

THE STATE
versus
EIVIS KUMIRE
and
TAFADZWA MASAWI
and
SPENCER KUDAWANATSA

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 30 July 2019

Criminal Review

MUSAKWA J: The accused persons were convicted of robbery. Each was sentenced to 16 months' imprisonment of which 3 months were suspended for 5 years on condition of good behavior. A further 3 months were suspended on condition of restituting to the complainant by each accused, \$267 through the clerk of court on or before 31 May 2019. The remaining 10 months were suspended on condition of performing 350 hours of community service.

Evidence led was to the effect that on 16 November 2018 and at night the two complainants who happen to be Police Officers were on their way from Glen Norah A to Glen Norah B. They passed through Glen Norah Park. At some footbridge they were attacked by some robbers who were armed with a knife and a sling shot (commonly referred to as a catapult). The complainant Bruce Moto managed to repel the attack. The first accused was arrested in the process. Two cell phones were stolen of which an Itel A16 was subsequently recovered. The first accused led to the arrest of the second accused. The second accused in turn led to the arrest of the third accused. The third accused led Police to one Andrew's residence where the Itel A16 was recovered. No details were given as to the place of recovery but the said Andrew was not found on that occasion.

The first accused's defence was that as he made his way from a church gathering (masowe) he heard shouting. He went to the scene where he saw more than five people. He found the complainants being labeled thieves. He tried to establish what was happening and was arrested instead. He was assaulted and compelled to indicate those he was in company of

and yet he was alone. As a result he led Police Officers to the second accused's residence. He only knew the second accused as he does some unspecified part-time work with him. He did not know the third accused. He was not involved in the recovery of the cell phone.

The second accused claimed that when Police Officers went to his residence they assaulted him and demanded that he show them his friends. As a result he indicated the third accused.

The third accused's defence was that he could not recall where he spent the particular day. Police officers came to his residence in the company of the second accused. He was not given an opportunity to explain as they assaulted him. Nothing was recovered from him.

Two issues arise in this matter. The first is adequacy of the evidence as against the second and third accused persons. The second issue concerns the sentence that was imposed. Was community service appropriate in the circumstances?

Conviction

The trial magistrate is of the view that he was satisfied with the evidence. As justification that the evidence of one accused is admissible against a co-accused, the trial magistrate cited the case of *Christopher Sambo v S SC 22-90*.

As justification for the sentence, the trial magistrate pointed out that the first and second accused spent six months in custody prior to the finalization of the case. This is notwithstanding that in the reasons for sentence the period of pre-sentence incarceration was noted as four months.

The only viable evidence is that which relates to the first accused's guilt. This is because he was at the scene of crime. According to Bruce Moto the first accused had a sling shot. Bruce Moto held the sling shot and struck the first accused who then fell down. He called to his colleague to bring a gun. The colleague came and held the first accused. According to the colleague (Maxwell Sibanda) the first accused attempted to flee and he tripped him and pinned him down. The first accused then stated that Spencer had the phone.

From the sequence of events, upon the first accused's arrest he was taken to Glen Norah Police Station. Thereafter the witnesses were led to the second accused's residence. From the second accused's residence they went to the third accused's residence. The third accused led them to one Andrew's residence whom they did not find.

In holding that evidence given by an accused is admissible against a co-accused, the Supreme Court in the case of *Christopher Sambo v S supra* also held that such evidence must be treated with caution since there is risk of false incrimination. It must be apparent from the

trial court's judgment that the trier of fact was alive to the risk of false incrimination. Concerning the nature of caution a court must take into account the Supreme Court also referred to the case of *R v O'Reilly* [1967] 2 QB 722 in which at 727 SALMON LJ had this to say:

“The rule that (the judge must warn himself) does not mean that there has to be some legalistic ritual to be automatically recited by the judge, that some particular form of words or incantation must be used, and if not, the (judgment) is faulty and the conviction must be quashed.”

With the *dicta* in *Christopher Sambo v S supra* in mind one has to consider how the trial court came to convict all the three accused. The trial court posed the question why the first accused would indicate where the second and third accused lived if he was simply asked to show his friends. It was of the view that the first accused would not have indicated the co-accused if they were not part of the criminal enterprise. The trial court also reasoned that the second accused did not challenge the first accused as to why he incriminated him. Thus the trial court finally reasoned that the implication of co-accused by the first accused was more probable as the first accused had been arrested at the scene. I take this to mean that the first accused would not have implicated the co-accused unless they were also involved in the crime.

Taking into account that all accused persons alleged they were assaulted by the Police witnesses, it was incumbent on the trial court to be alive to that when it came to considering the value of the indications they made. The prosecution did not seek to adduce in the expected way, evidence on statements the accused persons made in indicating and thus implicating each other. Essentially the pointing out of each other by the accused persons amount to mute statements. In this respect see *S v Nkomo* 1989 (3) ZLR 117 (SC). That the accused persons pointed out each other without statements accompanying the pointing out is of no evidential value. This is especially so when there is no evidence on what was discovered from the pointing out apart from the arrest of the second and third accused persons. Evidence on the recovery of the ITEL A16 is sketchy. All we know is that it is attributable to the third accused. But no clear evidence was led as to where this took place and where exactly it was found. This is compounded by the fact that Andrew who was the link to that phone was not accounted for. Ultimately, with the paucity of evidence and the trial court's misdirection in not showing that it treated the evidence of the first accused with caution, the conviction of the second and third accused is unsafe.

Sentence

It is trite that sentence is eminently a question of discretion. But such discretion must be exercised judicially. The trial court noted that the accused persons did not use violence that resulted in the infliction of injury on the complainants. It also considered that the accused were first offenders and had spent four months in custody. Objectively considered, it cannot be said that the aggravating factors were outweighed by the mitigating factors. This was a gang attack where the complainants were waylaid at night. The assailants were armed with a knife and sling shot. The knife was pointed at Bruce Moto and it was fortuitous that he managed to strike at the knife hand leading to the knife dropping. It was also fortuitous that the complainants, especially Bruce Moto were capable of defending themselves and were able to capture the first accused. As was held by RUMPF J in *S v Zinn* 1969 (2) SA 537 amongst the failings of judicial officers is misplaced pity. This is one such instance of misplaced pity if one considers the circumstances of the case. An effective custodial sentence was warranted.

Disposition

In the result the conviction and sentence in respect of the second and third accused persons is hereby set aside. As regards the sentence imposed on the remaining accused, it is declared that it is not in accordance with real and substantial justice.

MUSAKWA J

MUREMBA J agrees