

KENIAS MACHIRIKA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MUSHORE JJ
HARARE, 15 November 2016 & 22 November 2017

Criminal Appeal

A Rubaya, for the appellant
Ms S Fero, for the respondent

HUNGWE J: The appellant was convicted by the court of the magistrate for the crime of theft as defined in s 113 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to 10 years imprisonment of which 2 years imprisonment was suspended for 5 years a condition of good behaviour, and a further two years on condition he makes restitution through the Clerk of Court at Chivhu in favour of the complainant.

He appeals against both conviction and sentence.

As against conviction, the appellant raises the single ground that the circumstantial evidence led by the State was not so conclusive as to secure a conviction.

As for the appeal against sentence, the appellant contends that the sentence imposed by the court a given was so harsh as to induce a sense of shock.

The single issue in this appeal is whether the circumstantial evidence relied upon in convicting the appellant sufficiently proved the guilt of the appellant beyond a reasonable doubt. Put differently the question raised is whether the evidence led at trial led to no other possible inference besides that it is the appellant who committed the crime.

The facts in the matter are generally not in dispute. There can be summarised as follows. The complainant Joseph Nhau, a haulage truck driver was approached by four men as he inspected his load in Chivhu around 22h00 hours on the day in issue. These men asked for a ride on his truck to Harare. He was Harare bound. He turned the men's request down. Later, as he drove his truck, he felt that something was not right on the manner the motor was running. He pulled off the road some 10 km outside Chivhu in order to inspect his truck whose wheels were now binding. When he turned to look behind from inside the horse cab, he was attacked by catapult fired projectiles. He saw one man inside his trailer. Another man was tampering with the braking system ducts.

He managed to get out of the cab. As he did so he noticed that his assailants were armed with catapults. They were approximately four in number. He decided to seek police Chivhu's assistance. As he walked away from this haulage truck he saw a brown Peugeot sedan motor vehicle. It dipped its head lights as it approached his truck. It slowed down and parked.

He assumed that the driver was part of the syndicate which had attacked him.

When he got to the Police Station he reported the attack by catapults. He also reported that a brown Peugeot motor vehicle had apparently arrived at the scene and joined this group as he left. He accompanied police officers back to the truck. Upon inspection he discovered that his truck had been interfered with. His personal items including cash, compact discs, food, mobile phone and his catapults had been stolen.

The police officer assigned to the case knew the appellant, a resident of Chivhu, as an owner of a Peugeot sedan motor vehicle fitting the description given by the complainant. He apprehended the appellant as his suspect. He proceeded to his residence where he found two motor vehicles parked on the appellant's premises, including a brown Peugeot sedan vehicle. A search of the appellant's residence yielded nothing. He searched the motor vehicles. In the brown Peugeot sedan vehicle he recovered a catapult under the passenger seat. The catapult was recovered in the accused's presence. He took this as an exhibit. When he got to station, where the complainant had remained, he asked the complainant whether there could be anything by which he could identify his catapult before he disclosed the recovery of the catapult. The complainant at that point indicated that his catapult is marked "JN", which are his initials, and the leather rubber joint is marked similarly in blue ink.

Upon further examination the officer confirmed the presence of the letters “JN” as well as the blue ink marks. These were where complainant said they will be found. The appellant was then charged with the crime of theft.

The appellant in his defence does not dispute that the catapult was found inside a brown Peugeot sedan that was parked at his residence. However, he has an explanation as to how the catapult was found where it was. He claims that this was his catapult which he had bought in Harare when he had problems with his vehicle brakes. In fact he says that he sent one of his witnesses to Mbare Musika. He needed the thin rubber band holding the main rubber strip to the wooden handle of the catapult. He did not need the rest of the set, hence he undid the set. He also disputed that the catapult bore the initials “JN” and that there were ink marks on the rubber and leather joint.

In a well-reasoned judgment the court *a quo* identified the issues correctly when it pointed out that the case hinged more on the sufficiency of the circumstantial evidence led during trial evidence than the direct evidence. The court analyzed the credibility of the complainant and correctly found that he was a credible witness who had given his evidence objectively. The court then went on to identify the critical pieces of evidence which suggested an inference of guilt in respect of the appellant. For example, the court noted that the explanation of the state of the catapult by the appellant was false as the catapult set had been undone in court rather than in the circumstances that appellant described. It found his explanation as to how he came into possession of the catapult therefore false. It also found as highly probative and corroborative the existence of catapult belonging to the complainant in appellant’s motor vehicle. The court did not lose sight of the importance of the fact that the complainant was able to give identifying marks to the investigating officer before he was alerted on the finding of catapult in appellant’s vehicle. It is instructive that the investigating officer asked the complainant to describe what his mark of identification would be and where these were to be found. This was well before the complainant was shown the catapult recovered from the brown Peugeot Sedan at appellant’s residence. The court *a quo* also found further corroboration of the complainant evidence against the appellant when the complainant identified the motor vehicle used by his assailants as a brown Peugeot Sedan. It was this observation by the complainant which helped Police to narrow down their list of suspects to one person, the appellant. He was the driver/ owner of such a motor vehicle.

Clearly, when the investigating officer put out word that the appellant must report to the station, he had no idea that he had picked the correct person. When he went to search appellant's residence, he did not know whether he would recover anything linking the appellant to the crime. Indeed a search of his residence did not yield anything of interest to him. It was a search of the brown Peugeot sedan motor vehicle which yielded the all-important set of catapult. They were under the passenger seat.

The appellant's version was rejected by the court *a quo* for reasons given. We are unable to find any fault in the reasoning of the court *a quo* regarding where the probabilities in this case lay. In fact the court *a quo* gave cogent reasons for disbelieving the appellant's version regarding the ownership of the catapult. The court had sight of this exhibit. It found that indeed the initials "JN" appear inscribed on them.

Generally an appeal court will not interfere with the decision of a trial court based purely on a finding of fact, unless it is satisfied that the finding was based on an erroneous evaluation of the facts taken as a whole; or it is satisfied that the judge gave no weight or insufficient weight to those considerations which ought to have weighed with him; or that he was influenced by considerations which ought not to have been taken into account or should not have been given so much weight. That principle is trite. See *Levy v Modus Publications (Pvt) Ltd* 1998 (1) ZLR 229 (S); *S v Mlilo* 1982 (2) ZLR 175(S).

In the circumstances I am unable to find that the lower court erred in the application of the principles relating to circumstantial evidence. Once the court found as fact that the catapult found inside the appellant's brown Peugeot Sedan motor vehicle belonged to the complainant, the appellant had a lot of explanation to make as to how the catapult got there. The complainant gave a simple and straight forward explanation as to how they got there. They were stolen on the night he was attacked outside Chivhu.

The appellant gave an incredible explanation which cannot be said to be possibly true. He claimed these were his. He claimed there was no "JN" marked on them. Both claims are palpably false. They have been demonstrated to be so.

As for the sufficiency of evidence, which is clearly circumstantial in nature, I must observe that there is no magic in the word circumstantial. Circumstantial evidence is unrelated facts that, when considered together, can be used to infer a conclusion about something unknown. It is

information or testimony presented by a party to a civil or criminal action that permits a conclusion that indirectly establishes the existence or non-existence of a fact or event that the party seeks to prove. Most criminal convictions are based, at least in part, on circumstantial evidence that sufficiently links the criminal to the crime. To put it in other words for earlier comprehension, evidence consists in three broad senses as follows;

- a) words uttered, and thing exhibited in Court.
- b) facts proved by those words or things, which are regarded as ground work of inference as to other facts not so proved; and
- c) relevancy of particular facts to the matter under scrutiny or inquiry.

Where the sole basis for a conviction is circumstantial evidence the following conditions must be met:-

- (i) the circumstances for which an inference of guilt is sought to be made must be fully proved;
- (ii) all the facts must be consistent with the hypothesis of the guilt of the accused;
- (iii) the circumstances must be of a conclusive nature pointing unerringly towards the guilt of the accused; and
- (iv) the circumstances should, to a moral certainty, actually exclude every hypothesis except the one sought to be proved.

See *Attorney-General v Paweni Trade Corporation (Pvt) Ltd & Others* 1990 (1) ZLR 24 (SC).

In the present case, four men initially approached complainant as he inspected his load at Chivhu. Later when his engine failed he found men on his truck. They attacked him using catapults. He fled. As he did so, he saw a brown Peugeot sedan vehicle slow down and stop at his truck where the assailants were stealing his property. Amongst the stolen items was his own catapult which was later found in a vehicle fitting the description of the car which was driving behind his truck.

In these circumstances there can be no doubt that the appellant was part of the gang that approached the complainant in Chivhu, and which gang later attacked the complainant after interfering with his brakes. That is the only reasonable explanation as to why complainants catapult

was found beside the appellant's motor vehicle which was by then parked at his residence. He was properly convicted. The appeal against conviction therefore fails.

Although the appellant noted an appeal against sentence no meaningful submissions were made against sentence at the hearing. The appellant must be deemed to have abandoned the appeal against sentence. In the result the appeal is dismissed in its entirety.

MUSHORE J agrees.....

Rubaya & Chatambudza, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners