

THE STATE
versus
SAMUEL MICHAEL MUTSVUNGUMA

HIGH COURT OF ZIMBABWE
FOROMA & KWENDA JJ
HARARE, 13 February & 6 December 2023

Criminal Appeal

L Madhuku, for the appellant
T Mapfuwa, for the respondent

FOROMA J: The appellant was charged, tried and convicted of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced on 19 April, 2022 to 24 months imprisonment 3 months of which was suspended for 5 years on condition that he would not commit an offence involving dishonesty or fraud for which, upon conviction, he would be sentenced to imprisonment without the option of a fine and 9 months was suspended on condition he would make restitution to complainant in the sum of US\$18 000 through the Clerk of Court on or before 19 August 2022 leaving an effective 12 months as the effective term of imprisonment. Aggrieved by the outcome of his trial, the appellant noted an appeal against both conviction and sentence on 22 April, 2022. In the appeal against conviction appellant raised the following 3 grounds numbered as follows:

- “1.1. The learned magistrate erred in law in dismissing the *alibi* of the appellant despite it not being investigated on or disproved by any evidence before the court.
- 1.3 The learned magistrate erred law(sic) finding out and concluding that there was trust between the appellant and complainant when the evidence before the court pointed otherwise.
- 1.4 The trial court erred by failing to give due weight to appellant’s defence which was probable in the circumstances of the case which was before it considering that it accepted the credibility of the witness of appellant.”

In the appeal against sentence he raised the following 3 grounds:-

- “2.1 The court erred in sentencing the appellant to a custodial sentenced coupled with an order for restitution.

- 2.2 The court *a quo* erred in assessment that appellant was not suitable for non-custodial sentence basing on its dismissal of the *alibi* rather than on the facts before it.
- 2.3 The court *a quo* erred in making a perfunctory inquiry into the mitigating factor for the appellant and overstressing on its findings with regards to conviction rather than aggravating factors as put forward by the State.”

Appellant concluded his notice of appeal with the following prayer:

“Wherefore appellant prays for:

- (1) the setting aside of his conviction.
- (2) the appellant is found not guilty and acquitted.
- (3) In the event that the conviction is upheld – the setting aside of the sentence

passed.”

Before proceedings to deal with the merits of the appeal it is appropriate to make some salutary remarks regarding the notice of appeal against sentence. The three grounds of appeal against sentenced quoted above do not pass as valid grounds of appeal by reason of the fact that none of them avers any misdirection, irregularity or such excessive harshness as induces a sense of shock. Precedent is abundant on how a sentence is assailed through the grounds of appeal against sentence in a notice of appeal - see *S v Sidat* 1997 (1) ZLR 487. Appellant’s notice of appeal against sentence is further nullified by item number three of the prayer quoted above. Presently worded the appellant seeks that the court sets aside the sentence by the court *a quo* even after his conviction is confirmed. Legal practitioners are advised to take their work seriously if they expect the courts, in turn, to take them seriously. We were quite surprised to note that even in the heads of argument, the appellant’s attention was not attracted to the defective grounds of appeal.

Appellant’s heads of argument in this appeal were filed by and under the reference of J.NK/JB who we assume would be Mr *Kadoko* who represented the appellant at the trial in the court *a quo*. This court expects argument to be addressed based on heads of argument filed by counsel appearing at the hearing unless and for good reason, if counsel who filed heads of argument is unavailable to prosecute the appeal. Even then where counsel other than the one who prepared and filed heads of argument appears at the hearing the court should be advised if counsel adopts the heads filed by the other counsel. We also note with some concern that, at the hearing of the appeal, counsel did not formally file or address us with his own heads of argument.

That said, we proceed to deal with the appeal as presented in argument. At the commencement of the hearing of this appeal Professor Madhuku circulated the bench with cyclostyled copies of the Supreme Court judgement in the matter of *Alphonse Mushanawani v The State* SC 108/22 in which he happened to have represented the appellant. The said judgement was cited as authority for the proposition that an *alibi* once raised as a defence by an accused in a criminal trial ought to be investigated by the prosecution on whom there is an *onus* to disprove its veracity. Professor Madhuku further submitted that there is no requirement that the defence of an *alibi* be raised at any specific given time during criminal proceedings for the onus on the State to take effect. The gravamen of counsel's argument was that the onus resting on the State to verify the *alibi* defence does not shift onto the accused by reason of any delay in raising the said defence. As the facts of this matter will show, the appellant did not raise the *alibi* at the time police recorded a warned and cautioned statement from him. It was only raised at the trial through the defence outline, which the State argued was an indication that it was an afterthought. It was defence counsel's submission that even at that stage (late it may have been) the onus on the State to investigate the *alibi* still attached to the State and that the State ought to have applied for a postponement of the trial in order to investigate the veracity of the *alibi*. The merit or lack of it in Professor Madhuku's argument may not be properly appreciated without reference to the factual background of the matter which we summarise below.

Factual Background

Appellant and one Victoria Dhlamini were acquaintances having been so for quite a while. Victoria Dhlamini (Victoria) happened to be a relation of the complainant who regarded appellant and Victoria to be in both a love and business relationship. According to the complainant, Victoria approached her with a proposal that she and appellant were offering to sell her a Mercedes Benz vehicle as they needed to raise some funds for a business venture. Complainant who had been involved in some financial transactions with the two in the recent past indicated that she needed to see the vehicle before she could make up her mind and to this end it was agreed that the vehicle would be brought to her at her work place at Zimbank corner Rotten Row and Samora Machel Avenue for viewing.

On 10 May 2021 accused, by arrangement with Victoria, drove the Mercedes Benz vehicle to complainant's workplace where complainant had arranged that it be inspected by complainant's mechanic. The mechanic favourably recommended the vehicle to complainant

who agreed to buy it. Complainant immediately rushed into her office and fetched some money (US\$18 000) which she gave to accused who drove away the vehicle after the parties agreed that the appellant would deliver the vehicle at complainant's house on Thursday that week after the vehicle had been cleaned up and polished as appellant was busy attending a funeral that morning. The vehicle was eventually not delivered to complainant on the agreed date or at all. Despite attempts to contact them both Victoria and appellant were no longer contactable on the mobile. This frustrated complainant who decided to lodge complaint with the police leading to appellant's arrest and successful prosecution for fraud hence this appeal. Victoria was not located and she was believed to have gone underground.

Summary of the Trial

When complainant made a complaint to the police she implicated both Victoria and appellant but because Victoria could not be located the appellant remained to face the music alone. At the trial appellant was charged with fraud and he pleaded not guilty.

The State led the evidence of complainant and one Russel Chimedza (Russel) her mechanic who used to attend to her vehicle(s). Complainant had called Russel to inspect appellant's vehicle at her workplace for road worthiness and general fitness before she could consider purchasing it. Russel testified that he confirmed to complainant after inspecting the white Mercedes Benz 250E with a black interior that it would be a good purchase. As a result complainant went up to her office and brought an envelope with money which Russel observed being given to the appellant who drove away in the Mercedes Benz immediately after collecting the money.

The appellant in his defence testified and called three police details to confirm his *alibi*. In his defence appellant claimed that he had been in the company of the police details at Harare Hospital where he had gone to arrange for a post mortem to be conducted on the remains of his father in-law. He thus argued that complainant was falsely alleging that he was selling his Mercedes Benz at corner Samora Machel Avenue and Rotten Row, Harare as at the same time he was away at Harare Hospital as aforesaid.

The trial court disbelieved the evidence that appellant had not been at corner of Rotten Row and Samora Machel Avenue at the material time and believed the complainant's version that complainant had given appellant some money for the purchase price of the vehicle. It also found that complainant's evidence had been corroborated by Russel the mechanic. The court

disbelieved the appellant's *alibi* claim and did not find any support for it from the police witnesses whose evidence he caused to be adduced. Having summarized the case we proceed to consider the grounds of appeal.

The first ground of appeal against conviction can be paraphrased as follows – that the court *a quo* ought to have upheld the appellant's *alibi* defence as the State neither investigate it nor disproved it. When addressing the issue of the non-timeous raising of the *alibi* in its judgement the court *a quo* noted that the appellant had failed to raise the *alibi* with the police at the time appellant gave his warned and cautioned statement and that appellant's explanation for such failure was that he had not been given an opportunity to do so. The court then proceeded as follows: –

“In light of this, I follow the same reasoning applied in *S v Tungamirai Madzokere & Ors* 2016 judgement number HH 523-16 when the court stated that:

‘It is inconceivable that he could have failed to raise the defence in his warned and cautioned statement that he in fact had been at the Church when the offence was committed. In my view, what the accused says in his warned and cautioned statement forms the basis of his defence.’”

The court *a quo* proceeded to reason that because the accused failed to raise this *alibi* with the police the impression created was that the defence had been concocted and a product of recent fabrication. The suggestion by the court *a quo* that failure to raise an *alibi* results in the defence being (rejected) in its entirety as a statement of general import extracted from the judgement quoted above is incorrect and a misdirection. A failure to disclose an *alibi* at the stage of giving a warned and cautioned statement can only result in the defence being rejected if such rejection is the only reasonable inference to flow from such circumstances as the proof or disproof of an *alibi* must depend on the totality of the evidence in the case and the court's impressions of the witnesses – See *R v Hlongwane* 1959 (3) SA 337(AD) 341D – B where the court said:-

“The correct approach is to consider the alibi in the light of the totality of the evidence in the case.”

It is the court *a quo*'s approach that Professor Madhuku found assailable as he strongly argued that the *alibi* defence can be raised at any time and cannot be restricted to being raised at the time of giving a warned and cautioned statement. In our view it is advisable and in order to avoid the drawing of adverse inferences on account of the delay in raising it that the *alibi* be

raised at the earliest opportunity as this also affords the State a proper opportunity to investigate it. This accords with the ratio *decidendi* in the case of *Mushanawani v The State* (supra) wherein in para 48 of the cyclostyled judgement the Supreme Court said:-

“48. It can be inferred from the above cases that the general principle is that the accused must present his alibi at the earliest possible opportunity and once he has given full particulars of the *alibi* the police must investigate it with a view to confirm or disprove it. The *alibi* must be complete as to the time, the place and possibly those people at the scene of the crime who could help the investigation”

As part of making an *alibi* complete an accused should as far as possible mention people at the place physically away from the scene of crime who can vouch for his absence from the scene of crime at the time of the commission of the crime in order to meet the definition of *alibi* per MALABA DCJ (as he then was) in *Matanga v The State* S 17-15 at p 6 where he defined *alibi* as follows i.e:-

“An *alibi* is a statement of defence to the effect that a person accused of a crime was at a specific place different from the crime scene at the time the crime was being committed.”

In the court’s view, there may be a variety of reasons why an accused may have failed to raise the *alibi* defence at the recording of the warned and cautioned statement that may not justify the drawing of adverse inferences e.g. forgetfulness, ignorance, fright, exercise of the right to silence, counsel’s advice etc. Therefore the failure to raise the *alibi* defence in a warned and cautioned statement should not always be fatal to one’s defence unless in breach of s 188 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

The Consequences of Non-Prompt Raising of Defence of *Alibi*

The obvious consequence is that the State may lose the opportunity to investigate the *alibi* as required in order to either prove or disprove it. This may result in an injustice to the accused who may miss an opportunity to be cleared of criminal allegations early or altogether (should the alibi be verified as true). Depending on the circumstances adverse inferences may be drawn against the accused when witnesses may have either moved on and are no longer traceable or have lost their memories. Sometimes the *alibi* defence only arises when the full import of the State case is made known to the defence despite the accused having been represented by a legal practitioner at the time the warned and cautioned statement was recorded.

In casu the appellant raised the *alibi* defence late. We agree with the court *a quo*’s dismissal of the *alibi* as appellant’s explanation that he was not given an opportunity to raise it is

patently untruthful bearing in mind that he was in the company of his lawyer when the warned and cautioned statement was recorded and signed. For the avoidance of doubt it is always appellant's right to choose when to raise an available *alibi* even though a delay in doing so may sometimes be ill-advised as it is likely to result in adverse inferences being drawn. Faced with the delay in raising of the *alibi* defence *in casu* the State sought to disprove it by discrediting the said *alibi* – which the prosecution successfully did by demonstrating to the satisfaction of the trial court that the witnesses called by the appellant did not establish that they were with the appellant at the material time that the offence was committed. In this regard the court *a quo* found that the first two defence witnesses namely Musakarukwa Kachera and Patience Chisirai had not testified that they were with appellant at the material time on 10 May 2021. For this reason the two witnesses in fact did not corroborate appellant's *alibi*. The court *a quo* in fact did not find that the third defence witness was a credible witness. To the contrary appellant's contention that the court accepted the credibility of the witnesses of the appellant (if by this is included the third witness) is misplaced. Clearly the appellant misunderstood the court *a quo*'s reasons for judgement as in fact the third witness was expressly ruled not to be credible – see p 19 of the judgement where the court *a quo* said:-

“In stating this, I take note that there were three witnesses to the accused's defence, however the two witnesses could not account to the accused (sic) during the same time around about when the offence was committed. The third witness seemed to merely corroborate that the accused was there As such I found that the final defence witness evidence was not fully credible and convincing in this way.”

The court *a quo* accepted the evidence of Russel Chimedza as an eye witness and no issue was raised on appeal in this regard. Such finding of fact placed the appellant at the scene of crime thus corroborating the complainant.

Ground number 1.3 attacks the court *a quo*'s finding that there was trust between appellant and complainant. Complainant's evidence which must have been accepted by the court *a quo* was that the complainant and appellant had been known to each other for a considerable period of time as fellow worshippers and friend and business partner of Victoria Dhlamini. In fact the complainant's testimony that she used to assist Victoria financially and that appellant used to collect money from her was not challenged. It is important to note that appellant claimed that he had never met the complainant in person. The court *a quo* dismissed this claim by the appellant. In fact the complainant's explanation makes a lot of sense and supports the court *a*

quo's finding that complainant parted with a substantial amount of money without so much as to record the transaction or insisting on having sight of relevant documents relating to ownership of the vehicle sold to her because of trust. On p 38 of the record (under cross-examination) the following appears:

- “Q. You said you are a banker?
 A. Yes with ZB Bank.
 Q. What qualifications do you hold?
 A. I have a BC Honours Psychology, IOBZ C...p MBA and other certificates.
 Q. With such a vast range of qualifications for accounting how do you hand over US\$18 000 without right of property?
 A. Because of our relationship of trust, I would give money without product – (the underlining is mine for emphasis)
 On the same page the following also appears:
 Q. How many times did you call accused?
 A. I did not call him. I called Victoria. They are in a partnership.
 Q. What is the name of the partnership?
 A. They have always been business partners. Even when they would borrow money Samuel would come home to collect.”

The evidence that appellant used to collect money from the complainant was not challenged. On page 46 under cross-examination the following also appears:

- “Q. You said you made a follow up of car to Victoria but you gave money to accused?
 A. Yes because they were partners.
 Q. Can you establish this partnership?
 A. I have always worked with them as partners. Samuel has delivered things more times than Victoria but I talked to Victoria more. In the circumstances there was abundant evidence justifying the court a *quo's* conclusion that there was trust between appellant and complainant even though appellant would conveniently deny it. Before leaving this aspect it is significant to note that complainant's contention that there was trust is supported by the fact that even without the records of the transaction between her and appellant, appellant had initially not disputed the transaction – See p 37 of the record (evidence in chief) where the following appears:
 Q. How many transactions approximately had you done with accused and Victoria?
 A. 6/7 per year for me personally
 Q. When you realized you had been defrauded did you try to communicate with him?
 A. Yes. It back fired. It got me arrested I went to his house and spoke to his wife. I went around two times. By then another issue came out in the press that he had swindled someone. (the underlining is mine)
 Q. What was the response when trying to negotiate with accused?
 A. He agreed until he met his second lawyer.”

We note in passing that the underlined material was extremely prejudicial to appellant and ought to have been expunged from the record even though defence counsel did not raise any objection to it. That said it is significant to note that appellant initially did not dispute the transaction involving the sale of the vehicle (Mercedes Benz) to complainant until the arrival on

the scene of another legal advisor for appellant. This evidence despite its damaging effect as appellant’s previous inconsistent statement (amounting to a confession) was never challenged by the appellant in cross examination nor did the appellant comment on it in the defence case. The law is abundantly clear that in an adversarial set up as in this jurisdiction when evidence by the opponent is not disputed or challenged it is deemed to be admitted. Although the court did not say as much we find that this admission discredited the appellant’s *alibi* defence and the court *a quo* cannot be faulted for considering the delay in raising the *alibi* defence with the police as indicative of a concocted defence and a recent fabrication.

Appellant’s counsel argued that the court *a quo* committed a serious misdirection by not pronouncing or determining the credibility of complainant and that corroboration of the complainant could not have been established without establishing that complainant was credible in the first place. As we were considering judgement in this matter it occurred to us that no ground of appeal was raised addressing this complaint and consequently the State had not been given an opportunity to deal with it neither was the learned magistrate’s comment obtained on such a ground. The complaint not having been raised in the grounds of appeal the court could not properly exercise any attention on it and is accordingly dismissed.

In the circumstances we do not find any merit with the appeal against conviction.

As indicated herein above the appeal against sentence is a nullity and on the strength of the case of *Mac Foy v United Africa Co. Ltd 1961 3 ALLER 1169 PC* nothing arises from it. The appeal against both conviction and sentence is without merit and is accordingly dismissed in its entirety.

FOROMA J:.....

KWENDA J:.....Agrees

*National Prosecuting Authority, State’s legal practitioners
Mwonzora & Associates, appellant’s legal practitioners*