CHABWANA WISIKI AARON
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MUSHORE JJ
HARARE, 26 October, 9 November 2017 & 31 July 2019

Criminal Appeal

*A*ppellant in person
F I Nyahunzvi, for the respondent

HUNGWE J: The appellant, a self-actor, was convicted of one count of theft of motor vehicle;[1] one count of contravening the Customs and Excise Act;[2] one count of bribery,[3] and one count of contravening the Immigration Act.[4] He was sentenced to 10 years imprisonment of which 2 years were suspended on the customary conditions of future good conduct for theft. He was sentenced to a fine of US$2 000 or 9 months imprisonment for the charge of smuggling the stolen motor vehicle. He was sentenced to two years imprisonment for the bribery charge and fined US100 or 30 days imprisonment for unlawfully entering into Zimbabwe.

He appealed against both the conviction as well as the sentence on several general grounds of appeal.

On 9 November 2017 the appellant appeared to argue his appeal. We dismissed it in its entirety on the turn but adjusted the sentence by deleting all reference to the suspension of 2 years on the theft charge. We gave an *ex tempore* judgment on that date. Appellant has asked that the reasons be reduced to writing as he wishes to appeal our decision dismissing his appeal against both conviction and sentence. These are they.

[1] As defined in s 113 (1) (a) of the Criminal Codification and Reform) Act, [Chapter 9:23]
[2] S 182 (1) of the Customs and Excise Act [Chapter 23:02]
[3] As defined in Section 170 (1) (b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]
[4] Section 17 (1) (9) (3) of the Immigration Act [Chapter 4:02]

In summary the appellant attacked the conviction as follows:

Regarding the theft of motor vehicle conviction he challenged the dock identification by the complainant as insufficient to found a conviction. He submitted that since the robbery incident is alleged to have occurred around 7 p.m. and lasted only 3 – 4 minutes there was no sufficient light and time to enable the complainant to have taken note of any identifying feature on any of his attackers. Therefore, when the complainant says he knows the appellant in connection with the case as he was the one who robbed him of his motor vehicle he ought not to be believed. The appellant contends that the complainant identified him as one of his assailants because he was in the dock. His identification as one of the complainant's assailants cannot be said to have been proven beyond a reasonable doubt.

As for the smuggling charge, the appellant submits that the fact that Police confirm that they found him seated in the motor vehicle must be taken as corroborative of his version of the circumstances of his arrest and nothing more. He was waiting for one Charlot Mhlanga, his brother's wife. It was this lady who owned the motor vehicle and had driven it across. The court erred in convicting him. He had no reason to deny that he had smuggled the motor vehicle, if he had done so.

Regarding the bribery charge, the appellant submitted that the court erred in rejecting his version that it was a figment of the imagination of the arresting details as he never bribed anyone. They did this so as to fix him as he had refused to pay the people who found him in the motor vehicle a bribe. These two persons walked away after calling the police details who approached him and arrested him. He admitted the illegal entry charge.

It will be clear from the above that the appellant's grounds of appeal attack the findings of credibility made by the court *a quo.*

In our view, there is everything to be said in favour of the appeal ground attacking the dock identification. In *State v Dhliwayo & Another*[5] the Supreme Court, citing a passage from S v Mthetwa[6] said:

> `Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities; see cases such as R v Masemang, 1950 (2) SA 488 (A); R v Dladla and Others, 1962 (1) SA 307 (A) at 310C; S v Mehlape, 1963 (2) SA 29 (A).'[7]

He submits that the court erred in believing the three State witnesses and in disbelieving his version. The court a quo did not, in the reasons for judgment advert to such features as would have enabled the complainant to identify the appellant after such a brief and tension-filled encounter during which, one suspects, everything moved so swiftly. Had the witness been able to say that he noticed some special feature upon his tormentor that stood out, then that evidence would have gone a long way to corroborate not only the fact that the complainant was not genuinely mistaken but that he had recognised that particular feature as an identifying mark about his assailant. Without that, one cannot discount the probability that because complainant was told of an arrest of certain suspects in whose possession his motor vehicle was found, he naturally was convinced that the persons were his assailants. In short, the dock identification tendered by the complainant was of little probative value where no other independent identification of the appellant by the complainant was given outside the court-room. More is therefore required before a conviction of the appellant can be justified. Such evidence existed in the different pieces of separate independent evidence tendered by the prosecution. These pieces of evidence, standing alone, will not necessarily point to an accused's guilt but taken in its totality as a mosaic of a fuller picture, may lead to the only conclusion that the accused committed that crime. In *Attorney-*

[5] 1985 (2) ZLR 101 (S)
[6] 1972 (3) SA 766 (AD)
[7] At page 107

General v Paweni Trade Corp (Pvt) Ltd & Others [8] the court explained circumstantial evidence as follows:

> "It seems to me that, in determining the parameters of the phrase under consideration, the court is in a way concerned with the rules governing circumstantial evidence; for the court is merely drawing inferences from the proven facts. And as BEADLE CJ observed in R v Sibanda & Ors 1965 RLR 363 (A) at 370 A-C; 1965 (4) SA 241 (SRA) at 246 B-C:
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> > 'Generally speaking, when a large number of facts, taken together, point to the guilt of an accused, it is not necessary that each fact should be taken in isolation and its existence proved beyond a reasonable doubt, it is sufficient if there are reasonable grounds for taking these facts into consideration and all the facts, taken together, prove the guilt of the accused beyond reasonable doubt: See R v de Villiers (1944 AD 493). Where, however, there is a particularly vital fact which in itself determines the guilt of an accused, it must be proved beyond reasonable doubt.'
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> To my mind, then, if there are reasonable grounds for taking certain facts into consideration, and all the facts, when taken together point inexorably to the guilt of an accused beyond peradventure, but the trial court nonetheless acquits the accused, then the trial court has taken a view of the facts which could not reasonably be entertained."

The facts of the matter show that the appellant gave a highly improbable explanation as to his possession of the motor vehicle which had been stolen four days earlier. When the police approached him at the scene, he claimed it as his. He however failed to prove that he was in lawful possession of that foreign registered motor vehicle in Zimbabwe. Nor could he prove that he had lawfully entered Zimbabwe. He had an expired passport. On the way to the police station, he had offered the arresting details some R2000 for his and the motor vehicle release. If, as he claimed on appeal, he had been left in the car by the owner Charlot, why did he not say so upon being asked by the police? How is it that police found a tyre purchase receipt from a South Africa shop on his person if he had not bought a tyre for this vehicle which had yet another puncture? In our view, all these pieces of evidence point inexorably to the appellant's guilt than to his innocence. The court a quo correctly in our view, disbelieved the appellant and rejected his defence. It was highly improbable that a foreigner could be found in possession of a vehicle registered in yet another country when he had no papers for both the vehicle and himself and still claim that he was in innocent possession of that vehicle. The conviction for theft of the motor vehicle is unassailable.

It is trite that in the assessment of issues of credibility, a trial court, being the court before who the witnesses tell their stories, is better placed to make findings regarding credibility. That

[8] 1990 (1) ZLR 24 (SC).

court enjoys the advantage of observing how the evidence is delivered how the witness reacts during cross-examination, or when a piece of evidence is tendered and so on.

An appellate court enjoys none of that. It deals with the dry facts established at trial. Unless a finding of fact is so grossly unreasonable and wrong that no sensible person presented with the same evidence would make such a finding, an appellate court would be slow in overturning such a finding of fact.

The onus is therefore on the appellant to demonstrate that the court *a quo*'s finding on facts are so grossly unreasonable that no reasonable person applying his or her mind to the evidence would have made such a finding.

The following facts were found to have been proved:

1. On 4 September the complainant lost his Mercedes Benz motor vehicle to robber at his home in Pretoria, South Africa around 7 pm.
2. On 8 September 2014 the appellant was found in possession of the same motor vehicle at Chapfuche, Beitbridge, Zimbabwe.
3. Upon being asked for a Temporary Import Permit, the appellant failed to produce one although he had claimed to Police details that it was his motor vehicle.
4. The motor vehicle had a punctured rear wheel and a punctured spare wheel. Upon being searched, a tyre purchase receipt was recovered from appellant's person.
5. The appellant took the police detail to the illegal crossing point near a place called Pande Mine. Up to that place tyre marks made by a punctured wheel were noticed by the Police officers.
6. At Pande Mine there was evidence of a tyre change.
7. On the way to the Police Station appellant produced R2000 and gave it to one of the Police Officers so that they release him and the motor vehicle. It was produced in court as an exhibit.

Upon these facts, the court *a quo* convicted the appellant for theft of motor vehicle smuggling the stolen motor vehicle and bribery as well as illegal entry into Zimbabwe.

In convicting the appellant, the court *a quo* held that the complainant told the truth when he identified the appellant as the person who pointed a firearm at him whilst ordering him to lie down as his accomplices searched him for the motor vehicle keys. The court *a quo* also believed

the two police officers who produced R2000 which was given to one of them as the appellant asked the two to release him and the motor vehicle. The court *a quo* also believed the police witness evidence that the appellant said he would tell them the truth as he offered to show then the illegal crossing point on the Limpopo River. The tyre marks made by a flat tyre from that point up to the river convinced the two details that appellant was being truthful. This was sufficient corroboration of the story he told them. In any event he was a foreigner with an expired passport in possession of a foreign registered top end motor vehicle without any papers or even a temporary import permit. He had also showed his bemused hosts an illegal border crossing point which showed that a motor vehicle with a rear flat tyre had just used.

In our view, his recent possession of the motor vehicle, which motor vehicle had been lost in a car-jacking four days earlier, was sufficient evidence of a finding that he was part of the four men gang that robbed the complainant. Therefore the conviction for motor vehicle theft is unassailable.

The fact of the matter is he showed police the route which he used after illegally crossing into Zimbabwe when he had no valid passport whilst in possession of a stolen motor vehicle. In our view the conviction on all four counts is beyond reproach.

However being a foreigner no purpose will be served by suspending a portion of his sentence as this court has no capacity to monitor his behaviour once he is deported to his original jurisdiction. For that reason the reference to a suspended sentence will be removed with the effect that appellant will serve 10 years imposed by the court *a quo*.

The rest of the sentences imposed in our view are appropriate.

It was for these reasons that we dismissed the appeal against both conviction and sentence on the turn.

MUSHORE J agrees……

National Prosecuting Authority, respondent's legal practitioners.