BUKHOSI KHUBONI
**versus**
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI AND TAKUVA JJ
BULAWAYO 30 OCTOBER 2017 AND 2 NOVEMBER 2017

Appellant in person
*Ms N Ndlovu* for the respondent

**MATHONSI J:** If the police service in this country does not reform or remains determined to bury heads in the sand in typical ostrich style when the courts repeatedly advise it to re-adjust its ways of doing business in line with the requirements of the new constitutional order, then it runs the genuine risk of being rendered ineffective in the face of what appears to be escalating criminal activity among communities. On times without number the police force has been advised to comply with the law in the conduct of investigations and in particular to respect the rights of arrested persons for the successful prosecution of criminals. Arrested and accused persons also have rights enshrined in the constitution of the country which cannot be derogated from.

So critical are the fundamental rights contained in Chapter 4 of the Constitution, the declaration of rights, that as long as they are not respected during police investigations, courts of law have no choice at all but to uphold those rights at the expense of the protection of the generality of society. In that regard one can never over-emphasise the need for investigators to be trained, retrained and refreshed so that they uphold the rights of accused persons set out in sections 50, 69 and 70 of the Constitution. As it is now, a lot of extremely dangerous criminals are being let off the hook because investigators appear to ignore the constitutional rights of those that they arrest.

In terms of s50 (4) of the constitution, any person who is arrested or detained for an alleged offence has the right to remain silent, to be informed promptly of the right to remain silent and of the consequences of exercising that right, and they have the fundamental right not to

be compelled to make any confession or admission. In addition s69 gives an accused person a right to a fair and public trial within a reasonable time before an independent and impartial court. Further s70 (1) (i) bestows upon an accused person the fundamental right not only to remain silent and not to testify but also not to be compelled to give self-incriminating evidence.

Therefore before the prosecution can succeed in any prosecution of an accused person charged with an offence based on any confession or statement of indications made by that person, it must first of all satisfy the court that the rights of the accused person which I have outlined were not infringed in the process of securing the confession. It is just not good enough for an investigating officer in a criminal trial to rock up in the witness box and tell the court that upon his or her arrest the accused person admitted the charge and led the police for indications at the scene of the crime. Pretty much less is it acceptable for the police to drive with a bunch of accused persons in a motor vehicle and cause them to point at houses they allegedly broke into without satisfying the requirements for admissible indications. Such an exercise is a complete waste of time, the indications being inadmissible as evidence in a court of law.

The appellant and three co-accused were charged with eight counts of unlawful entry into premises as defined in s131. Three counts of robbery as defined in s126 and five counts of theft as defined in s113 of the Criminal Law [Codification and Reform}Act [Chapter 9:23]. After a full trial they were found not guilty and acquitted of the four charges in counts 7, 8, 15 and 16. They were however convicted in respect of the remaining 12 charges in counts 1, 2, 3 , 4, 5, 6, 7, 9,10, 11, 12, 13 and 14.

For purposes of sentence the court *a quo* paired the counts, that is counts 1 and 2; 3 and 4; 5 and 6; 9 and 10; 11 and 12 well as 13 and 14 and sentenced each of them to 3 years imprisonment per pair bringing the total to 18 years imprisonment. Of the total 18 years imprisonment 4 years imprisonment was suspended on condition of future good behaviour while 6 months was suspended on condition they restitute the various complainants the respective sums of money stolen from them. This left them with an effective 13 ½ years imprisonment.

Acting singularly the appellant has appealed against both conviction and sentence in respect of all the counts questioning the reliability of the evidence led on behalf of the state suggesting that the court could not safely convict upon such evidence. Generally the facts are

that a gang of armed and violent robbers would break into houses in the high density suburbs of Bulawayo in the middle of the night or early hours of the morning. They would use either axes or iron bars to break the doors and mainly find the owners sleeping. Using violence or threats of violence they would instruct their victims to cover themselves with blankets before robbing them of their belongings. That way they committed the crimes for which the appellant and two others were charged and convicted.

The state has conceded that there was no evidence linking the appellant to the offences in all the counts except for counts 9 and 10 wherein the appellant was found in possession of two speakers stolen during the robbery committed upon Priscilla Sibanda at house number 4389 Nkulumane 5 in Bulawayo on 16 November 2015. In respect of that offence the appellant and three accomplices broke down the door by chopping it with an axe and gained entry into the house as the complainant slept at about 0300 hours.

Once inside they threatened to kill the complainant while demanding money. They then took a Samsung phone, two eagle speakers, $100-00 and two handbags before escaping. It is those two eagle speakers which were recovered from the lodgings of the appellant which he shared with is co-accused Leaflet Moyo, upon their arrest on 28 November 2015. Having been found with contraband the appellant had an extremely difficult time explaining how he came to be in possession of the speakers which were positively identified by the complainant by virtue of the electrical cord which was cut and some scratches peculiar to them.

In his defence outline the appellant alleged that he had picked up the two speakers. He then said they were his speakers. At the hearing of the appeal the appellant turned round and stated that his landlord should explain how the speakers ended up on the wardrobe in their room because he knew nothing about them. He suggested that they may have been left by a previous tenant. That is exactly what happens when one is caught with his hands in the cookie jar. They cannot give a reasonable explanation and can only blush sheepishly because they are guilty.

The doctrine of recent possession postulates that a person found in possession of property that has recently been stolen and the circumstances of that person's possession are such that he or she has to give an explanation for such possession but cannot explain his or her possession, or gives a false or unreasonable explanation, the court may infer that the person is guilty of theft of

that property. See s123 of the Criminal Law [Codification and reform] Act [Chapter 9:23]. G Feltoe, *A Guide to the Criminal Law of Zimbabwe*, LRF, p126; *S* v *Maphosa and Another* HB 318/17.

Two speakers stolen during a robbery committed at a house in Nkulumane 5 Bulawayo which robbery was described in detail by the complainant, were found in the possession of the appellant. He has given conflicting accounts of how he came to be in possession. Therefore the court is entitled to infer that he stole them. Unfortunately in this case the theft took the form of a robbery meaning that the inference must be extended to the robbery as well.

Regarding the rest of the counts for which the appellant was convicted, I am satisfied that the concession by the state has been properly made. The blame must fall squarely on the police who investigated these offences. What happened is that after the commission of the offences some of the complainants went and filed reports of break-ins and/or robberies. Some of them claimed to have observed their assailants while some were not even present. Whatever happened after the arrest of the appellant and his accomplices is not clear. All we know is that the police received a tip off from an informer that the first accused at the trial, that is William Stephen Mpofu, was seen with property believed to be stolen. He was arrested and then implicated the appellant and others.

After interrogating the appellant and his accomplices they then showed the police three houses they had broken into. The police would simply drive with the accused in their vehicle who would then point at the houses. They would then park a short distance from the house in question and proceed to ask the occupants if there had been a break in. Upon confirmation they would then invite the complainants to Nkulumane Police station to identify their stolen property. What is that?

The arresting officers Detective Francis Makuku and Chrispen Maplanka of CID who gave evidence of the investigations they conducted innocently gave accounts of how they arrested the appellant and others and were led to the victims' houses. They did not even begin to suggest that upon the arrest of the appellant his constitutional rights as outlined above were explained to him. They did not even suggest that they warned and cautioned him as required by law before taking him for indication at the houses in question. They were however happy to talk

about the breakthrough they made when the houses were pointed out. An exercise in futility indeed.

The Supreme Court was emphatic on the admissibility of statements made by an accused person to the police during investigations in *S* v *Nkomo* 1989 (3) ZLR 117 (S) at 124 E-H, 125 A when it pronounced;

> "Sometimes I wonder whether police officers and prosecutors labour under the mistaken belief that 'a statement' is only 'a statement' when it is written down. Therefore, they may think, the rules about admissibility apply only to written statements. If that is a general belief it is necessary to say firmly that it is wrong. No statement to a person in authority by an accused person, made outside the court room, may be produced (if it is in writing) or quoted (if it was oral) unless the rules have been observed, that is to say unless the court is satisfied that it was made freely and voluntarily and without undue influence being brought to bear. That is what s242 (1) (now s256) of the Criminal Procedure and Evidence Act means. A statement is a statement, that is, it is something said by the accused. It may be recorded on paper, in which case it is called a written statement. It may be a formal statement made in an office before assembled witnesses, or it may be an informal statement, for example, chit chat on the way to the scene of the crime. A police officer may not give evidence of any such statements unless he first satisfied the rules about admissibility. See *S* v *Ndlovu* 1988 (2) ZLR 465 (SC)."

I state the obvious when saying that indications made by an accused person to a police officer cannot be used in court without the prosecution satisfying the elementary rules on admissibility. For instance it must be established from the very onset that such indications were made freely and voluntarily without any undue influence being brought to bear upon the accused. In this case the police witnesses were content to say that the appellant and others took them for indications to point out the houses that they attacked. They said nothing about the freeness and voluntariness of the indications. Neither did they say, as is now happening so often, that the appellant was cautioned before being taken for indications. Indications are mute statements or mute confessions. Therefore rules on admissibility must be met before they are introduced or before the police witness can even refer to them. Unfortunately in this case the court accepted such evidence hook-line-and-sinker.

Allied to that is the reliance on the identification of the accused persons by the complainants which was fraught with irregularities. The appellant was never taken to an identification parade. All that the police did was to invite the complainants to the police station

and ask them whether the appellant was one of the persons who had robbed them. Christmas having arrived quite early in the year the witnesses would simply oblige. It was no identification at all. It is for that reasons that Patricia Nyathi, the complainant in counts 1 and 2, gave the following evidence;

> "Q: Among the accused whom did you see?
> A: Accused 3 was in front and he was followed by accused 1 and 2. I and my children screamed and they ordered us to keep quiet.
> Q: Who silenced you?
> A: Accused 3. They then ordered us to cover ourselves with blankets ---. ---.
> Q: Why do you say it was them?
> A: I even identified them at the police station when I went to recover the property."

While it is true that good identification, that is where for instance the witness is kidnapped and spends a long time in the company of the accused, does not need corroboration or support, poor identification does. A trembling witness whose door has just been broken down at night and is asked to cover her head with a blanket, cannot be said to be capable of good identification. There is need for support. The evidence of identification is always riddled with dangers of false incrimination. The best way to eliminate such danger is to subject the suspect to an identification parade where the witness is asked to pick the accused out. Clearly therefore in this case there was no reliable evidence upon which the appellant could be convicted in the other counts where he was not even found in possession of the stolen property.

Regarding sentence in respect of those counts in which the appeal has not been successful we have no basis for interfering with the sentence as there was no misdirection whatsoever.

In the result, it is ordered that:

1. The appeal against conviction is counts 1, 2, 3, 4, 5, 6, 11, 12, 13 and 14 succeeds with the result that the convictions and sentences therein are set aside.

2. The appeal against conviction and sentence in counts 9 and 10 is hereby dismissed.

3. Effectively, we uphold the sentence of a total of 3 years imprisonment but will alter it slightly in respect of the suspended portion of it.

4. Of the 3 years imprisonment 6 months imprisonment is suspended on condition of future good behaviour while 1 month is suspended on condition he restitutes Priscilla Sibanda $9-00 by 31 December 2017.

Takuva J agrees…….

*National Prosecuting Authority*, respondent's legal practitioners