

CHARLES FAIRA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA & MUZENDA JJ
MUTARE, 22 January 2020

Criminal Appeal (Reasons for Judgment)

C Ndlovu
Mrs *J Matsikidze*, for the respondent

MUZENDA J: On 22 January 2020 we dismissed the appeal in this matter after hearing counsel and indicated that our reasons would follow; these are they.

On 15 July 2019 the appellant was convicted and sentenced to 10 years imprisonment for contravening s 89 (4) (b) of the Post and Telecommunication Act [*Chapter 12:05*], it being alleged that on 6 December 2018 and near PG Safety Glass Workshop, along Vhumba Road, Mutare, appellant without lawful cause cut and stole 20:06 kilogrammes of underground telecommunications line belonging to or used by a communication licence holder, secondly appellant was also convicted and sentenced to 6 months imprisonment which was to run concurrently with the ten years in count one for contravening s 40 (1) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] for possession of articles for criminal use, the state alleged that on 14 December 2018 at house No. 6 Lister Road, Hospital Hill, Mutare, the appellant without lawful excuse had in his custody or possession articles for criminal use in theft that is 2 bolt cutters, hacksaws, 1 unfunctional pellet gun and an electric shocker.

The appellant noted an appeal against both conviction and sentence in count 1. He outlined the grounds of appeal thus:

1.0. Ad Conviction

- 1.1. The Learned Trial Magistrate erred and misdirected herself at law when she accepted the evidence of Christopher Tsuro an accomplice witness who testified without being warned in terms of the law.

1.2. The Learned Trial Magistrate further erred and misdirected herself at law and fact when she convicted the appellant on circumstantial evidence which was susceptible of many deductive and possible inference.

1.3. The Learned Magistrate further erred and misdirected herself when she accepted the evidence of Detective Mavhengere in as far as it related to the search and recovery of items from No. 6 Lister Road Hospital Hill, Mutare. The search and seizure was undoubtedly without warrant and was in clear violation of the law and the appellant's rights.

1.4. The Learned Magistrate further erred and misdirected herself when she convicted the appellant when it was clear from objective evidence that appellant had not "wilfully damaged or interfered with the telecommunication lines and apparatus."

2.0. Ad Sentence

2.1. The Learned Magistrate erred and misdirected herself when she failed to interrogate or investigate the existence or otherwise of special circumstances.

2.2. The Learned Magistrate further erred and misdirected herself when she failed to accept and recognise the existence of special circumstances in the case. In particular, among other things the mere fact that appellant was an accessory after the fact was sufficient to find the existence of special circumstances.

2.3. The Learned Magistrate, Further erred and misdirected herself when she totally injudiciously forgot and ignored sentencing the appellant for his conviction on count two.

Facts

On 6 December 2018, near PG Safety Glass Workshop. Along Vhumba Road, Mutare the appellant in the company of three other outstanding accomplices, used a bolt cutter, cut and stole about 58 metres of underground telecommunication copper cables. Appellant proceeded to hire Christopher Tsuro's motor vehicle which he directed to the same to ferry the stolen cables. Upon arrival at the scene, the appellant and his accomplices loaded the cables into the boot of the vehicle. They were disturbed by the passer-by and left some of the stolen cables at the scene. The appellant ferried the cables to No. 6 Lister Road, Hospital Hill, Mutare. On the same date detectives recovered 4 x 2 metres of black copper cables which

were left by the appellant at the scene. Christopher Tsuro led the detectives to the appellant's residential house and found appellant inside the house. The detective made a search inside appellant's house and recovered 3 small pieces of copper wire, 2 bolt cutters, 1 shifting spanner, 1 spanner and 2 weighing scales. The detectives also recovered shells of red and black telecommunication copper cables packed in one blue and white sack which were placed on the backyard of the rented house.

The recovered cables were weighed at Zimpost and weighed 20.06kgs. The value of the stolen telecommunication cables was given as \$2 500-00 and cables value at \$400-00 were recovered.

According to the appellant's defence outline, he denied wilfully damaging, interfering or stealing the telecommunication lines and apparatus. He stated that he did not have knowledge about the alleged damage, theft or interference. He only received a call from one Courage to find a taxi so that Courage would ferry his property home. Courage never revealed to appellant on what exactly the property was. He denied being in possession of the stolen cables. On count two of possession of articles of criminal use, he stated that they did not belong to him and hence was not in possession of those articles. There were so many people who resided at No. 6 Lister Road, so it might be possible that one of those people might be the owner of the articles.

On the date of hearing Mr *Nldovu* for the appellant submitted that the trial court erred and misdirected itself when it accepted the evidence of Christopher Tsuro, whom the defence labels an accomplice witness in terms of s 267 of the Criminal Procedure and Evidence Act and such failure to do so by a Magistrate would amount to a misdirection and consequently should lead to a conviction being set aside by an appeal court. A number of cases¹ were cited by appellant's counsel to move the court to decide on the aspect of failure by a trial court to warn a suspect witness. Christopher Tsuro was the driver of the Honda Fit, the taxi, which was hired to ferry the cables by the appellant. When Tsuro led the detectives to the appellant, the state chose to exonerate him and made him its witness who provided a link between the cables and the appellant. A taxi driver provided transport to his clients and like an ambulance driver his task is endowed with confidentiality and privacy in protecting his stainless customers, but where a customer is implicated in a criminal activity, the taxi driver has a

¹ S v Ngara 1987 (1) ZLR (1) 91
The State v Malinga 1963 (1) A 692 (AD)
R v Simakonda 1956 REN 463 (SR)
S v Chouhan 1986 (2) ZLR 237 (S)

noble duty to assist the state in resolving an investigation. The appellant upon his arrangement did not implicate the taxi driver, he confirmed Christopher Tsuro's version about the hiring of the Honda Fit by the appellant to ferry the luggage to its destination. We cannot therefore describe Christopher Tsuro as an accomplice and we are satisfied that there was no legal basis by the court *a quo* to warn Christopher as an accomplice witness. The appellant further submitted that the trial court

erred and misdirected herself at law and fact when it convicted the appellant on the basis of circumstantial evidence when it was clear from the objective evidence that appellant had not wilfully damaged or interfered with the telecommunication lines and apparatus. Appellant added that there was no link between the recovered cables and the cables from the scene of the theft, or alternatively with the cables which were damaged or vandalised. There was no witness who was called by the state to state that he saw appellant cutting off the cables. The argument by the appellant is speculative in our view. Christopher Tsuro told the court what happened on the day in question, he was hired to go with the appellant to the place where the cables were loaded. The appellant actively assisted his colleagues and paid for the hire, he used the money from his pocket, when the taxi driver demanded a top up, appellant paid him \$9-00 more. When the detectives were led to the appellant's residence they found the cut cables which were positively identified by an officer from Tel-One. Appellant had in his possession all tools akin to the cutting and weighing of cables for sale. The logical reasoning by the Learned Magistrate pertaining to this aspect is beyond reproach in our view. Indeed circumstantial evidence in this case was conclusive and the only reasonable inference in the circumstances pointed to the appellant having damaged the telecommunications cables, packed them in sacks, hired a taxi and transported them to his house, this conclusion is not detached from the proven facts highlighted herein above and we are satisfied beyond reasonable doubt that the inference was properly reached by the trial court.

Ground number 3 of the appellant's notice of appeal attacked the search and seizure of the cables and tools as being in violation of the law and appellant's rights. However during arguments on appeal, the appellant wittingly or deliberately abandoned that line of argument, had he pursued it, we could have also canvassed it in our judgment. We take it that failure to pursue the ground of appeal means the appellant was no longer desirous of pursuing it. We deem it abandoned.

As regards the aspect of sentence, ground number 7 of appellant's notice of appeal states that the trial court erred and misdirected itself when she totally injudiciously forgot and ignored sentencing the appellant for his conviction on count two. During the hearing of the appeal Mr *Ndlovu* was asked by the court whether he was still pursuing the appeal *vis-à-vis* count two, he confirmed that he was not. This would remain with the question whether special circumstances exist in this case which would enable the trial court to avoid the mandatory sentence of 10 years. The appellant contended that the fact that he was an accessory after the fact was sufficient to find special circumstances. No other aspect was advanced by the appellant's counsel to constitute a special circumstance and we have carefully examined the record of proceedings more particularly on the issue of special circumstances, we were unable to find any. Even during hearing of the appeal appellant could not substantiate any that would amount to special circumstance. Hence we do not see any perceived misdirection at the instance of the court *a quo* on the issue of sentence.

Accordingly the following order is granted:

The appeals against both conviction and sentence are dismissed.

MWAYERA J agrees _____

Gonese & Ndlovu, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners