REPORTABLE (29)

(1) ELIAS MUDENDA (2) AGRIPPA MLOYI
v
THE STATE

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MAKONI JA & CHATUKUTA JA
BULAWAYO: 21 NOVEMBER 2024

T. Tavengwa, for the appellants

B. Gundani, for the respondent

MAKONI JA:

1. This is an appeal against the whole judgment of the High Court of Zimbabwe ("the court *a quo*"), sitting as an appellate court at Bulawayo, dated 21 June 2018. The appellants appeal against the dismissal, by the court *a quo*, of their appeal against both conviction and sentence. After hearing submissions from counsel, the court dismissed the appeal and advised that reasons would be furnished in due course. These are they:

FACTS

2. The appellants were tried, convicted and sentenced in the Provincial Magistrates Court at Bulawayo for the crimes of unlawful entry and theft in terms of ss 131 and 113 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Code"), respectively. They were charged with five counts of unlawful entry and correlating counts of theft, wherein it was alleged, by the State, that they unlawfully entered the premises of five complainants and stole property in the form of hard cash. Both appellants were each found not guilty and acquitted

on four of the counts of unlawful entry and four counts of theft. The trial court however convicted the first appellant on counts seven and eight and the second appellant on counts nine and ten.

PROCEEDINGS BEFORE THE TRIAL COURT

3. Both appellants pleaded not guilty to all the charges levelled against them. They denied the allegations and raised the defence of alibi by stating that they were never at the scenes of the crime. The appellants claimed that they were with their families at the times they are alleged to have committed the offences. Further, the appellants alleged that they were severely assaulted by the police and threatened with death if they did not admit to the allegations. Additionally, they claimed that when the police raided their houses, they did not recover any stolen property.

4. During the trial, the State relied mainly on fingerprint evidence. It was its case that fingerprints of both appellants had been found at some of the crime scenes. The State called Iscariot Chimbalanga, a finger print expert who testified that he received fingerprints belonging to the two appellants so that he would analyze them and determine whether they matched any crime scenes. He found that the first appellant's prints matched those found at Greens Supermarket relating to count 7, while those of the second appellant matched the prints found at Wholesale Liquor pertaining to count 9.

5. In denying the fingerprint evidence against them, both appellants alleged that the police could have uplifted their fingerprints, which were used in comparison to their inked fingerprints, from the water bottles they were made to touch while at the police station during the course

of investigations. The State pointed out that the finger prints were only positive in count seven for the first appellant and count nine for the second appellant. If the State had tempered with the evidence, it would have tied the appellants to all the crime scenes.

6. In its *ratio*, the trial court noted that the State relied on the evidence of the finger prints that were uplifted from the crime scenes which was confirmed, by the expert witness, as belonging to both appellants. The court found that the expert witness was reliable and his evidence unquestionable. It held that had the State wanted to manipulate the finger print evidence, then it could have tied the appellants to all the crime scenes and not just to two. Therefore, the court found that the first appellant was guilty of count seven and eight while the second appellant was guilty of count nine and ten.

PROCEEDINGS IN THE COURT *A QUO*

7. Aggrieved by the decision of the trial court, the appellants appealed to the court *a quo* stating that the trial court erred by relying on hearsay evidence which painted them as bad characters; the acceptance of the inadmissible confessions they made to the police as well as the phony indications they were subjected to.

8. During the proceedings in the court *a quo*, the State highlighted that the essence of the appellants' attack on their convictions should be the fingerprint evidence upon which their convictions were based. The State noted that all the other issues brought up by the appellants had nothing to do with their convictions and that they had been acquitted in respect of all the other charges where the same evidence complained of, was led.

9. The appellants maintained their argument that the police fabricated the fingerprint results. They suggested that the police must have uplifted their finger prints from the water bottles they were made to touch during the course of the investigation. It was submitted by the appellants that since they had challenged the fingerprint evidence, the State ought to have called the attending detail who uplifted the prints from the crime scenes to come and testify. The State did not do so but relied on the evidence of the expert witness which, therefore, raised the question whether the investigating team could have forwarded fake finger prints to the expert for analysis.

10. Concerning their sentences, the appellants contended that the values of the prejudice were astronomical and unproved and that the court should have treated the corelating counts in each case as one for purposes of sentence or ordered the sentences to run concurrently.

FINDINGS BY THE COURT *A QUO*

11. The question which, therefore, exercised the court *a quo*'s mind was whether the explanation proffered by the appellants was reasonable enough as to excite some doubt in the court's mind. In its *ratio,* the court *a quo* reasoned that finger print evidence is led to show that an accused person was present at the place where the crime was committed. The court found that the only significant argument advanced by the appellants was that the finger prints forwarded to the expert for analysis had been taken from water bottles at the police station and not at the scenes of crime.

12. The court *a quo* found the argument to be speculative as neither the appellants nor anyone else saw the police officers doing so. It also found that the latent impressions uplifted at the crime scenes were pasted on tape cards that is Form 240, several weeks before the appellants were

arrested. Therefore, the court held that if any fingerprints were uplifted from water bottles, they were not the ones which Iscariot Chimbalanga, the finger print expert examined. Accordingly, the court concluded that the conviction of the appellants was safe and proper in the circumstances.

13. Regarding the sentence, the court a *quo* found that in both situations, hard cash was stolen from safe boxes which were opened using a grinder. The court also found that the cash stolen was ascertainable and not disputed by the appellants. It held that sentencing was within the discretion of the trial court to assess a sentence based on the value stolen. As a result, the court *a quo* upheld the sentence imposed by the trial court.

14. Dissatisfied with the decision of the court *a quo*, the appellants noted the present appeal under the following grounds:

GROUNDS OF APPEAL

1. The court *a quo* erred in law in dismissing ground number 5 of the appeal without considering that the failure by the State to call the witnesses who canvassed the scene and uplifted the fingerprints from the scene was a clear display of the fact that the chain of custody had been broken.
2. The court *a quo* erred in law in dismissing ground number 5 of the appeal without taking cognizance of the fact that the source of latent and inked prints was never established.
3. The court *a quo* erred in law in failing to consider and determine ground number 6 of the appeal to the extent that qualifications and training of the expert witness was never established by the State.

15. The appellants seek the following relief:

That the appeal be upheld and that the order of the court *a quo* (High Court in HCA 65/17 and HCA 141/16) be set aside and substituted with the following:

> "i. The appeal against conviction of the first appellant on counts 7 and 8 and of the second appellant on counts 9 and 10 be and is hereby upheld.
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> ii. The conviction of the first appellant on counts 7 and 8 and of the second appellant on counts 9 and 10 be and is hereby quashed, and the verdict of the court *a quo* (Magistrates Court in Bulawayo P 189 A-C/15) be substituted with the following verdict:
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> 'Counts 7 and 8, the first accused is found not guilty and acquitted;
> Counts 9 and 10, the second accused is found not guilty and acquitted.'"

PROCEEDINGS BEFORE THIS COURT

16. It must be noted, at this juncture, that although the Notice of Appeal indicates that the appellants appeal against the whole judgment, there are no grounds of appeal relating to sentence. This judgment will relate to the appeal against conviction only. Further at the hearing of the appeal, Mr *Tavengwa,* for the appellants, abandoned the third ground of appeal.

17. In motivating the appeal, Mr *Tavengwa*, contended that the fingerprints which were presented as evidence were fabricated. Counsel argued that the respondent bore the onus to prove the source of the fingerprints beyond a reasonable doubt. In this case it failed to establish a chain of custody in respect of the fingerprints taken from the crime scenes. No evidence was led from the police officer who uplifted the fingerprints from the crime scenes. Upon being asked by the Court the stage at which the appellants raised the defence of fabrication, Mr *Tavengwa* submitted that the appellants raised the defence of an *alibi* in their defence outline and that such a defence would cover the issue of fabrication. On being asked whether the appellants challenged the production of the tape cards, which contained the latent impressions uplifted

from the crime scenes, Mr *Tavengwa c*onceded that the appellants did not and that they consented to the production of the tap cards into evidence. He however persisted with the argument that the chain of custody was broken.

18. *Per contra* Mr *Gundani* for the respondent, submitted that during the trial, the production of the evidence of the tape cards was never challenged. He stated that the evidence on the tape cards was validated by the *viva voce* evidence of the expert witness. Counsel further contended that the defence of fabrication fell away for the reason that the tape cards were generated six months before the appellants were arrested. In addition, he contended that the appellants had failed to show malice on the part of the police officers who handled the fingerprints.

ISSUE FOR DETERMINATION

19. **Whether the court *a quo* was correct in upholding the convictions of the appellants on the basis the fingerprints evidence.**

ANALYSIS

20. The appellants' first and second grounds of appeal challenge the court *a quo*'s decision to uphold the convictions on the basis of fingerprint evidence that was tendered by the State. Both appellants alleged that the State had the onus to prove that the chain of custody, in terms of the fingerprint evidence, was not tempered with and that the expert witness used prints uplifted from the crime scenes in his analysis. They contended that the State did not prove that the chain of custody was not corrupted or tampered with, in view of their allegation that the fingerprint evidence was fabricated.

21. The principle of chain of custody in evidence was defined and explained in the case of *S* v *Ndlovu* HB 240-23 at p 4 as follows:

> "[10] The continuity of possession of evidence or custody of exhibits and its movement and location from the point of recovery at the scene of a crime or from a person, to its transportation to the laboratory for examination and until the time it is allowed and admitted in the court, is known as the chain of custody or chain of evidence. The chain of custody is the most critical process of evidence documentation. It is a must to assure the court of law that the evidence is relevant and authentic, i.e., it is the same exhibit seized at the crime scene and it was, at all times, in the custody of a person designated to handle it and for which it was never unaccounted. Although it is a lengthy process, it is required for evidence to be relevant and admissible in the court. In *S* v *Matshaba* 2016 (2) SACR 651 (NWM) the court held as follows:
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> > 'The importance of proving the chain of evidence is to indicate the absence of alteration or substitution of evidence. If no admissions are made by the defence, the State bears the onus to prove the chain of evidence. The State must establish the name of each person who handles the evidence, the date on which it was handled and the duration. Failure to establish the chain of evidence affects the integrity of such evidence and thus renders it inadmissible.'"

See *Officila* v *S* (A346/2019) [2021] ZAGPPHC 244 (4 May 2021).

> "[11] The chain of custody proves the relevancy and integrity of a piece of evidence. A paper trail is maintained so that the persons who had charge of the evidence at any given time can be known quickly and summoned to testify during the trial if required. It is accepted that in order to save time instead of leading evidence of the chain of evidence or to provide proof of the chain of custody when it is not really in dispute, the prosecution may make use of the procedure provided in s 278 (1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (CP & E Act) by producing affidavits indicating such a chain. This would constitute *prima facie* evidence which may become conclusive if not attacked or controverted." **(**My emphasis)

22. What emerges from the above authority is that where there is a chain of evidence required to prove certain facts and there is no admission from the defence regarding those facts the State must prove the chain of custody to disprove alteration, substitution or manipulation of the evidence. Failure to establish the chain of custody will result in that evidence being ruled inadmissible.

23. In coming to its decision, the court *a quo* reasoned as follows at p2-3 of the cyclostyled judgment:

> "The only meaningful argument advanced by the appellants in that regard relates to what was purely conjecture that the prints forwarded to the expert for analysis had been taken from water bottles at the police station and not at the scenes of crime. The problem with that, apart from its being speculative as no one saw the police officers doing so, is that the latent impressions uplifted at the scenes were put on tape cards that is Forms 240, which had already been generated by the time the appellants were arrested several weeks after the scenes were visited. Therefore, if there were fingerprints uplifted from water bottles, they are not the ones which Iscariot Chimbalanga, the fingerprint expert, examined. That defence was therefore wide off the mark."

24. Further down, on p 3, commenting on failure by the State to call the police officer who uplifted the fingerprints the court remarked as follows:

> "In any event our criminal procedure only requires that where the State case rests exclusively, entirely or substantially on finger prints found at the scene, the State must call a fingerprint expert to testify as to the basis upon which he or she arrived at the conclusion that the prints belonged to one and the same person. See *S* v *Mutsinziri* 1997(1) ZLR 6 (H). It is not always necessary to call the detail who uplifted the fingerprints because it is not that detail whose opinion nails the accused person. In this particular case the explanation of prints being uplifted from water bottles given by the appellants were so irrational in terms of time that there was really no need to dignify it with calling the attending detail. In my view, the trial court was right to rely on the evidence presented by the State especially as Chimbalanga was an impressive witness. This is a witness who was quick to point out that although many scenes of crime were involved, he paired prints for only two scenes. Had he been given to fabrication, he would have easily claimed more. I conclude therefore that the conviction of the appellants was safe and proper in the circumstances."

25. To the above I would add that the appellants did not allude to the question of fabrication of the fingerprints in their defence outlines despite the fact that the State had outlined that it will rely on such evidence, in the state outline. Further the appellants allowed the tape cards to be admitted into evidence without any qualification. In other words, they were saying that they did not take issue with the manner in which the fingerprints were uplifted and the compilation

of the tape cards. There was therefore no need for the State to call a witness to testify on an admitted fact. This is the point made in *S* v *Matshaba supra* as quoted in *S* v *Ndhlovu supra*. This factor successfully demolished the appellants' defence that the fingerprints were uplifted from the bottles that they were made to touch during the investigations.

26. Additionally, the trial court and the court *a quo's* approach to fingerprint evidence given by an expert was as laid out in the case of *S* v *Mutsinziri supra* at p 8G-9B as follows:

> "Where fingerprint evidence is given by an expert, the court ought not insist on its own ability to make a fingerprint identification by study of a comparison chart between the latent print (that found at the scene) and the inked print (that recorded from the suspect). Nevertheless, the court is still faced with a decision as to whether or not to accept the expert's evidence when he purports to find sufficient points of identity between the latent and the inked print. The court must take into account the witness's experience and the apparent weight and reliability of his opinion."
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> See also *S* v *Mavunga* 1992 (1) ZLR 63 (S) at 68A-69F.

27. The trial court was aware of what was expected of it when dealing with expert evidence. In its judgment it stated that the expert witness must testify as to the basis upon which he reached his conclusion that the fingerprints belonged to the accused and that the court must also consider the witnesses experience and apparent reliability of his opinion. The court *a quo* could not fault the approach adopted by the trial court nor can this Court do so.

28. In any event it is trite that the assessment of the credibility of witnesses lies in the domain of the trial court and that the appeal court, as a matter of principle, does not interfere with the trial court*'s* findings in respect of such findings as the advantage enjoyed by a trial court of observing the manner and demeanour of witnesses is very great. See- *Beckford* v *Beckford* 2009 (1) ZLR 271 (S) at 275B. This Court cannot, therefore, fault the reasoning of the court

a quo in its acceptance of the trial court's assessment of the credibility of the expert witness by the court *a quo.*

29. Having considered all the above, this Court was of the view that the trial court cannot be faulted for convicting the appellants and the court *a quo* for confirming the convictions.

DISPOSITION

30. It is for the above reasons that the court found that the appeal had no merit and dismissed it.

GWAUNZA DCJ : I agree

CHATUKUTA JA : I agree

Mutuso, Taruvinga & Mhiribidi Attorneys, for the appellants

National Prosecuting Authority, for the respondent