HB 82/17
HCA 71/15

ANDREW DUMBA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
BERE & TAKUVA JJ
BULAWAYO 24 OCTOBER 2016 & 30 MARCH 2017

Criminal Appeal

T. Chivasa for appellant
Ms S. Ndlovu for respondent

TAKUVA J: The appellant was convicted of robbery as defined in section 126 (1) (a) of the Criminal Law Codification and Reform Act Chapter 9:23. It being alleged that on the 15th of November 2014 at around 0600 hours and at President's Office Gweru, the appellant intentionally used violence against Dennis Manyongori in order to steal Dennis Manyongori's cash amounting to US$300,00 that is to say the appellant assaulted Dennis Manyongori to instill fear and as a result Dennis Manyongori relinquished control over his cash amounting to US$300,00 to the appellant.

The facts are that on the 15th of November 2014 at the President's Offices in Gweru, the complainant was trying to relieve himself when he was grabbed by six men from the back and dragged into the appellant's office. The appellant then assaulted the complainant with a broom stick and a plank all over the body. The complainant was ordered by the appellant to put all his money on the floor which he did and the appellant then took $300,00. The appellant ordered the complainant to leave through the back door. Complainant made a report to the police leading to appellant's arrest. The complainant was referred to a doctor who compiled a medical report. The stolen money was not recovered.

Appellant pleaded not guilty but was however convicted and sentenced to 15 months imprisonment of which 6 months imprisonment was suspended for 5 years on condition he did not within that period commit an offence of which violence on the person of another or

dishonesty is an element and for which upon conviction is sentenced to imprisonment without the option of a fine. A further 9 months imprisonment is suspended on condition appellant performs 211 hours of community service.

Aggrieved by the conviction, appellant appealed to this court on the following grounds:

"1. The learned magistrate erred in law when he convicted the appellant of the crime of robbery in the absence of proof beyond reasonable doubt particularly in that:-
(a) the complainant's evidence was full of inconsistencies on material aspects.
(b) the evidence of the complainant was not something which should have been believed especially when he stated that appellant robbed him of US$364,00, but took only US$300,00 and returned US$64,00 to him (complainant)
(c) the alleged stolen money was not recovered.
(d) the alleged items (weapons) used in the commission of the offence were not even recovered or presented as exhibits.
(e) the appellant's defence which relied on a highly probable story was supported by eye witnesses as opposed to the state case which lacked that.
(f) the medical evidence was not consistent with the manner of the assault portrayed by the complainant and the injuries suffered.
(g) there was no evidence to show that apart from his own word complainant ever had the said sum of money.
(h) complainant was motivated to lie by the fact that he had been treated by the appellant in a manner he did not like and may have simply decided to fix appellant."

The respondent opposed the appeal arguing that the court *a quo* properly accepted the evidence of the complainant and rejected that of the appellant and his witnesses. It was further contended that the appellant was an untruthful witness because he claimed that Tendai Jera and Alfred Tarisai were CIO operations when they are not.

The sole issue *in casu* is whether or not the state proved its case beyond a reasonable doubt. In *S* v *Makanyanga* 1996 (2) ZLR 23 (H) it was held per GILLESPIE J that:

> "A conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of a criminal complaint, but the fact that such credence is given to testimony for the state does not mean that a conviction must necessarily ensue. Similarly, the mere failure of the accused to win the faith of the bench does not disqualify him from acquittal. Proof beyond a reasonable doubt demands more than that a complainant should be believed and the accused disbelieved. It demands that a defence succeed wherever it appears reasonably possible that it might be true. This insistence upon objectivity far transcends mere considerations of subjective persuasion which a judicial officer may entertain towards any evidence. The administration of justice would otherwise be the hostage of the plausible rogue whose insincere but convincing blandishments must prevail over the stammering protestations of the truth by the diffident, frightened or confused victim of false incrimination." (my emphasis)

In casu, the problem that the evidence posed is that it presented the learned magistrate with a boxing ring scenario in that on one side stood the appellant and his two workmates and on the other, the complainant and his workmate. According to the appellant's two witnesses, when the complainant was brought into the office by the appellant he (complainant) had a "swollen upper lip on the right side and his elbow was swollen and had bruises." Further, according to Jera the complainant was pushed out of a commuter omnibus and he "fell to the ground" along Mkoba road just before the railway line. After that he then saw the complainant who was already inside the fence removing his clothes and started urinating. The witness confronted the complainant who insulted him.

The complainant denied that he was pushed out of the vehicle and fell onto the ground. He however admitted that he had spent the better part of the previous evening drinking beer in a night club in Kwekwe. He left the night club during the wee hours and boarded a commuter omnibus going to Gweru. He admitted also that he disembarked just adjacent to the President's Offices in Gweru. He had wanted to drop off at the central business district but he fell asleep and was driven past his drop-off point. Complainant said he only woke up when the car was about to cross a railway line close to appellant's work place.

Faced with these conflicting versions, the learned magistrate made the following findings of fact. "The injuries as sustained by complainant are both consistent with one being assaulted with a plank and broom stick yet they can also be consistent with one falling off a vehicle in any

view…. There was an injury on the mouth either from the blow or from the falling off the vehicle". These findings in my view strengthen the conclusion that it appears reasonably possible that the appellant's defence might be true.

Once the learned magistrate reached the conclusion that it was reasonably possible that the injuries could have been caused by falling off a vehicle, the matter should have ended there. The rest of the court *a quo's* assessment of the evidence shows nothing more than a superficial comparison of probabilities and demeanour.

For these reasons, the court *a quo* ought to have given the appellant the benefit of the doubt since the state had not proved its case beyond a reasonable doubt.

Accordingly, I make the following order:

1. The appeal be and is hereby upheld.
2. The conviction be and is hereby quashed.
3. The sentence be and is hereby set aside.

Bere J ……. I agree

Chivasa & Associates c/o Dube-Banda,Nzarayapenga & Partners, appellant's legal practitioners
The Prosecutor General's Office, respondent's legal practitioners