COLLINS DZINOREVA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 12 May 2015 & 7 October, 2015

Criminal Appeal

N Mugiya, for the appellant
E Mavuto, for the respondent

HUNGWE J: The appellant was convicted of two counts; one in respect of theft from a motor vehicle as defined in s 113 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] ("the Criminal Law Code") and another in respect of possession of articles meant for criminal use as defined in s 40 of the Criminal Law Code. He was sentenced to 24 months and 6 months imprisonment respectively. He appeals against both conviction and sentence in respect of each count.

The grounds of appeal framed in support of the appeal against conviction in respect of both counts are defective. They do not comply with the provisions of r 22(1) of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, 1979. These grounds do not set "out clearly and specifically the grounds of the appeal." I make this observation because the appellant was convicted of two counts. He raised four "grounds" yet he does not state in respect of which count a particular ground is directed. The first ground is couched in the following terms:

> "(1) The court *a quo* erred when it convicted the appellant based on speculative and assumptive evidence relating to the exhibit which appears to link the appellant to the offence but without legal substance."

The record shows that evidence was led in respect of both counts. It is not clear in respect of which count it is alleged that the court *a quo* relied on "speculative and assumptive evidence." To add more confusion to the vagueness of this ground, an exhibit was produced in respect of each of the two counts. Both exhibits link the appellant to the commission of the

offence. In respect of this ground of appeal, therefore, one is not aware against which count this attack was directed.

The second ground is that:

> "(2) The learned magistrate erred when he failed to take note that the state failed to disapprove (*sic*) what he said in his defence case and no reasons were tendered concerning why the appellant could not be believed at the expense of the version by the state."

This ground makes two distinct averments. First, it is said that the error committed by the magistrate was failure to give regard to the fact that the state did not disprove what the appellant said in his defence. Second, it is also said that the court did not give reasons why it did not believe the appellant. It is not clear in respect of which count the court erred when it failed to give regard to the state's failure to disprove what the appellant said in his defence. It is not clear what it is the court ought to have regarded as not rebutted by the state, which was said by the appellant in his defence. It also remains a matter of conjecture in respect of what portion of his averment in the defence case which was not believed by the court. As a result, it remains unclear in respect of which aspect of the version given by the appellant the learned magistrate erred in rejecting. Is it what the appellant stated in respect of the first or the second count? Or does this apply to the first count only or to the second count only or to both the first and second count?

The third ground of appeal attacks conviction on the vague averment that the state failed to prove its case beyond a reasonable doubt. It is trite that such a ground is too vague a ground to constitute a ground of appeal. It is the same as saying the appellant is not guilty because he is not guilty. See *S* v *Jack* 1990 (2) ZLR 166 (SC). The magistrate who is seized with such a notice and grounds of appeal is entitled not to respond to it at all. He cannot possibly know what it is which is being attacked in his judgment. A notice of appeal without meaningful grounds is not a notice of appeal. As such it is a nullity which cannot be amended later.

In *S* v *McNab* 1986 (2) ZLR 280 (SC) Dumbutshena CJ @p281 put the matter as follows:

> "As can be seen from Rule 22(1) the above ground of appeal does not comply with the Rules of this court. The notice of appeal does not set 'out clearly and specifically the grounds of the appeal'.
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> That which the appellant is attacking in the judgment of the convicting court must be set out in the manner laid down by the Rule. A generalisation such as

that set out in the appellant's ground of appeal against conviction is not good enough. It does not point out where the magistrate erred or misdirected himself. See *Emerson & Ors v R* 1957 R&N 734 (SR); *Du Toit v R* 1958 R&N 177 (SR)

A better understanding of what is required can be gleaned from Rule 51 (7) of the Magistrates Courts' Act 32 of 1944 (South Africa). See *Kilian v Messenger of the Court, Uitenhage* 1980 (1) SA 808 (AD). The extract from the judgment of RABIE JA (as he then was) is taken from the official translation at 234 (p 815 of the Report). It reads:

> "Rule 51(7) provides, in so far as it is relevant, that:
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> > 'A notice of appeal or cross-appeal shall state-
> >
> > (a) ...
> >
> > (b) the grounds of appeal, specifying the findings of fact or rulings of law appealed against.'
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> Such a notice requires a precise statement of the points on which the appellant relies, so that the respondent may know on which points he must prepare a reply, and so that the Court may know on which points a decision is required. See e.g. *Himunchol v Moharom* 1947 (4) SA 778 (N) at 780; *Harvey v Brown* 1964 (3) SA 381 (E) at 383. The magistrate must also be properly informed of the grounds on which the appeal is based, so that he can comply with the duties imposed on him by rule 51(8). Para 1 of the notice of appeal merely contains an allegation that the magistrate erred in making the order in question, without stating in what respect he erred, and it cannot be said that it contains a ground of appeal as required by Rule 51(7)."
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> Although Rule 51(7) of the Magistrates Courts' Act 31 of 1944 (South Africa) deals with civil proceedings it, in as far as appeals are concerned, is relevant to criminal appeals. There must be stated in the Notice of Appeal 'a precise statement of the points on which the appellant relies.' A statement that the magistrate 'erred in fact and in law in holding that the State had proved appellant was so drunk as to be incapable of having proper control of his motor vehicle' is not precise enough. As I have pointed out above, it does not tell the respondent or the magistrate what it is that is being attacked. The respondent is required to prepare his answer to the allegations made in the Notice of Appeal. Rule 23(1) of the Appellant Division (Magistrates Court) (Criminal Appeals) Rules requires a magistrate to reply to the Notice of Appeal. He must set out in a statement his reasons for judgment and sentence and these reasons must be a reply to the grounds on which the appeal is based."

The rules are for the benefit of the appellant, the respondent and the court. This court has on times without number warned against parties who do not pay heed to the rules that where the notice directly offends the Rules this court will not condone such a blatant disregard of the Rules as would make their existence meaningless. In the present matter we

are unable to decipher from the manner the grounds are couched, what the source of dissatisfaction with the conviction by the appellant is.

On that basis we do not have an appeal before us. The appeal is dismissed in its entirety.

Even assuming that an accommodation can be found for such a notice and grounds, I am satisfied that the appeal lacks merit. The complainant's evidence was that on 21 March 2013 she parked her motor vehicle in the street in order to see someone in a nearby flat. That person had had similarly parked his car some six cars away. As she talked to this person whilst standing outside his car, she observed two people open her car. The one opened the front passenger door whilst the other opened the boot. She alerted her husband who shouted "Thief!" The two panicked and jumped into a motor vehicle without registration plates. They sped off before her husband could catch them. She noticed that the thieves had stolen her hand-bag which contained her Nokia C3 cell-phone, cash, passport, bank cards and other personal documents. She reported the matter to police. She was later on called after the appellant had been arrested on an unrelated matter. When she entered the room in which the appellant was kept, she noticed that her Nokia C3 cell-phone was on the desk and identified it as hers. When asked by the police how she could positively identify it, she gave the police officer the hand-set's serial numbers.

Under cross-examination the appellant's counsel took complainant to task in respect of the description she initially gave to the police. She had indicated then that the get-away car was a Toyota Chaser or Toyota Mark II. In court she had indicated that a Toyota Mark II was used to get away. She maintained that she had correctly identified the car by description as these two models have a similar rear side. There was an attempt by the appellant to suggest that whist the police recovered a dual sim handset, she had reported and identified hers as a Nokia C3 single sim. A reading of the record does not confirm this. In fact the first police officer who testified during trial maintained that the complainant had described her handset as a single sim one. In his heads of argument the appellant relies on the evidence given under cross-examination by another police officer, one Ngonidzashe Chimuto, which appears at page 62 to support the suggestion that the police had recovered a dual sim handset from the appellant yet she identified hers as a single sim handset. The heads state:

"On page 46;

> Q: Are you aware that Veronica Chitambo was one of the officers who arrested accused?

A: Yes.

Q: That officer upon arresting the accused said accused was in possession of a Nokia dual sim phone. Are you aware of that?

A: Yes that's true.

Q: Is the phone before the court a dual sim?

A: According to me it's a single sim if you physically check but upon lighting it indicates dual sim. Also searching the IMEI numbers it reflects two numbers which suggests that it has 2 sim cards but in actual fact it has one sim card.

Q: The phone before us today is a dual sim?

A: No. According to my observation it's a single sim."

This evidence supports the complainant's assertion that her handset is a single sim card rather that a dual sim. The exhibit in court was indeed a single sim Nokia C3 handset. It was argued in the heads that a failure to produce the IMEI given by the complainant when she identified the phone next to the accused in the police station cast doubt on the veracity of the identification of the handset by the complainant. In other words the argument here is that the police and the complainant connived to support the evidence of identification of the handset as claimed by the complainant at the station on the day she was called to station. I disagree. The complainant's evidence was that on the day of the theft, she had not reported that her phone was amongst the stolen property. It was when she got home that she discovered that her other handset, the Nokia C3 handset had been stolen. At that time she was using another handset not this one. She gave a good explanation of why she omitted to include all her stolen property at once. This to my mind also explains the apparent variation in the value of the stolen property. Needless to say the appellant pointed this discrepancy as casting doubt on the sufficiency of the evidence led by the state.

It is critical, in assessing the credibility of the opposing witnesses in any given case, to consider what each side says in respect of the issues for the court's determination.

THE TEST IN CRIMINAL CASES

The question that needs to be answered ultimately is whether the defence given by the accused is reasonably possibly true and whether the State has proved its case beyond reasonable doubt. Given the argument of Mr *Mugiya*, who appeared on behalf of the appellant, that this court should not discount the accused's explanation regarding his connection with the motor vehicle and its contents as well as the handset, it ought to be remembered that proof beyond reasonable doubt does not mean proof beyond any shadow of

a doubt. Furthermore, the test requires a consideration of the cumulative effect of all the evidence and not a piecemeal approach. In *S* v *Trainor* 2003(1) SACR 35 (SCA) at 41b, NAVSA JA applied this principle as follows:

> "A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any."

The decision in *S* v *Van der Meyden* 1999 (1) SACR 447 (W) at 449H-450B, endorsed in *S* v *Van Aswegen* 2001 (2) SACR 97 (SCA) 101C-E, is also instructive in these disputes. NUGENT J said the following:

> "A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence ... The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored."

Application of the law to the Facts

The evidence shows that on 21 March 2013 at corner Herbert Chitepo and Second Street, Harare, the complainant left her motor vehicle to speak to someone parked some six cars away. It was in the evening around 19h00. She then saw two men one at the passenger door the other at its boot, opening these two entry points. She raised alarm. Her husband reacted but failed to apprehend the culprits as they made good their escape in a Toyota motor vehicle. She noticed that that the thieves had gotten away with her handbag and its contents. She reported the theft that same night and itemised the contents of her bag. She described the get-away vehicle as a Toyota Chaser or Mark II. Exactly two weeks later she was called to the police station where the appellant was under police custody at Harare Central Police Station. Upon entering the office where he was being questioned the complainant noticed her Nokia C3 handset and immediately identified it as part of the stolen items. When asked how she identified it, she described it and indicated that it was a single sim. She gave the police the IMEI for this particular handset. The police officer verified it.

When the appellant was arrested, he was driving a Toyota Mark II fitting the description given to police by the complainant and her husband. The motor vehicle had registration plates which turned out to be false. The motor vehicle was sold to accused by someone who left the country. A search of the vehicle, in appellant's presence, yielded a T-bar usually associated with unlawful entry into motor vehicles. There was a driver's licence belonging to another person. The accused failed to explain the presence of Simbarashe Ushe's driver's licence inside his vehicle. The appellant told the police that he used the T-bar to open other people's cars and take bags. His explanation about the role of his other accomplices led police to release the two and charge him with the current offences.

The property stolen two weeks earlier was recovered in the appellant's possession. It is noted that cell-phone handsets easily change hands but the explanation given by the appellant as to how he came to possess the complainant's handset soon after it had been stolen leaves me in no doubt that he had stolen it from the motor vehicle parked in Herbert Chitepo Street as the complainant stated. In court the appellant under cross-examination agreed that police recovered a handset from him. This was the same handset produced in court. He maintained that it was a dual sim handset. Upon being asked to demonstrate where it would hold the other sim card, the appellant came unstuck. His untruthfulness was exposed for all to see. Needless to say the court *a quo* properly rejected his defence. His failure to explain the driver's licence, the T-bar, the cell-phone handset, in my view all point to him as the person who, two weeks prior had opened the car inside which was the complainant's bag and made off with it using the Toyota Mark II. That motor vehicle, from the evidence, had previously been shot at, in a car chase with the police. It was being used for committing crimes. In these circumstances, I am unable to find any error in respect of the conviction of the appellant in respect of both counts,

As for sentence, in my view, a sentence of 24 months for theft from a motor vehicle using another motor vehicle fitted with false plates in front and with none at the back to get away and evade arrest cannot be said to be so hash a sentence as to induce a sense of shock. In respect of the second count, six month for possessing instruments used in criminal enterprises is not harsh. He is, in any event, a repeat offender who deserves a harsher penalty, hopefully to drive home the unlearnt lessons from the past that crime does not pay. These sentences are within the range set out in the Criminal Code. There is nothing wrong in the court's approach to sentence warranting interference from this court. He made his bed and must lie on it. His appeal against sentence similarly fails.

Accordingly the order of this court is that the appeal against both conviction and sentence in respect of both counts be and is hereby dismissed.

BERE J agrees ……..

Mugiya & Macharaga, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners