IRVINE CHINYOKA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MUTEMA & MAKONESE JJ
BULAWAYO3 & 27 NOVEMBER 2014

V. Kwande for the appellant
N. Ngwenya for the respondent

Criminal Appeal

MUTEMA J: The appellant who was jointly charged with an accomplice was arraigned before a senior magistrate sitting at Mberengwa facing three counts of robbery in contravention of section 126 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. They both pleaded not guilty to all the three counts but following a trial both were convicted of all three counts as charged. Each count was treated separately as follows:

Count 1 - 15 months imprisonment

Count 2 - 18 months imprisonment

Count 3 - 9 months imprisonment

resulting in each accused being sentenced to a total of 42 months imprisonment of which 12 months were suspended on condition each accused paid US$1 906 restitution.

Aggrieved by both the conviction in respect of count 2 and the overall sentence, the appellant lodged this appeal. The appeal is encapsulated in the following grounds:

"Grounds of Appeal

(1) The court *a quo* erred in convicting the appellant of robbery in the second count although the evidence led by the state clearly indicated that the appellant was not present at the scene of the offence. The court relied on the assumptions of the state

witnesses that the appellant had been hiding in the bush. The state witnesses testified that the appellant was not part of the robbers who robbed them. Inspite (*sic*) of this evidence the court *a quo* convicted the appellant of robbery in that count and sentenced him to 18 months imprisonment.

(2) The court *a quo* erred in sentencing the appellant to a lengthy imprisonment term without giving sufficient weight to his mitigatory factors especially that he was a first offender who had committed the offence out of poverty.

Prayer

WHEREFORE Appellants prays (*sic)* that his conviction in the second count be set aside, and that he be sentenced to community service in relation to the remainder of the counts."

After hearing submissions from both appellant's and respondent's counsels we dismissed the appeal against both conviction and sentence and indicated that the reasons for the dismissal would follow. We also corrected the amount of the ordered restitution from US$1 906,00 to read US$1 406. Herewith are the reasons.

The state allegations pertaining to this count 2 are that on the day in question accused 1, the appellant and one Prosper Mawerewere who is still at large met the complainant Edmore Shoko around 18:00 hours at his village and greeted him and went away. An hour later accused 1 and Mawerewere came back to complainant's homestead and accused complainant of having stolen gold and cash from his employer. The two handcuffed complainant and Tinashe who had visited the homestead. Mawerewere remained guarding the complainant and Tinashe while accused 1 took complainant's wife Carren into her bedroom hut where he took an XTEL phone handset and NetOne line while threatening to lash her with the sjambok he was wielding. Carren told accused 1 that Portia her mother-in-law, had the cash whereupon accused 1 took Portia to her bedroom hut wherefrom he took US$1 500,00. Mawerewere then uncuffed Tinashe and force-marched complainant and Carren from the homestead. They then met appellant who said complainant and wife were thieves and needed beating and manhandled the complainant. After walking for about 900 metres the three robbers forced complainant and wife to return home. Value stolen is US$1 540,00 and nothing was recovered.

In denying the count accused 1 and appellant, who were legally represented by the same

legal practitioner appearing on appeal for appellant, said they never met complainant, do not know where he lives and never visited his homestead. On the day and time alleged they were elsewhere and so never robbed the complainant as alleged.

Edmore Shoko, the complainant's evidence was that he knew accused 1 and appellant for he used to see them at Chaza area of Mberengwa. On the day in question, he encountered the two in the company of another accomplice who was not in court at a bus stop around 5pm after he had disembarked from a car coming from Zvishavane. He was in the company of his uncle Tinashe. The three men asked for a cigarette from him and he told them that he did not smoke. He then went home. Around 6pm two of them minus appellant came to his homestead saying they were police officers and handcuffed him and Tinashe. One of them had a whip. They took his wife to the bedroom hut where they searched and took an XTEL cell phone and a memory card. After threatening to also handcuff his wife she told them where the money was. They went and took US$1 500,00 from his mother's hut. They ordered him to go with them to Mzezewa Mine where they alleged he had stolen the money from. About 200m from the homestead appellant joined them. Appellant's participation in this robbery was not challenged in cross-examination of this witness.

The complainant's wife Carren's evidence corroborated her husband's testimony and closed her evidence by saying appellant did not come into the homestead but he waited for hem along the way. Again her evidence pertaining to appellant participating in the event was not challenged.

The pith of the appellant's contention against conviction for count 2 is that since he did not enter the homestead – the theatre of the robbery – the state did not prove its case against him beyond reasonable doubt as he was not present at the scene. It was therefore a mis-direction on the part of the trial magistrate to convict him when no evidence was adduced to establish that he was present and participated in the commission of the robbery.

It is pertinent to note that regarding this count the appellant proffered the defence of alibi or an explanation amounting to implied innocent association. We were quite satisfied that the learned trial magistrate did not misdirect himself when he dismissed both these possible defences raised by appellant.

As regards the alleged alibi both the complainant and his wife Carren, whose testimony we have no cause not to accept as truth, told the trial court that accused 1, Mawerewere and appellant had accosted them at the bus stop an hour prior to the robbery asking for a cigarette from the complainant. It was around 5pm and visibility was clear. Over and above that they knew these people before the day in question as they not only reside in the same village but used to see them at Chaza Business Centre. When two of them robbed them at the homestead an hour later, visibility was still clear and they were able to identify them as the ones they had seen and met earlier at the bus stop and also as the ones they used to see at Chaza Business Centre. The two witnesses were honest in their testimony and went an extra-mile by even stating that appellant did not enter the homestead but joined the others along the way following the robbery.

By tending to portray himself an innocent individual, the appellant opened himself to the admissibility of similar fact evidence which generally is held inadmissible. In the case of *S* v *Banana* 2000 (1) ZLR 607 (SC) it was held that the test for the admissibility of similar fact evidence used to be whether the similar facts were of such striking similarity that it would be an affront to common sense to assume that the similarity was explicable on the basis of coincidence. However, the courts have moved away from this test. Striking similarity is not a pre-requisite to admissibility. What has to be assessed is the probative force of the evidence in question; there is no single manner in which this can be achieved. Like corroboration, this is a matter of logic and common sense.

In the instant case, although there exists striking similarity regarding the *modus operandi* employed in the commission of counts one and three (whose conviction appellant did not dispute) *viz* masquerading as police officers, use of handcuffs and sjambok as well as one robber keeping sentinel, what needs assessment is the probative value of this evidence employing logic and common sense.

All the robberies were staged in the same area, the appellant does not dispute taking part in the other two counts, the evidence of the complainant and his wife that appellant, although he did not feature in the homestead where the robbery was actually perpetrated but joined the other two robbers outside the homestead, was not challenged by the appellant. Complainant went further to explain that when appellant joined the other two robbers, he accused him and his wife

of being thieves who needed to be beaten up – the same pretext used by accused 1 and Mawerewere when robbing complainant. This appellant did not dispute having uttered. That coupled with his unexplained presence in the vicinity of the robbery leads to the irrestible inference that he shared a common criminal purpose with the actual perpetrators and, was simply keeping guard during the robbery. Such conduct/participation places him on the same criminal pedestal with his accomplices making him equally guilty. There is no iota of doubt that appellant's conviction of robbery in respect of count 2 was properly returned.

As regards sentence it amounts to a mockery of justice for appellant to submit that he robbed due to poverty and therefore should be ordered to perform community service. Since the majority of the citizenry seems to be poor and if they stole or robbed and poverty were taken as mitigatory, then that would certainly brew a recipe for lawlessness.

Robbery by its very nature, especially where a weapon is used is inherently serious. It is akin to reaping where one never sowed – the jungle law style. *In casu* all the three counts were carefully premeditated with the perpetrators masquerading as criminal investigation officers of the Zimbabwe Republic Police in both attire (wearing suits and carried handcuffs) and word.

All counts were perpetrated in the evening. In respect of all counts false accusations of either illegal possession of gold or theft of money were made against the victims who were handcuffed. In count 1 value stolen is US$1 009,00 and nothing was recovered. US$1 540,00 was stolen in count 2 while US$263,00 was stolen in count 3 and nothing was recovered. A total of US$ 2 812,00 was robbed and nothing was recovered. The appellant and his co-accused therefore benefitted from their criminal enterprise. They are a menace to society, they traumatized their victims in a very reprehensible manner hence they deserve prolonged incarceration. Between the two who got arrested, tried and convicted each benefitted US$1 406,00 hence each needs to make restitution in that amount. The learned trial magistrate's judicious exercise of his sentencing discretion cannot be faulted in any way.

It is in view of the foregoing reasons that we dismissed the appeal against conviction for count two and against sentence in respect of all the three counts of robbery and corrected the amount of the restitution which each should pay.

Makonese J ……. I agree

H. Tafa & Associates, appellant's legal practitioners
Prosecutor General's Office, respondent's legal practitioners