

FIBIAN MUNYUKI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA & MUZENDA JJ
MUTARE, 27 November 2019

Criminal Appeal

C Ndlovu, for the appellant
Ms T. L Katsiru, for the respondent

MUZENDA J: On 7 June 2019 the appellant was arraigned at Mutare Magistrates Court facing a charge of “unlawful dealing in or possession of precious stones” in contravention of s 3 (1) of the Precious Stones Act [*Chapter 21:06*]. The state alleged that on 25 December 2018 and at Sakubva Bus Terminus, Birchnough – Mutare Road, the appellant and one Kumbirai Karani, unlawfully dealt in or possessed 5 pieces of diamonds weighing 14, 80 carats and valued at \$1 267-17 without being exempted in terms of the said Act. At the close of the state case Kumbirai Karani was discharged, the appellant was put on his defence. He was subsequently convicted and sentenced to 5 years imprisonment. The 5 pieces of diamonds were forfeited to the state and were to be handed over to the Ministry of Mines.

On 3 September 2019 the appellant noted an appeal against both conviction and sentence and spelt out the grounds of appeal as follows:

1.0 Ad conviction

1.1 The learned Provincial Magistrate grossly erred to convict the appellant when there were gross inconsistencies in the evidence of the witnesses. The two state witnesses conflicted each other on where the diamonds were allegedly recovered from as one indicated that the diamonds were recovered from the appellant’s right hand, whilst the other one indicated that the diamonds were recovered from appellant’s right trousers’ pocket.

1.2 The court *a quo* erred grossly when it made a finding that the appellant had implicated the other co-accused as the owner of the diamonds, hence was the one

who was in possession of diamonds. That finding by the court is both factually and legally faulty.

2.0 Ad Sentence

The sentence that was imposed by the learned Provincial magistrate is disturbingly harsh in its excessiveness as to induce a sense of shock and the High Court is going to interfere with it in that:

- (i) the court *a quo* erred when it did not make a finding that the reasons that were proffered by the appellant amounted to special circumstances.
- (ii) the court *a quo* did not give reasons why it reflected the reasons proffered by the appellant were really special reasons.

BACKGROUND

According to the state precis, the appellant was employed as a police detail by the Ministry of Home affairs and resided at 2914 Crescent, Warren Park, Harare. On 25 December 2018 at around 1800 hours, Detective Assistant Inspector Dhliwe Mpfu received information that the appellant was in possession of diamonds and had boarded a vehicle travelling from Chiadzwa to Mutare. The detective then teamed up with Detective Assistant Inspector Mashizha, Detective Sergeant Major Manhivi and Detective Constable Chidhakwa and proceeded to intercept the appellant at Sakubva bus stop along Birchnough – Mutare road. The detectives identified themselves to the appellant by producing their police identity cards. Detective Assistant Inspector D. Mpfu searched the appellant and appellant was found with five pieces of diamonds in his right hand. The other members of the team were witnessing the search being conducted. The appellant implicated his co-accused as the owner of the recovered diamonds. Appellant did not have a permit authorising him to deal or possess diamonds. The five pieces of diamonds weighed 14.80 carats and were valued at \$1 267-17.

On the date of hearing of the appeal we allowed Mr *Ndlovu* to amend appellant's defective notice of appeal on the portion of the relief or prayer sought. That amendment was done by consent of the state counsel. In his submissions, appellant's counsel contended that the record exhibits material discrepancies between what is contained in the state outline, and also what is said by Detective Assistant Inspector Mpfu. In his own oral submissions Mr *Ndlovu* repeated that "there are also minute variations which are apparent from the evidence he gave

which if holistically considered” should have put Detective Assistant Inspector Mpfu’s credibility to question and create a reasonable, if not an actual doubt in the state case entitling the appellant to an acquittal. Mr *Ndlovu* attacked the evidence of Detective Assistant Inspector Mpfu stretching from the nature of the report the police detail got to the number of people who were alleged to have possessed diamonds, and more particularly as to where Detective Assistant Inspector Mpfu recovered the diamonds from. He urged the court to conclude that the detective’s narration of what transpired glittered with glaring inconsistencies. On p 24 of the record of proceedings the evidence of Detective Assistant Inspector Mpfu is captured as follows:

“accused was seated inside the motor vehicle on the front passenger seat. I observed accused putting his right hand, whilst it was still in his pocket, a struggle ensued eventually I recovered 5 pieces of diamonds clasped in his palm.”

Detective Assistant Inspector Mpfu was consistent on this aspect and we fail to see the alleged inconsistencies being relied upon by the appellant, in any event not every inconsistency affects the credibility of a witness.¹ On p 41 of the record of proceedings, Detective Constable Collen Chidhakwa told the court that:

“Detective Assistant Inspector Mpfu then searched accused and he recovered 5 pieces of diamonds from the accused (appellant)”

and on p 52 the police detective added:

“I saw Detective Assistant Inspector Mpfu putting his hand into the pocket and accused’s hand was also in the pocket.”

It is apparent the mere comparison of the two state witnesses’ evidence on record shows clearly what happened on the day in question. Upon search of the appellant by detectives, appellant reacted by trying to secure the 5 pieces of diamonds contained in his trousers pocket by clasping them with his right hand, the detective saw the appellant’s movement and placed his hand in appellant’s pocket, thereby recovering the diamonds from the appellant’s hand. We fail to see the nature of inconsistencies nor discrepancies that can affect the witnesses’ credibility. All in all the evidence of the police details shows a smooth flow of their narrations of the events and we see no basis of interfering with the founding of credibility by the trial court. The appeal against conviction has no merit and it is dismissed.

¹ See *S v Lawrence & Ors* 1989 (1) ZLR 29 (S)
S v Dube S-225-92

During the hearing of the appeal we asked Mr *Ndlovu* to address us on the aspect of appellant's appeal against sentence more particularly on whether on record there were special circumstances, he correctly in our view admitted that there were none. It was a wise concession and he went on to abandon the ground of appeal against sentence. The five year imprisonment is the mandatory sentence provided by the statute, in the absence of established special circumstances, and that onus lay on the appellant, the trial court had no option than to pass the mandatory penalty. There was nothing inducing a sense of shock on the aspect of sentence and equally the ground of appeal against sentence has no merit.

Consequently the following order was given:

The appeal be and is hereby dismissed.

MWAYERA J agrees _____

Gonese and Ndlovu, appellant's legal practitioners
National Prosecuting Authority, state's legal practitioners