

BRIAN WALUSA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
MUZOFA & CHIKOWERO JJ  
HARARE, 12 October & 2 November 2020

### **Criminal Appeal**

*Pesanai*, for the appellant  
*Nyahunzvi*, for the respondent

MUZOFA J: The appellant was convicted after a trial by a magistrate sitting at the Mutoko Magistrates Court on four counts of contravening s 60 A (3) (a) of the Electricity Act [*Chapter 13:19*]. He appeared in court with two co accused persons. The first accused was acquitted, the second and third accused persons were convicted. The appellant was the second accused person. All counts were treated as one for purposes of sentence. Each of them was sentenced to 11 years imprisonment of which 1-year imprisonment was suspended on condition of restitution. The court also ordered the return of the transformer oil to ZESA and all the tools used in the commission of the offence were forfeited to the State. He appeals against both conviction and sentence.

On 22 July 2017 one Silver Nyakusengwa “Silver” a caretaker at Kotwa High School woke up early around 4 a.m. He went outside his house. He heard some sounds by the transformer and subsequently someone jumping over the gate. He raised alarm with the guards. He then left for Marondera. The police were called and 6 containers were found near the transformer. Five of the containers were full of transformer oil and one was a quarter full. The containers were inscribed some initials TN, TMT and Kings. Police investigations revealed that the containers were in the custody of William Katsande ‘William’, the first accused before the trial court. William advised the police that he had given the containers to the appellant and the third accused. These two used to supply him with diesel. He

occasionally provided them with containers for use to supply him with diesel. This is how the appellant was arrested. The appellant and the third accused later made indications of the other three places where they drained transformer oil.

The appellant denied the offences. His defence was a bare denial, no details were given. However, in cross examining the State witnesses, he challenged the indications and the statements he allegedly made. He said the indications were not made freely and voluntarily.

In its judgment the trial court acquitted the first accused on the basis that the evidence established that he supplied the other two accused persons with containers. The provision of the containers was for the supply of diesel not transformer oil. In respect of the appellant and the co-accused the trial court relied on the indications and the containers recovered from one of the scenes of crime. It ruled that the indications were freely and voluntarily made.

The appellant's grounds of appeal against conviction raise two issues. Firstly, that the trial court misdirected itself in convicting the appellant on circumstantial evidence which did not give rise to the one inference that the appellant committed the offence. Secondly, that the trial court erred by accepting that the challenged indications and photographs were admissible in evidence.

In respect of sentence, that the court failed to explain in detail the meaning of special circumstances. In addition, it was alleged that the court should have found special circumstances in this matter.

The admissibility of indications and statements made by an accused is regulated by s 256 of the Criminal Procedure & Evidence Act [*Chapter 9:07*]

- “1) Any confession of the commission of an offence and any statement which is proved to have been freely and voluntarily made by an accused person without his having been unduly influenced thereto shall be admissible in evidence against such accused person if tendered by the prosecutor, whether such confession or statement was made before or after his arrest or after committal and whether reduced into writing or not...”

A statement made by an accused includes an oral or written statement and indications. The section requires that there must be proof that the statements that the State wishes to rely on was made freely and voluntarily. In the case of an unconfirmed statement, the only way to establish the admissibility of a statement in criminal proceedings is through a trial within a trial. It is in that process that the Magistrate then makes a ruling after hearing all the evidence relating to the making of the statements. It is a gross irregularity for a Magistrate to make a finding on the statement without resorting to a trial within a trial. See *S v Mazano and Another* 2000 (1) ZLR 347 (HC).

During the trial, the appellant told the court that he made the indications under duress. More specifically, he said he was assaulted by the police who led him to the scenes of crime and advised him what to do and say. On the day the indications were made, he simply complied for fear of further ramifications. He was photographed while making the indications. The photographs were produced at the trial.

The State led evidence from six witnesses. The first witness was from ZESA. His evidence established the commission of the offence. He provided transport at the time the appellant went for indications. The indications were made in his presence. He said the appellant made the indications freely and voluntarily. Under cross examination the appellant disputed that piece of evidence. Other witnesses gave evidence including Nyakusengwa of Kotwa High School. He was present when the indications were made. He said the appellant freely made the indications. Appellant disputed this. Similarly, Keith Enani a ZESA artisan's evidence on the voluntariness of the indications was disputed by the appellant. Despite the clarion call for a trial within a trial it did not occur to the prosecution to conduct it. The prosecutor happily called the investigating officers. The prosecutor had the audacity to ask the investigating officer to comment on the challenge by the appellant. The following exchange took place at p 45 of the record.

“Q. 2<sup>nd</sup> accused said he did not drain the transformer oil.

A. He is lying to the court. If he did not, he would not have made indications which were made freely and voluntarily. Further I did not know of the Kotwa hospital and Kotwa location which were drained they led me there.

Q. 2<sup>nd</sup> accused said you advised them to point to the areas drained oil

A. He is lying because I could not force them when they led me to other places where oil was drained.

Q. 2<sup>nd</sup> accused said you forced them to go for indications

A. That's a lie, 2<sup>nd</sup> and 3<sup>rd</sup> accused made indications freely and voluntarily.”

The exchange shows that the State was aware that the indications were challenged including the photographs that were produced. The standard of prosecution in this case did not serve the interests of justice. It actually compromised the proper delivery of justice. A diligent prosecutor in such circumstances should have applied for a trial within a trial to be conducted. It is for the State to establish the conditions of admissibility. In this case the State failed.

In its judgment, the trial court highlighted that the appellant challenged the indications. However, it dismissed the challenge in one sentence that,

“The two accused persons however told the court that they were heavily assaulted by the police for them to make confessions. They made these allegations during trial but when they appeared in court for initial remand, they never advised the court of same. When they were asked if they had complaints against police (sic).”

The finding is misdirected. When an accused person appears in court on initial remand, he is expected to register any complaints against the police. The finding by the trial court assumes that when the appellant appeared for initial remand, he had already made the indications. There was nothing before the court to support this conclusion. It was based on conjecture. A finding on the admissibility of a statement cannot be made save after a trial within a trial. It does not matter that the accused’s allegations are incredible. Similarly, it does not matter that some witnesses observed the accused making the indications and concluded that the indications were made freely and voluntarily as in this case. The purpose of a trial within a trial is to establish whether before and during the making of the indications the accused was not subjected to some form of influence to make the indications. Thus, in the event where some influence is borne on the accused before the making of the indications, those who witness the making of the indications may not even know about the unlawful influence.

The failure to properly determine the admissibility of the indications in a trial within a trial is a misdirection. The evidence of the utterances made during the indications cannot be relied on in this case. What remained before the court is the fact that transformer oil was stolen from the four places without evidence linking the appellant to the offences. The first ground of appeal succeeds.

The only piece of evidence that remained before the court were the containers. The court accepted that the containers were given to the appellant and the third accused by the first accused. This court’s task is to determine if the trial court applied the law on circumstantial evidence correctly.

The leading case on circumstantial evidence is *R v Blom* 1939 AD 188 at 202 – 203 which outlines how circumstantial evidence should be treated by the trial court in criminal matters. The cardinal principles are that;

- i. the inference sought to be drawn must be consistent with all proved facts. If not, the inference cannot be drawn

- ii. the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is the correct one. See also *Marange & Others* 1991 (1) ZLR 244 (S).

A court can return a verdict of guilty based on circumstantial evidence only see *S v Shonhiwa* 1987 (1) ZLR 215 (S).

I find no misdirection in the court's finding. There was evidence that the first accused person was a diesel buyer. He used to borrow some peoples' containers for use. The appellant and the third accused used to sell diesel to the first accused. The same containers given to the appellant and the third accused were found at Kotwa High School with transformer oil. Transformer oil had been stolen at that place.

The only inference is that the appellant and the third accused drained the transformer oil from the Kotwa High School transformer. The inference is consistent with the proved facts and admits of no other inference. The appellant did not indicate if he in turn gave the containers to someone else.

The second, third and fourth counts depended on the indications. The appellant benefits from the sloppy prosecution. He can only be liable in respect of the first count.

In respect of sentence. The trial court is impugned for not fully explaining the meaning of special circumstances.

The ground of appeal makes a subtle concession that an explanation was given, although it lacked detail. The submissions are not supported by the record of proceedings. At p 77 of the record there is an indication that special circumstances were dealt with. Unfortunately, the trial court did not fully record what transpired. A Magistrate Court is a court of record. Therefore, a magistrate presiding over a matter must record everything that takes place during the proceedings. As matters stand this court is unable to tell what the explanation was all about.

However, the non-recording is not fatal to the proceedings. The appellant confirms that there was an explanation. I find no misdirection in the court's finding that there were no special circumstances. There was nothing peculiar to the commission of the offence. I did not hear appellant's counsel refer to even a single special circumstance that the appeal court could consider. Indeed, the circumstances of this case admit of no special circumstances.

The offence that the appellant stood convicted of comes with a minimum mandatory sentence of 10 years where there are no special circumstances. Since the drained transformer oil in the 1<sup>st</sup> count was recovered it is unnecessary to order restitution.

From the foregoing the following order is made.

1. The appeal against conviction and sentence in the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> counts is allowed.
2. The convictions and sentence are set aside and substituted as follows,  
‘Not Guilty and Acquitted’
3. The appeal against conviction in the 1<sup>st</sup> count is dismissed.
4. The appeal against sentence partially succeeds. The sentence is altered as follows
  - i. 10 years imprisonment.
  - ii. The clerk of court is ordered to return the recovered transformer oil to ZESA.
  - iii. All the recovered tools used in the commission of the offence are forfeited to the State.’

*IEG Musimbe & Partners*, appellant’s legal practitioners  
*National Prosecuting Authority*, respondent’s legal practitioners

CHIKOWERO J Agrees .....