VINCENT CALVIN CHIKASHA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU AND CHIKOWERO JJ
HARARE, 7 and 12 September 2022

Criminal Appeal

Appellant in person
C Muchemwa, for the respondent

CHIKOWERO J:

1. This is an appeal against both conviction and sentence consequent to the Regional Court's decision convicting the appellant on three counts of robbery as defined in s 126 of the Criminal Law (Codification and Reform) Act *[Chapter 9:23]* (the Criminal Law Code). He was sentenced to 10 years imprisonment on each count with a third of the total sentence suspended for 5 years on the usual conditions of good behaviour to leave the effective sentence at 20 years imprisonment.
2. The second accused was similarly convicted and the same sentence imposed on him.
3. The third accused was acquitted on the third count only. On the remaining counts he was sentenced to 4 years imprisonment per count to take the total to 8 years imprisonment of which half was suspended for 5 years on the usual conditions of good behavior. The effective sentence was 4 years imprisonment.
4. In respect of the first count, the trial court found that the appellant and his two accomplices had attacked and robbed the complainant of a Honda Fit in Goromonzi on 29 July 2018 after they had purported to hire it to be driven to a funeral that never was.
5. The vehicle was recovered on 10 August 2018 with the appellant behind the steering wheel and one of the accomplices as a passenger. Its original colour, the vehicle had, when recovered, been painted black although the top part still bore the original colour. The authentic registration plates had been removed and false plates fitted.

6. As for count two, the trial court found that on 5 July 2018, in Marondera, the trio had attacked and robbed yet another complainant of a black Honda Fit after posing as desperate motorists who had hired the Honda Fit to be ferried to the spot where their own car (which was fictitious) had broken down.
7. They repainted the stolen vehicle silver before stripping it and selling all the wheels, the radio and the CD rom to one Aaron Saini after it had been involved in an accident. The keys for this stolen vehicle were recovered from the person of the appellant while he was driving the vehicle stolen in count one.
8. The *modus operandi* employed in the second count was replicated in the third count. The third complainant was bound and dumped with the appellant and the second accused vanishing with the hapless victim's Honda Fit on 6 January 2018 in Harare. They sold the vehicle to one Tafadzwa Muwezwa who, on insisting that the agreement of sale be reduced to writing before he parted with the balance of the purchase price, was never approached by the duo for payment of that balance.
9. The wreckage of this vehicle was recovered from Muwezwa. It included 4 doors, 4 seats, car radio, 2 fenders and 2 shocks.
10. The first, second and third grounds of appeal raise one issue. The appellant contends that the learned magistrate erred in admitting evidence obtained in violation of s 70(3) of the Constitution. He complains that the admission of the evidence rendered the trial unfair. This relates to counts two and three. The appellant told the trial court that he confessed that he had committed these two robberies and sold the radio, wheels and CD rom to Saini (count two) and the Honda Fit to Muwezwa (count three) because the police had subjected him to torture.
11. Acting on the information supplied by the appellant, the police recovered the wreckage of the stolen vehicle (count two) as well as those parts sold to Saini. The second complainant identified what remained of his vehicle through the engine and chassis number. Saini, for his part, testified that he had bought those parts from the appellant. This witness was believed.
12. Still acting on information received from the appellant, the police recovered the car parts which we have already itemized, from Muwezwa. This, in relation to count three.

Muwezwa was believed in testifying that he innocently bought the stolen vehicle from the appellant and accused two.

13. We think that the trial court properly applied its mind to the provisions of s 258(1)(2) and 258A of the Criminal Procedure and Evidence Act [*Chapter 9:07]* (CPEA), in light of s 70(3) of the Constitution, before admitting and relying on the evidence of the recoveries to convict the appellants. It concluded that there was no longer automatic exclusion of evidence obtained illegally because the court is obliged to consider such factors like an accused's rights, interests of the victims of crime and serious breaches of the law by the police or other State employees in deciding whether to admit illegally obtained evidence. Having carried out that balancing act, the court admitted evidence of the recoveries. We think that decision is beyond reproach.
14. Further, the three witnesses from whom car parts were recovered all testified that they had purchased those parts and, in respect of Muwezwa, that he had innocently bought the stolen vehicle from the appellant. These witnesses were believed. We see no basis for disagreeing with the credibility findings in this regard. In fact, the appellant was found in possession of the key for the vehicle stolen in count two at the time that he was arrested while driving the vehicle stolen in count one. This vital piece of evidence was independent of what the appellant and all the witnesses said. It linked the appellant to count two and spoke to the credibility of Saini.
15. That the appellant's warned and cautioned statements and no indications were produced does not detract from the adequacy and sufficiency of the evidence on which the convictions in respect of counts two and three rested. It is true that the investigating officer testified that the appellant's warned and cautioned statements were confessions. It is true also that the investigating officer conceded that the warned and cautioned statements were not confirmed. But that is immaterial. The conviction was not anchored on the warned and cautioned statements. It was never the respondent's case that the appellant made indications leading to the recoveries. Its case was that he revealed the sales and, acting on that information, the police located Muwezwa, Saini and Gorosviba, from whom the recoveries were effected. Resultantly, there is no merit in the fourth ground of appeal.

16. It is not correct that the trial court relied, through the back door (so to speak), on the evidence of dock identification which it had earlier expressly rejected. The court relied on other pieces of evidence to convict the appellant on counts two and three. That evidence had nothing to do with the dock identification of the appellant. The learned magistrate was satisfied that the police did not collude with those witnesses who testified on counts two and three because the third complainant exonerated accused three on the third count. That would not have been the case if there was collusion to falsely claim that the appellant and the two accomplices had committed the second and third robberies.
17. Further, the trial court correctly applied the law relating to similar fact evidence to the circumstances of this matter. It referred to pertinent case law in this regard, that is, *State* v *Banana* 2000 (1) ZLR 607 (SC) and *State* v *Mutsinziri* 1997 (1) ZLR 6 (H). The striking similarities in all three counts, listed by the court *a quo*, are as follows:
    - All three counts were committed between6pm and 7pm.
    - In two of the counts the accused would hire the complainants on the pretext that they wanted to attend to a broken down vehicle
    - In all three instances the stolen vehicles were Honda Fits
    - In all three instances the complainants were stabbed with a knife.
    - On the three occasions the vehicles had their colors changed and false number plates fitted.
    - On two of the occasions the complainants were bound hand and feet and dumped out of the vehicles.

18. We agree with the learned magistrate that the striking features were no coincidence but revealed:

    > "a scheme well-orchestrated by the accused person (*sic*) to target private taxi drivers and Honda Fit vehicles in particular."

19. We thus agree with Mr Muchemwa that there is no merit in the fifth ground of appeal
20. The appeal against conviction on count one is completely devoid of merit. The first complainant and his companion corroborated each other in narrating how the appellant and his accomplices purported to hire the former and thereafter robbed the complainant of the vehicle. The medical report reflected the injuries sustained by the first complainant. The appellant's assertion that the medical report was not a genuine document could not carry the day. The nurse who examined the complainant testified. The defence that the first complainant fabricated the robbery because he failed to raise the US$150 due to the

appellant for repairs to the vehicle in question was correctly rejected. The appellant failed to explain why he repainted the Honda Fit and fitted it with false number plates if he had lawful custody of the vehicle for the purpose of repairing the same. We share the learned magistrate's view that the appellant and his accomplices tampered with the vehicle in the manner described so as to conceal its identity. The first complainant was thus correctly believed, when he testified that he did not know the appellant until the fateful day. The second state witness, who was in the company of the first complainant at all material times, was also properly found to be a credible witness. No basis exists for upsetting the credibility findings.

21. There is thus no merit in the appeal against conviction in respect of all three counts.
22. The same obtains in respect of the appeal against the sentence.
23. The learned magistrate considered the appellant's mitigation, which included his youthfulness. He was 18 years old at the time of sentencing.
24. But he was the leader of a gang (including a 32 year old) which committed three counts of robbery in aggravating circumstances. Two members of the gang were armed with dangerous weapons in the form of knives. The appellant was one of those who used such weapons to stab two of the complainants inflicting thigh and shoulder injuries in the process. The offences were committed at night in clearly premeditated circumstances. The victims were bound and dumped. The appellant would on all occasions not only occupy the front seat, take the leading role in the false hiring of the vehicles but would be the first to pounce on the victims having created the opportune moment by causing each complainant to stop the vehicle on the false premise that he needed a health break.
25. There was good cause to differentiate the appellant's sentence from the third accused. The latter, an 18 year old, was a first offender. The learned magistrate was satisfied that immaturity played a role in the third accused committing counts one and two. Not so for the appellant. He was unrepentant. He had three relevant previous convictions, having undergone two spells in prison. On 15 July 2013 the appellant was convicted of two counts of unlawful entry into premises as defined in s 131 of the Criminal Law Code. Both counts being treated as one for the purpose of sentence, the appellant was ordered to undergo 12 months imprisonment of which half was suspended for 5 years on the usual conditions of

good behavior. On 28 October 2016 the appellant was convicted of theft. He was sentenced to 2 months imprisonment of which a quarter was suspended for 5 years on condition he paid restitution.

26. Less than two years later, the appellant was back on the criminal path, this time committing not one but three counts of a much more grave offence, namely robbery committed in aggravating circumstances. There was every justification for sentencing him differently from the 18 year old third accused.
27. For robbery committed in aggravating circumstances, the lawmaker has prescribed any definite term of imprisonment or life imprisonment by way of penalties. There is no alternative of a fine. This reflects the seriousness with which society views this crime. The protection of members of the public in their persons and property takes centre stage in the assessment of an appropriate penalty.
28. Even then, we think the trial court took a sober approach. It suspended a whole 10 years of the total sentence on the usual conditions of good behavior. That is a third of the sentence. Yet this was a repeat offender. The court *a quo* may well have decided not to suspend any portion of the sentence on the usual conditions of good behavior since the appellant was a repeat offender. It also considered suspending another portion on condition of restitution but decided not to do so because the appellant was a pauper. That decision cannot be impeached. Due to the length of the suspended sentence, the end result was that the appellant would actually serve time in prison for two of the three counts.
29. The cumulative effect of the foregoing considerations convinces us that the sentence imposed is not manifestly harsh and excessive as to induce a sense of shock.
30. In the result, the appeal be and is dismissed in its entirety.

CHIKOWERO J:……..

ZHOU J:……

The National Prosecuting Authority, respondent's legal practitioners