SALIM ABDUL KARIM NOORMOHAMED
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAVANGIRA & HUNGWE JJ
HARARE, 27 MARCH 2012

Criminal Appeal

J Samukange, for the appellant
E Nyazamba, for the respondent

HUNGWE J: After hearing both counsels in argument we allowed this appeal and indicated that our reasons for that decision will follow. These are the reasons. Appellant was charged with unlawful entry in aggravated circumstances as defined in s 131(2) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. After a contested trial, the appellant was found guilty as charged. He was thereupon sentenced to thirty-six months imprisonment of which twelve months suspended were on appropriate conditions. He appeals against both conviction and sentence.

The substantive grounds of appeal advanced by the appellant are the following; that the court erred in convicting the appellant when there was no evidence led to prove unlawful entry in aggravated circumstances; that the court erred in placing the appellant on his defence after the State conceded that it had failed to establish a *prima facie* case; that the court had erred in convicting the appellant when the State had conceded that it had not proved the case against the appellant beyond a reasonable doubt.

At the appeal hearing, the State maintained the same position that it had taken at the trial. In our view, that position is quite justified in all the circumstances of this case.

The State outline gave the following averments as the basis upon which the appellant was to be tried. Complainant is married to the appellant's sister. During 2002 complainant left for South Africa and left the appellant in charge of his shop at 64C Charter Road, Harare, which at the time, he leased from the appellant.

The State outline continued:

> "Some goods continued missing from the shop but the complainant could not tell how the goods were missing.
>
> At a later date he got an anonymous letter informing that someone had been stealing from his shop and suggested that the complainant changes his keys. The complainant changed his keys and all of a sudden no shortfalls were ever noticed.
>
> The accused took advantage the time he was left in charge of the shop and obtained duplicate keys which he then used to gain entry into the shop and stole various items. Total value stolen is $100 000, 00 and nothing has been recovered."

The evidence led during trial did not prove

(a) an unlawful entry;

(b) the quantity or the description of goods stolen, or

(c) the value of such goods, or

(d) when they were allegedly stolen or even

(e) such general deficiency as alleged in the outline.

More importantly, however, we noted that whilst the charge related to unlawful entry, the judgement dealt at length with theft. Yet such theft, if any, only served to aggravate the alleged unlawful entry which the State charged the appellant with. Regarding the allegation of unlawful entry the State was hard put to prove this element because the premises in question belonged to appellant. It is not clear from the evidence which part of the premises complainant leased from the appellant.

The allegation in the State outline that the appellant was at some point left in charge of the shop was denied by the complainant. It was not in dispute; however, that complainant's wife also sells shoes from the same shop which complainant leased from the appellant. In the absence

of the exact period during which his entry into the shop premises would have been unlawful it was difficult, if not impossible, to prove unlawful entry. Further, the risk of false incrimination in this case was not safely excluded. We make this observation on the following basis. Appellant and complainant were engaged in fierce civil litigation wherein the appellant sought to evict the complainant from the same premises in issue in the present case. He succeeded in the magistrate's court. Complainant, soon after receiving the notice of eviction, made a police report concerning the present allegations regarding issues dating back over four years previously. When asked why he took such a long time to report theft to the police, his explanation was that he attempted to resolve the matter at the family level. This may be so, but the inference that the report was actuated more by malice after he lost the battle for eviction, than the alleged theft, is highly irresistible. The court *a quo* should have approached the evidence tendered by the complainant with more caution than it did.

As for the ground of appeal that the court *a quo* erred in placing the appellant on his defence after the State had conceded that it had failed to establish a *prima facie* case, the submission is not wholly correct. It is doubtful, on the case law, whether such an error can be a sound ground of appeal standing alone. The authorities do not agree that this is so.

Section 198(3) of the Criminal Procedure and Evidence Act provides that if, at the close of the case for the prosecution, the court considers that there is no evidence that the accused committed the offence charged or any other offence of which he (or she) might be convicted thereon, it shall return a verdict of not guilty.

There is sound basis for ordering the discharge of the accused at the close of the case for the prosecution, where:

(I) there is no evidence to prove an essential element of the offence: see *Attorney-General v Bvuma & Anor* 1987 (2) ZLR 96 (S) at 102F-G;

(ii) There is no evidence on which a reasonable court, acting carefully, might properly convict: see *Attorney-General v Mzizi* 1991 (2) ZLR 321 (S) at 323B;

(iii) The evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it: see *Attorney-General v Tarwirei* 1997 (1) ZLR 575 (S) at 576G.

It is significant that s 198(3), unlike its precursor s 188(3) of [*Cap 59*], uses the word ``shall" and not ``may" - ``it shall return a verdict of not guilty". The amendment was probably occasioned by the dictum in *Attorney-General v Bvuma & Anor supra* at 102F that it is:

> ``not a judicious exercise of the court's discretion to put an accused on his defence in order to bolster the State case in a case which, standing alone, cannot be proved."

Hence, so far as the law in Zimbabwe is concerned, there is no longer any controversy as to whether a court may properly refrain from exercising its discretion in favour of the accused, if at the close of the case for the prosecution it has reason to suppose that the inadequate evidence adduced by the State might be supplemented by defence evidence.

In *S v Kachipare* 1998 (2) ZLR 271 (SC) the court held, however, that once an accused person is put on his defence, albeit wrongly, and is ultimately convicted, the refusal to discharge the accused is not in itself a sustainable ground for appeal against the ultimate conviction. At the stage the appeal is heard, the court cannot close its eyes to the evidence lead on behalf of the accused or a co-accused which, taken in conjunction with the State evidence, proves the accused's guilt conclusively. The question which the appeal court must consider is whether, on the evidence and the findings of credibility (if any), unaffected by the irregularity, there is proof of guilt beyond a reasonable doubt. If the court does so consider - and the onus is on the State to satisfy it - there is no resultant miscarriage of justice and the irregularity will be ignored.

In my view, where the appeal court finds evidence supporting the conviction in the defence case, the fact that standing on its own the State case had not established evidence upon which a reasonable court could convict does not entitle the appeal court to interfere with conviction. Therefore, an appellant cannot succeed in persuading the court that he was entitled to an acquittal at the close of the case for the prosecution simply because, at that stage, there was insufficient evidence upon which he could have been convicted. If there was admissible evidence indicating guilt on the part of an appellant on the record, an appeal court cannot rely on the erroneous decision of the court *a quo* placing the accused on his defence, unless there is some other irregularity which renders the conviction insupportable or not in the interests of justice. In the present case, the dearth of evidence was not cured either by the appellant exercising his right

to remain silent or the evidence showing that he gave his co-accused the tyres which led to his co-accused's arrest.

The duty to prove beyond a reasonable doubt that the appellant committed the offence charged remained squarely on the State. As I said at the outset of this judgment, there were too many gaps to put the matter beyond a reasonable doubt. Complainant stated that he was the sole importer of certain bicycle tyres. The court *a quo* appears to have believed him without any evidence to prove that indeed he was. It escapes me how such a claim could go unchallenged. There was no proof of any sort as to what exactly was allegedly stolen besides a blanket claim that an assortment of merchandise was stolen. What led the court to hold that the appellant who allegedly gave his co-accused bicycle tyres to sell, also stole double sockets, single sockets, spiral wires, hammers, axes, saws, bicycles? There is just no evidence to suggest he did.
The concession by the prosecution that there was no *prima facie* case against the appellant, in my view, was well made.

It was for these reasons that after hearing counsel's submissions we allowed the appeal. In the result therefore the conviction in the court *a quo* is set aside and the following is substituted:

"The accused is found not guilty and is acquitted."

MAVANGIRA J: agrees

Venturas and Samukange, legal practitioners for the appellant
Attorney-General's Office, legal practitioners for the respondent