MUNYARADZI MUKATSA
and
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE AND BERE JJ
HARARE, 21 JULY 2015 AND 6 SEPTEMBER 2017

Criminal Appeal

Mr *S Rugwaro*, for the appellant
Mr *R Chikosha*, for the respondent

BERE J: This is a seemingly very simple case of theft in terms of section 113 (1) (a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

Having pleaded not guilty to a charge of theft the appellant was convicted by a Magistrate sitting at Mbare Magistrates court and sentenced to 17 months imprisonment of which 6 months were suspended on the usual conditions of future good conduct. A further 3 months were suspended on condition the appellant pays restitution in the sum of nine hundred dollars (US$900-00) to the complainant. The remaining 8 months were suspended on condition the appellant performs 280 hours of community service.

Aggrieved by his conviction, the appellant filed this appeal in order to challenge his conviction.

THE BACKGROUND

Before I deal with the appeal itself I propose to give the background to this case in detail by providing those facts which were not in dispute. On 14 April 2014, the complainant, Howard Muchoko (Howard) who resides in Norton had three of his laptops valued at US$2200-00 stolen from him.

Brighton Mberi, (Mberi) an Information Technology (I.T) consultant, is based in Harare and operates from number 43 Robson Manyika road, Harare. Apart from working as an I.T. consultant, Mberi buys and sells laptops. He frequently flights advertisements in newspapers to this effect. On the same day that is, 14 April 2014, Mberi got a cellphone call from a lady who advised him that she was selling laptops. Mberi advised this lady that he did not have money at that stage. After an hour or so after talking to this lady, Mberi got a text message on whatsApp from his friend, Howard, advising him that he had some three laptops stolen from him. Mberi was given the specific details of the stolen laptops.

Upon seeing the whatsApp message from Howard, Mberi then recalled the call from the lady who had cellphoned him saying she was selling laptops. Mberi and Howard decided to set a trap for this lady. Mberi then called the lady and told her that he now had the money to buy the laptops and that she should bring them to his office as per his advertisement. The lady promised to deliver the laptops. In the meantime Mberi advised Howard to immediately report to his office and verify the Laptops which this lady was going to deliver to him. When Mberi was expecting to see the lady, the lady then cellphoned him and advised him that owing to her tight schedule she was no longer able to personally deliver the Laptops, but her brother by the name Munya would effect the delivery of the Laptops.

As fate would have it on the same date Munyaradzi Mukatsa (the appellant), a 32 year old taxi driver operating from the corner of 5th street and Central Avenue, Harare who had his taxi parked, waiting to be hired was approached by a man who was driving his motor vehicle. This man hooted and beckoned the appellant to get to his motor vehicle.

When the appellant rushed to this man he noted that apart from this man there were two ladies in the motor vehicle. The man told the appellant that he was rushing to Borrowdale for a meeting and therefore he wanted to give the appellant "a job". One of the ladies in the motor vehicle quickly scribbled on a piece of paper the following "$350, FI Laptop, Brighton 0772322871, Corner Robson Manyika and 2nd Merchant House 3rd Floor," The scribbled paper summarized the directions for the appellant. The lady also took the appellant's taxi registration number, name and cellphone number before the car was driven away.

The appellant then delivered the Laptop and upon delivery Mberi spoke to the lady over the cellphone in the presence of the appellant after which Mberi gave the appellant $330-00 for

onward transmission to the lady which the appellant did after the lady had phoned him. The lady then paid the appellant for his taxi hire services.

At the time the appellant delivered the first Laptop, Mberi spoke to the lady who promised to bring the second Laptop. The lady cellphoned the appellant to deliver this laptop, which the appellant did. The lady and Mberi spoke over the cellphone in the presence of the appellant and agreed that the Laptop would cost US$400-00.

When the appellant delivered the second Laptop to Mberi, the latter asked the appellant to fill in his personal details on a document which the appellant did. The appellant wrote his name, his identification number, and physical address. Mberi did not sign this document. It is not clear what sort of document this was but Mberi did not sign it.

It was when the appellant delivered the second Laptop that the allegations of the Laptops having been stolen were brought to the appellant's attention to which the appellant pleaded his innocence.

It was from these facts that the appellant found himself being charged and convicted of theft.

The state facts are very scanty in that they do not quite reveal what exactly the appellant did to warrant his prosecution. The appellant's defence in the lower court was quite simple. His defence was that all he did on the day in questions was to simply innocently deliver the laptops to Mberi- the buyer, and that he did not know that the laptops had been stolen.

When the appellant filed his notice of appeal against conviction the grounds were framed as follows:

> "2. GROUNDS OF APPEAL
> 2.1. the court *a quo* erred in its findings and in particular in rejecting the appellant's explanation on how the appellant came to be in possession of the stolen laptops, when such an explanation was a reasonable.
> 2.2. the learned trial magistrate erred in drawing adverse inferences against the accused person and coming to a conclusion that he acted in common purpose with other people when in fact there was no such evidence before the court and or where such an inference was not the only possibility.
> 2.3 the court *a quo* erred in convicting the appellant on the basis of circumstantial evidence in the absence of credible evidence to support that conclusion.

2.4. the court *a quo* misdirected itself by shifting the onus of proof to the appellant, to prove his innocence in a case where the state had failed to prove its case by establishing the essential elements of theft.

2.5 the court *a quo* erred in convicting the appellant of theft when the facts on record do not and had failed to establish that the appellant personally or in common purpose with the others stole from the complainant.

2.6. the court *a quo* misdirected itself by placing undue emphasis on its findings (which was wrong) that the conduct of the appellant upon apprehension amounted to alerting his co-criminals."

It was on this basis that the appellant prayed for the verdict of the court *a quo* to be set aside and that he be found not guilty and acquitted.

Although the judgment of the court *a quo* does not come out quite clearly on what principles of law the learned magistrate relied on in convicting the appellant, a reading of the judgment suggests that the learned magistrate was relying on the doctrine of circumstantial evidence and common purpose. I propose to deal with these two principles and the other general principles of our criminal law before I proceed to analyse in detail the judgment of the court *a quo* in the light of the evidence that was presented.

The starting point that must guide the court in criminal proceedings before one starts to analyse the evidence is an appreciation of the time honoured and accepted legal position that the onus to prove the guilt or otherwise of the accused person is thrust upon the state and not the accused person. This is an elementary position of our law. If an accused gives an explanation, it can only be rejected by the trier of facts if that explanation is shown to be false beyond reasonable doubt. If there is a reasonable possibility of the explanation being true, then no adverse inferences must be made against the accused, he must be given the benefit of doubt by being acquitted. This position of our law is settled and it was so settled as far back as 1937 by GREENBERG J in the much celebrated case of *R* v *Difford*[1] in the following:

> "---no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable it is false. If there is a reasonable possibility of his explanation being true, then he is entitled to his acquittal"

[1]. 1937 AD 370 at p. 373

Similarly, in *R* v *M*,[2] a case which was decided almost nine years after *Difford's* case, DAVIS AJA found himself echoing the same principle of our law in the following words:

> "And, I repeat, the court does not have to believe the defence story, still less has to believe it in all details: it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true-----"

See also *S* v *Kuiper*[3], *S* v *Chingunga*[4] and G Feltoe's *Criminal Defender's Handbook*[5].

As I have already highlighted earlier on, the learned magistrate found the appellant guilty on the basis of circumstantial evidence. Again, the legal position on circumstantial evidence is settled. The learned judge of appeal in *R* v *Bloom*[6] put the position of the law by referring to "two cardinal rules of logic which govern the use of circumstantial evidence in criminal trial as follows:

> "(i) The inference sought to be drawn must be consistent with all proved facts. If not the inference cannot be drawn.
> (ii) The proved facts should be such that they exclude any reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct."

When considering guilt by inference one also need to bear in mind the provisions of sections 123-125 of the Code.[7] In all these sections all the accused person is expected to do is to give a reasonable explanation of his possession of the property. The Act makes it clear that no adverse inference pointing to the guilt of an accused can be made as long as he gives a reasonable explanation for his possession. Further, the Act is clear that where an inference has to be drawn it must amount to be the only reasonable one to be drawn in the circumstances.

It will also be noted that the court *a quo* sought to find criminal liability against the appellant by invoking the common purpose doctrine which has now been refined in our law by CHAPTER XIII of the Code. The code defines *inter alia* who a co-perpetrator in a crime is and what common purpose in a criminal enterprise entails.

---

2. 1946 AD 1023 at p. 1027
3. 2000 (1) ZLR 113 (S) at p. 118 B-D
4. SC 21/02
5. P. 113
6. AD 188 at 202 at 203
7. Criminal Law (Codification and Reform) Act [Chapter 9:23]

It is with all these highlighted principles of our law in mind that I will now look at the judgment of the court *a quo* in the light of the notice of appeal filed by the appellant.

The starting point in the court *a quo's* judgment is that the learned magistrate sought to justify that the appellant was working in cahoots with the two unknown ladies who gave him the Laptops to deliver to Mberi. The learned magistrate went on to reason as follows:

> "The accused said he met the people at Corner S. Avenue and Central Avenue who then send him to deliver something at Robson Manyika. He said these ladies had the phone numbers of the person to whom the Laptops were to be delivered. The reason why they send the accused is because they were busy. However, there is no evidence why Brighton (Mberi) failed to come pick them. This, the accused should have thought of to ring alarm bells. This would be the first point to dispute his innocent involvement."[8] *(sic)* (my emphasis)

With respect to the trial Magistrate, this is false reasoning. The failure by Mberi to personally pick up the Laptops on his own was never an issue in the proceedings and it would not have suddenly assumed relevance at judgment stage. In any event, Mberi explained that the seller of the Laptops said she was unable to deliver the Laptops but would send Munya (who happen to be the appellant). There was nothing criminal about it and to this far, the issues commended upon by the learned Magistrate could not possibly have stripped off the appellant his jacket of innocence.

In paragraph 3 of her judgment the learned magistrate went on to question why the appellant was trusted by the Laptop sellers to the extent of being authorized to receive payment on their behalf. The court *a quo* went on to say that the appellant's story would have made sense if these sellers of the laptops had met the appellant in an office or his place of residence. The learned magistrate then concluded by saying:

> "Such trust can never be bestowed on a stranger, this is unbelievable. These people ought to have been working in common purpose. The accused himself should have been surprised. It is not enough to say that they took his details, i.e. his taxi's registration number and personal contact details. No one in his right sense of mind would do that."[9]

In my view, the reasoning by the learned magistrate was quite strange. In the first place, those who are familiar with the way taxi motor vehicles will appreciate that the majority of these

---

8. Record page 8
9. Record page 8

operators have no offices to talk about. Their officers are where their taxi motor vehicles are parked.

Secondly, the appellant explained during the hearing that, given the nature of his work, it was not unusual for him to get assignment from strangers as long as he took their contact number and they too, took his details like they did in this case. That, these Laptop sellers took his details was accepted by the court and was found out to be true as evidenced by the scribled paper which gave the appellant the directions to go to Mberi's place along Robson Manyika Avenue. In my view, there was nothing strange in the manner the appellant got an assignment from the Laptop sellers and there was absolutely nothing unusual with these people getting the appellant's details in the manner testified by the appellant and accepted by the trial court. The explanation given by the appellant was reasonably possible.

In paragraph 5 of his judgment, the learned went on to reason as follows:

> "The accused gave out his own personal details on a purported agreement of sale. Why would he do that if he was only a stranger? If those details were required, he should have contacted the ladies for their details. He did not. He could not give a satisfactory explanation for that."[10]

It is clear to me that the learned Magistrate totally misunderstood the evidence. There was no evidence led to the effect that an agreement of sale was signed by the appellant. The record of proceedings will show that of all the witnesses who testified, it was Mberi who said he invited the appellant to provide his details as someone who had brought the Laptops and not as the seller. This piece of evidence first came out when Mberi was giving evidence in chief and the relevant portion of the record captures the exchanges between the prosecutor and Mberi as follows:

"Q: How much did you pay?
A: $330
- At that time, he said he would bring the other 2.
Q: Were you issued a receipt?
A: No, he said he would write an affidavit upon bringing the other 2. ---.
Q: What was the role of accused?
A: He is the one who brought the Laptop and took cash.

[10] . Record page 8

On the second one, he brought it and he wrote the agreement of sale."[11]

It should be noted that when Mberi was cross-examined, he shifted from reference from his stance that the appellant had signed an agreement of sale. When Mberi was being cross-examined by the appellant's legal practitioner the exchanges on record went along the following:

"Q: You mentioned you asked the accused to put it in writing.
A: Yes I asked.
Q: What did you want him to write?
A: An agreement of sale
Q; Content
A: Full name and address, the Laptop and that he is the one who sold.
Q; Did he do that?
A: Yes
Q: What did he write?
A: The name, the price and the Laptops
Q: His address
A: I didn't see it
Q: His I.D No.
A: Yes
Q: Serial No. for Laptops
A: The C.I.D got in as he wrote the serial number
Q: In other words he was complying with what you told him.
A: When he wrote down I had told him I don't buy without agreements.
Q; So he wrote them because of the sell *(sic).*
A; He did not mention the seller. ---
Q: Do you have the agreement of sale
A: I left it at the police
Q: Did you sign it
A: No but he signed as the seller.
Q: <u>Did you sign as the buyer</u>?
A: <u>I didn't</u>
Q: When you asked from him to sign you knew the laptops were stolen.
A: We had not yet verified.
Q: It was suspicious
A: Yes
Q; So it was a way of delaying him?
A: It was standard procedure
Q: It was an affidavit form.
A; Yes
Q: Was there a commissioner of oath?
A: No

[11] . Record pp 32 and 33

Q: Which means the documents has not validity in law.
A: At that point, yes, but he signed it."[12]

Clearly, there was no agreement signed where the appellant gave out himself as the seller of the Laptops. If there was a sale agreement it ought to have been signed by both Mberi and the appellant. There was no such agreement. What is clear from what the appellant did was that he provided the details as requested or as instructed by Mberi. It is also clear from the record that Mberi was doing all this to give the owner of the Laptops, Howard and the police time to arrive in his office in order to have the appellant arrested. It was therefore wrong for the trial magistrate to make it as a finding of fact and borne out by the evidence in court that the appellant had signed an agreement of sale (which was a wrong finding) and then use that wrong finding to infer criminal liability against the appellant.

If Mberi wanted the details of the person who had delivered the Laptops to be provided (as what seems to have been the position in this case), if particular regard is had to the evidence of Mberi himself, there was certainly no need for the appellant to phone the ladies (the sellers) because he was the one who delivered the Laptops. The appellant gave a satisfactory or reasonable explanation for doing what he did. He complied with the instructions given to him by Mberi.

The concluding part of the learned magistrate's judgment sought to nail the appellant on the ground that he had refused to cooperate with the state witnesses and the police in order to facilitate the arrest of the sellers of the laptops. In this regard, the learned magistrate had this to say:

> "The accused is alleged to have refused to cooperate with the witnesses upon his apprehension. He actually alerted the ladies of what transpired. He tries to explain that he was disturbed to the extent of asking them why they sent him with stolen property. Any reasonable person would have done better than that. Instead of cooperating to nail them, he scares them away. This is not a sign of confusion or immaturity or naivety, it is clearly a sign of a person who actually intended to do what he did. His explanation was not plausible at all. Taking the above circumstances collectively, it would be very clear that the accused was not an innocent messenger but he was part of the deal."[13]

---

[12]. Record pages 39 and 42.
[13] . Record pp 8-9

It goes without saying that the inference which the learned magistrate sought to draw from the conduct of the appellant was not the only one which could have been drawn. To get a clearer picture of what happened one needs to go back to the record of proceedings to appreciate the sudden turn of events leading to the appellant's arrest by people who were not in uniform but who only later introduced themselves as police officers after the appellant had made an instinctive outburst to the sellers of the Laptops as to why they had sent him to deliver stolen items. The following is what the record contains and this is with specific reference to the exchanges between the appellant and his lawyer as the former was giving evidence in chief.

"Q: Describe the Laptop
A: It was sealed but bigger. They phoned each other again. When I arrived, I handed over the lady phoned Brighton (Mberi) and asked if he had arrived *(sic).* They talked about $430 and not $450.
Q; Did you write your details?
A: Yes, physical address, I.D number and phone number. On physical address, I wrote an address of where I used to stay, that is in Greendale.

After that I then saw him come with many people. He took my phone and switched it off. I was surprised and asked why he switched off my phone. The lady was phoning me asking where I was

Q: Before or after switching it off?
A: I took the phone and switched it on

Many people arrived and indicated that I was the person. I was shocked because I didn't know what was happening. Brighton said I was bringing him property that was not genuine. The lady phoned me again and I asked her why she sent me with stolen property.

The people said they were police officers, I didn't believe them because they were not in uniform. I thought they were thieves. One of the police officers answered my phone and told her to meet at Merchant house.

Q; Who said lets meet at Merchant House.
A: The policeman
I asked why they made me sign yet I was just a taxi driver. The police said they just wanted to delay me.
Q: You were then arrested?
A: They produced their I.D that is when I learnt they were police officers."[14]

[14]. Record p. 48

Later when the appellant was cross-examined by the prosecutor on the issue of allegedly alerting the real culprits (the ladies), the appellant had this to say:

"Q: At which juncture did the state witness tell you there were stolen property?
A: Second incident
Q: Why did you phone the lady in the presence of the police?
A: I was innocent
Q: If you were innocent why did you not comply?
A: The police didn't come at once, two men came first."[15]

What one can decipher from the circumstances under which the appellant was arrested is that it was infact the conduct of Mberi (switching off the appellant's cellphone) and the conduct of the police officer (a stranger who asked the lady to meet him at Merchant House) which scared away the ladies. There is evidence of naivety or lack of tactical approach in dealing with suspects in this case. The two witnesses created total confusion which created an opportunity for the suspects to escape. The confusion that is apparent at the time of the appellant's arrest does not suggest that the appellant refused to cooperate with the state witnesses in order to have the suspects arrested. The outbursts by the appellant when he querried why the suspects had sent him to deliver dirty property was, in my view an instinctive reaction justified by the sudden turn of events as experienced by the appellant, who all along thought he was merely carrying out his routine duties as a taxi driver.

There is nothing on record to justify that the only reasonable inference that could be drawn against the appellant was that he was part of the suspects. That is too remote a conclusion to arrive at. In my view, the explanations given by the appellant were quite reasonable in the circumstances.

The new section, 196A[16] which was introduced by the General Laws Amendment Act 2016 now defines the liability of co-perpetrators in greater detail. It is clear from this section that before one can be found guilty as a co-perpetrator, the state must have led sufficient evidence to satisfy the requirements that the co-perpetrators committed the crime in association with each other. Again the state case was terribly limping in this regard.

---

[15]. Record p. 54
[16] . Amendment to the code.

Whichever way one looks at the evidence that was presented to the court *a quo*, one cannot avoid coming to the inevitable conclusion, as I come to, that the appellant was convicted against the weight of evidence. The conviction was indeed a traversity to the very basic principles of our criminal law.

This appeal is upheld and the appellant is found not guilty and acquitted.

Hungwe J agrees……..

S Rugwaro Legal Practitioners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners