

AKIDU IWENI MUKUMBA
and
TICHAONA CHIMUTSANYA
and
LLOYD BANDA
and
HALOON MALENGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE AND MUSAKWA JJ
HARARE, 14 January and 24 August 2016

Criminal Appeal

T.K. Hove, for third and fourth appellants
E. Makoto, for the respondent

MUSAKWA J: The appellants were convicted of contravening s 157 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. They were sentenced to nine years imprisonment. They now appeal against conviction and sentence. The first and second appellants' appeal was dismissed for want of prosecution.

The charge for which the appellants stand convicted involves dagga weighing 2 400kg. The first, third and fourth appellants are Malawian nationals. The second appellant is a Zimbabwean national who was employed by Vemoit Company as a clearing agent.

The evidence is that on 12th January 2013, 41 bags loaded with dagga were transported to Zimbabwe from Malawi. The bags were loaded on a Malawian registered truck which was driven by the first appellant. The drugs were concealed among 3 000 hessian bags. Fake documents indicated that the hessian bags were consigned to Twahi family of Graniteside.

On 13th January 2013 the third and fourth appellants entered Zimbabwe through Nyamapanda Border Post. The third appellant engaged the second appellant to facilitate the clearance of the goods. On 14th January 2013 the truck proceeded to Aspindale after picking the fourth appellant at the Chisipite toll gate. Whilst the truck was being offloaded Police

officers from Southerton Police Station descended on the scene. The fourth appellant and another person managed to escape. The first appellant was arrested and he implicated the second and third appellants. Apart from the drugs, a bag containing two Telecel sim certificates was recovered from the front passenger seat of the truck. Of the sim certificates one relates to phone number 0737096810. The second appellant was arrested on 15th January 2013.

On the 21st January 2013 the third appellant was arrested in town. He then led the arresting officers to 17 Chatima Road, Mbare where he was lodging. Upon arrest the third appellant denied his first name. Passports belonging to the third and fourth appellants were recovered from one of the bags in the room. When the fourth appellant arrived at the house and saw detectives in the yard he tried to escape by scaling the wall. He was actually arrested by members of the public after detectives called for help. He was found in possession of a sim card relating to phone number 0737096810 in his pocket. According to analysis of call history this was the most frequently called number. For example, on 12th January 2013 when the truck departed from Malawi there was communication between the first appellant and the fourth appellant. There was communication between the first and second appellants after the truck entered Zimbabwe on the 14th January 2013.

The first appellant's defence was that he was not present when the truck was loaded in Malawi. He was only handed documents relating to the consignment and he believed that he was transporting goods reflected in the documentation. The second appellant's defence was that it was his duty to clear commercial goods. Thus he assisted in the clearance of 3 000 hessian bags. He did not know any of the other appellants prior to the transaction. The third and fourth appellants claimed they were severely assaulted by Police officers who threatened them with death as a way of inducing confessions. They were coerced to sign statements admitting the allegations. They were denied access to legal representation and to their relatives. They also denied possessing the drugs in question.

Conviction

Most of the grounds of appeal do not comply with the rules of court. The first meaningful ground is that the trial court erred in not treating the evidence of an accomplice with caution. The other ground is that the trial court erred in failing to note that the appellants were not caught dealing with or in possession of the dagga.

Although the first appellant denied it, the evidence shows that he was arrested whilst participating in off-loading the truck. He then implicated the rest of the appellants. Strictly considered, the first appellant is not an accomplice as contended by counsel for the appellants. This is so if regard is had to the definition of accomplice as provided in s 195 of the Criminal Code. Rather, he is an actual perpetrator. An accomplice witness is one who testifies for the state as provided in s 267 of the Criminal procedure and Evidence Act [Chapter 9:07]. That the first appellant testified in his defence and also implicated the other appellants does not render him an accomplice witness. He is distinguishable from an accomplice witness counsel for the appellants might have had in mind. See for example *S v Paweni & Another* 1985 (2) ZLR 133 (SC), *Sivako v Attorney-General* 1999 (2) ZLR 271 (SC) and *R v Tela* 1964 (2) SA 436 (FC).

Notwithstanding the above observations, it is pertinent to note that it was competent for the first appellant to testify for the defence. His testimony against the other appellants would have been considered for purposes of determining their liability.¹ Notwithstanding that the first appellant was not an accomplice witness as observed authorities suggest that his testimony still needed to be treated with caution in order to guard against false incrimination.² Notwithstanding the trial court's failure to adopt a cautionary approach to the first appellant's testimony, such misdirection can only work in favour of the third and fourth appellants if it can be held that it led to a substantial miscarriage of justice.³

The charge in question is not dependant on proving the appellants' physical possession of the dagga as contended in the notice of appeal. Possession is not an essential element of dealing although it may complement it. The second appellant facilitated the clearance of the dagga. He did communicate with the first appellant telephonically on the day the dagga entered Zimbabwe. According to the first appellant, the seal was broken and the shipment was inspected at the border. This evidence was not challenged. If indeed the truck was opened it was inevitable that the dagga would have been smelt. It is irrelevant that it is not the first appellant who broke the seal.

When the first appellant was arrested, he claimed that the consignment belonged to his boss, Lloyd. It cannot be mere coincidence that the third appellant is Lloyd. The third appellant happened to be at the border at the time the shipment was cleared. When the third

¹ John Reid Rowland, *Criminal Procedure in Zimbabwe*, 18-25

² John Reid Rowland, *Criminal Procedure in Zimbabwe*, 21-3

³ S 38 (2) High Court Act [Chap 7:06]

appellant was subsequently arrested he denied that he was Lloyd. Then there is the admission that the third and fourth appellants travelled on the same bus from Malawi, although they would rather paint a picture of innocent association. The third appellant would later be found with the fourth appellant's passport. On the other hand the fourth appellant communicated frequently with the first appellant as evidenced by mobile call history. The fourth appellant also turned up at the house where the third appellant was lodging and attempted to flee from the detectives who were at the house. To cap it all, there were disused hessian sacks at the Mbare house. This suggests that the Mbare lodging was being used as a distribution point for the dagga.

Concerning the issue of dealing, s 155 of the Code defines it as follows-

““deal in”, in relation to a dangerous drug, includes to sell or to perform any act, whether as a principal, agent, carrier, messenger or otherwise, in connection with the delivery, collection, importation, exportation, trans-shipment, supply, administration, manufacture, cultivation, procurement or transmission of such drug;”

The circumstantial evidence in this case was sufficient to draw an inference of the appellants' guilt. The offence has the hallmarks of organised crime. Therefore the aspects of importation, false declaration, transportation and communication amongst the co-accused in relation to the consignment fall within the definition of “deal in”.

Sentence

The quantity of dagga involved was considerable. It might actually be the biggest haul so far to grace these courts. It is inescapable that the dagga was meant for sale. Section 156 (1) (e) (ii) provides for a sentence of a fine not exceeding level fourteen or imprisonment not exceeding fifteen years or both such fine and imprisonment. In my respectful view the sentence that was imposed fits the enormity of the crime.

In the result, the appeal is dismissed in its entirety.

HUNGWE J agrees.....

T. K. Hove & Associates, appellants' legal practitioners
National Prosecuting Authority, legal practitioners for the state