REPORTABLE (93)

ALPHONSE MUSHANAWANI
v
THE STATE

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, UCHENA JA & MAKONI JA
HARARE: 10 FEBRUARY 2022 & 14 OCTOBER 2022

L. Madhuku, for the appellant

R. Chikosha, for the respondent

MAKONI JA

[1] This is an appeal against both conviction and sentence. The appellant and another, who is not a party to this appeal, were charged and convicted of "Unlawful dealing in a dangerous drug" as defined in s 156 (1) (c) of the Criminal Law Codification and Reform) Act [*Chapter 9:23*] (The Code), by the Regional Magistrates Court (trial court) sitting at Harare on 12 April 2019. They were sentenced to 10 years imprisonment of which 2 years were suspended for 5 years on the usual conditions of good behaviour. In addition, the trial court ordered the forfeiture of 710 kgs of dagga and a Toyota Hiace motor vehicle, registration number AEI 6094 (the motor vehicle).

FACTUAL BACKGROUND

[2] The appellant and his co-accused, one Blessing Dinda were arraigned before the Magistrates Court facing the above mentioned charges. They both entered pleas of not

guilty. The State alleged that on 18 April 2018, police detectives from the Criminal Investigations Department Vehicle Theft Squad, Harare, were conducting investigations in Epworth with Genius Ruzha whom they were investigating for certain offences .They received information from an informer, which caused them to drive to Damafalls where they apprehended the appellant and other accused persons.

[3] The detectives recovered 30 bags of dagga weighing 710 kgs with a street value of US$51 000 from a motor vehicle which was being driven by the appellant.

LITIGATION HISTORY

PROCEEDINGS IN THE TRIAL COURT

[4] The appellant and his co-accused, were arraigned before the magistrate's court on 23 August 2018. They pleaded not guilty to the charge. The State relied on the evidence of Detective Sergeant S Nhokwara, Detective Constable Musuka, Detective Constable Chikwavire and Genius Ruzha.

[5] The appellant and his co-accused raised the defence of *alibi.* He averred that the police arrested him at his place of residence in Glen Norah and not in Damafalls. He stated that he was in the company of his co-accused who was repairing his other motor vehicle. He had hired out the motor vehicle in which dagga was allegedly found to Reuben Chimanya and Johanners Moyo.

[6] The appellant further denied having made any written statement freely and voluntarily admitting to the crime in question. He contended his conduct did not fall into the

ambit of "deal in," as prescribed by s 155 of the Code. Instead, he attributed his misfortune to his detractors who wanted to destroy his transport business. The co- accused emulated the appellant's version of the circumstances surrounding their arrest and his defences.

[7] Before the trial court counsel for the appellant made the following contentions:

The arresting officers ought to have produced evidence from mobile telecommunication service providers to establish that the appellant and his co-accused were in Damafalls and not in Glen Norah at the time of their arrest. Secondly, they should have produced photographs or video tapes showing the scene where the arrest took place. Thirdly, that they ought to have uplifted finger prints from the steering wheel to prove that the appellant was driving the motor vehicle at the time of the arrest. Lastly, that the absence of corroboration from independent witnesses who allegedly gathered at Damafalls to witness the arrest of the appellant and his co-accused, after a short, had been fired adversely impacted the State Case against them.

[8] It is pertinent at this point to highlight that the defence of an *alibi,* which is the subject of this appeal, was promptly raised. The State was notified of the fact that the appellant and his co-accused were going to place reliance on that defence in their application for bail pending trial as well as in their defence outline.

THE TRIAL COURT`S FINDINGS

[9] The trial court found that the State witnesses' evidence was credible. It considered the discrepancies therein, particularly on the time when the accused persons were arrested and the route which they took from Damafalls to Southerton Police Station

immaterial. It also found that Genius Ruzha and the police witnesses had no reason or motivation to lie against the appellant.

[10] Regarding the defence of *alibi*, it held that the State managed to prove that at the time of the arrest, the accused persons were in Damafalls and not Glen Norah and thus, their defence of *alibi w*as effectively disproved. To that end, the trial court found that the State managed to prove its case beyond a reasonable doubt. The appellant and the co-accused were found guilty as charged.

[11] After the verdict, the court inquired into the mitigating and aggravating factors. The major mitigating factor was that the accused persons were first offenders. On aggravation, the trial court reasoned that dealing in drugs constituted a serious offence. As a result, the appellant and his co-accused Brighton Dinda were sentenced to 10 years imprisonment of which 2 years was suspended for 5 years on condition that they do not, within that period, commit any offence involving unlawful possession or dealing in cannabis. The court ordered the 710kgs of cannabis and the vehicle to be forfeited to the State in terms of s 262 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

[12] Aggrieved by the decision of the trial court, the appellant and his co-accused appealed against the conviction and sentence to the court *a quo.*

PROCEEDINGS IN THE COURT *A QUO*

GROUNDS OF APPEAL

[13] The appellant and the co-accused raised the following eight grounds of appeal against both conviction and sentence:

1. The trial court erred in rejecting the appellants` defence of *alibi* which defence was raised in good time before the completion of investigations.

2. The trial court erred in convicting the appellants on the basis that they failed to prove their defence.

3. The trial court erred in believing the police witnesses despite contradictions in their testimonies relating to the times of arrest and the route taken to the Police Station.

4. The trial court erred in downplaying the need for the Police Informer to testify in light of the appellants` defence that the motor vehicle had been hired out.
5. The trial court erred in relying on the testimony of Genius Ruzha who was a suggestible witness.

6. The trial court erred in not accepting inconsistencies about the time of arrest and route of travel which if they had been upheld, struck at the root of the State case.

7. The trial court erred in passing a severe sentence despite the mitigatory factors.

8. The trial court erred in imposing a lengthy custodial sentence despite that the forfeiture of the first appellant`s motor vehicle also constitutes a form of punishment.

[14] The crux of the appellant's and his co-accused`s argument was that they were not at the crime scene where the police detectives alleged that they arrested them. They also contended that the trial court erred in convicting them on the basis that they failed to prove their defence thereby reversing the *onus* of proof. They further asserted that the State did not provide any evidence before the court to disprove the appellant's *alibi*.

They contended that instead, the court *a quo* erred in relying on the testimony of Genius Ruzha who was under arrest at the time when he purportedly witnessed the alleged arrest of the accused persons and in an area that he was told by the police officers to be Damafalls. They stressed that Genius Ruzha showed considerable discomfort and restraint when he was giving his testimony and thus his evidence was questionable.

[15] The appellant and his co-accused also contended that the court *a quo* erred in accepting police witnesses' testimonies despite contradictions relating to the time of arrest and the route taken to the police station. The appellant and his co-accused further argued that the court *a quo* erred in passing a severe sentence despite the fact that they were first-time offenders and that the appellant had already been punished by an order of forfeiture of his motor vehicle to the State.

[16] The State maintained its argument that the police officers and Genius Ruzha were clear on where the arrests took place.

THE COURT *A QUO`S* FINDINGS

[17] The court *a quo* found the evidence of the arresting officers as corroborated by Genius Ruzha, convincing enough. It opined:

> "Notwithstanding the appellants' defence as regards where they claim the arrest took place, the evidence of the arresting officers as corroborated by Genius Ruzha is convincing enough. There would be no motive for them to lie that they were in Epworth investigating a case against Genius Ruzha when they received a tip-off regarding the appellants. Why would they pick on the appellants as suspects to frame for the crime whilst leaving the actual culprits?"

[18] In dismissing the appellant's evidence that the arresting officers should have produced phone records confirming that they were in Epworth when they received a call from the informer; they should have taken photographs at the scene of arrest; there ought to have been corroboration from independent witnesses regarding the arrest in Damafalls and that they should have uplifted fingerprints from the steering wheel, the court observed:

> "With respect, I do not think that investigations are conducted in anticipation of every conceivable defence that might be raised by an accused person at trial."

[19] The court further held that the only relevant aspect of the detectives' testimony was that they received information from an anonymous source which led them to arrest the appellant and his co-accused. Regarding contradictions in respect of the route followed after the arrest the court found that there were no differences in the routes. From the evidence of the two officers they essentially followed Mutare Road, Robert Mugabe Road, Charter Road and Simon Mazorodze Road. The omission of Kenneth Kaunda Avenue by one of the officers is immaterial and cannot discredit him.

[20] The court *a quo* also found that despite the contradiction as to the reason why Genius Guzha was arrested and some other unsatisfactory aspects of his evidence, his evidence corroborated that of the arresting officers. He had no reason to lie and was not a suspect in the dagga case. It concluded by stating that in any event the accused would still have been convicted.

[21] It held that the State managed to prove its case beyond a reasonable doubt.

[22] The court *a quo,* however, reversed the trial court`s ruling on the forfeiture of the motor vehicle in which the drugs were recovered. It held that whilst the forfeiture of the motor vehicle was not mitigatory, it constituted a form of punishment, especially if the article that is forfeited is of considerable value. The court reasoned that in that regard, the trial court did not exercise its discretion reasonably and judicially and thus, the order regarding forfeiture had to be set aside. Notwithstanding the misdirection on forfeiture, the court *a quo* held that the sentence was amply justified. As a result, the appeal against conviction and sentence was dismissed.

[23] It is this decision that is subject to the present appeal. The appellant's co-accused in both the Magistrate's court and the High Court is not party to the present appeal.

[24] The appellant raised the following grounds of appeal:

GROUNDS OF APPEAL

"1. The court *a quo* misdirected itself and erred at law in not finding that the convicting court (that is, the magistrates court) had misdirected itself in convicting the appellant in circumstances where the appellant's defence of an *alibi* could not have been said to be false beyond a reasonable doubt.
2. As an alternative to 1 above, the court *a quo* misdirected itself and erred in law in not finding that the convicting court (that is, the magistrates court) had misdirected itself in convicting the appellant in circumstances where no reasonable court could have failed to find that it was reasonably possible that it might be true that the appellant's motor vehicle had been hired and that the offence had been committed by persons who had hired the vehicle.
3. The court *a quo* misdirected itself and erred in law in that having been faced with a judgment of the convicting court (that is, the magistrates court) that did not make specific findings on the requirements of "possession" and "dealing" in drugs, its finding that the issue of possession was of no relevance was improper.
4. The court *a quo* misdirected itself and erred in law in not finding that the convicting court (that is, the magistrates court) had misdirected itself in convicting the appellant without making specific findings on the credibility of the witnesses who gave evidence in trial.

AD SENTENCE

5. The court *a quo* misdirected itself and erred in law in not finding that the sentencing court (that, is the magistrates court) had improperly exercised its discretion in respect of sentence in that the effective sentence of eight (8) years is so manifestly excessive in all the circumstances of this case as to induce a sense of shock."

SUBMISSIONS ON APPEAL

[25] At the hearing of this appeal, Mr *Madhuku* abandoned the third and fourth grounds of appeal. He, thus, restricted his arguments, regarding conviction to the first and second grounds of appeal.

Regarding the first ground of appeal, Mr *Madhuku* submitted that the trial court did not exercise its mind on the requirements of the defence of *alibi* and the applicable settled principles of law in this regard to the extent of only mentioning the word *"alibi"* once in its judgment. He further submitted that the court *a quo* erred in not correcting the point. It correctly identified the principles of law applicable but those principles were not applied.

[26] Mr *Madhuku* also contended that the court *a quo* ought to have conducted an investigation to inquire whether the defence of *alibi* was false beyond a reasonable doubt. He further argued that the court *a quo* only assessed whether the evidence led by the respondent was credible and did not do the same in respect of the appellant's evidence. Counsel also contended that the State witnesses changed their testimonies several times and that the court *a quo* ought to have made findings as to their credibility.

[27] On the second ground of appeal, Mr *Madhuku* submitted that there was no basis for the trial court to reject the appellant`s explanation that his motor vehicle had been hired and that the offence may have been committed by persons who had hired the vehicle. He further contended that the trial court erred in convicting the appellant in circumstances where no reasonable court would have convicted the appellant. It put the *onus* on the appellant to prove his defence. It believed the evidence of Genius Ruzha which could not be believed. He did not answer more than 20 questions. This is the witness that the trial court described as an independent witness who had no reason to lie.

[28] The court *a quo* fell into the same error by describing the contradictions in the witnesses' evidence as minor.

[29] On sentence, Mr *Madhuku* submitted that the court *a quo* ought to have interfered with the sentence imposed by the trial court because the sentence was so disturbingly inappropriate that no appeal court applying its mind to the facts of the case could have refused to interfere with it. He moved that the appeal against conviction and sentence be allowed.

[30] *Per contra,* Mr *Chikosha,* for the respondent, argued that the appellant was arrested in Damafalls and there was no evidence placed before the court by him to disprove such. He submitted that Genius Ruzha was not an accomplice in the present matter and he had no reason to incriminate the appellant. He was, thus an independent and credible witness under those circumstances. Mr *Chikosha* further submitted that the evidence for the respondent that shots were fired at the vehicle gave credit to the testimony of

the police that at the time of arrest, at the scene of the crime, warning shots were fired when the co-accused attempted to escape arrest. Counsel also contended that the appellant ought to have provided the court with contact details of the persons he claimed to have hired out his vehicle to. He prayed that the appeal be dismissed with costs.

ISSUES FOR DETERMINATION

[31] This appeal raises only two issues for determination by the Court, namely:

1. Whether the appellant was properly convicted; and
2. Whether the sentence was proper in the circumstances.

WHETHER THE APPELLANT WAS PROPERLY CONVICTED

[32] The gravamen of this appeal rests on whether or not the defence of *alibi* was properly dealt with by the trial court and by extension, the court *a quo.*

THE LAW ON *ALIBI*

[33] The definition of *"alibi" w*as crisply captured by MALABA DCJ (as he then was) in *Matanga* v *The State* S-17-15 at p 6 as:

> "An *alibi* is a statement of defence to the effect that a person accused of a crime was at a specific place different from the crime scene at the time the crime was being committed."

[34] The correct approach in assessing a defence of *alibi* was set out in the case of *S* v *Morris* S-29–98 at pp 6 – 7 as follows:

> " The legal position is that there is no *onus* on an accused person to establish the defence of *alibi*. This was made clear many years ago in a number of cases,

such as *R v Hlongwane* 1959 (3) SA 337(AD). In that case, HOLMES AJA had this to say at 340H:-

> 'The legal position with regard to an *alibi* is that there is no *onus* on an accused to establish it, and if it might reasonably be true he must be acquitted. *R* v *Biya* 1952 (4) SA 514 (AD). But it is important to point out that in applying this test, the *alibi* does not have to be considered in isolation.

Further on at 341 A-B the learned JUDGE OF APPEAL continued:-

> 'The correct approach is to consider the *alibi* in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses. In *Biya's* case *supra* GREENBERG JA said at p 521 (the underlining being mine):
>
> '… if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime'.'"

See also *S v Burt* S–204–98 at p 8.

[35] It is trite that where the accused`s defence is an *alibi*, this defence must be properly investigated. In *S* v *Mutandi* 1996 (1) ZLR 367 (HC) the court rightly observed that mistakes often happen in identification evidence and that where a person identified claims he was elsewhere at the time of the crime, the State ought to investigate the *alibi* prior to trial, as the *onus* is on the State to disprove his *alibi.*

[36] It held as follows at p 370.

> "Similarly, in South African Law of Evidence 4 ed by Hoffmann & Zeffertt, the following appears at p 619:
>
> '—If there is direct or circumstantial evidence which points to the accused as the criminal, the most satisfactory form of rebuttal is for him to show that he could not have committed the offence because he was somewhere else at the relevant time. This is called the defence of *alibi*, but it is a straightforward denial of the prosecution's case on the issue of identity. Courts have occasionally fallen into error by treating it as though it raised two separate issues: (a) did it look as if it was Smith who broke into Jones's shop at midnight, and (b) was Smith really at home in bed?

> Splitting up the inquiry in this way leads the judge to say that if the prosecution adduces strong evidence on the first issue, the onus should be on the accused to prove his *alibi*. But the reasoning is fallacious because the prosecution has to prove beyond reasonable doubt that Smith is the burglar, and if the court considers it reasonably possible that he may have been at home in bed, it must acquit."'

[37] In the South African case of *S* v *Kandowa* 2013 (3) NR 729 (HC) on appeal, the court applied the following *dicta* from *S* v *Malefo en Andere* 1998 (1) SACR 127 (W) at 157i – 158d that:

(1) there is no burden of proof on the accused person to prove his *alibi;*

(2) if there is a reasonable possibility that the *alibi* of an accused person could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt;

(3) an *alibi* must be assessed, having regard to the totality of the evidence and the impression of the witnesses on the court;

(4) if there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable; and

(5) the ultimate test is whether the prosecution has proved beyond reasonable doubt that the accused has committed the relevant offence and for this purpose a court may take into account the failure of an accused to testify or that the accused had raised a false *alibi*.

APPLICATION OF THE LAW TO THE FACTS

[38] This is a case in which the defence of *alibi* was promptly raised. Ordinarily, the defence of *alibi* is raised at the time an accused person`s warned and cautioned statement is recorded from him by the Police to enable the Police to investigate the same. *In casu,* the warned and cautioned statement was not produced at the trial. As a result it is not clear whether the appellant raised this defence at that stage. The first state witness, Detective Sergeant Nhokwara, who was the leader of the arresting team, initially denied that the appellant advised them of his *alibi.* He testified that he was hearing it for the first time in court during the trial proceedings. It was only after being cornered in cross- examination that he admitted that he got to know of this defence during the initial remand hearing.

[39] It is common cause that at the point the defence was raised, investigations had not yet been finalised. The police, having been made aware of the defence, ought to have carried out further investigations and obtained evidence to rebut that defence. It is puzzling that, even after conceding during trial, that carrying out further investigations into the defence was possible, the Police did not do so *in casu.* Further, the appellant testified that he had hired out his vehicle, in which the dagga was allegedly found, to Ruben Chimanja and Johannes Moyo. Despite this information, the police did not seek to look for the aforementioned persons to confirm the veracity of the accused`s claims.

[40] The conduct by the police *in casu* is deplorable considering the seriousness of the allegations against the appellant in this matter. Such conduct has serious implications on the criminal justice delivery system in that innocent persons can be convicted,

whilst the converse is that guilty persons can be acquitted due to poor conduct or lack of necessary investigations in a matter.

[41] In some foreign jurisdictions such as Australia, the United Kingdom, Nigeria and most American states, an accused is, in terms of legislation, required to give advance notice of an *alibi* defence. The purpose of this type of legislation is to enable the state to investigate the *alibi* prior to trial. In South Africa, such legislation does not exist. See (Van Der Merwe in the section 'The Evaluation of Evidence' in *PJ Schwikkard* & *SE van der Merwe* (in collaboration with DW Collier) *Principles of Evidence* 3ed (revised) (2009) at page 551). The approach in South Africa is that if the *alibi* is raised belatedly, the court may, in assessing whether there is a reasonable possibility that the *alibi* is true, take into account that the late disclosure of an *alibi* defence has deprived the state of the opportunity of investigating the alibi. (***S* v *Zwayi*** 1997 (2) SACR 772 (Ck) at 778 h-j)

[42] We also do not have legislation, in our jurisdiction, regulating the approach to be adopted when such a defence is raised. However it is settled in our law, through case law, that once an accused raises the defence of *alibi* that defence must be investigated and a definitive position taken by the court. In ***State* v *Musakwa*** *1995 (1) ZLR 1* at p2 *D-E*, MCNALLY JA in his usual eloquence could not have put it in any better way when he remarked as follows:

> "What no-one seems to have realised is that the defence raised was that of an *alibi*. The appellant was saying that he had only just arrived when he was accused. So he was not there when the confidence trick was set in motion.
>
> The appellant said so right from the beginning. So why did the police not check whether he was being truthful when he said he worked for "Heat and Systems"….Why did they not check his story that he left work at 4.30 pm? Why did they not check how long it takes to walk from there to the spot

where the offence was committed… The court should have been alive to the importance of these matters…"(the underlining is for my emphasis).

[43] Further down on p 3 C he stated:

"It is not good enough simply to throw the complainant and the accused into the ring and decide the matter on credibility."

[44] MCNALLY JA, at the outset in his judgment, classified the matter before him as an example of "inadequate investigation by the police and of a failure in the trial court to appreciate the nature of the defence put up by the accused."

[45] Going further afield, in the Supreme Court of Canada in ***R* v *Clerghorn*** [1995] 3 SCR 175 it was held that:

"The requirement that disclosure of an *alibi* defence be made is one of expediency, not of law. If the police are not given adequate notice to allow for an investigation of the *alibi*, the trial judge may draw a negative inference given the potential for fabricating *alibi* evidence. The disclosure requirements have been modified by *Charter* considerations, especially with respect to an accused's right to silence. Disclosure need only be made in sufficient time for the police to be able to investigate. It need not be made at the earliest possible time or in a formal manner. Disclosure may be made by a third party who is a witness to the *alibi."*

[46] Further down at p 179 – 180 in its analysis of the evidence the court stated:

"At issue in this appeal is whether the *alibi* defence raised by the accused at trial was properly disclosed to the Crown. As outlined by my colleague, proper disclosure of an alibi has two components: adequacy and timeliness. This principle was recently reiterated in *R. v. Letourneau* (1994), 87 C.C.C. (3d) 481 (B.C.C.A.), where Cumming J.A. wrote for a unanimous court at p. 532:

"It is settled law that disclosure of a defence of *alibi* should meet two requirements:

(a) it should be given in sufficient time to permit the authorities to investigate: see *R. v. Mahoney*, supra, at p. 387, and

R. v. Dunbar and *Logan* (1982), 68 C.C.C. (2d) 13 at pp. 62-3 ... (Ont. C.A.);

(b) it should be given with sufficient particularity to enable the authorities to meaningfully investigate: see *R. v. Ford* (1993), 78 C.C.C. (3d) 481 at pp. 504-5 ... (B.C.C.A.).

Failure to give notice of *alibi* does not vitiate the defence, although it may result in a lessening of the weight that the trier of fact will accord it....”

[47] In ***R* v *Clifford,* 2017 SCC 9*, [*2017] 1 SCR 164** the Court of Appeal in a decision confirmed by the Supreme Court of Canada, the defence counsel in that matter did not call the accused; rather the evidence to disprove the *alibi* was led through two police officers who had interviewed him about an arson that took place in Cranbrook, British Columbia. The accused maintained he was in Camrose, Alberta, at the time of the fire – some 670 kilometres away. However, based on evidence of the accused’s *animus* towards the victims, cellphone records and the presence of a car he used in Cranbrook at the relevant time, the trial Judge found his *alibi* was irreconcilable with evidence led by the Crown.

[48] It can be inferred from the above cases that the general principle is that the accused must present his *alibi* at the earliest possible opportunity and once he has given full particulars of the *alibi*, the police must investigate it with a view to confirm or disprove it. The *alibi* must be complete as to the time, the place and possibly those people at the scene of the crime who could help the investigation.

[49] In *casu* the appellant raised the defence of an *alibi* at the earliest available opportunity. It was that he was not at the scene of the crime and therefore could not have been the person driving the motor vehicle. Further he specifically mentioned

that he had hired out the motor vehicle in issue to Rueben Chimanja and Johannes Moyo. Furthermore, he stated that he was arrested at his place of residence in Glen Norah whilst in the company of his co-accused who was attending to repairs of his other motor vehicle. They were put in the Police vehicle where Genius Ruzha was. They were taken to Southerton Police Station where he then saw the motor vehicle in issue loaded with bags of dagga.

(50) There were two divergent positions before the trial court which were maintained before the court *a quo* and this Court. The first one, which is the State's case, is that the appellant and his co-accused were arrested in Damafalls whilst the appellant was driving the motor vehicle. A shot was fired in the course of their arrest. Genius witnessed the arrest. The second version, which is the defence case, is that the appellant and his co-accused were arrested at his home in Glen Norah whilst the co-accused was attending to his other motor vehicle. He was not arrested at the scene of the crime neither was he driving the motor vehicle. When they got into the Police vehicle Genius Ruzha was there. He had hired out the vehicle in issue. He later observed the motor vehicle loaded with dagga and with a bullet hole on its body, at Southerton Police Station.

[51] Both the trial court and the court *a quo* relied heavily on the evidence of Genius Ruzha as having corroborated the evidence of the arresting details that the appellant was arrested in Damafalls. I do not agree with the court *a quo*`s finding that the testimony of Genius Ruzha was convincing. Such a finding does not accord with a reading of the evidence. He was rather a suggestible witness. It is apparent from the record that Genius Ruzha was under arrest at the time the appellant was arrested

although in respect of a different offence. This is confirmed by the fact that Nhokwara stated that when the Damafalls issue arose, they could not release him as they were not yet finished with him.

[52] Ruzha's testimony was marred by material discrepancies. The first one being that he did not, in fact, know the place called Damafalls. The Police officers are the ones who told him that it was Damafalls. He confirmed the position during cross examination when he testified that he was made to append his signature to a statement prepared by the Police. The second material discrepancy related to the question of which of the police officers fired the warning shot. He testified that it was Nhokwara who did so while at the same driving to block the appellant's motor vehicle. Nhokwara testified that it was one of his colleagues who fired the warning shot. He was also not sure of the sitting positions of the appellant after his arrest. In his evidence in chief he testified that he was not sure of which motor vehicle the appellant used to travel to Southerton. What he was certain of was that he was in Nhokwara's vehicle and it was just the two of them. During cross examination he changed position and stated that the appellant used the same vehicle with him. The other discrepancy was that they had travelled from Epworth to Damafalls through the CBD. In cross-examination he denied that they drove through the CBD but he could not explain how they moved. He contradicted various aspects of his statement. One example is the address given as his residential address. He testified that he never gave the police that address as there are no addresses in Epworth. His statement indicated that he had overhead Nhokwara being informed by the informer about some people loading dagga in motor vehicles in Damafalls. Under cross examination he denied ever saying that. He stated that he did not hear anything as he was busy being interrogated by the other officers.

[53] It is problematic in the circumstances to say that the evidence of the police relating to the place of the arrest was corroborated. This is compounded by the fact that the State had not investigated the *alibi* to establish its truthfulness or otherwise. It becomes clear from a close reading of the record why the defence was not investigated. The arresting details made this case their own preserve. According to their version they were in Epworth when they received the report from an unidentified informer. Instead of phoning the nearest police station to attend to the matter, which in my view was urgent, they decided to drive all the way from Epworth to Damafalls. They could not explain why they did not pass through the nearest police station which was Ruwa after the arrest to alert them about their scoop. They also could not explain why they passed several other police stations, including Harare Central CID Drugs section, as they proceeded to Southerton. They did not enter the case in the Occurrence Book at Southerton. According to their version, after informing their commander and taking photos of the accused by the motor vehicles, they then took them to CID Drugs section.

[54] According to the appellant's version, the officers at CID Drugs section did not understand what transpired, did not want to be involved and they asked the arresting details to deal with the matter. This is confirmed by the fact that Nhokwara recorded the Warned and Cautioned statement, in the dead of the night, at 23:05 hours and it was witnessed by a fellow arresting detail. They are the ones who 'recorded' Genius Ruzha's statement and took it to Epworth for him to sign. The record indicates that the Investigating Officer in the matter was one Assistant Inspector Mhondiwa. There was no statement from him neither was he called to testify. We do not know whether

he was informed by the arresting details, *cum* IOs, about the appellant's *alibi*. The only witnesses called by the State were two of the arresting details and Genius Ruzha. The third one was not called.

[55] I am of the view that the evidence of Genius Ruzha was riddled with a lot of material contradictions and inconsistencies on the alleged arrest of the appellant and how it happened. His evidence even contradicted that of the police as outlined in para 52 above. The version that was presented by Genius Ruzha was that he did not know a place called Damafalls and that it was the Police who had told him that it was Damafalls. Neither did he know Glen Norah. He had not been to the two places before the day in issue. Under such circumstances, it cannot be said that the evidence of the police officers, relating to the place of arrest of the appellant, was corroborated. This point alone lends credence to the appellant`s testimony that he was not in or arrested in Damafalls.

[56] Furthermore, Genius Ruzha was questioned on whether a statement was recorded by the police from him relating to what had transpired on the day of the appellant`s arrest. In response, he said:

> "I was caused to append my signature Your Worship in relation to the fact that I was said to have witnessed what had transpired."

[57] Further under cross-examination he indicated that:

> "The police simply said to me, 'you witnessed what transpired, proceed and affix your signature."

[58] Generally his evidence in chief and in cross examination did not make good reading. He refused to answer, at least more than 20 questions which were pertinent. He gave the impression that his evidence was choreographed but still did not do a good job of it.

[59] It is vital to point out that an appellate court is slow to interfere with the findings of credibility of the witnesses by a lower tribunal. This principle was well captured in the case of *Gumbura* v *The State* SC 78/14 at p 7 where the court remarked as follows:

> "As regards the credibility of witnesses, the general rule is that an appellate court should ordinarily be loath to disturb findings which depend on credibility. However, as was observed in *Santam BPK v Biddulph* (2004) 2 All SA 23 (SCA), a court of appeal will interfere where such findings are plainly wrong. Thus, the advantages which a trial court enjoys should not be overemphasised. Moreover, findings of credibility must be considered in the light of proven facts and probabilities."

[60] The South African Supreme Court of Appeal held as follows in ***S v Pistorius 2014(2) SACR 315 (SCA)*** para 30:

> "It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. *R* v *Dhlumayo and Another* 1948 (2) SA 677 (A) at 706; *S* v *Kebana* [2010] 1 All SA 310 (SCA) para 12.' As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, this Court is not at liberty to interfere with his findings."

[61] It is settled that inconsistencies and imperfections in the evidence led by the State will not necessarily result in the reversal of the judgment under attack unless such inconsistencies got to the root of the matter. See ***S* v *Lawrence & Anor 1989 (1) ZLR 29 (S) at p 35.***

[62] In *S* v *Oosthuizen* 1982 (2) SA 571 (T) at 576 G-H the following was said with regards to a witness contradicting himself or herself:

> "But the process [of identifying contradictions of previous statements] does not provide a rule of thumb for assessing the credibility of a witness. Plainly it is not every error made by a witness which affects his credibility. In each case, the trier of fact has to make an evaluation, their number and importance and their bearing on the parts of the witness' evidence."

[63] This approach was adopted in ***S v Nyabvure S-23-88*** at p 5.

[64] In light of the evidence presented to the trial court, I am satisfied that on the conspectus of the evidence, this court is entitled to interfere with the factual findings made by the trial court. The evidence of Genius Ruzha was inconsistent and he contradicted himself in material respects, which contradictions went to the root of the matter.

[65] Over and above this, the arresting officers agreed that during the arrest, there were a number of spectators who gathered. Surprisingly, they did not call any of those onlookers to testify and confirm that indeed the appellant and his co-accused were arrested in Damafalls.

[66] On the other hand, the appellant gave an elaborate account of how he was arrested at his home attending to the repair of one of his vehicles. He repeated several times that he was not arrested in Damafalls and that the state witnesses were lying when they testified that he was arrested while driving the motor vehicle in question. There was extensive cross-examination which did nothing to shake the appellant's evidence.

[67] Despite the glaring discrepancies raised above, the trial court and the court *a quo* did not ask and answer the critical question as required in such cases – is the *alibi* false beyond a reasonable doubt. The court *a quo* clearly and correctly laid out the law but did not apply the law to the facts. The court *a quo* was correct to state that not all defences raised by an accused can be investigated. That statement cannot be correct in respect of the defence of an *alibi*. Once raised it has to be investigated.

[68] From the authorities cited earlier on in the judgment, which the court *a quo* related to, three main principles emerge and these are;

1. An accused person has no onus to establish his/her *alibi*

2. Once an *alibi* has been raised, it must be accepted, unless it can be proven that it is false beyond a reasonable doubt, and that

3. Evidence relating to the *alibi* defence must be considered in light of the totality of evidence.

[69] A court faced with the defence of an *alibi* must consciously relate to the above principles. It must be uppermost in its mind that an accused person has no *onus* to establish his *alibi.* It must be aware that once that defence is raised it must be accepted unless it can be proven that it is false beyond a reasonable doubt. In carrying out that assessment it must consider the totality of the evidence before arriving at its decision. Both courts *a quo* did not engage in this exercise. They instead adopted a 'boxing ring' approach and decided the matter on credibility.

[70] In *Mutandi supra* the court held that:

> "Where there is direct or circumstantial evidence which points to the accused as the criminal, the most satisfactory form of rebuttal is for him to show that he could not have committed the crime because he was somewhere else. This is known as the defence of *alibi*, but it was a straightforward denial of the prosecution's case on the issue of identity. There is no *onus* on the accused to prove his *alibi*, if on all the evidence there is a reasonable possibility that the *alibi* evidence is true, there must be the same possibility that he did not commit the crime and the accused is entitled to be acquitted." (the underlining is for my emphasis.

[71] In view of the failure by both the trial court and the court *a quo* to properly consider the principles applicable where the defence of an *alibi* is raised the appellant's grounds of appeal must succeed. It is, therefore, not necessary to deal with the ground of appeal relating to sentence.

[72] The ineluctable conclusion is that the appeal has merit and must be allowed.

[73] As alluded to in para 1 of this judgment, the appellant was jointly charged, convicted and sentenced with one Brighton Dinda (Dinda). They both raised the defence of *alibi* It appears the said Dinda did not file an appeal against the judgment of the court *a quo*. Having come to the conclusion that I have, it is inescapable that the proceedings of the courts *a quo*, in so far as they relate to Dinda be related to. This court necessarily has to invoke its review powers in terms of s 25 (2) of the Supreme Court Act [*Chapter 7:13*]. It goes without saying that the fate of Dinda cannot be any different from that of the appellant. For the same reasons that I have allowed the appellant's appeal against conviction and sentence, the co-accused's conviction and sentence must also necessarily be set aside. This Court proceeds to do so in terms of its review powers.

[74] For the avoidance of doubt, the above referred to review powers can only be invoked in circumstances as *in casu* where the appellant's defence would be the same with that of the co-accused.

[75] In the result, it is ordered that:

1. The appeal against conviction and sentence succeeds.
2. The judgment of the court *a quo* be and is hereby set aside and substituted with the following:

    i. The appeal against conviction and sentence succeeds.

    ii. The judgment of the court *a quo* is set aside and in its place, the following is substituted:

    "The first accused, Alphonse Mushanawani, is found not guilty and acquitted."

3. In the exercise of this Court's review powers in terms of s 25(2) of the Supreme Court Act [*Chapter 7:13*] the conviction and consequent sentence of Brighton Dinda, be and are hereby quashed.

MAVANGIRA JA **:** I agree

UCHENA JA **:** I agree

Lovemore Madhuku Lawyers, appellant`s legal practitioners

National Prosecuting Authority, respondent's legal practitioners