The company's General Manager a Mr Innocent Kurwa worked from the same premises. On 3 March 2006 Kurwa passed through the factory on his way out for lunch. He saw the accused carrying something he did not identify but later believed to be newspapers to a place he believed was a convenient place from which they would be eventually moved out of the factory. He believes they were eventually placed in a broken down machine within the factory because he heard a metallic sound when the accused was out of his sight. He later found heaps of newspapers within the factory including some which were hidden in a machine which was not working. A total of two hundred and fifty seven copies were eventually found. They were valued at $30840000.00, and were all recovered within the factory.

The accused person and all his workmates who where in the factory were arrested on the basis of Kurwa's report to the Police. According to him the accused's co-accused who was acquitted, had told him not to blame the accused as they were all involved. The police declined to charge the other 5, but preferred theft charges against the accused and his co-accused.

In his defence outline the accused said he simply picked printed wastes which were scattered in the factory and placed them at a place where water had been spilled to absorb it.

He said other news paper wastes were found in a broken down machine. They were all arrested as Kurwa believed everyone in the factory was involved, but others were released except him and his co-accused.

In his defence outline the accused's co-accused said the accused took some newspapers and placed them where tea is made to absorb water which had leaked from a kettle. He later heard the General Manager calling the accused. He went to where the general manager was, and was asked about the newspapers. He told the general manager that they were printed wastes. The manager then accused him of protecting thieves.

Innocent Kurwa gave evidence for the state. He told the court of how he saw the accused carrying something within the factory and become suspicious. He followed him but lost sight of him during which period he heard a metallic sound which he believes was caused by the accused when he placed what he was carrying in a broken down machine. He later found copies of make ready newspapers in a broken down machine. He also found other heaps, of wastes, and make-ready newspapers in the factory. He eventually discovered 257 wastes and make-ready copies of the Independent Newspaper. Kurwa told the court that wastes and make ready newspapers are not for disposal by employees as they send them back to their customers together with properly printed newspapers.

Morgan Chatikobo the investigating officer told the court of how he was called to the complainant's company and he arrested the accused and 6 others. He further told the court of how Kurwa showed him a heap of newspapers at a place "which he said was used as a changing room by workers". The newspapers in question were not yet completed to make a full paper and it then became very difficulty for him "to ascertain the quantity." He told the court that the accused and his workmates denied putting all the news papers there as they said some had been put there by those on the night shift. He said some of these papers appeared to have been where he saw them for some time. He told the court that Kurwa told him that he believed the accused's co-accused who is a member of the Worker's Committee influences other workers. He was responding to the prosecutor's question on the accused's co-accused being implicated because of his membership in the company's worker's committee. He told the court that he checked the point Kurwa suspected was used for taking out the newspapers and found it was very difficult for them to carry the newspapers out through that point. His last comment under examination in chief was;

"From my own observation maybe the circumstances surrounding this case as I proceeded to the scene it gives me the impression not to emphatically say the accused persons stole the newspapers."

Under cross- examination by the accused he was asked about the state of the papers he saw and he said;

"There were several heaps from the entrance up to the point where you were seen carrying the papers."

When asked whether the accused did not show him where there was water he wanted to absorb using the newspapers he said; "Yes you did."

The following exchange took place when he was being cross examined by the accused's co-accused.

Q Is it not true that Kurwa said he wanted you to detain the 2 of us and leave the other five?
A Its true.
Q Is it not true initially you said the value was $8 million but when we came to court he said $ 30 million?
A Yes and I didn't argue with the complainant.
Q Is it not true that when we left the papers were still scattered?
A It is true.

The trial proceeded into the defence case and nothing of benefit to the state's case was established. The accused person, was surprisingly, convicted and sentenced as already indicated.

The following should have put the trial Magistrate on alert;

1) There was bad blood between the General Manager and the accused person's co-accused. He wanted the two of them to be detained and he believed the accused's co-accused a member of the workers committee influenced others to behave in an unacceptable manner. The Magistrate should have realized that the complainant was biased against the accused persons.
2) The alleged stolen papers were scattered in the factory as per the investigating officer's evidence. When he left the factory the papers were scattered all over. This must have indicated that the newspapers were not being kept in an orderly manner and that the first accused's explanation that he picked newspapers from the floor to absorb spilled water, was probably true.

3) The papers the accused is alleged to have stolen were seen by the Investigating officer at a place where they were being used to absorb water which had leaked on to the floor. This supports the accused persons' versions.
4) The Investigating Officer agreed that it was not easy to take out the papers through the place indicated by Kurwa. This again tilts the probabilities in the accused person's favour.
5) The Investigating Officer believed that some of the papers had been where he saw them for some time. This proves the accused person had nothing to do with some of the newspapers for which he was convicted.
6) The Investigating officer confirmed that the complainant initially said the value of the stolen newspapers was $8 million but later increased it to $30 million. This points to the unreliability of the complainant as a wittiness.
7) The newspapers were not taken out of the complainant's premises. This coupled with their being placed where water was being absorbed and several heaps of them being all over the factory supports the accused person's denial of the charge.
8) Above all the Investigating Officer said in the circumstances of the case he could not emphatically say the accused persons stole the news papers. He was not satisfied that the offence was committed. This must have reminded the Magistrate that there was a doubt which must be resolved in the accused person's favour.
9) Kurwa did not see the accused placing the newspapers in the machine. He merely assumed from the sound he said he heard. The same Kurwa according to Chatikobo the investigating officer indicated to him newspapers which were at a place used as the worker's changing room, not in a machine as per Kurwa's evidence. Kurwa merely assumed things from the circumstances. He did not see where the accused placed the papers. He did not for certain know what the accused wanted to do with the papers he saw him holding. Theft was not the only reasonable inference which could be drawn from Kurwa's evidence.

The record of proceedings was forwarded for scrutiny. The Regional Magistrate raised issues on the propriety of the accused's conviction. The trial Magistrate surprisingly defended the conviction. It's clear to me that she should have conceded and taken correction instead of wasting every one's time defending a conviction which is not supported by the state's

evidence. It is obvious from the investigating officer's evidence that the case was viewed with suspicion by the officer who brought it to court. That officer contradicted Kurwa's evidence. The state did not prove its case beyond reasonable doubt. It is surprising that the trial Magistrate was not alerted by the Police officer's doubt and the corroboration his evidence gave to the accused person's defence.

In her response the trial Magistrate said she drew inferences from the evidence led and the demeanour of the accused person. I am aware of what EBRAHIM JA said in the case of *George Parkin v Guardian Security Services (Pvt) Ltd* SC 130/99 about an appellate court's interference with a trial court's findings on credibility. At page 10 of the cyclostyled judgment he said;

> "It is true that an appellate court is reluctant to interfere with the findings of credibility of a trial court unless the reasons given for accepting certain evidence may be unsatisfactory- Hoffman & Zeffert The South African Law of evidence 4th ed at p 484. The probabilities are important in assessing credibility. See *Arter v Burt* 1922 AD 303, *Germani v Herf & Anor* 1925 (4) SA 887 at 903B. *Compare Zimbabwe Electricity Supply Authority v Dera* 1998 (1) ZLR 500 (S) and *Caps Holdings Ltd v Zivo Chikuavira* S-73-99."

In the case of *Cletos Toendepi Mpofu v The State* SC 154/91 at page 3 of the cyclostyled judgment, EBRAHIM JA again commented on the appellate court's interference with the trial court's findings on credibility based on demeanour as follows;

> "An appeal court will not lightly interfere with the findings on credibility based on demenour made by a trial court; see *Rex v Dhlamayo & Anor* 1948 (2) SA 677 (AD); *Watt (or Thomas) v Thomas* (1947) All ER 582 (HL); *Joyce v Yeomana* (1981) 2 All ER 21 (CA) and *S v Makawa & Anor* SC 46/91."

In this case the magistrate's reasons are not supported by both the law and the evidence. Her reasons for accepting the state's evidence as a basis for the conviction are unsatisfactory. She relied on inferences and the accused's demeanour in circumstances where she was not entitled to do so as the state's own evidence clearly pointed to a contrary inference and the use of demeanour was inappropriate because common cause evidence had proved the issues she sought to prove by relying on the accused's demeanour. In my view an accused's poor demeanour does not justify a finding against him when the evidence including that of the state clearly supports his defence. Demeanour is a product of impressions created by the conduct of a witness in the mind of a judicial officer. It could be due to the wittiness's discomfort because

he is not telling the truth. It can in some cases be due to the wittiness succumbing to the intimidating atmosphere of a courtroom or even be due to the normal character of the wittiness. Some people are strong while others are weak. This will have a bearing on how they present themselves before the court. Judicial officers must take these factors into consideration before condemning a witness's evidence on the basis of demeanour. It is therefore important for judicial officers to carefully examine the demeanour of a witness before drawing adverse inferences from it. In my view demeanour should only be relied on in cases where a determination cannot be made on the basis of the available evidence. In this case the accused's evidence that he used the newspapers to absorb water is corroborated by that of the investigating officer who found newspapers placed where water had been spilled. This could not be outweighed by Kurwa's inconclusive evidence that he saw the accused coming without the newspapers and assumed he had placed them in a broken down machine because he heard the sound of a metal object, and subsequently found some newspapers in a broken down printing machine. If that evidence is compared to Chatikobo;s to the effect that newspapers were strewn all over the factory and that some seemed to have been in the positions he saw them for some time the accused's poor demeanour referred to by the magistrate does not justify her conclusion that the accused stole the newspapers.

The magistrate's inference that the accused stole the newspapers is not consistent with all the proved facts. In the case of *Anthony Chukwuemeka Anochili v The State* SC 24/2001 SANDURA JA at page 7 of the cyclostyled judgment commenting on circumstantial evidence said;

> "Whilst it is true that the state relied in the main upon circumstantial evidence, I am satisfied that the inference which the state urged the court to draw was consistent with all the proved facts. In addition the proved facts excluded the possibility that the appellant was innocent."

In the case of *Michael Chimanga v The State* SC 125/98 MUCHECHETERE JA at page 8 of the cyclostyled judgment when dealing with circumstantial evidence commented as follows;

> "I am however in agreement with Mr Wamambo's submission that the only inference a court could draw from the facts is that the appellant stole the money in question. In the first instance, the appellant's attempt to blame Dube in the matter is without any substance. Although Dube admitted to having at times handled the keys to the safe and the Post Office, there was no opportunity for him to have had the keys to the new office duplicated. He could not have got to the safe without getting into the appellant's new

> office. The evidence that the appellant had moved into a new office a few days before the theft and that no-one had had access to the new office and its keys before the theft was committed was not disputed. Further, the evidence that Dube was in Bulawayo during the week-end that the theft occurred was not seriously challenged. It is also of significance that because he flouted PTC regulations on keys he for most of the time kept both keys to himself and therefore lessened the chance of any other person to duplicate them."

In the present case it cannot be said that the inference drawn by the magistrate is consistent with all the proved facts. The proved facts do not exclude the possibility of the accused's innocence. The evidence outlined above does not only point to the guilt of the accused person. In my view it is more consistent with the accused's innocence than his guilt. The investigating officer's evidence in particular supports the accused's evidence and expresses doubt on the complainant's claim that the accused stole the newspapers.

Circumstantial evidence can only be used to draw an inference if the inference sought to be drawn is the only reasonable inference which can be drawn from those facts. The inference as demonstrated in Chimanga (supra) must be supported by a rational reasoning and an analysis of the proved facts. In the present case it cannot be said that the proved facts are only consistent with the accused person's guilt. The proved facts in fact favour the accused and raise a doubt in his favour.

An accused person is entitled to an acquittal if there is a doubt after the consideration of all the available evidence, and if his defence is probably true. In the case of *Hardlife Matida v The State* S.C.180/98, EBRAHIM JA at page 3 of the cyclostyled judgment said;

> "There is nothing on the record of evidence to justify a finding that his explanation cannot reasonably be true and he must therefore be given the benefit of the doubt, even though the army driver's version seems more probable."

In the present case the accused's story was more probable than Kurwa's and he must certainly have been given the benefit of the doubt. The onus was on the state to prove him guilty beyond reasonable doubt. In the case of *R v Difford* 1937 AD 370 CURLEWIS CJ at page 383 said;

> "It is equally clear that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is unprovable. but beyond reasonable doubt that it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

In this case there is no question of the accused's story being possibly true as it is supported by what the Investigating officer saw at the scene of the crime. He should have been acquitted even without being put on his defence as the state's own evidence supported his defence outline. The Magistrate did not realize that she has a duty to protect the interests of an unrepresented accused. It was not fair to put the accused persons on their defence in the face of the Investigating Officer's evidence narrated above. In the case of *S v Garande* 2002 (1) ZLR 297 (H) NDOU J at page 303D said;

> "---but the learned trial magistrate appeared not to be aware that the unrepresented accused needed her assistance. Such conduct on the part of judicial officers came under attack in the case of *S v Manyani* HB-36-90 wherein at pp 4-5 of the cyclostyled judgment MUCHECHETERE J (as he then was) said;
>
> " Another matter which is of concern is that the trial magistrate appeared not to have been sensitive to the fact that the accused before him was unrepresented. *See S v Matmhodyo* 1973 (1) RLR 76; *S v Wall GS* 190/81 and *S v Kambani Nyoni* HB-248-86. It is clear that in the end the accused who appeared to be a simple person was facing the prosecutor and an unsympathetic court."----

The Zimbabwean system of criminal justice is essentially adversarial in nature. The essential characteristic of the adversary system is that the presiding officer appears as an impartial arbiter between the parties. Although, according to the well-known dictum of CURLEWIS JA in *R v Heerpworth* 1928 AD 265 at 277, a judge must ensure that "justice is done", it has been held to be "equally important" that the judge must ensure that "justice is seen to be done"—see *S v Rall* 1982 (1) SA 828 (A) at 831H-832A. When the accused is unrepresented, the judicial officer is then in the invidious position of being an arbiter and, at the same time, an adviser of the accused because he must explain the rules of procedure and evidence to the accused. Over the years, there has been a steady progression in the fashioning of rules by the courts in order to mitigate the harshness of putting an unrepresented accused on trial, particularly on serious offences. These rules require positive conduct by judicial officers to assist unrepresented accused in a variety of ways. They are all judge-made rules, and have their origin in the fundamental principle of fairness which is the bedrock of law that requires trials to be fair and justice to be equal."

The magistrate in this case did not explain the procedure entitling the accused to a discharge at the end of the state case in circumstances which called for such an explanation in view of the investigating officer's evidence. She also did not act as an impartial arbiter. She in

fact stretched the states' evidence to justify a conviction as demonstrated by her relying on an improper use of circumstantial evidence to draw unjustifiable inferences, and her relying on demeanor when the issues could be determined by the evidence led by the parties

In the case of *State v Jojo Mbiri* HH 239/98 GILLESPIE J at page 3-4 of the cyclostyled judgment commented on the court's duty to examine evidence as follows;

> "In my estimation this is a classic example of the court massaging the evidence in order to have it fit a preconception. That is not the way to do things. It should scarcely need saying that one must examine the evidence first, and see what it proves rather than arriving at a preconception first, and see whether it can, no matter how , be supported."

The correct judicial assessment of evidence must be based on establishing proved facts whose proof must be a result of a careful analysis of all the evidence led. The final result must be a product of an impartial and dispassionate assessment of all the evidence placed before the court. The judicial officer's duty is to determine the issues before him one way or the other guided by the evidence which he must critically examine.

I am satisfied that the Regional Magistrate was correct in questioning the propriety of the accused's conviction. The accused's conviction and sentence must be set aside. The accused was sentenced on 3 of August 2006. He according to the sentence imposed by the magistrate must have completed serving that sentence within 3 weeks of the date of sentence. The Regional Magistrate's letter to the trial Magistrate is dated 8 February 2007. This was some six and half months after the accused had finished serving the sentence imposed on him. The trial magistrate's response is dated the 19th February 2007. The Regional Magistrate's letter forwarding the record of proceedings for review is dated 14 May 2007. It is accompanied by the clerk of court's letter which reads as follows;

> "The above matters refers:
> A lot of cases coming in were completed last year. There was a delay in processing them because of either stationary shortages or machine breakdown.
> Any inconveniences, is sincerely regretted." (sic)

This is an example of how administrative inefficiencies can prejudice accused persons. The letter of explanation and apology though welcome as acknowledgment of the delays does not help the accused person who has served a sentence for a conviction which is going to be set aside. The explanation of the delay is not valid as cases can be, send on review or scrutiny on improvised review or scrutiny covers. They also need not be typed as hand written review

covers are acceptable. Review and scrutiny periods must be strictly adhered to, to avoid injustices such as the accused in this case has suffered. In the case of *S v Edmore Lindo* HH 149/03 at pages5-6 of the cyclostyled judgment I said;

> "Magistrates at trial and scrutiny levels should ensure that the urgency with which records are to be prepared for scrutiny and review as provided by sections 58(1) and 57 (1) of the Magistrate's Court Act is complied with. The record of proceedings should within a week be sent for review or scrutiny. As soon as a record is received for scrutiny or review it should be timeously attended to by the scrutinizing Regional Magistrate or reviewing Judge. If this is not done the need for urgently sending records for review or scrutiny may be frustrated and mistakes which should be corrected by the review and scrutiny procedure will take long to correct as happened in this case. Persons wrongly convicted or sentenced will continue to serve their sentences. The injustice which should be corrected by the scrutiny and review procedures will continue for longer than was anticipated by sections 57 (1) and 58 (1) of the Magistrate's Court Act."

I must add that in some cases as happened in this case the injustice may become too late to correct because the accused will have finished serving his sentence. Even though the accused has served the sentence imposed on the basis of a wrongful conviction, the conviction and sentence must be set aside.

The accused's conviction and sentence are set aside.

BHUNU J, agrees----------