TELLMORE MANWERE
and
SEBASTINE TANAKA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA and MUZENDA JJ
MUTARE, 16 October 2019 and 28 November 2019

Criminal Appeal

J Mangwende, for the Appellants
Mrs *J Matsikidze*, for the Respondent

MWAYERA J: The appellant was convicted and sentenced for contravention of s 78 (1) of the Forest Act [*Chapter 19:05*]. The appellants were convicted of having removed 32 gum trees by cutting them down unlawfully and without authority from Forestry Commission of Zimbabwe. The appellants were sentenced to 24 months imprisonment of which 4 months imprisonment were suspended on condition of restitution of the complainant. Aggrieved by both conviction and sentence both the appellants lodged the present appeal with this court.

The respondent partly opposed the appeal in that it conceded the sentence imposed was unduly harsh, whilst it opposed the appeal against conviction. The appellants raised grounds of appeal as follows:

> "Add Conviction
> 1. The trial Court erred in disregarding the fact that there was no evidence linking the accused person to the cutting of the trees.
> 2. The trial Court erred in disregarding the fact that there was no evidence showing any transport system to ferry the logs from the alleged crime scene.
> 3. The trial Court erred in placing credence in witness evidence of Artwell who had a peculiar interest to safe guard his job by ensuring that anyone was charged and convicted as the trees has been cut under his watch.
> 4. The trial Court erred in accepting that the Appellants were the persons who cut down the trees whilst not giving due weight to the fact that no tool, cart or any material was discovered that had been used in the commission of the alleged crime.
> 5. The trial Court erred by finding the accused persons guilty based only on circumstantial evidence.
> 6. The trial Magistrate erred by ignoring evidence which tended to be in favour of the accused person."

> "Add Sentence
> 1. The trial Court erred by failing to give due weight to the following mitigatory factors which would have resulted in a lessor sentence…."

The brief facts informing the charge are that both accused persons on 10 February 2019, cut down gum trees and hid the poles in their village. The appellants were seen by Artwell Mushowe who then laid an ambush for the appellants. The accused later came to collect the poles and as they tied the poles for collection they were intercepted and then arrested. It is clear from the grounds of appeal against conviction that the appellants are questioning the finding of the court and its reliance on the witness evidence.

It is apparent in this case that gum poles were removed from the forest and that both appellants were apprehended at or close to the pile while tying the poles. The court *a quo* had to decide on whether or not from the evidence adduced the State had discharged the required onus of proving the case beyond reasonable doubt. The court *a quo* did not hold the appellants' explanations to be probable and reasonably possibly true given the evidence adduced by the State. The first appellant denied all allegations pointing out his attention was drawn to the scene by people talking. The second appellant denied saying the poles were not at his residence and that on the day in question he was with his wife.

The findings of the court *a quo* were based on credibility. The court was impressed by the State witnesses and not appellants. It is settled that credibility or otherwise of witnesses is a domain of the trial court. The findings of fact are not lightly interfered with. It is only when the factual findings are at variance with the facts on record that the appellate court can interfere with the findings of the trier of fact who for the obvious reasons has the opportunity to hear, observe and assess the witnesses.

The main witness Artwell Mushowe gave clear evidence of how the appellants were found in the vicinity of the stolen poles securing same for purposes of ferrying the poles away. The appellants themselves do not dispute being in the vicinity of the stolen poles. The witness was well known to both appellants and as such no question of mistaken identity. In fact at the time of arrest the witness conversed with the appellants who were apologetic. It is also on record that the witness and appellants enjoyed cordial relations hence the trial court found no reason why the witness would have falsely incriminated the appellants. That the witness Artwell Mushowe was a security guard cannot be held against him given the totality of evidence. The bare denials by the appellants and the fact that they were found bundling the poles for purposes of later ferrying supports the finding of the court *a quo*. The conviction was therefore well-founded on evidence anchored on the record. The findings of the court *a quo* on both facts and law can therefore not be faulted.

Turning to the sentence imposed it is apparent the court *a quo* did not give due weight to the circumstances of the commission of the offence, mitigatory and aggravatory factors. Lip service was paid to the laid out sentencing principles of seeking to strike a balance between the offence and the offender while at the same time tempering justice with mercy.

A reading of the penalty provision of the relevant charge provides for the option of a fine. It has been said on countless times by this court that to consider imprisonment were the penalty provision gives the option of a fine without cogent reasons is a misdirection. Imprisonment is a preserve for the very bad and serious cases not minor infractions. In casu both appellants were first offenders, family men with dependants. The value of the poles forming the subject of the offence was given as $320-00 most of which were recovered. The court opted for imprisonment of which no portion was suspended on conditions of good behaviour. There are no reasons recorded why first offenders were not granted the opportunity to have a suspended prison term act as a deterring factor. Punishment is not meant to break the individual but should be appropriately considered so as to have the positive effects of rehabilitating the offender.

The reasons for sentence are devoid of the thought process of how the trial court discarded the other sentencing options namely a fine and or community service. To this end therefore the court *a quo* did not properly exercise its sentencing discretion. We are at large to interfere with the sentence which in the circumstances is viewed as unduly harsh. In the result the appeal against conviction is dismissed and the appeal against sentence is upheld

Accordingly it is ordered that:

1. The appeal against conviction is dismissed.
2. The appeal against sentence succeeds. The sentence imposed by the court *a quo* is set aside and substituted as follows:

   Each accused is to pay a fine of RTGS$500-00 or in default of payment 3 months imprisonment. In addition 3 months imprisonment is suspended for 3 years on condition accused does not within that period commit any offence involving dishonesty for that he is sentenced to imprisonment without the option of a fine.

MUZENDA J agrees_____

Chiwanza & Partners, appellants' legal practitioners
National Prosecuting Authority, State's legal practitioners