

ARCHFORD CHARAKUPA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & TAKUVA JJ
BULAWAYO 24 JANUARY 2022

Criminal Appeal

T. Runganga for the appellant

T. Nyathi for the respondent

MAKONESE J: The appellant appeared before a Regional Magistrate at Tredgold, Bulawayo on the 31st January 2019 facing a charge of contravening section 60A (1) of the Electricity Amendment Act, No. 12/07, that is to say, cut, damage, interfere with equipment to generate, supply and distribute electricity. The matter went to a full trial. Appellant was convicted and sentenced to a mandatory 10 years imprisonment.

Dissatisfied with the conviction and sentence appellant noted an appeal with this court.

Factual background

On the 6th of September 2018 detectives from the Minerals Border Control Unit were on patrol with members of the Zimbabwe Electricity and Distribution Company along the Harare road. They observed a red Honda Fit motor vehicle bearing registration numbers AEO 2975 parked by the side of the road. The team approached the driver of the motor vehicle who was donning a work suit. The members identified themselves as police officers and requested to search the vehicle. One metre of aluminum cable was found inside the motor vehicle. The patrol team conducted a surveillance of the area in the company of the

driver of the vehicle. Residents of the Montgomery area who had apprehended the appellant who was carrying two heavy duty bolt cutters surrendered him to the team on patrol. Investigations revealed that appellant and his co-accused had gone to plot number 5 Montgomery where they cut 12 rolls of overhead copper conductors. The court *a quo* was satisfied that the state proved its case beyond reasonable doubt.

Submissions by the appellant

The appellant submitted that the court *a quo* misdirected itself in making a finding that the state had proved its case beyond reasonable doubt when the state case was marred by inconsistencies. It was argued that the court *a quo* misdirected itself in finding that the appellant made some pointing out of the copper cables or led to the recovery of the copper hidden in some grass at a plot in Montgomery. Appellant contended that there was a further misdirection in the court *a quo* not believing the appellant's version when such version was reasonably possibly true. Appellant submitted that the court *a quo* erred in relying on circumstantial evidence when the inference sought to be drawn was not consistent with all the proved facts.

As regards sentence, the appellant argued that he learned magistrate erred and misdirected himself by failing to consider special circumstances advanced by appellant in that appellant was not found in possession of the tools that were used in the commission of the offence. In general, appellant contends that the court *a quo* paid lip service to the factors in mitigation.

Submissions by the respondent

The state argued that sufficient evidence was placed before the court *a quo* to secure a conviction. The state witnesses placed the appellant at the scene of the crime. The appellant

was spotted at the scene busy trying to cut the copper cables by one Never Dube. Never Dube, alerted his neighbours after he had heard dogs barking. Appellant was apprehended by the witnesses and he fled the scene but was apprehended near the main road. Appellant claimed that had come to see his girlfriend. The state contends that there was sufficient evidence linking the appellant to the offence. Appellant was charged with an accomplice who was driving a Honda Fit motor vehicle. A shoe print seen at the scene matches that of the appellant. The officer who testified, Andrew Shoko arrested appellant's accomplice Michael Masenga who was in telephonic communication with one Shine who confirmed that they were waiting to be picked up as they had completed their mission. The witness Andrew Shoko discovered that both appellant and his accomplice were communicating with Shoko and other associates who were at large at the time of the trial. The appellant led the police to where the copper cables were hidden.

It is submitted by the respondent that the learned magistrate in the court *a quo* did not err in finding the appellant guilty as charged. The respondent contends that the trial magistrate carefully assessed the evidence and that his assessment on credibility cannot be faulted.

As regards sentence the respondent submitted that issues of sentence are the province of the trial court. The well-established principle is that the appeal court will not interfere with the sentence of a lower court unless such sentence is vitiated by misdirection or it is shown that the sentencing discretion of the trial court was injudiciously exercised.

Whether the trial court erred in convicting the appellant

A perusal of the record of proceedings reflects that sufficient and credible evidence was placed before the court to sustain the conviction. Where the state leads evidence from a number of witnesses, the strength of the case against the accused that is sufficient to prove a

case beyond reasonable doubt takes into account all the evidence led in its totality. The court is enjoined to ensure that there is sufficiency of evidence by assessing all the evidence. It is erroneous, to take the evidence of each state witnesses, in a piece-meal approach.

A finding of proof beyond reasonable doubt necessarily means all the evidence for the state must point to the guilt of the accused. Put differently the evidence of the state must be examined in its entirety. Minor contradictions by state witnesses does not lead to a conclusion that the state has failed to prove its case.

On matters of credibility, it now settled law that the assessment of credibility of a witness is the province of the trial court and it ought not to be disregarded by the appeal court unless it defies reason and common sense. See; *S v Nyirenda* 2003 ZLR (2) 64 (H) and *S v Mlambo* 1994 (2) ZLR 410 (S).

In this matter there is no dispute that copper cables and bolt cutters were recovered at the scene. Appellant assisted in the recovery of the cables. Appellant's version that he was in the area to meet a girlfriend in Cowdray Park was false. Appellant did not lead evidence from this "lady of the night" despite being given an opportunity to do so. Appellant's defence was shown not only to be false, but probably false. The trial court correctly rejected his version. The appeal against conviction has no merit and the conviction cannot be assailed.

As regards sentence the general principle is that the trial court enjoys a sentencing discretion. Unless the sentence suffers from misdirection or is wholly inappropriate, an appeal court will not interfere with the sentence of a lower court. In this matter, upon conviction the sentence applicable in the absence of special circumstances is a mandatory 10 year prison term. The sentence is prescribed by statute. No special circumstances were shown to exist. There was no misdirection on the part of the sentencing court.

In the result, and accordingly, the following order is made:

1. The appeal be and is hereby dismissed in its entirety.

Takuva J.....I agree

Tanaka Law Chambers, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners