SIMON DUBE
and
DUMISANI DUBE
and
MLAMULI DUBE
and
MCEBISI SIBANDA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAKONESE AND MOYO JJ
BULAWYO 14 NOVEMBER 2016 AND 8 DECEMBER 2016

Criminal Appeal

T Tapera for the appellant
Miss N Ngwenya for the respondent

MOYO J: At the hearing of this appeal I dismissed the appeal by first to third applicant and acquitted the fourth applicant. I indicated that reasons would follow. Here are the reasons.

The four appellants were convicted of eleven counts of robbery as defined in section 126 of the Criminal Law Codification and Reform Act [Chapter 9:23] and were sentenced to four years imprisonment of which six months imprisonment was suspended on the usual conditions. A further 6 months was suspended on condition of restitution. Dissatisfied with both conviction and sentence they appealed to this court on the following grounds *inter alia* that, their defence of an *alibi* was not disproved by the state, that the learned magistrate used inadmissible confessions to convict the appellants, and that the evidence of the complainants was unreliable and self-contradictory. The appellants also take issue in their notice of appeal with the conduct of the police, on the recoveries, the recording of witness statements, and the recording of the warned and cautioned statements by the appellants.

The appellants also contend that they were not properly identified and that there were no exhibits tendered in some of the counts. Also, that in some counts only two accused were

present but four were charged and convicted. The appellants also have a gripe with the sentence imposed wherein they contend that the learned magistrate did not take into account all relevant factors like the fact that appellants had been in custody prior to the trial commencing and also that some property had been recovered.

The accused persons in their defence outline denied committing the offences as alleged and averred that they were never at the crime scenes and that they resided in Zhombe during the time of the robberies. All the counts relate to robberies committed in Kwekwe.

The complainant in the first count was robbed in the early hours of the morning after being struck with a knobkerrie. He recovered a leather jacket that had been stolen in the robbery through the assistance of the police. Nothing much turned on the cross examination of this witness as the defence counsel was trying to split hairs.

The complainant in the second count was robbed with his friend by a gang that had knobkerries. He managed to recover his cellphone as it had a mobile tracker. The police recovered the phone and the black pair of shoes that had been stolen from him in the incident. Nothing much turned on the cross examination of this witness either.

The third complainant was robbed by two men. He made a report to the police. He later identified his property at CID offices. He identified a shirt. I have to comment that the cross examination by the defence counsel dwelt on the recording of the statements rather than the evidence the witness was giving in court.

The fourth complainant was robbed by three people who grabbed him and ordered him to sit down. A cellphone was stolen in the robbery. His sim card was allegedly used by the accused persons. This was a telecel line.

Complainant number five was also robbed and he identified accused number one during the robbery, he knew accused one prior to the robbery. He observed the first accused person during the robbery. He was also attacked in Kwekwe and fell down. He lost cash and a cellphone together with blue jeans and puma shoes. Accused one was with other guys whom the complainant failed to identify. He recovered a belt through the assistance of the police.

The complainant in count six said he did not see the faces of the accused persons when he was attacked and robbed at about midnight near Imbizo shopping centre, but his property was allegedly recovered from the accused persons.

Maxwell Mandora was the seventh complainant he was also robbed in Kwekwe and had his cellphone and items of clothing stolen. He recovered sneakers allegedly from accused one's place in Zhombe. He also told the court that he knew accused one facially prior to the robbery but that he did not know his name.

The eighth complainant was also robbed in Imbizo he lost a cellphone, shoes and a wallet. His cellphone was recovered from one Archbold Takavira who had allegedly bought it from the accused persons. Archibold Takawira also testified in court that he bought the phone from accused one who was in the company of accused two and three. Accused one fled and the other two were arrested. Thandolwenkosi Moyo told the court that he bought a cellphone from accused one. It was a Samsung cellphone.

Delan Kufahazvinei also confirmed that accused one, two and three came selling cellphones to him and they gave fake names as accused one said that his name is Defeat Ncube.

He bought an android Samsung, black nokia, Vodafone and an x-tell which he sold to Archibold. Tichaona. The complainant positively identified the X-tel cellphone as his. Delan Kufahazvinei was there when accused two and three were arrested while accused one fled. Lovemore Mashekere was also robbed on his way from Imbizo. They met six robbers who surrounded them. He was then robbed with his friend Thembinkosi. He was robbed of a cellphone. The accused were arrested whilst selling his cellphone.

Thembinkosi Khumalo was also robbed by the accused person in Imbizo and had his property valued at $36-00 stolen and he recovered nothing but because he was robbed whilst together with Lovemore Mashekere, whose cellphone linked the accused persons to the robbery, that is how he also linked them to his own case.

Jefias Banda was also robbed in Imbizo and his property was allegedly recovered from the accused persons. He positively identified a khaki short.

Joseph Chari a member of the Zimbabwe Republic Police, told the court that in May 2014, there was an upsurge of robbery cases in Kwekwe. A crack team was established to handle same. One of the complainants who had been robbed positively identified a cellphone displayed by a second hand goods dealer who indicated that the person who had sold the cellphone to him was a Defeat Ncube, and had given an address as 13648/1 Mbizo Kwekwe and he supplied his number as 077438211-, the same number is registered in the name of accused

one. The dealer also told the police that he knew the people who had sold the cellphone to him. On 16 May 2014 the second hand dealer called the police to tell them he had seen the people who had sold him the cellphone. His colleagues (the witness's colleagues) arrested accused two and three while accused one fled from the scene.

A telecel juice card was recovered from a place that accused two and three had pointed to as their criminal base near Cottco ginnery. The juice card had been used to top up airtime in accused one's young brother's cellphone, namely one Owen Dube who tendered an address as 13648/1 the same address given by accused one. They managed to locate another complainant through a telecel sim card that the accused had stolen from her during one of the robbery incidents. They proceeded to Zhombe and recovered from accused one's and Owen Dube's residences several clothing. The items complainants were called to identify the recovered property and several of them did so.

Appellant number four was found not guilty and acquitted as it clearly does not seem that the court record contains any evidence that links him to the commission of the offence, as obviously the state had an onus to prove his involvement in the commission of these crimes.

The first to third appellants

The first to third appellants are sufficiently linked to the robberies in that stolen property was recovered from accused one and he was also known to at least two of the complainants who positively identified him during the robberies. The second and third appellants made indications to the police of a base near Cottco ginnery that they were operating from. A telecel juice card was indeed recovered from that scene. This telecel juice card was confirmed at telecel to have topped up airtime in Owen Dube's phone, one of the accused persons who is still at large. This then also led to a search in the call history resulting in the identification of a sim card that was also being used by the accused persons and yet it belonged to a robbed complainant.

Although accused two and three say they made indications without volition and hence the indications are inadmissible, the juice card is however admissible. Refer to the cases of *Jana* v *S* SC 172/88 and *Ndlovu* v *S*, 1988 (2) ZLR 465 (S), wherein it was held that any evidence, discovered as a result of his/her indication or of information given by an accused is still admissible even if accused did not make the indications freely and voluntarily.

Accused two and third sold some of the stolen loot to the cellphone dealer and were arrested after he positively identified them.

The court has to take note that the robberies were committed about the same place, Mbizo Kwekwe and surrounding areas and, the alleged robbers used the same *modus operandi* of attacking people at night and robbing them of the same kind of property that is, cellphones, cash and clothes as well as shoes.

First to third appellants are therefore sufficiently linked to the robberies by the evidence in the court record. Similar fact evidence is a well known and acceptable principle of our law. In the case of *Banana* v *S* 2000 (1) ZLR 607 (SC) the Supreme Court held on the principle of similar fact evidence that striking similarity is not a pre requisite to admissibility. What has to be assessed is the probative force of the evidence in question, there is no single manner in which this can be achieved. Like, corroboration, this is a matter of logic and common sense.

In the case of *Mutsinziri* v *S*, 1997 (1) ZLR 6 (H), the court pointed out that where there are multiple counts, the fact that each one must be looked at separately does not prevent material which could be admissible under the rules relating to similar fact evidence from being received. It was held in this case that similar fact evidence may be admitted on one count to bolster evidence on another count where there is an issue of identity.

In the case of *Mupah* v *S* 1989 (1) ZLR 279 (SC) it was held that the features in the different counts must bear striking similarity that it would be an affront to common sense to assert that the similarity was explicable on the basis of coincidence.

It is our finding that the three appellants are sufficiently linked to the eleven counts as reasoned herein to hold otherwise would be illogical and it would lack sense.

Proof beyond reasonable doubt

In the case of Isolano 1985(1) ZLR 62 S it was held that proof beyond a reasonable doubt does not mean proof to an absolute degree of certainty. It means that there should be such proof as leaves no reasonable doubt in the mind of an ordinary man capable of sound judgment and appreciating human motivations. It was a high degree of probability, not proof beyond a shadow of doubt. The state does not have to close every avenue of escape and fanciful or remote possibilities can be discounted as these do not lead to reasonable doubt.

Prof G Feltoe in the *Judges' handbook for Criminal cases* 2009 1st Edition says at page 80,

> "The question which needs to be asked is: do all facts taken together prove guilt beyond reasonable doubt? Even a number of inferences, none of which would be decisive, may in their total effect lead to there being proof beyond a reasonable doubt."

In this case the following facts have a cumulative effect of providing proof of guilt beyond a reasonable doubt as against the three appellants:

(a) The robberies were between December 2013 and May 2014, they were frequent, almost every single month through that period had at least a robbery.
(b) The robberies were around Mbizo Kwekwe and surrounding areas
(c) The victims would be accosted and robbed of their values, having been attacked with weapons like a knobkerrie.
(d) The robbers would gun for cellphones, cash and clothing items.
(e) Accused one, had some of the complainants' items recovered at his home
(f) Accused two and three sold some of the stolen cellphones to a cellphone dealer in the company of accused one.
(g) Some of the complainants knew accused one and could positively identify him.
(h) Accused two and three made indications (that although in admissible for lack of freedom) led to the recovery of a cellphone juice card which led to telecel and the call history that showed that the accused persons in fact used a sim card stolen in one of the robberies.
(i) The cellphone dealer knew the people who had sold him the stolen cellphone who are the three appellants.

All this cannot as a matter of logic be a coincidence to the three appellants were involved in the robberies as the facts clearly point out.

Counsel for the appellants over emphasized the aspect of the appellants' *alibi* not having been disproved. I do not appreciate what kind of evidence the state should have adduced to disprove the *alibi* other than the clear evidence that it already had in the court record. Two complainants positively identified accused one as their attacker in two of the robberies, and

accused one had most of the stolen items recovered from his home. Accused two and three sold some of the stolen loot (cellphone) to a cellphone dealer in the company of accused one, so what other evidence should the state have provided to disprove the *alibi*? The *alibi* was thus sufficiently disproved. The appellants were at the scene of crime as the totality of the facts as assessed herein point to that simple fact.

Ad sentence

The notice of appeal and the heads of argument do not show how a sentence of 4 years imprisonment with 1 year suspended on conditions, leaving the appellants with 3 years imprisonment effective, for eleven counts of robbery is excessive, harsh or a misdirection. I hold the view that this sentence is in fact in line with decided cases and does not as a matter of fact induce any sense of shock as being manifestly excessive. Sentencing is the province of the trial court and this court will interfere sparingly only where there is a misdirection or where the sentence is manifestly excessive so as to induce a sense of shock. I find no such reason to interfere with the sentence.

As a result I make the following order:

(1) The appeal against both conviction and sentence by the fourth appellant succeeds, he is found not guilty and is acquitted. He is entitled to his immediate release.

(2) The appeal by first, second and third appellants against both conviction and sentence is dismissed entirely as it is devoid of merit.

Makonese J agrees…….

Magodora and Partners, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners