THEMBEKILE NDLOVU
and
MEMORY NHOKWARA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 28 January 2014 and 9 August 2017

Criminal Appeal

Mr *Makuku,* for the appellants
I. Muchini, for the respondent

BERE J: The appellants who were unrepresented were arrested and charged with the offence of violating s 10 of the Copper Control Act [*Chapter 14:06*], the allegations having been that they were found in possession of 140 kgs of copper wire and that they had failed to give a satisfactory account of such possession. Upon pleading to the charge each appellant was sentenced to an effective prison term of 2 years and the copper wire was declared to have been forfeited to the State.

Aggrieved by both conviction and sentence both the appellants noted an appeal to this court for redress.

As against conviction the appellants have raised what they perceive to be the following glaring errors factors:

> "(a) that the court *a quo* erred in that it did not establish if the appellants admitted that there was a reasonable suspicion that the copper found in their possession was stolen as required by s 10 of the Copper Control Act, [*Chapter 14:06*].
>
> (b) That the court *a quo* did not bother to find out the explanation given by the appellants to the police to enable it to find out if the explanation was satisfactory or not.
>
> (c) That basically, the elements of the offence as canvassed by the court *a quo* were inadequate."

The State concedes that the conviction was not proper and that the sentence imposed was so severe as to induce a sense of shock under the circumstances.

To understand the issues involved in this case it is pertinent to briefly restate the state outline and the canvassing of the element which passed the way for a pronouncement of the verdict of guilty on the part of the appellants.

The state allegations were that on the 17th day of September 2011, police officers received a tip off to the effect that the two accused persons had boarded a combi on their way to Beitbridge and that they had bags of copper in their possession.

The allegations went on to say that when the police officers made a follow up they apprehended the appellants in possession of five bags of copper which they failed to account for.

When the two appellants were taken to court they both pleaded guilty to the charge (as already referred to above). The presiding magistrate canvassed the elements of the offence as follows:

> "Elements to accused one
> …..Q. You were in possession of the copper as alleged?
> A. Yes
> Q. You failed to satisfactory explain such possession?
> A. Yes I agree
> Q. Any right?
> A. I had none.
> Q. Any defence?
> A. I have none.
> Guilty as pleaded."

The elements of the charge which were put to the second appellant were more or less a repetition of what was put to the first appellant and at the end of it, both appellants were found guilty as charged.

It is the approach in handling this case which has come under attack by the appellants and conceded to by the State counsel.

The legal position of the law in handling matters of possession like what confronted the court *a quo* have been sufficiently traversed in our jurisdiction. The errors made by the trial magistrate are regarded as elementary. See *State* v *Chitombo*[1]; *S* v *Chitsinde*[2]; *S* v *Dube and Anor*[3]; *S* v *Ganya*[4] and *S* v *Chiwondo*[5].

[1] 1978 RLR 243 (G)
[2] 1982 (2) ZLR 91 (S)
[3] 1988 (2) ZLR 385 (S)
[4] 1977 (2) ZLR 97 (A)
[5] 1999 (1) ZLR 407 (H)

The common thread that runs in all these cases is that it is not competent for the court faced with a case of possession as in the instant case to convict without leading evidence irrespective of the admissions made by the appellants.

In the case of *Chiwondo* the court put it as follows;

> "……. the procedure under section 271 (2) (b) of the Criminal Procedure and Evidence Act requires the accused to make admissions. The accused can only admit to facts known to him. It is absurd in plea proceedings to ask the accused if he admit that the person finding him in possession of the goods had a reasonable suspicion that the goods were stolen. The accused cannot know what was in the mind of the person who found him in possession. The person who found him in possession of the goods should testify about the basis upon which he formed his suspicion that the goods were stolen. It is on the basis of this testimony that the court can evaluate whether the suspicion was reasonable or fanciful. my emphasis

I must add caution and say that in this case the accused was charged with violating s 12 (2) of the Miscellaneous Offences Act [*Chapter 9:23*]. What is important is to note that the same principle applies in equal force to the case that we are now seized with in this appeal.

In *S* v *Chiwondo* (*supra*) the failure by the State to call evidence was regarded as a fatal procedural irregularity and the conviction could not stand.

It is abundantly clear in the case before us that the court *a quo* wrongly convicted the appellants on the basis of their misplaced admissions. Evidence ought to have been led from the arresting details to explain the basis of their suspicion that the copper wire had been stolen. Furthermore, the explanation given by the appellants should have been captured in the record of proceedings.

Consequently, the error made by the trial court was fatal to the proceedings. The conviction and sentence are accordingly set aside. The matter is remitted to the court *a quo* for trial *de novo* before a different magistrate.

HUNGWE J agrees ……..

Ndlovu and Hwacha, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners