

WILSON MUYANGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MAVANGIRA JJ
HARARE, 5 February 2013

Criminal Appeal

Appellant in person
Ms *F Kachidza*, for the respondent

HUNGWE J: The appellant was a clerk of court at Magistrates Court, Karoi, when he was convicted of defeating or obstructing the course of justice. He was sentenced to 24 months imprisonment of which 6 months were suspended for four years on conditions of good behavior. He appeals against both his conviction and sentence. The record shows that two notices of appeal were filed within the stipulated period within which to file the notice, one by his legal practitioners and another by the appellant, personally. As he has since been granted leave to prosecute his appeal in person, nothing should really turn on the quality of the papers filed since the papers substantially comply with the rules of this court. I proceed to consider his appeal on the basis of the notice filed by counsel.

The notice and grounds of appeal consists of some 40 paragraphs spread over seven pages. The grounds boil down to an attack on the basis that the court erred in convicting on the basis of circumstantial evidence. There is an enumeration of various particulars of alleged error or misdirection set out as if in argument.

The facts upon which he was convicted are that sometime in March 2005, the appellant was arrested on charges of theft of a court record. On 18 March 2005 he was taken to the Magistrates Court for the purposes of carrying out a hand-over-take-over of his office and his duties as clerk of court for the period he was on suspension. The appellant was accompanied by a police constable. The two sat on the bench. He asked the police escort if he could visit the

toilet. Among other places he visited, he went into the strong-room where certain court records and exhibits are kept. Witnesses saw him. They knew that his conditions of suspension did not permit him to be there alone. He was asked to leave. Another court official used the same toilet which the appellant had been to and flushed it after use. It was blocked. A further investigation of the cause of the blockage revealed that a court record had been torn and flushed down the system. It was exh 1 during trial. Suspicion of this foul deed fell on the appellant. The reason for this is that the appellant at the time was under investigation for theft of a court record. It is also common cause that as clerk of court, he was the custodian of court records. He had the keys to the clerk of court's office. He was responsible for receipting fines and bail money. He was the custodian of court exhibits, including passports surrendered to court in terms set out by the court granting bail to a suspect. This particular record, exh 1, showed that the suspect, one Michael Togaraseyi Muzhewe had been granted bail. The conditions attaching to the grant of bail were that he resided at an address in Zengeza 2, Chitungwiza; that he deposits a stated amount of money as bail; that he surrenders his passport to the clerk of court, Karoi and that he reports once every week at St Mary's police station. It is common cause that the appellant did not enter Michael Togaraseyi Muzhewe's passport in the appropriate register as he was duty bound to do. The said Muzhewe had abandoned his reporting conditions and his Zengeza 2 residence. He was, by the time of this investigation, employed and resident in South Africa.

In a well reasoned judgment the learned trial magistrate found the above facts to have been proved. He recognised that as there was no direct evidence that the appellant was seen destroying the court record and flushing it down the toilet; a conviction could only be founded on circumstantial evidence. He set out a clear understanding of the issues at stake regarding circumstantial evidence. He then concluded that the evidence was strong enough for a safe conviction. The appellant, for the reasons he gives, disagrees with this finding and urges this court to set aside the conviction as he argues that the matter was not proved beyond suspicion.

The law regarding circumstantial evidence is well-settled. When a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

- (1) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;

- (2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (3) 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
- (4) 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. See *S v Shoniwa* 1987 (1) 215 (SC) and the cases therein cited.

In the light of the legal position about the circumstantial evidence, this court has to examine whether the circumstantial evidence in the instant case satisfies the requirements of law.

Circumstantial evidence can be contrasted with direct evidence. Direct evidence is what a witness says he or she saw or heard or did. It may be a witness saying that he or she saw an accused person do the act which the State says constitutes the alleged crime charged. It may be a video recording showing an accused person committing an act that the State relies upon as part of its case or it can be evidence from a witness that he or she heard an accused person admit to committing the crime. In a direct evidence case, if the evidence is accepted beyond reasonable doubt, it is capable of proving the guilt of the accused.

In a circumstantial case, the State lacks direct evidence of that kind. This does not mean that a circumstantial case is for that reason weaker than a case based upon direct evidence. Some direct evidence can be of very dubious quality. For example, direct evidence from a witness identifying an accused person as being the offender can be very unreliable because identification evidence can be honest but mistaken.

But in a circumstantial case no individual fact can prove the guilt of the accused. Where the State's case depends either wholly or in part on circumstantial evidence, then the court is asked to reason in a staged approach. The State first asks the court to find certain basic facts established by the evidence. Those facts do not have to be proved beyond reasonable doubt. Taken by themselves they cannot prove the guilt of the accused. The court is then asked to

infer or conclude from a combination of those established facts that a further fact or facts existed. Ultimately, the State asks the court to find, based upon the basic facts, that an accused person is guilty of the offence charged.

A case based on circumstantial evidence may be just as convincing and reliable as a case based upon direct evidence. This will depend upon the number and nature of the basic facts relied upon by the State when considered as a whole (not individually or in isolation). And it will depend upon whether all of the evidence leads to an unavoidable conclusion that the State has established the guilt of the accused. It is important that the court approaches a circumstantial case by considering and weighing, as a whole, all the facts found established by the evidence. It is wrong to consider any particular fact in isolation and ask whether that fact proves the guilt of the accused, or whether there is any explanation for that particular fact or circumstance which is inconsistent with the accused's guilt.

The correct approach is first to determine what facts are established by the evidence. The court must then consider all of those facts together as a whole and ask whether it can be concluded, from those facts, that the accused is guilty of the offence charged. If such a conclusion does not reasonably arise, then the State's circumstantial case fails because there is no proof of guilt beyond reasonable doubt.

But if the court finds that such a conclusion is a reasonable one to draw based upon a combination of those established facts then, before it can convict the accused, it must determine whether there is any other reasonable conclusion arising from those facts that is inconsistent with the conclusion the State says is established. If there is any other reasonable conclusion arising from those facts that is inconsistent with the guilt of the accused, the circumstantial case fails because there is no proof beyond reasonable doubt of the accused's guilt.

Drawing a conclusion from one set of established facts to find that another fact is proved involves a logical and rational process of reasoning. The court must not base its conclusion upon mere speculation, conjecture or supposition.

As pointed out by EBRAHIM JA in *State v Masawi* 1996 (2) ZLR 472 (SC) @p 525 F-G;

“This is not a question of throwing any onus on the second appellant, but a conclusion of guilt that a court is entitled to draw from the weight of the circumstantial evidence adduced, if no explanation of such evidence is forthcoming from the second appellant - *R v Difford* 1937 AD 370 at 373. Where circumstantial evidence leads inexorably to a definite conclusion no direct evidence is necessary for their probative value, save that things do not happen that way without reason or explanation.”

The appellant failed to explain why, for example, he entered the clerk of court’s office at a time when he was not authorized to do so since he was on suspension on allegation relating to his duties there. He also could not give a reasonable explanation as to why he did not receive Michael Togaraseyi Muzhewe’s passport at the time he received his bail deposit, as he was duty-bound to. He could not explain why, soon after he had visited the toilet, the record in which the indiscretion regarding the passport was recovered in the toilet system rather than where it should have been.

The circumstantial evidence in the instant case may be broadly classified into three parts;

- (1) The oral evidence to prove that the appellant was under investigation for theft of court records.

He was escorted by police to the court house for the purpose of hand-over-take-over. He had the motive to conceal instances of further breaches of security regarding court records of which he was the custodian. If this particular record was discovered, it would have provided further evidence of criminal conduct on his part; the circumstances surrounding the bail conditions regarding one suspect whose passport was not retained by his office when it should have been,

- (2) The recovered record in the case of Michael Togaraseyi Muzhewe.

The state of the recovered record shows that it was recovered soon after it was flushed down the toilet. The appellant had visited the toilet shortly before the record was recovered.

- (3) The evidence shows that of all those who had access to the strong-room.

Appellant had a stronger motive, better access and closer connection to the situation created by the failure to retain the passport of another suspect than anyone else at this court. Only he knew what transpired when bail was paid for Muzhewe without his passport being surrendered. This information was within his special knowledge. His conduct on the day of the recovery of exh 1 tied him more closely to all these events such

that the only reasonable inference is one of guilt of the appellant. These circumstances, taken cumulatively, do not, in my view, admit of any other inference except the one which was drawn.

In all the circumstances of the case, I am satisfied that the court correctly convicted the appellant. There is no merit in the appeal and it is therefore dismissed in its entirety.

MAVANGIRA J: agrees.

Attorney-General's Office, respondent's legal practitioners