

ALPHONSE MUSHANAWANI
and
BRIGHTON DINDA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUSAKWA AND MUZOFA JJ
HARARE, 2, 16 March & 9 March 2020 & 9 November 2020

Criminal Appeal

T. Mpfu, for appellants
R. Chikosha, for respondent

MUSAKWA J: The appellants were convicted of contravening s 156 (1) (c) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Each appellant was sentenced to 10 years' imprisonment of which 2 years were suspended for 5 years on condition of good behaviour. In addition the trial court ordered the forfeiture of 710kg of dagga as well as a Toyota Hiace motor vehicle, registration number AEI 6094. This is an appeal against conviction and sentence.

The grounds of appeal are as follows:

Conviction

1. The trial court erred in rejecting the appellants' defence of alibi which defence was raised in good time before the completion of investigations.
2. The trial court erred in convicting the appellants on the basis that they failed to prove their defence.
3. The trial court erred in believing the Police witnesses despite contradictions in their testimonies relating to the times of arrest and the route taken to the Police Station.
4. The trial court erred in downplaying the need for the Police informer to testify in light of the appellants' defence that the motor vehicle had been hired out.
5. The trial court erred in relying on the testimony of Genius Ruzha who was a suggestible witness.

6. The trial court erred in not accepting inconsistencies about the time of arrest and route of travel which if they had been upheld, struck at the root of the State case.

Sentence

7. The trial court erred in passing a severe sentence despite the mitigatory factors.
8. The trial court erred in imposing a lengthy custodial sentence despite that the forfeiture of the first appellant's motor vehicle also constitutes a form of punishment.

The Facts

According to detective sergeant Nhokwara of Vehicle Theft Squad, on 18 April 2018 in the afternoon they were on duty and in Epworth. He was in the company of two other detectives and Genius Ruzha whom they were investigating. He received a call from an informer concerning what was taking place in Damafalls. Having been supplied with the registration number of the motor vehicle, AEL 2492 they came across and blocked it. They arrested the driver and detective constable Chikwavaire took control of the vehicle.

Towards Corner Store in Damafalls, they came across a silver Toyota omnibus, registration number AEI 6094 which was being driven by the first appellant. The second appellant was a passenger in the front seat. Having blocked the omnibus the second appellant tried to flee and this was after detective constable Musuka had disembarked from their vehicle. Warning shots were fired. The appellants were then arrested by detective constable Musuka who took control of the omnibus.

According to detective sergeant Nhokwara they drove to Vehicle Theft Squad, Southerton where he briefed the Officer In-Charge. They were then instructed to go to Drugs Squad. Having briefed Chief Inspector Zvidzai they were told that the drugs would be weighed the following day. On the following day they counted 30 bags in the presence of the appellants. On 14 April 2018 they had the dagga weighed at Vehicle Inspection Depot, Eastlea. The dagga in question weighed 710kg.

Genius Ruzha of Epworth confirmed that he was being investigated by vehicle Theft Squad detectives. He corroborated the detectives on the circumstances surrounding the appellants' arrest.

Detective constable Musuka stated that after Zimre Park they drove along a dirt road leading to Damafalls. After a rise they then came across a motor vehicle, registration number AEL 2492. After they blocked the motor vehicle detective constable Chikwavaire then peeped

into the vehicle and remarked that it was full of dagga. The driver of that motor vehicle was Ranganai Samhembere. Detective constable Chikwavaire took over the vehicle and Ranganai Samhembere was taken into the Police vehicle.

At Corner Store they came across motor vehicle registration number AEI 6094. The first appellant tried to drive off. Detective constable Musuka who had disembarked then fired warning shots. He switched off the vehicle engine. When he peeped through the window he saw dagga which he also smelt. He arrested the appellants and took them to their motor vehicle. He is the one who drove the seized vehicle to Vehicle Theft Squad from where they were directed to go to Harare Central Police Station.

The appellants' defence was a denial of being found with a vehicle that was loaded with dagga. They claimed to have been arrested whilst at the first appellant's residence. According to the first appellant the motor vehicle had been hired by one Johannes Moyo and his colleague.

The first appellant's evidence was to the effect that he and the second appellant were arrested on 13 April 2018 whilst at house number 2561 Mugadzi Road, Glen Norah A around 5 pm. At that time the second appellant was servicing the first appellant's motor vehicle. At the time of arrest the first appellant claims he was asked on the whereabouts of his motor vehicle (presumably the one in which dagga was found). The arrest took place in the presence of the first appellant's relatives. People from within the neighbourhood also gathered but were dispersed by the detectives. They went to Southerton Police Station with detective sergeant Nhokwara, detective constable Musuka and Ranganai Samhembere. Photographs were taken of them whilst by his motor vehicle which they found already at the Police Station. They were also taken to Ranganai Samhembere's motor vehicle where photographs were taken. Thereafter they were taken to Harare Central Police Station and in the vehicle was Genius Ruzha whom they had found at Southerton.

As for the second appellant, his version of the circumstances surrounding their arrest mirrors that of the first appellant. He stated that the arrest took place in the presence of the first appellant's elder brothers. He had last serviced the appellant's vehicle that the Police impounded a month before. He claimed not to know Damafalls or Corner Store. He also denied that shots were fired during their arrest. The issue of where the arrest took place was raised at their initial court appearance. The investigating officer, one Mhondiwa undertook to investigate the issue. The second appellant also stated that the Police located the first appellant's residence using some gadget he could not describe.

Submissions

In his address Mr *Mpofu* submitted that the trial court should have addressed the issue of possession. This is because the state should have proved the purpose of possession. A defect in the charge was brought to the attention of the trial court. Therefore since the defect was not cured in evidence it amounted to an irregularity. No evidence was led to prove that what the appellants did constituted dealing. In the same vein, he submitted that failure by the court to give reasons on issues raised amounts to an irregularity. In support thereof he cited the cases of *S v Makawa and Another* 1991 (1) ZLR 142 (SC) and *Arafas Mtausi Gwaradzimba v C. J. Petran and Company (Proprietary) Limited* SC 12-16.

Mr *Mpofu*'s next contention related to the issue of *alibi*. He submitted that there was a double onus on the state to dispel the *alibi* as well as to establish identity of the other persons that Police officers arrested in connection with the dagga. He pointed out that false evidence was given regarding Johannes Moyo. Attempts should have been made to trace the location of the appellants through mobile network boosters. Call records should have been availed. Thus there was no independent evidence proving the arrest of the appellants in Damafalls. Mr *Mpofu* was dismissive of the evidence of Genius Ruzha. His criticism of this witness focused on his lack of consistency. He also submitted that since Genius Ruzha was a suspect, his evidence was not admissible against the appellants as his rights had not been explained to him. He referred to the case of *S v Nkomo and Another* 1989 (3) ZLR 117 (SC).

Mr *Mpofu* also highlighted some unsatisfactory features of the evidence. He pointed out inconsistencies of state witnesses' testimony regarding the route that was used to travel from Damafalls. He also queried why the informer would call the arresting officers thrice. He was very critical of the arresting officers as he accused them of having operated outside their operational jurisdiction.

On sentence, Mr *Mpofu* submitted that since the appellants' circumstances are different they should have been sentenced differently. He further argued that a distinction should have been made on who possessed the drugs as they would not have possessed such at the same time.

In his submissions, Mr *Chikosha* pointed out that if there were defects to the charge, the appellants should have excepted. Thus in the absence of a challenge to the charge, the appellants accepted that it was valid. He further submitted that the quantity of the dagga is such that it was meant for dealing. He also pointed out that the notice of appeal and heads of argument did not raise that issue. In the event of a defect such defect would be cured by

evidence in terms of sections 202 and 203 of the Criminal Procedure and Evidence Act [Chapter 9:07].

Mr *Chikosha* further submitted that police officers and Genius Ruzha were clear on where arrests took place. Genius Ruzha was not aware of where they were going. Police officers' duties are wide. The arresting officers received a tip-off about a crime that was in progress and they had no time to involve the relevant section that investigates drug related crimes. The arresting officers never lost sight of the appellants from the time they arrested them. Apart from cell phone numbers of the implicated persons, no other information was availed, including documentation relating to the hiring of the vehicles or even their addresses.

Analysis

The appellants' grounds of appeal make no issue about possession. The submissions made by Mr *Mpofu* regarding possession are of no relevance. It must be noted that there was no application to amend the grounds of appeal.

Alibi

The Merriam-Webster dictionary defines *alibi* as:

"The plea of having been at the time of the commission of an act elsewhere than at the place of commission."

It is trite that the defence of *alibi*, just like any other defence save for that of insanity must be disproved by the State. In the case of *Scott Morris v S* SC 28-98 SANDURA JA stated the following:

"The legal position is that there is no *onus* on an accused person to establish the defence of alibi. This was made clear many years ago in a number of cases, such as *R v Hlongwane* 1959 (3) SA 337 (AD). In that case, HOLMES AJA had this to say at 340H:-

"The legal position with regard to an alibi is that there is no *onus* on an accused to establish it, and if it might reasonably be true he must be acquitted. *R v Biya* 1952 (4) SA 514 (AD). But it is important to point out that in applying this test, the alibi does not have to be considered in isolation."

Further on at 341 A-B the learned JUDGE OF APPEAL continued:-

"The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses."

In the case of *R v Biya* 1952 (4) SA 514 and at 521 GREENBERG JA had this to say:

"If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime."

In discussing the defence of alibi the following emerges from the judgment by GILLESPIE J in *S v Mutandi* 1996 (1) ZLR 357 (H) at 370:

“Similarly, in South African Law of Evidence 4 ed by Hoffmann & Zeffertt, the following appears at p 619:

"If there is direct or circumstantial evidence which points to the accused as the criminal, the most satisfactory form of rebuttal is for him to show that he could not have committed the offence because he was somewhere else at the relevant time. This is called the defence of alibi, but it is a straightforward denial of the prosecution's case on the issue of identity. Courts have occasionally fallen into error by treating it as though it raised two separate issues: (a) did it look as if it was Smith who broke into Jones's shop at midnight, and (b) was Smith really at home in bed? Splitting up the inquiry in this way leads the judge to say that if the prosecution adduces strong evidence on the first issue, the onus should be on the accused to prove his alibi. But the reasoning is fallacious because the prosecution has to prove beyond reasonable doubt that Smith is the burglar, and if the court considers it reasonably possible that he may have been at home in bed, it must acquit."

Ordinarily the defence of *alibi* ought to be raised at the time an accused person's warned and cautioned statement is recorded from him by Police. Thereafter Police then investigate the *alibi*. The recording of warned and cautioned statements is routine procedure. The statements recorded from the appellants were not produced during the trial. It would have been interesting to know if the defence of *alibi* was raised in the statements. I make this observation because the arresting officer was not the investigating officer.

Notwithstanding the appellants' defence as regards where they claim the arrest took place, the evidence of the arresting officers as corroborated by Genius Ruzha is convincing enough. There would be no motive for them to lie that they were in Epworth investigating a case against Genius Ruzha when they received a tip-off regarding the appellants. Why would they pick on the appellants as suspects to frame for the crime whilst leaving the actual culprits?

During the trial the defence insisted that the arresting officers ought to have produced evidence of the Police officers' location as established by mobile telecommunication service companies. Such information would have confirmed their presence in Epworth when they received the tip-off. I do not see the relevance of such information. The defence also insisted that the arresting officers should have produced photographs showing the scene where the arrests took place in Damafalls. They also raised the issue that there should have been fingerprints uplifted from the steering wheel to prove that it was the first appellant who was driving the motor vehicle at the time of arrest. Then there was the demand that there ought to have been corroboration from independent witnesses as regards how the arrests took place in Damafalls. With respect, I do not think that investigations are conducted in anticipation of every conceivable defence that might be raised by an accused person at trial.

The second ground of appeal has no basis. A reading of the judgment of the court *a quo* does not reveal where a finding was made to the effect that the appellants failed to prove their defence. The ground of appeal is erroneous as it attacks a finding that was never made by the trial court.

The third ground of appeal attacks the trial court's acceptance of evidence of Police witnesses despite contradictions regarding the route that was taken to the Police station. According to detective sergeant Nhokwara they took the following route: Mutare Road, Rhodesville, Robert Mugabe Road, Charter Road, Fly-Over, past Mbare, Rothmans and then Southerton. Detective Constable Musuka gave the following route: Mutare Road, Eastlea, past Vehicle Inspection Depot, Fourth Street (Now Simon Muzenda) Kenneth Kaunda, Charter Road, Simon Mazorodze. Any person who is familiar with Harare will agree that there is hardly a difference in the routes. Essentially they followed Mutare Road, Robert Mugabe Road, Charter Road and Simon Mazorodze Road. The omission of Kenneth Kaunda Avenue in detective sergeant Nhokwara's narration is not material and cannot discredit him.

The Informer

S 233 of the Criminal Procedure and Evidence Act provides that:

“(1) When any person appearing either in obedience to the subpoena or by virtue of a warrant, or being present and being verbally required by the court to give evidence, refuses to be sworn or, having been sworn, refuses to answer such questions as are put to him or refuses or fails to produce any document or thing which he is required to produce, without in any such case offering any just excuse for such refusal or failure, the court may adjourn the proceedings for any period not exceeding eight days, and may in the meantime, by warrant, commit the person so refusing or failing to a prison, unless he sooner consents to do what is required of him.”

The trial court invoked the above provision in absolving detective sergeant Nhokwara from disclosing the identity of their informer. In my view that was a just decision. Police officers are not magicians such that they can conjure information at will. Effective crime detection is bolstered by a network of informers who, like in the present case must remain anonymous. Sometimes informers are known to the accused such that the disclosure of their identity may result in a backlash. Where the identity of an informer is not disclosed and he is not called to testify, obviously his evidence is hearsay. In such a situation it suffices for a Police witness to simply state that he received a tip-off from a source he is not at liberty to disclose.

I am mindful of HUNGWE J's observations regarding evidence of informers. In the case of *Daniel Mpa v S* HH-469-14 the learned judge had this to say at p. 5:

“The claim that appellant was in possession of the ivory was never tested by independent evidence. It is extremely dangerous to convict an accused person on the say so of a police informer who is not called to testify and cross-examined in court. Such a person's evidence

remains hearsay. It may be a direct result of police collusion, or outright figment of that particular person's fertile imagination concocted by an accomplice to exculpate himself from possible prosecution. It violates an accused person's right to a fair trial in that the accused does not test the evidence by cross-examination. There are other reasons why the inference drawn by the court is not the only reasonable one on these facts."

In the present matter the State never sought to rely on what the informer told the detectives. That would amount to hearsay. The only relevant aspect of the detectives' testimony is that they received information from an anonymous source and this led them to arrest the appellants.

Whether Genius Ruzha Was A Suggestible Witness

Genius Ruzha claimed to have been arrested on allegations of theft of a phone. On the other hand the Police officers claimed he was assisting in investigations to do with theft of a motor vehicle. Notwithstanding this contradiction and some other unsatisfactory aspects of the witness's testimony, his evidence corroborated that of the detectives. There is no discernible reason why he would have lied. He was not a suspect in respect of the drugs. In any event, without his evidence the appellants would still have been convicted.

The sixth ground of appeal is a duplication of the third ground. In my view the case for the State was proven beyond a reasonable doubt. Regarding the degree of proof required in criminal cases, DUMBUTSHENA CJ had this to say in *S v Isolano* 1985 (1) ZLR 62 (S) and at pp 64-65:

"In my view the degree of proof required in a criminal case has been fulfilled. In *Miller v Minister of Pensions* [1947] 2 All ER 372 (KB), LORD DENNING described that degree of proof at 373H as follows:

. . . and for that purpose the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

See Hoffman and Zeffertt: *South African Law of Evidence* 3rd ed 409-410."

In *R v Mlambo* 1957 (4) SA 727 (AD) and at 738 MALAN JA had this to say:

"In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.

An accused's claim to the benefit of a doubt must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case."

The contention regarding sentence is that the trial court erred in not taking into account that the forfeiture of the first appellant's motor vehicle was a form of punishment. As such this should have been reflected in the sentence that was imposed.

S 62 (1) of the Criminal Procedure and Evidence Act provides that:

"(1) A court convicting any person of any offence may, without notice to any other person, declare forfeited to the State—

(a) any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or

(b) if the conviction is in respect of an offence specified in the Second Schedule, any vehicle, container or other article which was used for the purpose of or in connection with the commission of the offence in question or, in the case of a conviction relating to the theft of any goods, for the conveyance or removal of the stolen property;

and which was seized in terms of this Part:

Provided that such forfeiture shall not affect any right referred to in paragraph (a) or (b) of subsection (4) if it is proved that the person who claims such right did not know that the weapon, instrument, vehicle, container or other article was being used or would be used for the purpose of or in connection with the commission of the offence in question or, as the case may be, for the conveyance or removal of the stolen property in question, or that he could not prevent such use, and that he may lawfully possess such weapon, instrument, vehicle, container or other article, as the case may be."

The trial court reasoned that forfeiture of the first appellant's motor vehicle was not mitigatory. Whilst it was correct in that regard it nonetheless erred in not realising that forfeiture constitutes a form of punishment, especially if the article that is forfeited is of considerable value. In this respect see *R v Barclay* 1975 (2) RLR 87 and *S v Blanchard and Others* 1999 (2) ZLR 168 (H).

The critical issue is that forfeiture in terms of s 62 (1) of the Act is not mandatory. It is discretionary. Discretionary powers must be exercised reasonably and judicially. On the authority of *R v Ndhlovu* (1) 1980 ZLR 96 the following factors should have been considered:

- (a) The nature of the article.
- (b) The role played by the article in the commission of the offence.
- (c) The possibility of the article being used again in the commission of the offence.
- (d) The effect of the forfeiture on the first appellant.
- (e) Whether by virtue of its value the forfeiture of the article would be disproportionate to the gravity of the offence.
- (f) In the case of an article of considerable value like a motor vehicle, whether it has been used previously for a similar purpose.

None of the above factors appears to have exercised the trial court's mind. In particular two aspects are uppermost, the possibility of the motor vehicle being used again in the commission of a similar offence and whether it was previously used for a similar offence. The trial court merely focused on the seriousness of the offence. There is justification in interfering with the order of forfeiture.

Notwithstanding the hiccup on forfeiture, the sentence that was imposed was amply justified. In that regard, the trial court properly exercised its discretion. The quantity of dagga involved is one of the highest our courts have dealt with. As was held in *Alfrenzi Nhumwa v S* SC 40-88 a sentence induces a sense of shock if general principles regarding quantum are disregarded. It was further held that it is not the duty of an appellate court to interfere with the discretion of a sentencing court merely on the ground that it might have imposed a different sentence. If a sentence conforms with relevant principles, even if it is severe the discretion of the sentencing court will not be interfered with.

Accordingly it is ordered as follows:

1. The appeal against conviction and sentence is hereby dismissed.
2. The order of forfeiture in respect of Toyota Hiace motor vehicle, registration number AEI 6094 is hereby set aside.

MUZOFJA J agrees

Rubaya and Chatambudza, appellants' legal practitioners
National Prosecuting Authority, legal practitioners for the respondent