NOMATTER GOLIATH
and
FANUEL MBEWE
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE J (In Chambers in terms of section 35 of the High Court Act, [Chapter 7:06])
HARARE, 6 February 2013

Criminal Appeal

Z.R Kajokoto, for the appellant
Mrs *S Fero,* for the respondent

HUNGWE J: The appellants appeared before the magistrate at Bindura charged with unlawful possession of gold in contravention of the Gold Trade Act, *[Cap 21:03]*. Although they vehemently disputed the allegation, after a contested trial, their protestations did not win favour with the court. They were both found guilty and, on 18 February 2009, sentenced to the minimum mandatory five years imprisonment each. They still protest their innocence in the present appeal against both conviction and sentence. Having read the papers, we agreed with the concession by Mrs *Fero*, for the State, that the conviction is not supportable.

The three grounds of appeal raised in the present appeal by both appellants amount to an attack on the lack of evidence to prove the element of possession beyond a reasonable doubt. The appellants were suspected, from information reaching the police, of illegal possession of gold. Two police details went to the first appellant's residence where illegal gold dealings were alleged to take place. Paragraph 4 of the state outline sets out in summary the basis of the charge and, similarly, the basis of the present appeal as it sums up what the prosecution set out to prove but which, the appellants argue, the prosecution failed to prove. It states:

> "4. The detectives rushed there and upon arrival they entered the house and proceeded to the bedroom where the two accused persons were. Upon entering the bedroom, they saw accused number one, who resides at the house standing next to

> his bed whilst accused number two was standing near a cupboard holding something in his hand. When he realized the detectives had arrived he threw the piece he was holding on the cupboard trying to conceal it. Detective Karemba then rushed to see what had been dropped and picked it up and discovered that it was gold."

In his evidence-in-chief Detective Karemba is asked whether he knows the first appellant (then accused 1). He confirms that he does as he arrested him in possession of gold. He goes on to explain that the appellants were in the bedroom standing next to a cabinet. The first appellant suddenly dropped something on the floor which the witness picks up and discovers to be gold. Towards the end of his evidence-in-chief he then says the first appellant held something in his hand which he placed on the steel cabinet which, when he checked, turned out to be gold.

Yet, under cross-examination by the second appellant when he is asked;

"Did you say you found me holding something in my hand?"

His answer is;

"Yes and you dropped it on the floor."

It is not just the recovering officer who gives conflicting evidence regarding where the gold was found, the second state witness is not sure as well. He says in-chief that upon entering the house they found both appellants inside the bedroom. They ordered them not to move the first appellant was next to a steel cabinet. He then says;

> "It was then that my colleague, the first witness recovered the gold which had been placed on top of the cabinet in the house."

Asked by the second appellant under cross-examination if he saw him drop the gold on the cabinet, he answers;

"You placed it on top of the cabinet."

The evidence is not clear as to who had the gold in his possession. Where two or more persons are accused of committing an offence, in which no connivance is alleged, the State must prove what each individual accused did or did not do, which action or inaction, makes him criminally liable for the offence charged. The trial court had to resolve this issue first in its judgment before it could convict. The trial magistrate does not seem to have been alive to the contradictory evidence placed before him by each witness which contradiction he had to resolve before he could convict. In his reasoning he seems to have accepted that first appellant had

dropped the gold on to the floor. He does not explain why he opted to accept the initial version given by the first State witness nor does he explain how he reconciled it to the later version by the same witness who then says the second appellant placed it on top of the steel cabinet. The learned trial magistrate also fell into the same error by adopting contradictory findings regarding who, between the two appellants held the gold at the critical time. Towards the end of his judgment he says:

> "Evidence on record is to the effect that accused 2 was physically holding the gold which he, upon seeing the police, placed it on top of the steel cabinet. (*sic*)" Accused 2 got to accused 1's house as early as 0800hrs and accused 1 could not specifically say what he had come to his house and proceeded straight to the bedroom where the police found the two discussing. (*sic*)"

The reasoning seems to be that because the second appellant had gone to first appellant's residence very early in the morning and was found inside the bedroom discussing, therefore they possessed the gold allegedly found inside their room. He correctly held that physical possession was not necessary for a conviction to follow. In my view, he should have gone further and critically dealt with the explanation given by the appellants whom he said were blaming each other. In light of the fact that the police themselves were not consistent as to who, between the two, held the gold and then placed it on the cabinet (or threw it onto the floor), could the State case be said to have been proved beyond a reasonable doubt?

Worse still he goes on to find corroboration of this evidence in the second witness' evidence when clearly he ought to have found that they contradicted each other in material respects. He seems to have found comfort in the findings of corroboration from the fact that gold was found inside the house in which the appellants were present and that they shifted blame on each other. The court *a quo* failed to realized the need for the State to furnish proof beyond a reasonable doubt.

In the oft-quoted words of GREENBERG J cited by WATERMEYER AJA in *R* v *Difford* 1937 AD 372 at 373:

> "... no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

The explanation by the appellants was that they were not in possession of the gold. The evidence to prove possession was contradictory. The trial court failed to reconcile the contradictions in the evidence rendering the convictions unsafe. The evidence was incurably contradictory. If the first appellant held the gold as is initially claimed how is it possible that the second appellant then placed it on the steel cabinet or threw it to the floor? In the face of such evidence on the record, without an attempt to reconcile it, the convictions are unsafe.

In light of the above it is not necessary to deal with the appeals against sentence as they both fall away.

In the result I make the following order:

The appeals against conviction be and are hereby allowed. The verdict in the court *a quo* is quashed and the sentence set aside. In its place the following is substituted:

"The accused are both found not guilty and are acquitted."

MAVANGIRA J agrees

Kajokoto & Gumbo, appellant's legal practitioners
Attorney-General's Office, respondent's legal practitioners