HH 640 /17
CA 787/10
CRB BNR 97/10

ONISMAS CHIGWENDE
versus
THE STATE

IN THE HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE 16 SEPTEMBER 2014 & 27 SEPTEMBER 2017

Criminal Appeal

E. Jena, for the appellant
R. Chikosha, for the respondent

BERE J: In this case the state filed a notice conceding that the conviction as it stands is unsupportable. Fully appreciating the informed stance taken by the respondent's counsel, the case was therefore withdrawn from the roll to be dealt with in chambers. I proceed to set out the reasons why the appeal must succeed.

After a contested trial the appellant was convicted on a charge of robbery as defined in section 126 (3) (a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The appellant was then sentenced to 5½ years imprisonment of which 2 years were suspended for 5 years on the usual conditions of future good behaviour. A further 1½ years was suspended on condition the appellant paid $995,00 as restitution to the complainant through the Clerk of Court, Bindura by 20 August 2010.

It is against this conviction and sentence that the appellant has now lodged this appeal. The main ground of the appeal against conviction is that the learned magistrate erred and misdirected himself by admitting into the record of proceedings evidence which was inadmissible, the alleged confessions having been challenged by the appellant during the trial.

It was further contended on behalf of the appellant that the court *a quo* erred and misdirected itself by failing to conduct a trial within a trial once the appellant had alleged that he had been severely tortured and subjected to duress on both his alleged confessions and indications to the police.

It was common cause and as conceded by the respondent that the appellant was kept in police custody for a considerable period of time and the appellant alleged that it was during such unlawful detention that he was severely assaulted and forced to make certain confessions and indications. The over detention of the appellant was never probed or dealt with in court, neither was a trial within a trial conducted to ascertain the circumstances under which the confessions and indications which the appellant was challenging from the beginning of the trial were made.

It is elementary procedure that when an accused challenges unconfirmed warned and cautioned statements and indications, before such evidence can be admitted into proceedings, a trial within a trial must be conducted. See *S* v *Ndlovu*[1], *S* v *Kuzwayo*[2], *S* v *Tandwa*[3] and *R* v *Wong-ming*[4].

In addition, section 70 of the Constitution of the Republic of Zimbabwe speaks to the exclusion of evidence that has been improperly obtained in an accused's trial. It is even more disturbing in this case that the torture which the appellant alleged was subjected to was never investigated in the court *a quo*. The situation becomes even more curious when one considers the averments that were made that in a separate case of *S* v *Tofarirepi Masipiki and Ors* case number

---

[1] 1988 (2) ZLR 465

[2] 1949 (3) SA 761 (A)

[3] 2008 (1) SACR 613

[4] 1979 (1) ALLER 939

BNR 166-68/10 dealt with by the same court which tried the appellant, the accused were convicted of the same armed robbery which the appellant was convicted of.

In our view the way in which the trial was conducted in this case amounted to a serious miscarriage of justice. The whole process was flawed hence the concession made by the respondent.

The appeal is upheld. The conviction and sentence are accordingly set aside.

Hungwe J …….. I agree

Jena & Associates c/o Musemburi & Muchenga, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners