LIKANI SITHOLE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 27 November 2019

**Criminal Appeal (Reasons for Judgement)**

*N Nhambura,* for the appellant
Mrs *J Matsikidze,* for the respondent

MUZENDA J: On 27 November 2019 we dismissed this appeal in its entirety and indicated that our reasons for dismissal would follow, these are they.

On 10 April 2019, the appellant appeared on charges of contravening s 131 (1) (a) as read with s 131 (2) (e) of the Criminal Code for unlawful entry into premises in aggravating circumstances, he was convicted after a full trial and sentenced to 36 months imprisonment with 6 months imprisonment being suspended for 5 years on the usual conditions of future good behaviour, a further 12 months were further suspended on conditions of restitution. When the appellant appeared for trial he was unrepresented.

The appellant noted an appeal against both conviction and sentence outlining the following grounds:

AD CONVICTION

1. The honourable court *a quo* erred in convicting the appellant based on circumstantial evidence when in fact the guilt of the appellant was not the only reasonable inference to be drawn from the circumstances of the case.
2. The honourable court *a quo* erred in disregarding the defence raised by the appellant when in fact the defence was reasonably probably true *vis-à-vis* the fact that the defence withstood the rigors of cross-examination.

AD SENTENCE

The honourable court *a quo* erred in sentencing the appellant to restitute the sum of $2 500-00 to the complainant when in fact no proper assessment or evaluations of the unrecovered goods had been made.

BACKGROUND

The state alleged that on the period extending from 15 July 2018 to 27 January 2019, at Tom Homestead, Gwama Village, Chief Mutema Chipinge, the appellant unlawfully, and intentionally entered Otilia Chiyangwa's bedroom through breaking the window which was closed and then stole various clothing, a solar panel and two black Omega speakers belonging to the complainant. On 27 January 2019, the complainant arrived from South Africa and discovered that her house had been broken into. On 29 January 2019 complainant reported the matter to the police, leading to the recovery of some of the property stolen. Complainant also managed to recover some of the stolen property from people who had bought from the appellant.

The appellant pleaded not guilty to the charges, and in his defence, stated that he shifted clothes and property of his young brother and son from their homes due to incessant burglaries which were taking place. He did not know part of the property he shifted to his home belonged to the complainant. He then called his son, Kenneth Sithole to inform him what he had done and the reason for doing so. He denied ever going to complainant's residence at all.

It is not disputed by the defence that the complainant left for South Africa in 2018 leaving her property secured in her house, when she returned in January 2019, she discovered that her house had been broken into and property stolen. Some of the stolen property was recovered from the appellant by the police during investigations, the other property was recovered by the complainant from third parties who had bought that property from the appellant.

In assessing evidence adduced by the state the learned magistrate properly in our view applied circumstantial evidence and convicted the appellant. The law regarding circumstantial evidence is settled:

> "(i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.
> (ii) these circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.

(iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else; and

(iv) the circumstantial evidence in order to sustain conviction must be complete and inescapable of explanation by any other hypothesis than that of guilt of the accused but should be inconsistent with his innocence." [1]

The record of proceedings clearly in our view shows that the complainant's house was broken into through a closed window and property was stolen. That is not in dispute. The stolen property was recovered from the appellant's place and other from people who had bought such property from the appellant. The property so recovered belong to the complainant. We do not accept the argument by the state which submitted in its heads that it is not clear as to how the complainant's property was broken into, and that complainant's relatives might have taken the property, that inference is farfetched in our view, first the appellant does not say he got the property from complainant's contacts, secondly in its own papers the state contends that complainant's house was broken into and that various properties were stolen, some of which was found in appellant's possession and others from those who had bought from the appellant. It is true that an accused has no onus to prove his innocence but in this case surely he has a duty to prove his possession as an innocent one. He ought to have at least called his brother and son to come and explain how they came to possess complainant's property which was found in appellant's possession or sold by the appellant. The appellant did not challenge much of the state's evidence and could not allege that the same property which complainant claimed to be hers belonged to appellant's brother and son, he stated that he was willing to compensate complainant why would appellant offer to compensate complainant if his possession or acquisition of that property was innocent? Further, if the appellant's intention was to safeguard the property why would he sell that property to third parties?

It is because of the foregoing analysis that we felt the concession made by the state was not proper, in our view, and we did not accept it.

We see no fault in the approach used by the trial court and are satisfied that the conviction of the appellant is unassailable.

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[1] R v Bloom 1939 AD 188 at p. 202 -203
S v Makunyanga HH 179/2013
S v Shomwa 1987 (1) ZLR 215
R v Sibanda1965 RLR 363

As regards sentence, the value of $2 500-00 constituted value which was not recovered and the appellant never challenged that value at all. The value was supplied by the complainant and there is no misdirection by the court *a quo* in ordering restitution amounting to that value.

Hence the following order is returned:

The appeal be and is hereby dismissed in its entirety.

MWAYERA J agrees _____

*National Prosecuting Authority*, state's legal practitioners
*Zimbabwe Lawyers for Human Rights*, accused's legal practitioners