

CHARLES CHIROZVI
and
NICKSON MAREYA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA AND MUZENDA JJ
MUTARE, 13 March 2019 and 28 March 2019

Criminal Appeal

T. T Sigauke, for the accused
M Musarurwa, for the state

MUZENDA J: Charles Chirozvi and Nickson Mareya were jointly charged with Tinashe Chinhango before the Provincial Magistrate sitting at Mutare facing Robbery as defined in s 126 (1) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. It was alleged that on 29 November 2018 at Chikanga 2 Mutare, near sports field accused took property that is a G-tel A728xP2 model cell phone and cash \$2-00 from Bokang Mukwena by forcefully pushing him to the ground and hitting him with a stone on the forehead and kicking him on the ribs several times intending to induce Bokang Mukwena to relinquish his property and also to prevent him from recovering his property immediately after taking. After trial they were all convicted and each was sentenced to 5 years imprisonment of which one year imprisonment was suspended for 5 years on the usual conditions of good behaviour.

Charles Chirozvi and Nickson Mareya, who were accused 1 and 3 respectively in the court *a quo*, and a first and second appellant in this court noted an appeal against the whole judgment on 8 January 2019. They spelt out the grounds of appeal as follows:

AD CONVICTION

1. The learned Provincial Magistrate erred in convicting the two appellants on the basis of circumstantial evidence in circumstances where it was not clear that the only reasonable inference to be drawn was that all three had participated in the alleged robbery.

2. The learned Provincial Magistrate erred in refusing to accept the two appellants' explanations.
3. The court misdirected itself at law and on the facts in its analysis of the evidence and the fact that the first appellant accompanied the second accused Tinashe Chinhango on the first occasion does not indicate that he participated in the robbery but is equally consistent with his explanation that he was only accompanying and assisting the said Tinashe Chinhango.
4. The court failed to appreciate that in respect of the second appellant there was in fact very little evidence adduced by the state linking him to the offence and it was a misdirection to place heavy reliance on the alleged implication by the first appellant and he in fact should have been discharged at the close of the state case.
5. In all the circumstances, the state failed to prove its case against the two appellants as there is no direct evidence linking them to the commission of the offence and they should have been given the benefit of doubt.

As against sentence the appellants spelt their grounds as follows:

1. In view of the relatively small amount and the fact that there was virtual full recovery of the property, the sentence imposed is so manifestly severe so as to induce a sense of shock and outrage.
2. The learned trial magistrate paid lip service to the appellants' clear records and overally placed too much emphasis on the prevalence of the offence resulting in a sentence out of sync with sentences of similar cases.
3. Even if a custodial sentence is warranted, its length is shocking and the principle of incarceration can be equally served by a short and sharp term of imprisonment.

The appeal is opposed.

The facts are as follows: first appellant is employed as a soldier and based at Herbert Chitepo Barracks, where he resides. Second appellant resides in Chikanga, Mutare, he is not employed. Complainant is Bokang Mukwena, he is a policeman based at ZRP Mutare Central. On 29 November 2018n at around 2200 hours, complainant was coming from Legends Night Club going to his house and was followed by the accused persons who attacked him just a few hundred metre from Legends Night Club near sports field in

Chikanga 2. They assaulted him with a stone on the forehead and kicked him several times on the ribs. The complainant then pleaded with the accused persons to spare his life as they were threatening to kill him. There were four accused. The accused persons then took complainant's G-Tel A728xP2 cell phone and cash \$2-00 bond and 2 quarts of beer and they went away leaving the complainant lying helpless on the ground.

Moments later, complainant regained strength and went and made a report at Chikanga Police Station. He sustained bleeding on the forehead and also complained of painful ribs and he was referred to Mutare general Hospital for medication and a medical affidavit was compiled. On 4 December 2018, the complainant approached Artwell Mapinga after receiving a tip from his informant that Artwell was in possession of the stolen cell phone. Artwell led complainant to the appellants from whom he purchased the cell phone. The appellants and the second accused in the lower court were arrested. The value stolen was \$252-00 and that recovered is \$250-00 that means the complainant did not recover the \$2 bond.

In first appellant's defence outline he pointed out that on 29 November 2018 he was at work thereby raising a defence of alibi. He told the court that he knew nothing about the offence. Second appellant equally raised an identical defence of alibi and told the court that on 29 November 2018 at around 2200 hours he was in Mutare town not at Chikanga he also told the court that he knew nothing about the offence that allegedly occurred in Chikanga.

WHETHER THE COURT A QUO ERRED IN CONVICTING THE APPELLANTS ON THE BASIS OF CIRCUMSTANTIAL EVIDENCE?

The appellant's counsel submitted that the whole case was based on circumstantial evidence as correctly pointed out by the trial court as there was no evidence directly linking the two appellants to robbery. However, the appellants further argued that the evidence presented by the state fell short on proving the participation of the appellants in the robbery of the complainant. The evidence adduced by the state did not rule out that the second accused in the proceedings *a quo* honestly picked the subject cell phone, or that the cell phone could have been dropped by one of the robbers or thirdly that by the time complainant was robbed, he had lost the cell phone in the bar. Tinashe Chinhango's unchallenged evidence was that he was alone in the club when he picked the phone from the floor and none of the two appellants was present.

The state on the other hand submitted that first appellant claimed ownership of the cell phone and sold it to Artwell for \$150-00 and also proffered proof of ownership. The state added that first appellant possessed the stolen cell phone immediately after commission of the robbery. The state went on to submit the first and second appellants' conduct post robbery showed that they knew that the property had been stolen and that they were participating in its disposal and relied on the doctrine of recent possession of stolen property. The conduct by the appellants, the state concluded, during transactions with Artwell Maponga can only be appellants were the robbers and that was enough to have them convicted.

When a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

- a) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.
- b) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.
- c) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else and,
- d) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation by any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.¹

Hence the inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn. All 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 correct. The complainant told the trial court that he could not identify the robbers, he only knew appellants through Chinhango and Chinhango's name was introduced to complainant through Artwell Maponga, the buyer. Tinashe Chinhango right from the start maintained his defence which was uncontroverted by the state that he picked the cell phone on the floor of a bar.

¹ S v Jekiseni HB 106-08, S v Muyanga HH 79/13, Esther Manyengavana v S, S-83/88

The state did not reject that version by Tinashe Chinhango as possibly untrue. The state did not apply for a separation of trial and besides relying on the doctrine of recent possession there was no other evidence linking the appellants to robbery. Appellants raised defences of an alibi which was not probed by the state. Hence, there are wide possibilities in the appellants' favour. It is possible that 1st appellant was at work at 2200 hours on the date of robbery. It is possible that appellants participated in the selling of the cell phone ignorant of the fact that the cell phone was a subject of robbery, that the appellants wanted to recover the balance of the purchase price from Artwell Maponga purely out of greed or to recover an outstanding debt due to either of them from Chinhango or even to steal from Chinhango.

These are not remote or improbable possibilities. It is also possible that complainant lost the cell phone well before robbery or that one of the robbers dropped the cell phone in a bar fearing to be tracked by the police. The trial court did not rule these possibilities remote, improbable, far-fetched and incongruous in the light of the rest of circumstances. I tend to agree with submissions on behalf of the appellants that the court *a quo* indeed erred in concluding that the participation of the appellants in the selling and tracing of the balance of the purchase price was to infer that appellants were guilty of the offence of robbery of the complainant. It was not the only reasonable inference to be deducted from the circumstances.

The matters of *S v Kawadza*² cited by the state on the doctrine of recent possession and authorities cited therein are relevant but the inference deducted by the trial court from the proven facts should be primary; the issue of possession becomes secondary to cement the inference established by a trier of fact. Where an accused cannot give an innocent explanation of the possession, yes the inference that he stole the property would be and can be drawn as the only reasonable inference that can be drawn from such possession. If the only inference that can be drawn from the totality of the evidence is that he stole the goods then he can be convicted of the robbery of those goods.³ The state failed to prove that in this case.

WHETHER OR NOT THE STATE MANAGED TO DISPROVE THE APPELLANTS'
DEFENCE OF ALIBI

² 2005 (2) ZLR 321 (H)

³ *S v Kawadza*, (supra) at p. 322A

The state in its papers correctly admitted that it did not pursue the defence of alibi raised by the appellants. The record of proceedings correctly points out that there is no evidence that an attempt was made to prove whether 1st appellant was at his work place or not and whether the second appellant was in town at 2200 hours. No investigations were carried out and this the state did not dispute.

“Whether a person identified (or implicated) claims he was elsewhere at the time of the crime, the police should check his alibi as the onus will be on the state to disprove his alibi. The court should not dismiss an alibi on the basis of comparative credibility of the complainant and the accused.”⁴

WHETHER ROBBERY WAS THE ONLY REASONABLE INFERENCE FROM THE PROVEN FACTS IN LIGHT OF THE CIRCUMSTANTIAL EVIDENCE PROFERRED IN COURT

When the court examined critically this ground of appeal, it appeared that it was the side of a coin of ground number one outlined in the grounds of appeal, the analysis would inevitably led to conclusions already made by the court in analysing the first. The state also made references to the same conclusion. The effect sought to be attained by the appellants will dispense dealing with this ground. I will however consolidate my decisions on ground one with this for this ground of appeal and uphold all the three grounds of appeal as against conviction.

AS AGAINST SENTENCE

There are submission made by both parties as regards sentence. I do not see any merits on the aspect of sentence advanced by the appellants. Where an accused is convicted of robbery a sentence in the region of 6 years with a portion suspended on conditions applicable would be appropriate.⁵ I would have dismissed appeal against sentence had the court upheld the conviction but in the light of upholding the appeal on conviction the ruling on the aspect of sentence becomes academic.

Accordingly, the following order is granted:

1. The appeal against conviction is upheld.

⁴ S v Musakwa 1995 (1) ZLR 1 (S) per McNally JA

⁵ S v Madondo 1989 (1) ZLR 302 (H)

2. The decision of the court *a quo* is set aside in its entirety and substituted by the following:

Accused 1 and 3 are found not guilty and acquitted.

MWAYERA J agrees _____

Gonese and Ndlovu, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners