

SIMBA CHITSUNGO
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA AND MUSAKWA JJ
HARARE, 9 OCTOBER 2017

Criminal Appeal

Appellant in person
E. Nyazamba, for the respondent

MUSAKWA J: We dismissed the appeal in this matter and gave our reasons *ex tempore*. The appellant subsequently, inarticulately requested for a certificate to enable him to approach the Supreme Court. Essentially the appellant wants the written judgment of the court.

It can be noted that on 4th February 2016 this court granted the appellant leave to note appeal in person and also condoned his late noting of appeal. However, what is annexed to the record as a notice of appeal is a meaningless statement. It will also be noted that the Supreme Court (Magistrates Courts) (Criminal Appeals) Rules, Statutory Instrument 504/1979 do not excuse a self-actor from filing a notice of appeal with clear and specific grounds. Being a self-actor we however indulged the appellant and let him argue his case.

The background to this matter is that the appellant was charged with robbery as defined in s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was jointly charged with Vincent Magadhi. After a contested trial he was convicted and sentenced to 12 years' imprisonment. Of that sentence 2 years were suspended for 5 years on condition of future good behaviour. The motor vehicle that was used in the commission of the offence was ordered forfeited to the State.

Although the appellant pleaded not guilty the evidence against him was overwhelming as was shown by the evidence. According to the outline of state case, the appellant resided at 17 Ambleside Crescent, Braeside, Harare and was self-employed as a mechanic. On 21st January 2012 the appellant and three others who included Vincent Magadhi teamed up and

went to Gombo Business Centre, Marondera. The appellant remained in his motor vehicle, a Mercedes Benz registration number AAW 7523 whilst the other three went inside a shop that was described as Nhekairo Stockist. Having feigned interest in purchasing beer, the three accosted the cashier and demanded money. When the cashier resisted a gun was fired. With the gun pointed at him the cashier surrendered \$3 000.00. The robbers got into the appellant's motor vehicle and he drove off. Follow-ups were made and the appellant's motor vehicle was eventually recovered from a home where it had been abandoned along the road to Murehwa.

The appellant was eventually arrested in July 2012. The appellant's defence was a lame one. He claimed that the motor vehicle had been stolen from a garage where he had left it for sale. This is despite the fact that he never made a report of the contrived theft.

In sentencing the appellant the trial court took into account his personal circumstances. It also considered that the offence was committed in aggravating circumstances, in that a firearm was used. The trial court also took into account that forfeiture of the motor vehicle might result in discrepancy in sentence.

The appellant did not have any new argument to advance on appeal. He rehashed mitigatory factors which he augmented with a claim that he is HIV positive. He also submitted that the forfeiture of his motor vehicle amounted to double punishment. He also now claimed to have repented on account of the incarceration.

It is trite that a trial court generally has wide latitude on sentence. The discretion bestowed on a court is only interfered with where it is tainted with some irregularity or where the sentence is manifestly excessive as to induce a sense of shock.

It may be worthwhile to consider similarly decided cases for comparison. In the unreported case of *S v Ramushu and Others* S-25-93 the appellants were convicted of armed robbery. One of the appellants played a lesser role but there was no distinction when it came to sentence. Thus a sentence of twelve years' imprisonment of which five years were suspended on condition of good behaviour was upheld on appeal.

In *Desmond Banda v S* HH-70-15 a gang was convicted of armed robbery. During the heist a motor vehicle and a variety of valuables and a considerable amount of cash were stolen. The appellant was sentenced to twelve years' imprisonment with no portion suspended. On appeal four years were suspended on condition of good behaviour. A further three years were suspended on condition of restituting \$6 387.50.

It will be noted that robbery involving the use of a firearm is a Second Schedule offence for which forfeiture of an article or instrument used in the commission of the offence may be ordered.

The order of forfeiture applicable in the present case is governed by s 62 of the Criminal Procedure and Evidence Act. In particular, s 62 (1) provides that:-

“A court convicting any person of any offence may, without notice to any other person, declare forfeited to the State—

(a) any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or

(b) if the conviction is in respect of an offence specified in the Second Schedule, any vehicle, container or other article which was used for the purpose of or in connection with the commission of the offence in question or, in the case of a conviction relating to the theft of any goods, for the conveyance or removal of the stolen property; and which was seized in terms of this Part:

Provided that such forfeiture shall not affect any right referred to in paragraph (a) or (b) of subsection (4) if it is proved that the person who claims such right did not know that the weapon, instrument, vehicle, container or other article was being used or would be used for the purpose of or in connection with the commission of the offence in question or, as the case may be, for the conveyance or removal of the stolen property in question, or that he could not prevent such use, and that he may lawfully possess such weapon, instrument, vehicle, container or other article, as the case may be.”

In this regard I do not see any misdirection on the part of the trial court in ordering forfeiture. It was for the above reasons that the appeal was dismissed.

CHATUKUTA J agrees.....