STATE
versus
EMMANUEL CHINEMBIRI

HIGH COURT OF ZIMBABWE
MUREMBA & MUTEVEDZI JJ
HARARE, 4 July 2024

Criminal Review Judgment

MUREMBA J: The accused was arraigned before the Magistrates Court facing two counts of theft as defined in s 131(2)(e) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] (the Criminal Law Code). The allegations against him were that on the night of 29 April 2023 at Mashwede Complex, in Warren Park, Harare, he broke into two different shops and stole various property. He pleaded not guilty to both counts, but was convicted of the first count and acquitted of the second count after a contested trial.

I am concerned with the propriety of the conviction of the accused in the first count. From the evidence led, it is common cause that after the accused was arrested, none of the complainant's property was recovered from him. The first reason for the accused's conviction was the indications he made to the police. The sole witness to those indications was the complainant, Amen Tsindikidzo, who owns the shop. She became acquainted with him when the police brought him to her shop, where he demonstrated how he and an accomplice forcibly opened the door using a towel, a metal object, and a screwdriver. Notably, she did not witness any police officer assaulting the accused during that demonstration.

The second reason for the accused's conviction relates to his borrowing of a tyre lever from Leonard Wadawareva, a tyre repairman at the same shopping centre where the offence took place. Leonard Wadawareva testified as the second witness for the State. According to his account, the accused requested the tyre lever from him on the night in question and then proceeded towards the shops. Although the accused was accompanied by Brian, it was the accused himself who returned the tyre lever to Leonard Wadawareva approximately 30 minutes later. The magistrate reasoned that this borrowing of the tyre lever further supported the case

against the accused, leading to the conclusion that the State had proven his guilt beyond a reasonable doubt.

In his defence, the accused vehemently denied being present at the shopping centre on the night in question. Furthermore, he refuted the claim that he borrowed a tyre lever from Leonard Wadawareva that same evening. According to the accused, it was only after his arrest that he learnt that Brian was the person who had actually borrowed the tyre lever. The accused asserted that the indications he made to the police occurred under duress, following their assault on him. Despite the accused's strong protestations, the learned magistrate convicted him.

I express reservations regarding the conviction of the accused for two distinct reasons. Firstly, the learned Magistrate failed to elucidate how the accused's borrowing of the tyre lever from Leonard Wadawareva established a connection to the break-in at the complainant's shop. The link between the borrowed tool and the alleged offence remained inadequately discussed. In criminal matters, it is imperative that the court transparently outlines its adjudication process and the rationale behind determining the guilt or innocence of the accused. When issues are contested, the court must meticulously evaluate evidence, legal arguments, and witness credibility. Clarity in reasoning is essential particularly for the parties to the trial and generally for the interested reader and members of the public. A judgment lacking sufficient reasoning and with scant analysis of evidence carries several drawbacks. It fails to expound on the legal foundation for the decision, leaving room for ambiguity. Without thorough analysis, the judgment lacks legal reasoning. Furthermore, insufficient scrutiny of evidence risks overlooking critical facts or misinterpreting them. An inadequately reasoned judgment, coupled with scanty analysis of evidence, amounts to a poorly substantiated decision. Such judgments are susceptible to challenges during review and appeal. Therefore, I encourage the learned magistrate to refine her judgment-writing skills, ensuring clear articulation of her reasoning. Well-explained judgments enhance understanding for all readers.

The magistrate having failed to explain the link between the borrowing of the tyre lever and the break-in at the complainant's shop, the conviction of the accused based on this ground cannot stand. The only remaining basis for the accused's conviction is the evidence of indications. This leads me to my second reason for having reservations about the conviction. The

indications evidence was solely provided by the complainant, who is the owner of the shop. The evidence presented as she was being led by the prosecutor was as follows:

> *"Q. How do you know it was him?*
> *A. He came to the shop and made indications of how he stole.*
> *Q. What exactly did the accused say during indications?*
> *A. He said he broke into the shop and took the property. He demonstrated how he broke in. He said he was holding the other part of the door while someone held the other one. He said he used a wet towel, a metal object and a screw driver.*
> *Q Is there anything else?*
> *A No."*

In convicting the accused, the learned magistrate reasoned that:

> "The accused could not have made indications of that which he did not know. Whether or not he was assaulted does not invalidate that he accurately showed he had committed the offence."

In a criminal trial, the prosecution has the onus to prove the accused's guilt beyond a reasonable doubt. In a case where there is no other evidence against the accused except the indications the accused made to the police, for the prosecution to secure a conviction, the evidence has to be compelling. If compelling, this evidence can establish guilt beyond a reasonable doubt. The indications evidence presented by the complainant in this case indicates that the accused person made gestures, signs, and verbal statements to the police officers, explaining how he broke into the shop. Essentially, the accused provided extra-curial statements which accompanied the pointing out which he made. These indications therefore comprised gestures, a confession of the offence, and explanations of how the offence was committed. However, it is important to note that indications evidence is subject to specific rules of admissibility in criminal procedure. The court should be aware of these rules during trial. Unfortunately, in the present case, the trial magistrate did not adhere to those rules. S 256(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CPEA) provides for the admissibility of such confessions and statements. It reads: -

> "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"
> Provided that—
> (i) a certified copy of the record produced in terms of section 115B shall be admissible in evidence against the accused;
> (ii) any information given under any enactment which provides a penalty for a failure or refusal to give such information shall not, on that account alone, be inadmissible."

This provision shows that a confession or a statement made by an accused person is admissible in evidence if it meets the following conditions. It was freely and voluntarily made. The accused was not unduly influenced to make the confession or statement. This applies whether the confession or statement was made before or after the accused person's arrest or after his or her committal. The form of the confession or statement (whether written or not) does not affect its admissibility. This provision therefore ensures that voluntary confessions and statements can be used as evidence in criminal proceedings, subject to certain conditions and exceptions. The exceptions are that (a) a certified copy of the record provided under s 115 B is admissible against the accused. (b) Information given under any enactment that imposes a penalty for failure or refusal to provide such information is not automatically inadmissible sorely because of that reason.

The provision makes reference to a confession and a statement. My understanding is that a confession is an explicit admission of guilt or responsibility for an offence. In some cases, it provides details about the crime committed, the accused's involvement, and sometimes their motives. Confessions are therefore powerful evidence because they directly implicate the accused and can be either oral or written. On the other hand, a statement is a broader term that encompasses various types of communication made by the accused. These statements can include explanatory statements (where the accused explains their actions, even if they don't admit guilt), *alibi* statements (where the accused provides an *alibi*, claiming they were elsewhere during the crime), and witness statements (describing what the accused observed or experienced). Therefore, statements may not necessarily imply guilt but can still be relevant to the case. In short, a confession directly admits guilt, while a statement includes various types of communication by the accused. Both confessions and statements can be used in court, but their weight and implications differ.

In *casu* since prosecution wanted to rely on the extra curial statements that were made by the accused while he was pointing out the scene and demonstrating to the police how he broke in, it was necessary to adhere to the rules of admissibility outlined in s 256(1) of the CPEA before such extra curial statements could be admitted into evidence. To do so, prosecution should have presented evidence from the police officers who conducted the indications proceedings. These police officers, not the complainant, were the ones to whom the accused person made the indications. Prosecution proves through police officers that the accused made the indications freely and voluntarily, without having been unduly influenced. The accused's statement admitting that he broke into the shop and took the property amounted to a confession to the offence. Additionally, when the accused mentioned holding one part of the door while someone else held the other part, and described using a wet towel, a metal object, and a screwdriver, it was an explanatory statement clarifying the accused's actions during the break-in. Therefore, before the police officers could testify about the confession and statement, the accused should have been given an opportunity to confirm whether he made them freely and voluntarily, without undue influence. If the accused had contested this, and the confession and statement not having been confirmed, a trial within a trial would have been necessary. The confession and statement are not admitted into evidence until the State proves beyond reasonable doubt that they were made freely and voluntarily, without undue influence. See *S v Ndlovu* 1988 (2) ZLR 465 (S). In the case of *S v Mazano & Anor* 2000 (1) ZLR 347 (H). The accused asserted during their trial that the indications they made to the police were made under duress. Despite this claim, the magistrate admitted the statements, concluding that they were given freely and voluntarily, without conducting a trial within a trial. This court held that the magistrate erred in admitting the indications without following the proper procedure of holding a trial within a trial. Importantly, only evidence resulting from indications made by the accused—such as a murder weapon or stolen goods—is admissible, even if the accused did not make those indications freely and voluntarily. See s 258 (2) of the CPEA. *S v Nkomo* 1989 (3) ZLR 117 (S); and *S v Ndlovu* 1988 (2) ZLR 465 (S).

A trial within a trial is a separate mini trial that the court holds specifically to address the admissibility of the indications. The prosecution and the accused, through relevant witnesses such as police officers, the accused and independent eye witnesses to the indications, if any,

present evidence that is related to the making of the indications. The court then evaluates the circumstances under which the indications were made and makes a ruling. If the court finds that the indications were made freely and voluntarily, without undue influence, the indications may be admitted as evidence in the main trial. If the court determines that the indications were a result of coercion, they will not be admitted into evidence. It should be noted that while indications made by the accused during investigations might be factually accurate, they can still be deemed inadmissible if they were not made freely and voluntarily. Coercion or external pressure can compromise the validity of such indications, even if they contain truthful information. Our criminal justice system prioritizes the protection of an accused person's rights and wants to ensure that evidence is obtained without undue influence. This is so because the accused person has the right to remain silent and not to be compelled to give self-incriminating evidence.[1] Coerced indications violate this right. It is the duty of the State and the courts to protect this right in order to ensure fair trials. The burden of proving guilt lies with the prosecution. Coerced indications may shift this burden. If the accused's rights were violated, the prosecution must prove guilt using other evidence. If evidence relies solely on coerced indications, it weakens the prosecution's case and this can significantly affect the outcome of the case. Courts should therefore carefully assess the circumstances surrounding the making of indications in order to uphold justice.

Therefore, in the present matter the learned magistrate was not correct when in convicting the accused she said that,

> "The accused could not have made indications of that which he did not know. Whether or not he was assaulted does not invalidate that he accurately showed he had committed the offence."

From the above reasoning it would appear that the trial magistrate intended to place reliance on s 258(2) of the CPEA which provides that:-

> (2) it shall be lawful to admit evidence that anything was pointed out under trial or that any fact or thing was discovered in consequence of information given by such person notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him on such trial.

If she indeed wanted to rely on the above provision, the trial magistrate's reasoning still betrays her failure to appreciate the tenor of that law. In the case of *S v Tafadzwa Shamba and Anor* HH

[1] S 70(1)(i) of the Constitution of Zimbabwe, 2013.

396/23 this court in explaining the essence of s 258(2) at p. 20 of the cyclostyled decision, stated as follows:

> "Paraphrased, the above provision entails that where an accused points out something without verbal or written utterances that demonstration may be admitted into evidence without the need for a trial within a trial which usually precedes the admission of other objectionable extra curial statements. In addition, where a fact or item is discovered as a result of information made available by the accused that fact or item shall also be lawfully admitted into evidence despite it being linked to a confession or statement which in itself is by law not admissible.

The provision therefore, is used where an accused simply points out to something and does not make any oral or written utterances or where through a confession the police then discover other items of incriminating evidence. Those are admissible without the need to adhere to the rules of admissibility prescribed in s 256(1). What is admissible are the mute indications or what is subsequently discovered through inadmissible statements. The confession or the statement itself remains inadmissible. But as can be seen and as explained above, that is not what happened in this case. The accused's demonstration was accompanied by a confession that it was him who had committed the offence. If that was the case, the confession fell into the realm of s 256(1) which once the accused protested that it had been induced by duress and coercion, required the State to prove that the confession had been made voluntarily and without undue influence. Further, the prosecution did not point to any fact or thing which was discovered as a result of the confession. Put differently, s 258 (2) only applies where there was incriminating evidence such as a murder weapon or a tool that was used to effect a break-in into premises discovered as a result of an inadmissible confession or statement.

In the end whether by application of s 256(1) or s 258 (2), the learned magistrate showed that she is not aware of the rules of admissibility that should be adhered to when prosecution intends to lead evidence on extra curial statements. By failing to adhere to the rules of admissibility laid down in s 256(1) of the CPEA, the magistrate misdirected herself. Therefore, the conviction of the accused on the basis of the indications he said he made under duress cannot stand.

Accordingly, the conviction of the accused is quashed and his sentence is set aside.

Since the accused was sentenced to effective imprisonment of 14 months, I hereby issue a warrant of his liberation forthwith.

MUREMBA J: ……

MUTEVEDZI J: Agrees ……