

FREDDY DOWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 21 July and 16 September 2021

Application for Bail Pending Appeal

Mangeyi, for the applicant
Nyahunzvi, for the respondent

FOROMA J: Applicant was charged with two counts of Unlawful Entry in aggravating circumstances and was convicted of both counts despite pleading not guilty. The complainants in both counts are residents of the same neighbourhood and their premises were broken into the same night one after the other. The complainant in the first count had her 3 cell phones stolen by the burglar. Fortunately for the complainant, the burglar must have left the premises in the second count in some hurry and dropped a pink satchel in which he had loaded some of his loot from both premises he broke into in count one and two. The burglar made away with second complainant's 42 inch Sonny Television set leaving behind the pink satchel which contained first complainant's cell phones and a wheel spanner screw driver a pair of yellow and black handle pliers and a box of Madison cigarettes and 6 lollipops.

When complainant in count 2 was woken up by the movements of the burglar inside the house she woke up her brother and went to investigate. They did not see any one inside the house and on investigating outside they found in the neighbour's yard at the boundary wall a pink satchel which on inspection contained her open view Decoder a black Sony TV remote control and a black Sonny TV power pack and 3 cell phones. On return to her house complainant in count 2 noticed that her 42 Inch Sonny TV was missing.

Coincidentally someone called one of first complainant's mobile phones which had been stolen by the burglar (now in 2nd complainant's possession). On answering the first complainant's mobile phone the distraught second complainant realised that the owner of the cellphone she had answered had also been victim of a break in. That early morning first

complainant called at the second complainant's residence and identified her cell phones and other stolen goods and a report was made to the police by phone. Police suggested that they come to the station after day break.

The same day (on 21 October 2020) in the afternoon second complainant's 42 inch Sonny TV was sold to one Mavis Mathe without its remote control. Police stumbled upon information about a flat screen Television set at 867 Mpata Chinhoyi which they recovered from Mavis Mathe who disclosed to police that she had just bought it from applicant who had promised to come back for the balance of the purchase price. Police then arranged to trap the seller of the TV set as he was coming to collect the balance of the purchase price. According to the police witness one David Madhedhe upon arrest the appellant had confessed to the unlawful entry and theft. Appellant also took the police to the two properties which he had broken into and made indications as to how he made entry in each of the premises in count one and two and how he stole the complainants' property. Then he did not make any suggestion that he had not been in the area at the time of the alleged offences (alibi). At the trial appellant who was defended by Mr *Mangeyi* pleaded the defence of an alibi claiming that he had been in Harare at Parirenyatwa Hospital (where his sister is employed and resides) over the period beginning of October 2020 until the 22 October 2020 when he returned to Chinhoyi where on his arrival police arrested him. Applicant appreciating that he would have a problem with his alibi defence which he was raising for the first time at the trial in his defence outline claimed in his defence outline that he had disclosed his alibi defence and details thereof on the 20 October 2020 but police ignored it and did nothing to investigate it. Appellant also claimed that he had indeed sold a 42 Inch Television set to Mavis Mathe but the TV he sold to her was his own Samsung which he also claimed to have sold at the beginning of October 2020 before he left for Harare. The state called Melody Longwe (complainant in count 2) who testified that when called by CID Chinhoyi to look at a Sony 42 Inch Flat screen TV which police had recovered she had no difficulty in identifying it as hers as it had an identifying feature which she demonstrated to the police who were satisfied beyond doubt that it was the TV stolen from her. The identification feature was the screen mirroring which wrote her name Melody Longwe on being switched on. David Madhedhe the police witness corroborated Melody in the identification of the television set which was produced in court as an exhibit. It is quite surprising that in the application for bail the defence took issue with whether the Sonny TV set

produced as an exhibit in court at appellant's trial belonged to the complainant Melody Longwe. Firstly it does not and cannot lie in the applicant's mouth to dispute ownership of the Sony 42 inch flat screen produced in court as his defence was that the TV set he sold to Mavis Mathe at the beginning of October 2020 was a Samsung 42 Inch. Secondly the police corroborated Melody Longwe in her identification of her Sony TV set which had been stolen before pursuing investigations as to who was the burglar. Besides applicant through his counsel did not challenge Melody Longwe to demonstrate the mirroring of the screen despite the availability of the TV set in court. In any event the court *a quo* justifiably accepted the exhibited TV set as second complainant's property stolen from her in the wee hours of 21 October 2020. The court convicted the appellant of unlawful entry in both counts largely on the basis of circumstantial evidence. In this regard it is appropriate to quote from the court's judgment how she reasoned leading to the conclusion that applicant had been proved guilty beyond all reasonable doubt. She reasoned thus – "The court having regard to all the evidence placed before it is of the view that the State has managed to prove the guilt of the accused beyond any reasonable doubt. The testimony of Mavis Mathe that the accused sold the 42 Inch TV to her on 21 October 2020 in broad day light is very credible. The court is unable to perceive any reason why any of the State witness would fabricate the events that transpired and lie against the accused. With the exception of Bianca Mashumba none of them knew accused prior. It seems highly improbable that property is stolen from complainants in the wee hours of the morning and in the afternoon part of it is recovered from someone who had just bought it from accused. It is perfectly reasonable to conclude that the accused is the one who stole it and is the one who had unlawfully entered the complaint's premises." The court *a quo* can scarcely be faulted for this perfectly logical reasoning which on a proper construction of the finding precludes any other conclusion suggesting that anyone else had stolen the said property given the dismissal by the court of appellant's *alibi* defence after the court found that accused gave the impression of a witness who fabricated his version - See *R v Hlongwane* 1959 (3) SA 337.

In the circumstances I do not find applicant's appeal against conviction to be arguable at all.

As for the appeal against sentence it is this court's view that considering that the appellant was found guilty of unlawful entry committed in aggravating circumstances an imprisonment sentence was unavoidable. There is absolutely no merit in the argument that the

previously suspended sentence ought to have been further suspended. Indeed, the respondent's argument that appellant as a repeat offender should not have expected any mercy from the court is highly persuasive and will be found so by the appeal court. In the circumstances the appeal against sentence does not enjoy meaningful prospects of success. The application for bail pending appeal is accordingly dismissed.

Mangeyi Law Chambers, applicant's legal practitioners
The Prosecutor General's Office, respondent's legal practitioners