GODFREY JOSI
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU J & CHIKOWERO JJ
HARARE, 6 & 9 March 2023

Criminal Appeal

E Mavuto, for the appellant
Ms *K H Kunaka*, for the respondent

ZHOU J: This is an appeal against conviction and sentence. The appellant was convicted of one count of "possession of a firearm without a licence" in contravention of s 4(1) of the Firearms Act [*Chapter 10:09*] and unlawful possession of explosives in contravention of s 3(1) and (2) of the Explosives Act [*Chapter 10:08*]. He was sentenced as follows: Count 1: 36 months imprisonment of which 15 months imprisonment is suspended for 5 years on condition accused does not within that period commit any defence involving the possession of a firearm without a valid certificate for which he is sentenced to imprisonment without the option of a fine. 21 months imprisonment to be effective. Count 2: 10 months imprisonment of which 4 months imprisonment is suspended for 5 years on condition that during that period he does not commit an offence involving possession of explosives without a valid explosives permit for which he is sentenced to imprisonment without the option of a fine. The effective period of imprisonment is 6 months.

The court *a quo* found that on 3 July 2021 and at 3731 Damafalls Phase 3, Ruwa, the appellant was raided by eighteen police officers from different sections. He emerged from the house armed with a firearm, a revolver that had been stolen during a robbery at another property. When he tried to escape the police shot him, thereby immobilizing him. He was arrested. The firearm was recovered following his arrest. After the appellant had been arrested the police searched his bedroom and recovered the Superpo explosive dynamites and detonator fuse cables that formed the basis of the charge in count two. The appellant's defence was that the Rossi

Revolver and the explosives were planted by the police in order to cover up for the fact that they had shot him. He denied being in possession of the items in question. His defence was rejected by the court *a quo.*

In challenging the conviction, the appellant set out two grounds. The first ground is meaningless and lacks the precision that is required of a valid ground of appeal. In that ground the appellant asserts that the Learned Magistrate erred in making "a finding of law that the prosecution has proved its case beyond reasonable doubt irrespective of a reasonably probable defence preferred by the appellant". The conclusion that the offence has been proved beyond reasonable doubt is underpinned by factual findings. The appellant has not challenged any such factual findings. This ground of appeal must therefore fail.

In the second ground of appeal the appellant alleges misdirection on the part of the court *a quo* for finding that the second and third state witnesses were credible yet, so it is submitted, there were contradictions in their evidence. The alleged contradictions pertain to where the firearm was recovered. Simbarashe Zvinogona stated that the firearm was recovered besides the appellant after he had been shot. Damson Chatukuta's evidence was that the firearm was less than three metres from where the appellant landed after he had been shot by the police. There is clearly no contradiction in the evidence of these two witnesses. Less than three metres and next to the accused merely show that one witness described the position of the firearm in metres while the other witness did not give the distance between the appellant and the firearm in metres. The substance of the evidence of the two witnesses remains the same. After all, the place where the firearm was ultimately picked is irrelevant because both witnesses had seen the appellant holding the firearm when he got out of his house to escape. The crime of possession had already been established once the appellant was seen holding the firearm as he was trying to escape. It was not proved by the position where the firearm ultimately landed after the appellant had been shot by the police officers. For these reasons, the ground of appeal lacks substance.

The ground of appeal suggesting that some state witnesses were found not to be credible in the trial within a trial is false. No findings of credibility were made in relation to the witnesses who testified during the trial within a trial. In concluding that the appellant had not signed the notebook that was the subject of those proceeding freely and voluntarily the court *a quo* merely relied on the evidence that was common cause and was being accepted by the state witnesses.

Such evidence included the facts that the appellant had been bitten by dogs and shot in the legs before he signed the notebook. Accordingly, this ground of appeal is also meritless.

The issue of the state witnesses having no motive to falsely implicate the appellant was merely a factor which the court was entitled to take into account. Indeed, no motive to falsely implicate the appellant was established. Clearly, the police knew the kind of person that they were looking for, hence a complement of eighteen officers from different sections was constituted. Some officers were from the Canine Section, eight were from the Police Support Unit, and eight were detectives. The evidence of the witnesses which the court *a quo* accepted was that they scaled over the pre-cast wall after the appellant had refused to cooperate by opening the gate for them. They were attacked by and had to shoot and kill appellant's dogs. The suggestion that these eighteen police officers had carried the Ross Revolver and explosives to plant them at the appellant's residence is fanciful. It was correctly rejected by the Learned Magistrate.

The reference to the evidence of the appellant's wife during the trial within a trial was relevant only in so far as it confirmed that when the police officers entered into her bedroom they were not holding any explosives. When they came out of her bedroom they were holding the explosives. This is consistent with the evidence of the state witness that the explosives were recovered from the appellant's bedroom hence the finding that his wife's evidence actually corroborated the evidence of the police officers. We find no misdirection in the reasoning of the court *a quo* in this regard. This ground of appeal must therefore be dismissed.

As regard the sentence, the authorities cited would suggest that the sentence of 36 months imprisonment for count one is excessive, see *State* v *Sithole & Another* HH 54-15. In the *Sithole* case (s*upra*) a sentence of 18 months imprisonment of which 6 months imprisonment was suspended was accepted. A sentence in that region would meet the justice of this case. Appellant submitted in the notice of appeal, that the two counts be taken as one for the purpose of sentence. We do not agree. These are two distinct offences based on two different statutes. For the same reason, we do not find any misdirection arising out of the court *a quo's* decision not to order the sentence in count two to run concurrently with the sentence in count one. This court does not accept the respondent's concession in this respect. This was a matter that fell squarely within the discretion of the trial court. There is no evidence that the discretion was not exercised judicially. The proposal by the respondent to start at a sentence of 12 months imprisonment for count one is

not sound when regard is had to the aggravating features of this case which made it a bad case of possession. The other ground of appeal is that the court *a quo* erred in failing to give reasons for not ordering community service. The court *a quo* did give reasons why community service was inappropriate and why a custodial sentence was warranted. It emphasized the need for deterence and observed that this was a bad case involving as it did, a firearm that had been stolen in the course of a robbery. We note, too, that the appellant did not explain his possession of the firearm. There are the additional factors that the firearm was loaded, and the appellant had the temerity to brandish it in the face of the police officers who had come to arrest him. All these factors aggravate the offence.

The fact that the appellant is a first offender was considered. The court *a quo* also took into account the time that the appellant had spent in remand prison pending the finalization of the trial. These factors, though important, were not enough to justify a non-custodial sentence when balanced against the aggravating features of the offence. Thus, while this court considers it just to interfere with the sentence in count one in light of the authorities cited, the appellant cannot escape a custodial sentence.

In the result, IT IS ORDERED THAT:

1. The appeal against conviction is dismissed in its entirety
2. The appeal against sentence partly succeeds to the extent that the sentence imposed in count one is set aside and the following is substituted:

   "18 months imprisonment of which 6 months imprisonment is suspended for 5 years on condition that during that period the accused does not commit any offence involving possession of a firearm without a valid certificate for which he is sentenced to imprisonment without the option of a fine or community service. Effective 12 months imprisonment"

3. For the avoidance of doubt the sentences in counts 1 and 2 are to run consecutively. Total effective sentence is therefore 18 months imprisonment.

CHIKOWERO J; agrees……

Maposa and Ndomene Legal Practitioners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners