

TATENDA ZAMBEZI ZHUWAWO  
and  
BLESSED MOYO  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
CHATUKUTA & MANGOTA JJ  
HARARE, 9 MARCH, and 12 AUGUST, 2015

### **Criminal Appeal**

*P. Chiwetu*, for the plaintiff  
*I. Muchini*, for the defendant

MANGOTA J: The appellants and two others were charged with theft of Trust Property as defined in s 113(2) (d) of the Criminal Law [Codification and Reform] Act [*Chapter 9 : 23*]. Both of them were convicted after trial. They were each sentenced to 48 months imprisonment all of which were suspended as follows:

- (i) 12 months imprisonments were suspended for 5 years on condition of future good conduct.
- (ii) 24 months imprisonment were suspended on condition they paid restitution of \$36 400 to the complainants;
- (iii) 12 months imprisonment were suspended on condition that each of them performed 420 hours of community service.

Their two accomplices were acquitted at the close of the case for the prosecution.

The state allegations were that, on 9 March 2012 and at number 22 Rubidge Road, Philadelphia, Harare the appellants and their accomplices were entrusted by Sibusiso Mlingwa and Zivai Mzila Sibanda to hold the latter persons' 700 grams of gold for purposes of smelting

and handing it over to the complainants upon demand. In breach of the terms they were holding the gold, the appellants converted the gold to their own use and they, in that regard, deprived the complainants permanently of their gold.

The first appellant appealed against conviction. The second appellant's appeal was against both conviction and sentence. The appellants' grounds of appeal were that:

- (a) the state did not prove their guilt beyond reasonable doubt;
- (b) the trial court should have taken into consideration the fact that the first appellant exonerated the second appellant;
- (c) the conviction of the second appellant on circumstantial evidence was erroneous as the court *a quo* did not take account of several explanations which pertained to his case - and
- (d) the sentence which was imposed on the second appellant, a young, first offender, was not only severe but was also excessive.

The respondent's position was that the appellants were properly convicted and sentenced. It stated that their appeal was devoid of merit. It urged the court not to quash the appellants' conviction. It submitted that the sentence which was imposed was in *sinc* with the crime which the appellants committed as well as their personal circumstances.

During the parties' submissions, counsel for the first appellant realised that his client's case hanged on nothing. He abandoned the appeal.

The court commends counsel for not wasting its time by challenging what was obvious. The conviction of the first appellant was above board. It is, accordingly, confirmed. He did not challenge the sentence which was imposed upon him. The sentence remains undisturbed.

The second appellant challenged the trial court's conclusion. He said it erroneously concluded that he stole the complainants' gold. He stated that he did not have the requisite mental state to commit the offence. He submitted that the first appellant exonerated him. He said the first appellant did not disclose to him what the transaction between the complainants and him was all about.

The respondent maintained a contrary view. It stated that the circumstances of the case showed that the second appellant connived with the first appellant to steal the complainants'

gold. It submitted that the second appellant's assertion which was to the effect that he allowed the first appellant to hold a meeting at his house with strangers did not make sense. It stated that the directive which the second appellant issued to his security guard to pretend that the first appellant and the guard were known to each other was not for no reason.

The court *a quo* found, as a fact, that it was at the second appellant's home that the first appellant disappeared with the complainants' gold. It was not in dispute that the complainants had, on 8 March 2012, met and discussed with the first appellant. The subject matter of their discussion differed. The complainants said they requested the first appellant to smelt their gold. The first appellant said the complainants offered to sell the gold to him. It is mentioned in passing that the three of them agreed to meet on the following day.

The circumstances which prompted the complainants and the first appellant to go to the second appellant's home are pertinent. The complainants' testimony on that matter was that, at about 10 am of 9 March 2012, the first appellant phoned and asked them to meet him at Sam Levy's Village in Borrowdale. The three of them met at the mentioned place. The first appellant left his motor vehicle, a Mark II, at Sam Levy's Village and jumped into the complaints' car. He directed the driver of the car to drive to the second appellant's home. As they drove, he talked to the second appellant on his mobile. The mobile was on a loud speaker and they were, therefore, able to hear the conversation which was taking place between the first and the second appellants. When they were close to their destination, the first appellant phoned the second appellant telling him that he had brought the complainants. The second appellant told him that he (second appellant) had instructed the security guard to open the gate for them. At the gate of the second appellants home, the driver of the motor vehicle hooted once and the gate was opened. The security guard greeted the first appellant by his name. Within the second appellant's premises, the first appellant phoned and advised the second appellant that he (first appellant) had come with the women who wanted their gold smelted. The second appellant allowed them into his house. When they were in the house, the first appellant asked them to give him the gold which he said he would smelt outside. They handed the gold to him and he disappeared with it.

The second appellant, it is noted, was ably legally represented during his trial. That matter notwithstanding, he did not challenge the complaints' assertions in any meaningful way.

He, in particular, failed to challenge their assertions which were to the effect that the first appellant told him on the mobile phone that he had brought the complainants to his home and that, when they were in his house, the first appellant told him, once again on the phone, that he (the first appellant) had come with the women who wanted their gold smelted.

The complainants' evidence resonated well with the testimony of Gunhill Muchemwa. Mr Muchemwa was on guard duty at the second appellant's home on the day of the alleged offence. He said:

"I was at work and Blessed said there were some people who were coming. He said if the people come and there will be someone who will be sited in front you should greet him and that I should ask them what we should do because there was no electricity and whether I should connect the generator for them. The vehicle came and he said that was the vehicle and he went inside" [emphasis added].

It is evident from a reading of the uncontroverted testimony of Mr Muchemwa that the second appellant saw the complainants' car pulling into his premises. He instructed Mr Muchemwa to greet the first appellant and to ask the first appellant if he should connect the generator for the first appellant's use as there was no electricity at the house at that time.

The abovementioned matters inculpated, more than they exculpated, the second appellant. We are in agreement with the court *a quo* which found as a fact that the instruction which the second appellant gave to Mr Muchemwa to greet the first appellant by the latter's name was to create in the minds of the complaints the impression that the first appellant was an acquaintance of the second appellant. We are also satisfied that the instruction which the second appellant gave to Mr Muchemwa to connect the generator for the first appellant's use were meant to convey to the complaints the impression that their gold would be smelted at the second appellant's house.

The second appellant was not candid at all as a witness. His claim which was to the effect that the first appellant did not disclose to him the identity of the persons whom the first appellant would meet with at his house was false. The first appellant's evidence was that he told the second appellant that he was bringing the complainants to his house.

The second appellant stated that he had met the first appellant only once. He said he met the first appellant at a party which he hosted at his house. However, evidence which is filed of

record showed that the two appellants were known to each other prior to the day of the alleged offence.

The first appellant stated that the two of them had known each other for quite a while. The second appellant confirmed the first appellant's statement in the mentioned regard. He stated that his best friend introduced the first appellant to him. It was his testimony that the first appellant was, in fact, in love with his best friend's sister.

We mention for the avoidance of doubt that none of the complainants dealt directly with the second appellant. The court *a quo* convicted him on the strength of circumstantial evidence. The law which pertains to proof of a matter by circumstantial evidence was aptly stated in *S v Tambo*, 2007 (2) ZLR 35 wherein Uchena J remarked as follows:

“Circumstantial evidence can only be used to draw an inference if the inference sought to be drawn is the only reasonable one which can be drawn from those facts. It must be supported by rational reasoning and an analysis of the proved facts. The correct judicial assessment of evidence must be based on establishing proved facts, the proof of which must be a result of careful analysis of all the evidence led. The final result must be the product of an impartial and dispassionate assessment of all the evidence placed before the court.”

The court *a quo* found, as we did, the following to have been the proved facts of this case:

- (i) On 9 march 2012 the first appellant went with the complainants to the second appellant's home.
- (ii) the first appellant took the complainants to that house following an agreement which he had concluded with the second appellant. The second appellant stated through counsel that:

“On the day in question he was approached by accused 2 whom he had met only once at a party hosted by the fourth accused at his place of residence. Accused 2 asked accused 4 if he could use accused 4's place of residence to have a meeting and accused 4 agreed.”

Reference is made to the second appellant's defence outline. It is important for us to clarify that accused 2 and accused 4 refer respectively to the first and the second appellants.

- (iii) The second appellant knew that the complainants were coming to have their gold smelted by the first appellant at his house. The complainants' evidence on this matter

- was not challenged. The first appellant and him created in the minds of the complainants not only that the two of them were known to each other but also that the first appellant would smelt their gold at his house.
- (iv) When the complainants and the first appellant got into the second appellant's house, the first appellant disappeared with the complainants' gold.
  - (v) The complainants made an effort to ascertain the whereabouts of the first appellant and bring him to book. They phoned the second appellant asking where the first appellant had gone with their gold- and
  - (vi) The second appellant lied. He told them that he was not at his house but was having a transaction with the first appellant at Sam Levy's Village. The reasons which he advanced for the lie he told are meaningless.

Only one inference can reasonably be drawn from the above stated facts. The inference is that the second appellant was as much involved in the commission of the offence as the first appellant was. He, in our view, connived with the first appellant to steal the complainants' gold.

The court *a quo* was satisfied, as we are, that the defence which the second appellant raised did not hold. His criticism of the trial magistrate's findings was totally devoid of merit. The state proved his guilt beyond reasonable doubt. His conviction, therefore, stands.

The second appellant's appeal against sentence was raised by him as a matter of course. The complainants placed the value of their stolen gold at \$36 400-00. The second appellant did not challenge their assertions in the mentioned regard. He introduced the matter which related to the value of the stolen gold in his grounds of appeal against sentence. The value which the complainants gave stands.

The second appellant got away with community service as the sentence for theft of gold valued at \$36 400-0. The gold was not recovered. The effort which he made towards stealing the gold was very substantial. His moral blameworthiness was very high.

The court *a quo* in our view considered all the matters which favoured him when it assessed sentence. It, in fact, erred on the lenient side. The sentence will not, therefore, be disturbed.

It is our considered view that the second appellant was properly convicted as well as sentenced. His appeal lacks merit. It is, accordingly, dismissed *in toto*.

CHATUKUTA J: agrees.....

*Rubaya & Chatambudza*, applicant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners