

RAPHAEL MASUKU

And

SINDISO NCUBE

MLOBISI EVANS NYATHI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & KABASA JJ
BULAWAYO 7 & 24 JUNE 2021

1ST and 2nd appellants in person
3RD appellants in absentia
K. Ndlovu for the state

Criminal Appeal

MAKONESE J: Section 274 of the Criminal Law Codification and Reform Act (Chapter 9:23) provides that where a person is charged with a crime the essential elements of which include the essential elements of some other crime, he or she may be found guilty of such other crime, if such are the facts proved and if it is not proved that he or she committed the crime charged. The effect of this provision in our law, is that where the evidence led and proven facts are found that another cognizable offence at law, other than that in the charge sheet has been proved, the court may convict the accused of that other offence. In this regard, such other offence does not have to be a permissible verdict as provided in section 275 of the Criminal Code.

The appellants were arraigned before the Provincial Magistrate sitting at Tredgold, Bulawayo facing various charges of unlawful entry and theft as defined in sections 131 and 113 of the Criminal Law (Codification and Reform) Act. They pleaded not guilty. The matter proceeded to a full trial. The appellants were found not guilty and acquitted in counts 2, 20, 23, 24 and 30. Applicants were convicted on 24 counts. They now appeal against both conviction and sentence.

Background

Count 3

On this count the appellants were charged with theft of an air compressor, the property of one George Tzicalle of Khumalo in Bulawayo. The air compressor was stolen from a motor vehicle that was parked at complainant's place of residence on 5th June 2015. It was recovered on 16th January 2016 at 1st appellant's residence following the arrest of 1st appellant. The complainant was called to court to testify as the state's 15th witness. The complainant testified that the recovered compressor was similar to the one stolen from him.

He testified that he was positive that the air compressor was his because of a unique wheel feature which had been welded on to it by his son. That particular model of air compressor did not ordinarily have wheels. The recovered property was intact and there was no actual prejudice to the complainant.

Count 4 and 5

In these two counts, the appellants were charged with unlawful entry and theft arising from housebreaking and burglary which occurred at 5 Copley Crescent, Bulawayo on 20th August 2015. The complainant had his Tech Africa TDE generator, 24 inch LG plasma television and HP desktop computer stolen amongst other things. It was established during the trial that the property subject to the charges inclusive of complainant's generator and wi-fi speakers was recovered at 1st appellant's place of residence on his arrest on 16th January 2016. The LG plasma television was recovered at 1st appellant's home at stand number 88 Heany Junction Extension, Ntabazinduna. The value of the stolen property was US\$4 547 and property worth US\$2 147 was recovered. The complainant suffered actual prejudice in the sum of US\$2 147.

Count 6

In this count it was alleged that during the month of November 2015, the appellants acting in common purpose, stole 7 tyres, a brown 99m² tarpaulin and 88m² green tarpaulin from one Charles Mpofu's motor vehicle which was parked in his yard. The complainant was called to testify as the state's 6th witness. The tyres were recovered from Leonard Mutavikwa. They were fitted onto his motor vehicle. The tyres were sold to him at 1st appellant's residence. Both 1st and 2nd appellants actively negotiated the purchase price. He was charged US\$400 for 6 tyres. He handed the money to 2nd Appellant. Complainant identified the tyres through their brand names, one was branded Taurus, another Webmaster and the remaining one was branded Energia. All the property in these counts was recovered.

Counts 7 and 8

In these counts appellants were charged with unlawful entry and theft which occurred at number 4 Buckall Place, Khumalo on the 4th of December 2015. Complainant's Defy deep freezer, blue mountain bike and Day Tech television set were among the items stolen. Precious Sibanda was called as the state's 17th witness. She gave evidence and identified some of the recovered property. She indicated that the house that was broken into belonged to her brother. She had left some her own property at her brother's house which was amongst the stolen loot. She identified her daughter's blue mountain bike, her brother's deep freezer and microwave as the stolen property. The goods were recovered by the police on 16th January 2016 at 1st appellant's residence. An old fan was recovered at 2nd appellant's residence. 2nd appellant's defence was that the old fan was his and he had purchased it sometime back at an auction. 1st appellant maintained that he had purchased the items recovered from his friend one Khumbulani Mpofu.

Counts 9 and 10

Appellants were charged with unlawful entry and theft which occurred at 17 Albermarle Road, Bradfield in Bulawayo on 6th December 2015. The complainant in these

counts lost a 32 inch Sony Bravia television set, a home theatre system, a Deep Cycle branded solar battery, 500w inverter and an HP 20 laptop. The HP laptop and home theatre system were recovered at 1st appellant's home upon his arrest on 16th January 2016. The rest of the items, namely the deep cycle solar battery, the 500w inverter and the 1 x 12v Transver battery were recovered at 1st appellant's rural stand number 88 Heany Junction, Ntabazinduna. The complainant positively identified the recovered property as his. As regards the HP 250 laptop, the witness indicated that he had installed in it photo shooter, a specialised software for graphic design. He showed the court some family photos on the gadget. The Sony Bravia was recovered at 2nd appellant's Cowdray Park house. This was not disputed by 2nd appellant. Appellant however alleged that he had purchased the television set from Khumbulani Mpofo. 1st appellant indicated that he had purchased the HP laptop from the same Khumbulani Mpofo.

Count 11

In count 11 appellants were charged with the theft of a Tech Africa Generator, 4 plastic garden chairs and a rubbish bin, the property of Owen Tsiwa, the complainant in this count. The property was stolen on 6th December 2015 at number 12 Fitch Road, Khumalo, Bulawayo. 1st appellant stated in his defence that he had bought the recovered generator from Khumbulani Mpofo. Garden chairs were also recovered from 2nd appellant who in turn indicated that he had purchased them from Khumbulani Mpofo. The generator subject to this charge was recovered from 1st appellant's rural home. Complainant identified the generator through its unique yellow handle. The serial number on the generator had been tempered with making it impossible for the complainant to match it with the one he had. The stolen property was valued at US\$1 260. The recovered property was pegged at US\$1 150. The actual prejudice to the complainant was US\$110.

Count 12

This count involves theft from a motor vehicle which occurred on 14th December 2015. The allegations by the state were that the appellants under cover of darkness, conspired and pounced on complainant's Honda Fit motor vehicle. The vehicle was parked at number 27 De Beer Road, Paddonhurst, Bulawayo. The appellants stripped off and stole head lamps, a battery and a car boot. The boot door and head lamps were recovered fitted onto 1st appellant's own Honda Fit motor vehicle. The battery was recovered from 1st appellant's rural home. At an inspection *in loco*, complainant Berta Kadene indicated that the boot door fitted on 1st appellant's vehicle was hers as it had a crack which had developed after she hit a pushcart prior to the alleged offence. As regards the head lamps she indicated that hers had lines of dirt or some such substance which she intended to clean off just before the theft. 1st appellant was adamant that the door was his and was originally on the motor vehicle when he acquired the vehicle.

Count 13 and 14

In these counts appellants were charged with unlawful entry and theft. The offences occurred on 31 December 2015 at number 113 Harmon Gardens, Selborne Park, Bulawayo. The complainant Fungai Jonga was away at the material time. He only returned to be told that there had been a break-in at his house. He lost property inclusive of his 39 inch Philips LED

television set, DSTV decoder, a Sony DVD with two speakers, a decoder 17 inch laptop and a Samsung and Dell laptop during the break-in.

Tafadzwa Chidori, a young brother to the complainant testified that on the fateful day, he was house sitting for his brother who was away. The two assailants broke into the house. The one armed with a metal pipe confronted him, hit him on the back and force marched him to the toilet where he was left while they stole the property in the charge sheet. On this count 1st appellant's defence was that he purchased the property from Khumbulani Mpofo. The testimony tendered in court revealed that a more serious charge of robbery should have been preferred against the appellants.

Counts 15 and 16

These were additional unlawful entry and theft charges which occurred on 1st January 2016 at number 14334 Selbourne Brook, Bulawayo. The complainant Bernard Murwazwa lost 2 washing baskets. These items were recovered at 1st appellant's place of residence on the 16th January 2016.

Counts 18 and 19

These charges related to house breaking and theft which occurred at number 26 St Albans Street, Parklands, Bulawayo on 2nd January 2016. It is alleged in these counts that the appellants, one or more of them broke into Christopher Chidzanya's residence and stole a 32 inch LED television set, and home theatre system. These items were recovered at 1st appellant's residence, hidden in the ceiling after 1st appellant's arrest on 16th January 2016.

Counts 21 and 22

In these counts it is alleged that appellants acting in common purpose, broke into complainant Jeffrey Zindoga's residence at number 2 Mower Road, Ilanda, Bulawayo. Once inside the premises, the appellants stole a KIC refrigerator, a microwave oven, a gas stove and two kango pots. The refrigerator and microwave were recovered in a room used by 3rd appellant. 3rd appellant was a live-in gardener at appellant's place of residence.

3rd appellant told the court that the recovered property was not his but belonged to 1st appellant who brought it to his room for safe keeping. 1st appellant tried to distance himself from the evidence of 3rd appellant. He denied knowledge of these two items and indicated that he never donated such items of value to 3rd appellant. The matter appeared to have been unresolved by the evidence led by the state and defence.

Counts 25 and 26

The appellants were charged with unlawful entry and theft of 5 x 32 inch Samsung plasma television sets and 5 x 360 consoles, which offences occurred on 13th January 2016 at Fortune Nhlalo's premises at shop number 5 Megawatt Chamber, Parklands, Bulawayo. The items were all recovered hidden in a ceiling at 1st appellant's residence on 16 January 2016. The complainant identified the recovered items through a password prompt and passwords that he used to get the machines operational.

Count 27

This is a charge of theft. Appellants were charged with theft of Andrew Dinhidza's Kypo generator. The generator was stolen from the complainant's place of abode at number 3 Skirwith, Greendale, Bulawayo on 14th January 2016.

The generator was recovered at 1st appellant's place of residence upon his arrest on 16th January 2016 buried in a waste pit. 1st appellant stated that he had brought the generator from Khumbulani Mpofu.

Count 28 and 29

In these counts appellants were charged with house breaking and theft. It was alleged that during the month of November 2015, appellants broke into Costa Mavhima's place of residence and stole his double bed and jerry can. These items were in complainant's garage. The bed was recovered at 2nd appellant's residence while the jerry can was recovered at 1st appellant's residence, after indications made by 2nd appellant at the time of his arrest.

The learned magistrate in the court *a quo* conducted a lengthy trial spanning 25 witnesses. He found the appellants guilty on the counts stated in his judgment. The appellants were sentenced to undergo 17 years imprisonment with all the (23) counts being taken as one for the purposes of sentence. Of the 17 years imprisonment 3 years was suspended on condition of restitution of the sum of US\$2 889. The effective custodial sentence was 13 years imprisonment.

At the time of the hearing of this appeal the appellants had served 3 years and 3 months of their sentences.

Appellant's grounds of appeal

In their grounds of appeal the appellants argued that:

1. The learned magistrate erred at law in finding that the circumstantial evidence in the case was such that no other inference could be drawn from it.
2. The learned magistrate paid undue regard to the possession of the property by appellant number three ignoring appellant's explanation of how he came to possess the property.
3. The magistrate erred at law in her failure to consider that the appellants' defence that they bought the property from Khumbulani Mpofu was not investigated and that if the defence had been investigated the appellants would have been exonerated.
4. The learned magistrate erred in law in taking into account as evidence that which appellant three gave out as pleas of guilty (when allegedly under mental illness) when she altered such pleas from guilty to not guilty.
5. The learned magistrate erred in her failure to find that indications by appellant two were fatally defective and as such could not form the basis of a conviction.
6. The sentence imposed on the appellants induces a sense of shock and disbelief by its severity.
7. The learned magistrate erred in failing to take into account the fact that appellants had served 25 months imprisonment as at the date of sentence.

Analysis of the evidence in the court a quo

The convictions of 1st appellant in respect of counts 6 and 12 for theft from motor vehicle are proper. There was sufficient evidence beyond reasonable doubt to sustain the convictions. There is no need to interfere with the convictions. 1st appellant was properly convicted for unlawful entry and theft in respect of count 15 and 16. The convictions are sound both at law and on the facts. The conviction of 1st appellant in counts 21 and 22 relating to house breaking and theft at Jeffrey Zindoga's residence cannot be allowed to stand. The state elected to try 1st and 3rd appellants jointly. This made it difficult to establish where the probabilities lay. The convictions and sentence in respect of these counts ought to be set aside. The convictions of 1st appellant in counts 28 and 29 relating to house breaking and theft involving a bed and jerry can at number 10 Clement Avenue, Parklands, Bulawayo are, unsafe. The property stolen from the complainant one Costa Mavhima was recovered through indications made by 2nd appellant. These indications were not properly conducted and the findings were improperly admitted into evidence.

As regards counts 3, 4, 5 and 7 and 8 and 10, 11 13 and 14; 18 and 19 and 26 and 27, 1st appellant admitted possession of items related to these charges in each of these counts. 1st appellant's defence was that he purchased the goods from Khumbulani Mpofo of 7567/12 Tshabalala, Bulawayo. The defence proffered by 1st appellant was not properly investigated. The Investigating Officer were not called to testify. The conviction on the substantive charges of unlawful entry and theft are not safe. These convictions cannot be sustained by the evidence on the record. The convictions for unlawful entry in counts 4, 7, 9, 13, 18 and 25 must be set aside with the result that the appellants are found not guilty in respect of these counts. The convictions on charges of theft in counts 3, 5, 8, 10, 14, 19, 26 and 27 must be set side and substituted with convictions for possession of property reasonably suspected to have been stolen as defined in section 125 of the Criminal Law (Codification and Reform) Act. Section 274 of the Criminal Code provides that where a person is charged with a crime the essential elements of which include the essential elements of some other crime, he or she may be found guilty of such other crime if such are the facts proved and if it is not proved that he or she committed the crime charged. See; *State v Kizito Mutsure* HH458/18.

As regards 2nd appellant, the conviction in respect of count 6, 28 and 29 are proper both at law and on the facts presented in the court aquo. There was abundant evidence that 2nd appellant was actively involved in the disposal and sale of tyres. On counts 28 and 29 the second appellant led the police to the houses where break-ins had occurred and yet these complainants had not reported the break-ins.

Even if it were to be accepted that the second appellant was assaulted, such assault would not make him know of places which he had not been to and such places are proved to have been broken into.

Section 258 of the Criminal Procedure and Evidence Act Chapter 9:07 provides that it is lawful to admit evidence that anything was pointed out by the person under trial or that any fact or thing was discovered in consequence of information given by such person notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him at such trial.

The learned magistrate was therefore correct that counts 28 and 29 are an exception to the rest of the counts where second appellant was linked due to indications he allegedly made.

He could only have led the police to these houses because he had been involved in the break-ins. Whilst the convictions on the remaining counts cannot stand, the convictions on counts 28 and 29 are proper.

In respect of the 3rd appellant, he was primarily prosecuted and convicted on the basis that he had been implicated by his co-accused (1st appellant) in most of the counts. 3rd appellant's appeal against conviction and sentence in respect of all the counts must succeed. In the result 3rd is found not guilty and acquitted on all counts. The sentence is set aside. He must be released forthwith.

The doctrine of recent possession

This court in the case of *S v Everton Moyo* HB-169-17 pointed out that for the doctrine of recent possession to apply three requirements must be satisfied.

- (a) That the goods were stolen were found in the possession of the accused;
- (b) That the goods were stolen at the relevant time;
- (c) That the accused has failed to give a reasonable explanation of his possession.

See also: *S v Kawadza* 2005 (2) ZLR 32 (H) where the court held that:

“the doctrine of recent possession is based on an inference being drawn that the possessor of recently stolen property stole the property. It may be relied on where he cannot give an innocent explanation of his possession and the inference that he stole the property is the only reasonable inference.” See also; *S v Hondo & Anor* HB 183/18.

1ST appellant was found in possession of a car boot. The complainant's property, car boot and other property was stolen at her residence. The boot of the car was found in the possession of 1st appellant. Complainant adequately identified the car boot by a crack caused by a push cart, just before the theft. Appellant failed to give a reasonable explanation of his possession of the boot. Washing baskets were stolen and found in the possession of the 1st appellant. Complainant testified that he had purchased the items in South Africa. The same washing baskets could not have been found in appellant's possession by mere coincidence. 1st appellant's explanation of his possession was clearly false.

In respect of all the counts where the state conceded that unlawful entry and theft was not proved beyond reasonable doubt. The court accepts the concession. It shall not be necessary to repeat the evidence in each and every count. The role of 2nd appellant in the counts where he was convicted was well defined. The evidence is reliable and credible in all material respects.

Sentence

With respect to sentence this court is at large. 1st appellant is a man of means. He stole out of greed. He set out to steal as much property as possible and then resale the items for a profit. 1st appellant was never contrite and fought the allegations to the bitter end. The fact that some of the property was recovered does not count much in his favour. The recoveries were fortuitous and in most instances a result of intensive investigations by the police. The 1st appellant went to great lengths to conceal the property stolen. Some of the stolen goods were hidden in a ceiling at appellant's residence. Some property was buried and concealed in the ground. 1st appellant even took some of the property to his rural plot in Ntabazinduna. This was a carefully planned criminal enterprise.

In the result, the following order is made:

1st appellant

1. The appeal against the convictions of theft from a motor vehicle in counts 6 and 12 and against conviction for unlawful entry and theft in counts 15 and 16 are dismissed. 1st appellant is sentenced to 2 years imprisonment for the convictions in counts 6 and 12 taken as one for the purpose of sentence. 6 months imprisonment in respect of count 15 and 16 also taken as one for the purpose of sentence.
2. The appeals against conviction in counts 4, 7, 9, 13, 18, 21, and 27 (unlawful entry) and count 21 and 22 (theft) succeeds and the appeal be and is hereby upheld. The 1st appellant is found not guilty and acquitted.
3. That the appeals against conviction in counts 3, 5, 8, 10, 14, 19, 26 and 27 wherein 1st appellant was charged with theft succeed to the extent that the convictions for theft be set aside and substituted with convictions for possession of stolen property reasonably suspected of having been stolen. In these counts 1st appellant is sentenced to 4 years imprisonment with all counts being treated as one for the purpose of sentence.
4. That the sentence of 27 years imprisonment imposed by the court *a quo* be and is hereby set aside and substituted with one of 6 years and 6 months imprisonment being the cumulative total sentence in respect of counts 6 and 12, counts 13 and 16 and in counts 3, 5, 8, 10, 14, 16, 19, 26 and 27. Of this cumulative total 2 years imprisonment is suspended for 5 years on condition appellant is not within that period convicted and sentenced for an offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine

2nd appellant

5. The appeal against the conviction for theft from a motor vehicle in count 6 be and is hereby dismissed. The appeal against conviction for unlawful entry and theft in counts 28 and 29 be and is hereby dismissed. On count 6, Second appellant is sentenced to 18 months imprisonment. Counts 28 and 29 will be taken as one for sentence and second appellant is sentenced to 24 months imprisonment. Of the total 3 years 6 months, 6 months imprisonment is suspended for five years on condition accused is not within that period convicted and sentenced for an offence

involving dishonesty and for which he is sentenced to imprisonment without the option of a fine.

6. The appeal against conviction in the remaining counts be and is hereby upheld with the result that 2nd appellant is found not guilty and acquitted.
7. That the appeal against sentence succeeds to the extent that the sentence of 17 years imprisonment imposed in the court *a quo be* and is hereby set aside and substituted with one of 42 months imprisonment with 6 months imprisonment suspended for 5 years on condition accused is not within that time convicted of an offence involving dishonesty and for which is sentenced without the option of a fine.
8. 2nd appellant has served 3 years and 3 months of his sentence, pending his appeal. He is accordingly entitled to his immediate release.
9. 3rd appellants appeal against conviction and sentence succeeds. He is found not guilty and acquitted on all counts. He is entitled to his immediate release.

Kabasa J I agree

National Prosecuting Authority, state's legal practitioners