

TENDAI ZUZE  
versus  
THE STATE

HIGH COURT OF ZIMBAWE  
ZHOU & CHIKOWERO JJ  
HARARE; 18 November & 5 December 2024

### **Criminal Appeal**

*D Mudadirwa*, for the appellant  
*F Kachidza*, for the respondent

CHIKOWERO J:

1. This is an appeal against conviction.
2. The appellant and six others pleaded not guilty to a charge of robbery as defined in s 126 (1) (a) (b) of the Criminal Law (Codification and Reform) Act [ *Chapter 9:23*].
3. The allegations were that on 6 January 2021 and at the 55 kilometer peg along the Harare- Chirundu Road they threatened to shoot Nomattor Jonga and Fanuel Simango and fired two shots into the air thus forcing the duo to relinquish control over cash in the sums of US\$ 2 775 000 and ZWL 43 090, a cellphone, a pistol and a rifle.
4. The appellant was the second accused at the trial.
5. After a protracted trial which saw the state producing 13 witnesses and several exhibits, the court found Trymore Chapfika, Tozivepi Chirara, Dennis Madondo and Tatenda Gadzikwa not guilty and acquitted them. These four were the fourth, fifth, sixth and seventh accused respectively. The appellant, as was the case with the first and third accused, was convicted as charged and sentenced to 10 years imprisonment of which 2 years were suspended on the usual conditions of good behavior.
6. The following facts were common cause at the trial. On 6 January 2021 a ZB Bank cash – in- transit vehicle was despatched from Harare towards Chinhoyi laden with US\$2 775 000 and ZWL 43 000. The money was destined for ZB Bank branches in Chinhoyi, Kadoma, Kwekwe, Gweru, Bulawayo, Gwanda and Zvishavane. The cash – in- transit crew was comprised of Fanuel Musakwa, Nomatter Jonga and Matthew

Simango. Jonga, who was a former member of the Zimbabwe National Army, was the driver while Musakwa was the crew commander. The crew members were the first suspects and were arrested on allegations of theft of the money, phone and the firearms which later became the subject of the robbery charge. The theft charge was withdrawn by the state. Both Jonga and Simango then testified as state witnesses in the trial on the robbery charge. Musakwa was a fugitive from justice at the time that the appellant and the other six were undergoing trial on the robbery charge. The evidence of Jonga and Simango did not add any value to the case for the prosecution save to confirm what was already common cause, namely that the money in question, belonging to ZB Bank, was stolen. Jonga and Simango confirmed that they did not identify or see any of the seven accused persons at the scenes amongst those they offered a lift and those who pounced on them.

7. It appeared to the trial court that Jonga, Simango and Musakwa were vital cogs in a well – orchestrated, well planned and executed grand scheme to feign that they had been robbed when in reality they were part of a huge gang that had simply stolen the money in question from ZB Bank. The red flags were these. Since they were delivering cash to various branches of the bank in Zimbabwe the crew members knew that their employer's operating procedures prohibited them from carrying passengers. Despite this, they picked passengers at Westgate in Harare ( a male, female and a child). As if this was not enough, they picked more passengers ( all males ) at Nyabira turn – off. They were also aware that the guard at the back (where the cash boxes were ) was supposed not only to be alone but also to be armed with the bigger rifle than everybody else. This they did not do. Simango, who was supposed to guard the money, exchanged rifles with Jonga (the driver). Jonga placed Simango's bigger rifle behind the driver's seat, away from the boxes containing the cash at the back of the vehicle. This was done on the pretext that the passengers, who were not supposed to have been in the vehicle in the first place, would not be scared by beholding a guard armed with the bigger rifle. The guard, seated at the back, had the audacity to unlock the security cabin that contained the cash boxes and allowed people to sit in there. A few metres from Nyabira tollgate ( where there are proper ablution facilities) the same guard, namely Simango, then beeped the driver, Jonga, on the phone. As if on cue, the latter stopped. Simango said he wanted to relieve himself in the bush hence his beeping the driver was a signal for

a health break. Almost instantly, the robbers arrived, pounced on them and forced the crew members to drive into the bush. The trial court said :

“ According to the crew members they did not identify those who arrived and which type of vehicles they were driving and they simply said they were threatened with some pistols and two shots were fired. In short what I am saying is that these were people who when they testified they had a lot to hide, they had a lot to conceal such that they did not want to actually show exactly what happened apart from simply saying two shots were fired and then they were forced to drive into a bush. In any event the people who arrived in those motor vehicles and subsequently forcing the crew members to drive into a bush actually fired some shots is not in dispute because that is what the witnesses or the police officers who attended the scene told the court. Had the state pursued these crew members, I am doubtful, they would [have] failed to secure a conviction”.

8. It was common cause at the trial that ZB Bank did not, prior to despatching the crew to deliver the cash in question to its various branches in the country, record the serial numbers of the bank notes. It thus was common cause that ZB Bank, through the first state witness (John Chiwawa), could not identify the huge sums of money recovered from the appellant and his then co – accused as being part of the money stolen from the complainant.
9. It also was common cause both at the trial and before us that there was no direct evidence linking the appellant to the commission of the offence.
10. The court convicted him after inferring that he was involved in the commission of the offence. That inference was drawn from what the trial court viewed as circumstantial evidence. In reality it was not. The court also completely ignored the direct evidence of Jonga and Simango. Those two completely exonerated the appellant. They neither placed him nor the vehicle he was driving at the scene of the crime of robbery, assuming that this was a robbery and not a theft disguised as a robbery. That an informer, who was not produced as a state witness, told the 5<sup>th</sup> state witness ( Damson Chatukuta ) that the appellant was involved in the robbery could only have been significant for purposes of police investigations not as a piece of evidence enabling the court to convict. Chatukuta was a police officer.
11. What the trial court considered as circumstantial evidence justifying its inference that the appellant was involved in the robbery were the cumulative effect of the following:
  - (a) that an amount of US \$ 35 000 was recovered from the appellant upon his arrest.

- (b) that he had purchased a Honda Fit vehicle two days after the offence was committed.
  - (c) That he drove past Nyabira tollgate in his wife's silver Toyota Lexus around the same time that the ZB Bank cash – in- transit vehicle also passed through the same tollgate, which was shortly before the offence was committed.
  - (d) The Econet call log, although it did not show who the appellant called, proved that the appellant was in the Nyabira area at the time the offence was committed.
  - (e) The appellant had lied that he did not have his phone and that he was at his residence in Harare on the day that the offence was committed in Nyabira.
  - (f) An informer told the police through the person of Chatukuta that the appellant was involved in the commission of the offence.
12. The appellant explained that of the sum of US \$ 35 000, recovered from him, US \$ 10 000 belonged to his spouse being her Stockvel money. Stockvel is a term for an arrangement where people form a group and then each contributes an agreed amount of money to the pool at certain intervals with each group member having his or her turn to receive the lump sum. The balance, so said the appellant, was his own money earned from his endeavours as a small-scale miner. This explanation was not controverted. In any event, since the money stolen from the complainant did not have its serial numbers recorded, nobody testified that the US \$ 35 000 recovered from the appellant was part of the complainant's money stolen during the commission of the offence of robbery.
13. At its highest, even taken together with the other circumstances listed at para 11 of this judgement, the fact that the appellant purchased a Honda Fit vehicle two days after the commission of the offence may have raised eyebrows. But suspicion is not evidence. We have said the state did not, *a quo*, controvert the appellant's explanation that he was a small scale miner given to obtaining and spending huge sums of money. The trial court did not find that he was not a small scall miner.
14. It is true that the appellant lied that he did not have his phone on the day in question. He also lied in his defence outline when he asserted that he was at his residence in Harare on the day that the offence was committed in Nyabira. There is a strong suspicion that the appellant may have been up to no good. He may well have been involved, in some unknown way, in the commission of the offence. That could be the reason for his initial untruths. But that is all that can be said. It remains in the realm

of suspicion and speculation. It is not evidence. Even though he later admitted, at the trial, that he drove his spouse's silver Toyota Lexus past the Nyabira Tollgate at about the same time that the ZB Bank cash in transit vehicle passed through the same tollgate (shortly before the robbery) and made a phone call in that area, that is not evidence that he was involved in the robbery. The two ZB Bank cash-in-transit crew members, who were at the scene of crime at the material time, testified that they neither saw the appellant nor his wife's silver Toyota Lexus at the scene of crime. They testified that they were robbed by some of the passengers that they had offered a lift. Yet they allowed some of the passengers, who did not commit the offence, and could have been vital state witnesses, to go away without at the very least leaving contact details. Simango and Jonga may very well have been lying to protect not only themselves but some other persons (the appellant possibly included) but they were not impeached. What this means is that the trial court should have accepted their testimony as it stands on record. The only material piece of their evidence was that the money was stolen. That was common cause. The other material piece of their testimony was that they did not place the appellant at the scene of the crime. That too was common cause, yet the trial court did not take it into account in determining whether the state had proven its case against the appellant beyond reasonable doubt. This misdirection resulted in a gross miscarriage of justice. The court ignored direct exculpatory evidence in favour of the appellant preferring to found the conviction on circumstances which came nowhere near justifying the inference that the appellant was involved in the commission of the robbery.

15. The court referred to the "two cardinal rules of logic" stated in *R v Blom* 1939 AD as:

- a. The inference sought to be drawn must be consistent with all proven facts. If not that inference cannot be drawn.
- b. The proved facts should be such as to exclude every reasonable inference from them save for the one sought 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."

It inferred from the circumstances set out at para 11 of this judgement that the only reasonable inference to be drawn from those circumstances was that the appellant was involved in the commission of the robbery. We think the court erred in its approach. Inferences can only be drawn from proved facts. The court did not set out the facts that it

found proved by what it considered to be the circumstantial evidence. We agree with Mr Mudadirwa that what was treated as circumstantial evidence was colourless.

16. We pause to record that the appellant testified that he passed through the Nyabira tollgate, which is on the highway, on his way to Banket. That was not disproved as nobody testified to seeing either him or his spouse's vehicle at the crime scene.

17. It was not for the appellant to prove that he was innocent. The onus remained on the state to prove that the appellant participated in the robbery and how he so participated. Instead of proving the appellant's guilty beyond reasonable doubt, the state did the exact opposite. It produced Jonga and Simango. Although called as state witnesses the two were effectively defence witnesses of the appellant in light of their testimony. The other eleven state witnesses did not implicate the appellant at all.

18. We cannot conclude this judgement without saying this. The trial court grossly erred in predicating the appellant's conviction on colourless circumstantial evidence while at the same time ignoring direct evidence, produced by the prosecution itself, which clearly exonerated the appellant.

19. In the result, **IT IS ORDERED THAT:**

1. The appeal is allowed.
2. The conviction is quashed and the sentence set aside. The following is substituted:

“Accused two (2) is found Not Guilty and is Acquitted.”

**CHIKOWERO J :** .....

**ZHOU J :** .....

*Gurira & Associates*, appellants legal practitioners  
*The National Prosecuting Authority*, respondent's legal practitioners

