TAURAI CHAZA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA & MANGOTA JJ
HARARE, 18 February, 2015 & 18 February 2016

Appeal

Appellant: In person
T. Mapfuwa, for the respondent

MANGOTA J: The appellant was convicted, after trial, of unlawful entry into premises as defined in s “131 (2)(e)” of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Code). He was sentenced to 12 months imprisonment with one half of that sentence being suspended on the following two conditions:

(a) 3 months imprisonment were suspended for 5 years on the usual condition of future good conduct – and

(b) 3 months imprisonment were suspended on condition he paid restitution of $350 to the complainant.

The state allegations were that, on 12 February 2014, the appellant entered into the house of one Sophia Mushamba at number 1584 Glen Norah A, Harare. He stole six disco speakers, a Nokia N70 cellophone and a variety of grocery items all valued at $350. The goods were not recovered.

The appellant appealed against both conviction and sentence. His grounds of appeal were that:

(i) the state did not rebut the defence of *alibi* which he raised during his trial.

(ii) the trial court misdirected itself and shifted the *onus* onto him to prove the truthfulness of the defence which he raised;

(iii) the state did not establish that the allegedly stolen property was valued at $330 and/or that the appellant was the person who stole it;

(iv) the trial court should not have believed the uncorroborated evidence of the second state witness on the identification of the appellant as the culprit – and

(v) the trial court misdirected itself in sentencing him to a custodial sentence and not to such non-custodial sentences as a fine or community service.

The respondent opposed the appeal. It submitted that the appellant was properly convicted and sentenced. It stated that the prosecution rebutted the appellant's defence of *alibi* and proved his guilt beyond reasonable doubt. It said the sentence which was imposed was commensurate with the offence which the appellant committed and his personal circumstances.

The defence of *alibi* which the appellant raised is provided for in s 175 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The *onus* is on the state to disprove it. In *South African Law of Evidence* 4th ed 619 Hoffman & Zeffertt state:

> "If there is direct or circumstantial evidence which points to the accused as the criminal the most satisfactory form of rebuttal is for him to show that he could not have committed the offence because he was somewhere else at the relevant time. This is called the defence of *alibi*, but it is a straightforward denial of the prosecution's case on the issue of identity. Courts have occasionally fallen into error by treating it as though it raised two separate issues:
>
> (a) did it look as if it was Smith who broke into Jones' shop at midnight, and
> (b) was Smith really at home in bed?
>
> Splitting up the inquiry in this way leads the judge to say if the prosecution adduces strong evidence on the first issue, the *onus* should be on the accused to prove his *alibi*. But the reasoning is fallacious because the prosecution has to prove beyond reasonable doubt that Smith is the burglar, and if the court considers it reasonably possible that he may have been at home in bed, it must acquit".

Whether or not the state rebutted the defence which the appellant raised depends on the quality of evidence which the prosecution led. Two state witnesses testified against the appellant. These were the complainant and her sister Yvette Mushamba.

The complainant's testimony was that her house was broken into in the early hours of 12 February, 2014. She said the person(s) who broke into her house stole all the property which was mentioned in the charge sheet. She was candid enough to tell the trial court that she did not see the person(s) who broke into her house.

Yvette Mushamba was sleeping at the complainant's house on the night in question. She said she saw the appellant in the complainant's house at the time of the alleged offence. He was holding a cellophone in his left hand. She insisted that she was not mistaken in her

identification of the appellant as the culprit. She said the electric light was on in the room and she made eye contact with him.

Yvette Mushamba and the appellant knew each other for four years prior to 12 February, 2014. The appellant confirmed that fact.

It was on the basis of the testimony of Yvette Mushamba that the state insisted that it rebutted the appellant's defence of *alibi*. The fact that Yvette Mushamba and the appellant knew each other four years points to the conclusion that Yvette Mushamba was able to positively identify the appellant as the culprit.

The appellant did not challenge the testimony of witnesses for the prosecution in any meaningful way. This became obvious when he cross-examined the state witnesses. He did not suggest to Yvette Mushamba that he was not at the complainant's house on the night of the alleged offence. He did not suggest to her that he was sleeping at his home. What he only did was to make a bare denial of what was being alleged against him.

Nelson Vasco whom the appellant called as a witness did not assist his case either. Mr Vasco was a candid witness. He did not discount the possibility that, by use of a spare key, the appellant could have left Mr Vasco and his wife sleeping in the house whilst he (appellant) went somewhere else on the night of 12 February, 2014.

We are convinced, as the court *a quo* was, that Yvette Mushamba's positive identification of the appellant as the culprit cannot be faulted. Neither the complainant nor Yvette had any motive to implicate the appellant. There was no bad blood between the appellant and witnesses for the prosecution. The appellant stated as much when he was under cross-examination.

The trial magistrate was satisfied, as we are, that the state rebutted the appellant's defence of *alibi*. That defence could not hold. The appellant could not have been sleeping at his home and, at the same time, be in the house of complainant. He, in short, could not have been in two places at one and the same time. His criticism of the trial magistrate's conclusion in respect of his first ground of appeal was totally without merit.

The appellant did not pursue his second and third grounds of appeal against conviction. He advanced no reasons therefor.

The respondent adopted a similar approach. It ignored the appellant's second and third grounds of appeal.

The attitude which the parties took in respect of the two grounds of appeal against conviction persuaded us to treat the grounds as having been abandoned. We will not, therefore, consider or comment upon them.

The appellant's last ground of appeal against conviction was that the court *a quo* should not have believed the uncorroborated evidence of Yvette Mushamba on the identification of him as the culprit. He submitted that Yvette Mushamba and him were placed in what McNally JA (as he then was) described in *S* v *Musakwa* 1995(1) ZLR I (S) as a "boxing ring" situation. He stated that the court *a quo* placed the two of them into the ring and decided the matter on the basis of who, between them, was more credible than the other. He referred us to *S* v *Musakwa* (*supra*) which he said was authority for the submission which he was making.

The respondent submitted that the "boxing ring" situation which McNally JA described in *S* v *Musakwa* did not apply to the present case. It stated that the appellant was convicted on Yvette Mushamba's positive identification of him. It insisted that Ms Mushamba was not mistaken in her identification of him as the culprit.

We took the liberty to read the case of *S* v *Musakwa*. We noted that its circumstances were distinguishable from those of the present case. We observed that in *S* v *Musakwa* the parties had met for some ten or so minutes. We observed, further, that the complainant in that case was a suspect witness.

We are satisfied that the court *a quo* decided the present case on the basis of what Yvette Mushamba said as read together with other factors which supported her credibility. It took into account the fact that she had known the appellant for four years. It also considered the appellant's confirmation of that fact. It, accordingly and properly so, ruled out the possibility that Yvette Mushamba might have been mistaken in her identification of the appellant as the culprit.

McNally JA's remarks, in our view, are more relevant to such circumstances as were described in *S* v *Musakwa* than they are to the circumstances of this case. They are relevant to a situation where the parties had a brief encounter with each other. They are not relevant to such cases as the present one where:

(i) the parties knew each other for four years;

(ii) they did have eye contact;

(iii) the one knew that the other had seen him;

(iv) both of them were in a room where the electric light was on and visibility was good - and

(v) the burglar told the person(s) who was or were with him to run away.

The appellant's submission which was to the effect that there was no corroboration of Yvette Mushamba's evidence was neither here nor there. The respondent had a very easy answer to the submission. It stated, correctly so, that it was competent for a court to convict an accused person on the single evidence of a competent and credible witness. It referred us to s 269 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] and to *S* v *Banana* 2000 (1) ZLR 607 (S).

Section 269 of the Criminal Procedure and Evidence Act reads:

> "269 SUFFICIENCY OF ONE WITNESS IN CRIMINAL CASES, EXCEPT PERJURY AND TREASON
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> It shall be lawful for the court by which any person prosecuted for any offence is tried to convict such person of any offence alleged against him in the indictment, summons or charge under trial on the single evidence of any competent and credible witness:
> Provided that it shall not be competent for any court-
>
> (a) to convict any person of perjury on the evidence of any one witness as to the falsity of any statement made by the accused unless, in addition to and independently of the testimony of such witness, some other competent and credible evidence as to the falsity of such statement is given to such court;
> (b) to convict any person of treason, except upon the evidence of two witnesses where one overt act is charged in the indictment, or where two or more such overt acts are so charged, upon the evidence of one witness to each such overt act;
>
> (c) to convict any person on the single evidence of any witness of an offence in respect of which provision to the contrary is made by any enactment".

The present case does not fall into any of the three exceptions which are mentioned in the proviso to s 269. The appellant's criticism of the court *a quo*'s reasoning on this aspect of the case was, in our view, without merit. Our views find fortification from the remarks of Gubbay CJ who, in *S* v *Banana* (*supra*), stated at pages 614 H and 615 A as follows:

> "It is, of course, permissible in terms of section 269 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] for a court to convict a person on the single evidence of a competent and credible witness"

The learned Chief Justice cited with approval the remarks of Lewis JP who in *S* v *Nyathi*, 1977 (2) RLR 315 (A) discussed the matter at hand and stated at p 318 F-G that:

> "The court is entitled to convict on the evidence of a single witness if it is satisfied beyond reasonable doubt that such evidence is true".

In *S* v *Nathoo Supermarket (Pvt) Ltd* 1987 (2) ZLR 136 (S) Gubbay JA (as he then was) remarked at p 138 E-F as follows:

> "There is no magic formula which determines when a conviction is warranted upon the testimony of a single witness. His evidence must be approached with caution and the merits thereof weighed against any factors which militate against its credibility. In essence, a common sense approach must be applied. If the court is convinced beyond a reasonable doubt that the sole witness has spoken the truth, it must convict, notwithstanding that he was in some respects unsatisfactory".

The court *a quo* approached the evidence of Yvette Mushamba with caution. It stated as much in its judgment. It, in that regard, complied with Gubbay CJ's remarks in *S* v *Banana*. It convicted the appellant on the evidence of that competent and credible witness.

We are satisfied that the appellant's appeal against conviction has no merit. His grounds of appeal did not hold. His conviction is, therefore, confirmed.

The appellant split his grounds of appeal against sentence into three segments. He submitted that:

(i) the custodial sentence which the trial magistrate imposed was so harsh as to induced a sense of shock;

(ii) the trial magistrate placed too much reliance on the factor of prevalence (*sic*) and, to that extent, he fell into an error- and

(iii) the court *a quo* paid lip service to his mitigating factors.

He urged us to interfere with the sentence. He moved us to substitute the sentence with such non-custodial sentences as a fine or community service.

The respondent's position was to the contrary. It stated that the appellant committed the crime of unlawful entry into the complainant's house in aggravating circumstances. It said he did so at night and under cover of darkness. It submitted that the complainant's stolen property was not recovered. It said the court *a quo* erred on the lenient side. It stated that the sentence did not induce a sense of shock and should not, therefore, be disturbed.

Two matters favoured the appellant in this case. These were that he is a first offender and that he pleaded with the court for forgiveness. The following factors militated against him: that the offence he committed was both serious and prevalent, that what he stole was not recovered, that he broke into the complainant's house and he, in that way, violated her privacy.

There is no doubt that the appellant's aggravating features outweighed what favoured him. He was, in our view, fortunate to have gotten away with an effective sentence of only six months imprisonment. The respondent stated, correctly so, that the trial magistrate erred on the lenient side.

The appellant's criticism of the sentence which was imposed upon him was misplaced. The penal parameters which the legislature stipulated for the offence offer a good guideline to what should have been an appropriate sentence for what he did.

The sentence which the court *a quo* imposed was in line with the offence which the appellant committed and his personal circumstances. The trial magistrate exercised his mind properly when he assessed and imposed it. The sentence does not induce a sense of shock in us. It will not, therefore, be disturbed.

It is pertinent that we make a comment as regards the charge which the state preferred against the appellant. The appellant was charged under subsection (2) of s 131 of the Criminal Code. Subsection (2) of s 131 of the Code does not create any offence. It refers to aggravating circumstances.

Only subsection 1 of s 131 of the Code creates the offence of unlawful entry into premises. Section 131(2) does not.

The appellant should not have been charged under s 131(2) (e) of the Criminal Code. He should have been charged under s 131 (1) (a) of the Code. The charge was therefore defective. The defect was, however, not fatal to the case for the prosecution as no prejudice was suffered by the appellant.

The charge is, accordingly, amended to read as follows:

> "(Hereinafter called the accused) charged with unlawful entry into premises as defined in s 131 (1) (a) of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*]. In that on 12 February, 2014 at House number 1584 Glen Norah A, Harare Taurai Chaza unlawfully, intentionally and without permission or authority from Sophia Mushamba, the lawful occupier of the premises concerned or without other lawful authority, entered Sophia Mushamba's premises by opening a closed window to gain entry".

We delved into the above matter to some appreciable degree. We considered it pertinent to clarify, for the benefit of magistrates and other court officials, the meaning and import of s 131 of the Criminal Code. We, in this regard, urge judicial officers to familiarise themselves with the section and the case of *S* v *Chirinda*, 2009 (2) ZLR 82 (H). The headnote on p 82 F-H spells out in clear terms what is constituted by the offence of unlawful entry into premises as defined in s 131 of the Criminal Code. It reads:

> "Section 131(1) of the Criminal Law [Codification and Reform] Act ("the Criminal Code") enacts the crime of unlawful entry into premises. The essential elements of the crime are an intentional entry into premises without the authority of the lawful occupier or other lawful authority. The crime is aggravated by the fact that the accused person stole from the premises or caused damage or destruction to the property thereon. The section does not create an offence of unlawful entry and theft, so the accused cannot be convicted of unlawful entry and theft, even if the facts establish that he stole from the premises he unlawfully entered. The elements of theft need not be canvased as they would for purposes of securing a conviction for theft. The stealing of property can merely be mentioned in the agreed facts or the state outline or the prosecutor's address in aggravation" [emphasis added]

The headnote gives a summary of the remarks which Uchena J made when he was reviewing three different cases which had a common error. The cases emanated from three different magistrates sitting at three different magisterial court stations. Their cases all came up for review by the same judge. He found that a common mistake occurred in each case. The error, in each case, was that the accused was charged with unlawful entry and theft as defined in s 131 of the Criminal Code.

It was decided in that case that s 131 (2) (e) does not create an offence of unlawful entry and theft. We add that no offence is created under paras (a) to (e) of subsection (2) of s 131 of the Criminal Code. The offence of unlawful entry into premises is only created under paragraphs (a) and/or (b) of subsection (1) of s 131 of the Criminal Code.

By way of conclusion, therefore, we are satisfied that the appeal is devoid of merit. It is, in the result, dismissed in *toto.*

CHATUKUTA J agrees ………………………

National Prosecuting Authority, respondent's legal practitioners