TIMOTHY MACHEMEDZE
and
SAVENCE MACHEMEDZE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHAREWA and MUZENDA JJ
MUTARE, 21 September 2022

Criminal Appeal: Reasons for Judgment

M. Mbanje with *M. Mugaduri*, for both Appellants.
M. Musarurwa, for the Respondent.

MUZENDA J: On 21 September we gave an extempo judgment dismissing both appeals against conviction and sentence. On 26 September 2022 appellants' legal practitioners of record wrote to the Deputy Registrar requesting reasons for the judgment to enable them to appeal. For the record detailed reasons were given to both parties during the hearing and it appears appellants did not record the reasons for the order we gave. However these are the reasons for the order given.

On 3 August 2018 both appellants were convicted at Mutare Provincial Magistrate's court on a charge of robbery as defined in s 126 (1)(a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] and were sentenced each to 3 years imprisonment of which 6 months imprisonment was suspended for 5 years on condition of future good behaviour. A further six (6) months was suspended on condition of restitution. After a series of court applications by the appellants for reinstatement of the appeal, the matter was finally heard at Mutare on21 September 2022.

<u>Grounds of Appeal</u>

<u>Ad Conviction</u>.

1. The court *a quo* erred in convicting the appellants on the charge of robbery when it is clear that there is no evidence which shows that violence was used with the intention to make the complainant relinguish her property.
2. The court *a quo* erred in convicting the appellants on the offence of robbery when there is no evidence which shows that the appellants are the ones who took complainants property.
3. The court *a quo* misdirected itself when it failed to advice and afford the appellants of the right to cross examine the complainant on matters arising on the complainant's evidence.
4. The court *a quo* erred in relying on inconsistent, unreliable, uncorroborated and insufficient evidence of a single witness with interest in the matter in convicting the appellants on the offence of robbery.
5. The court *a quo* erred in disbelieving the appellants' *alibi* in the absence of corroborative evidence from the state undermining such defence.

Ad Sentence

1. The court a quo erred by failing to consider the imposition of community service on the appellants
2. The court a quo erred in failing to give due weight to the fact that the appellants were first offenders.
3. The court a quo erred in imposing unduly harsh sentence which induces a sense of shock.

Background facts.

The state alleged on the charge sheet that on 15 June 2018 and at Goyi Village, Odzi, Manicaland, appellants one or more or both unlawfully and intentionally used a threat of immediate violence against complainant and stole a handbag with 9050 South African Rands and clothes worthy 1670 South African Rands. The outline of the state reflects that on the fateful day complainant and both appellants who are related and known to one another met. On 15 June 2018 complainant was coming from a shopping trip from South Africa and disembarked from a bus at a known bus stop. Both appellants approached complainant, first appellant was holding an axe and he threatened complainant stating that both of them had been

waiting for her. Both induced fear in her complainant who was forced to abandon her property. She then went to report the matter to the police.

On page 9 of the record the trial court outlined issues that it concluded to be uncontroverted. That complainant and both appellants live in the same village and familiar to one another. On the day in question complainant arrived from South Africa and disembarked at a bus stop with her goods and money. Her children carried part of her goods home leaving complainant guarding the remainder. Two assailants armed with a knobkerrie and an axe then accosted complainant and she fled leaving the goods. The learned provincial magistrate singled out the issue of identity of the robbers as one for determination. The court *a quo* after analysing complainants' evidence came to a conclusion on page 10 of the record that the people who accosted her were the appellants. When they accosted her the court concluded that both appellants were so near to her such that she facially identified them as there was moonlight so to complainant visibility was good.

First appellant admits meeting complainant on the date in question but did so under different circumstances as well as time. Second appellant raised an *alibi* that he was somewhere at that time and denied meeting the complainant on that day. The trial court found that complainant was worthy to believe and dismissed and rejected both appellants' version. It convicted the two appellants

The state counsel does not oppose the appeal against conviction.

Submission by Appellants.

Appellants submitted that for an offence to be called robbery there must be evidence of use or threat of violence with the intention of taking someone's property. Threat of violence to induce submission to taking must be proved. Appellants added that there must be a causal link between the violence perpetrated and the taking of the property. It was further submitted by the appellants that in this case the alleged perpetrators wanted complainant and not her property in addition appellants contended that there is no evidence to prove that appellants took complainant's property. As such argued that the essential elements of the crime of robbery were not proved by the state and the court *a quo* erred in convicting appellants of robbery.

Appellants went on to attack the conviction by submitting that the state did not lead evidence of identification. Appellants went on to attack the state case on the aspect of time of the occurrence of the offence. Whether it was at 1600 hours or 1900 hours, they concluded that the issue of time becomes focal in light of the appellants' defence of *alibi*. To appellants the

court failed to assist the appellants as to whether there were any matters arising from the court's questions about mistaken identity and issue of visibility. Failure to afford both appellants an opportunity to put questions to the complainant, to the appellants impugned the conviction, the court *a quo* made a further error in relying on the evidence extracted from its clarifying questions put to the complainant it was further submitted by the appellants

Both appellants also added and emphasised the discrepancy between the state outline and the complainant's evidence on whether robbery took place at 1600 hours or 1900 hours. To the appellants that amounted to a discrepancy or inconsistency on the part of the complainant.

Appellants further submitted that the court *a quo* erred in relying on uncorroborated evidence of a single witness. To the appellants the court should have called complainant's children especially on the aspect of occurrence of the crime. It is also the submission of appellants that the court *a quo* erred in rejecting appellant's defence of alibi. Appellants are of the view that the state failed to disprove appellant's defence of *alibi.*

On the grounds of appeal against sentence the appellants submitted that the court *a quo* erred in disregarding mitigatory factors placed before the court and ought not have passed a custodial sentence. A non-custodial sentence should have been passed. Appellants pray that the entire appeal be upheld.

Analysis of the Appeal

The essential elements of a crime of robbery are clearly stipulated under s 126 (1) (a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] and state that the person "shall be guilty of robbery if he or she intentionally uses violence or threat of immediate violence." (my own emphasis) The record of proceedings clearly shows that complainant perceived both appellants holding an axe and a knobkerrie and appellants threatened her that she was not going to ever come back to collect her bags. The trial court found complainant credible and also concluded what appellant's threatened complainant. It was not denied by the appellants that they were both armed when they approached complainant and that complainant abandoned her goods due to the conduct of the appellants who even told her not to dare coming back to collect the property. For the appellants to argue that what the alleged perpetrators wanted was complainant is in our view farfetched. One cannot distinguish complainant from her goods. Complainant felt that she was under threat of being harmed and the nature of the weapons intimidated her and she chose to save her life by parting with her property. We are

satisfied that the court *a quo* did not err in concluding that the essential elements of robbery were proved by the state and we dismiss that ground of appeal.

Appellants strongly submitted that the evidence of identification was improperly and lately introduced during clarification by the bench after complainant had been cross-examined by both appellants. Identification of the appellants had never been in dispute in our view. First appellant was the husband of complainant's sister and second appellant was the young brother to first appellant, all three are neighbours in the same village and are well acquainted to one another. First appellant and his wife acknowledged during trial that they met complainant on the day in question, the two sides differ as to what happened when first appellant met complainant. Both appellants cross-examined complainant and the latter remained adamant that the people who robbed her were none other than the appellants. The trial court believed her. However as the dispenser of justice the court *a quo* wanted to clarify issues which it felt pertinent. We see nothing wrong on the part of the court to do so. However in as much as it was incumbent for the trial magistrate to afford both appellants an opportunity to ask any questions arising from those put to the witness by the bench, such a failure by the magistrate did not amount to a fatal misdirection that would go to the root of the proceedings. The issue of robbery occurring at 1600 hours was not stated by the complainant. It appears in the state outline. Complainant spoke of 1900 hours and no other time.

We fail to see how appellants came to a conclusion that complainant was contradicting herself the aspect of time. (See the matter of *Ephias Chigova* v *State* SC 177/92 per KORSHA JA at p 9 of the cyclostyled judgment) (See also *S* v *Seda* 1980 ZLR 109 per SQUARES J).

We came to a conclusion that complainant's evidence as assessed by the court *a quo* did not reflect any discrepancies at all in as far as the identity of the appellants is concerned. The issue of bad blood alleged by first appellant was refuted by complainant and also rejected by the trier of facts and we were not given any tangible reasons by the appellants to overturn the conclusion reached by the trial court.

The judgment of the court *a quo* dealt at length on the appellants' defence of an alibi. After analysing the evidence adduced before it, it rejected the defence of *alibi* as unfounded and gave its reasons. In deed the record of proceedings is replete with evidence of conflicting versions between the appellants on none hand and their witnesses especially on the aspects of their whereabouts and their time. They contradicted and the trial court found the appellants not credit worthy. We cannot falter such a conclusion basically on the old accepted principles of these courts that the aspect of credibility or otherwise of a witness is best adjudged by the trier

of fact who had an opportunity to observe the candour of such a witness. Appellants also submitted that the court erred in convicting appellants relying on evidence of a single witness. In terms of s 269 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*], the court can completely do so if it finds that the witness is competent and credible. As already found by this court in this appeal, the trial court believed the complainant. We are not convinced that the court erred in accepting the complainant as a credible witness. That ground of appeal lacks merit. In any case first appellant provides corroboration by admitting meeting complainant on the day in question and none of the appellants is disputing complainant's version that from the scene of robbery she went straight to the police to file a complaint leading to the arrest of both appellants.

On the aspect of sentence, we have gone through the reasons for sentence on pp 15-16 of the record of proceedings and are unable to find fault with the reasons given by the court *a quo*. In any case the matter of *S* v *Madondo* 1989 (3) ZLR 300 is seminal on sentences of robbery cases. It is because of the forgoing that we did not think that the concession by the state was proper.

Accordingly the following order was returned.

Appeal against conviction and sentence be and is hereby dismissed.

CHAREWA J agrees._____

Kwiriwiri and Magadure Law Chambers, Appellants' legal practitioners
National Prosecuting Authority, for the respondents