LAST MUPFUMBURI
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 21 October 2014

Criminal Appeal

S. Gahadzikwa, for the appellant
Ms *F. Kachidza,* for the respondent

HUNGWE J: The appellant was convicted on one count of theft as defined in s 113 (1) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*]. He was sentenced to 30 months imprisonment of which 12 months were suspended for five years on the usual conditions and a further six months were suspended on condition that appellant makes restitution in favour of the complainant in the sum of US$130,00 within a given period.

This matter raises the single issue of the sufficiency of evidence by a single witness in a criminal trial. What is the probative value attached to such a witness when he testifies in a case in which his interest looms large? Pointedly, that is also the only ground of appeal succinctly raised by the appellant. The facts upon which the conviction was based were as follows.

The complainant boarded a Dzivaresekwa-bound commuter omnibus. He sat in the front passenger seat. Between him and the driver was a conductor. He was asked to close the door as the bus took off at high speed. There were other passengers inside the bus. After a short distance which the complainant gave as 200m, he was told to disembark as the bus was no longer going to Dzivaresekwa. He did as ordered. Upon disembarking he realised that he had been relieved of his wallet. Immediately, he got onto the next commuter omnibus and a car chase involving the two omnibuses followed. The former commuter omnibus evaded the latter. Complainant gave up the chase and went to make a police report at Dzivaresekwa Police Station near his home. Police there advised him to lodge his report with Kuwadzana

Police Station. He went home and changed his clothes. Later, he was recalled to his place of employment. He decided to make a police report at Kuwadzana Police Station, on his way back to work. As he walked along the road, he then saw an omnibus which he flagged down. The appellant was the conductor occupying the same seat as did his assailant a few hours previously. He announced that the appellant had stolen from him and effected a citizen's arrest. Police on patrol nearby came and picked the appellant on these charges. He repeated this evidence during trial. No other witness was called by the state. The learned trial magistrate found that there were inconsistencies in his testimony but went on to convict on the evidence of a single witness.

The Law Regarding Single Witness Evidence

The entire State case against the accused may rest upon the evidence given by a single State witness. This may be because the State has been able to produce only one witness against the accused. Alternatively, the State may have called more than one witness but the only evidence on which the guilt of the accused is going to depend is that of one witness alone. This situation has been referred to as a "boxing ring" situation because the outcome of the "contest" hinges on which of the two contestants is believed, namely the State witness or the accused.

With crimes other than perjury and treason, the court may be entitled to convict an accused on the basis of the uncorroborated evidence of a single competent and credible State witness: s 269 Criminal Procedure and Evidence Act, [*Cap 9:07*].

There is obviously a risk which attaches to convicting the accused on the basis of the uncorroborated testimony of a single witness. There is a scarcity of evidence in the case and the testimony of the witness is the sole proof of the accused's guilt. In this situation the danger arises of poor observation, faulty recollection, and reconstruction of evidence after the event, bias and any other risk that the circumstances of the case suggest. Before the court relies on such evidence it must be satisfied that the quality of evidence must make up for the lack of quantity.

It is recognised that corroboration is regarded by many as a cornerstone of the criminal justice system. It is perceived to be an important check which helps to ensure, so far as practicable, that miscarriages of justice are kept to a minimum.

Sufficiency of evidence is the amount of evidence required for a conviction. This is a matter of law. It is not concerned with whether the evidence is truthful or reliable. There may be sufficient evidence for a conviction, yet the judge or jury may choose to acquit an accused because of the quality of that evidence.

For a person to be convicted of a crime there must be:

(a) at least one source of evidence, e.g. the testimony of a witness, that describes the commission of the crime and points to the accused as the perpetrator; and
(b) an additional source of evidence, e.g. the testimony of at least one other witness, which confirms or supports the first source in respect of each of these two essential or crucial facts, i.e. that the crime was committed and that the accused was the perpetrator.

The sources may consist of direct (eye witness) evidence or indirect (circumstantial) evidence.

The requirement for corroboration

7. Corroboration is biblical in origin, its roots being found in references in both Old and New Testaments [ii] to a fact needing to be established by two or more witnesses. The purpose of the requirement is to protect an accused from being convicted on the basis of a single witness, who may be either fallible or dishonest. Hume states:

> "no matter how trivial the offence and how high so ever the credit and character of the witness, since the law is averse to rely on his single word in an inquiry which may affect the person, liberty or fame of his neighbour; and rather than run the risk of such an error, a risk which does not hold when there is concurrence of testimonies, it is willing that the guilty should escape."
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> [iii]

The classic statement on the principle of corroboration comes from a civil case of *O'Hara* v *Central SMT Co* 1941 SC 363, LP (Normand) at 379

> "Corroboration may be by facts and circumstances proved by other evidence than that of a single witness who is to be corroborated. There is sufficient corroboration if the facts and circumstances proved are not only consistent with the evidence of the single witness, but more consistent with it than with any competing account of the events spoken to by him. Accordingly, if the facts and circumstances proved by other witnesses fit in to his narrative so as to make it the most probable account of the events, the requirements of legal proof are satisfied".

The requirement for corroboration was re-stated more recently in *Fox* v *HM Advocate* 1998 JC 94, LJG (Rodger) at 100-101 in the following, rather different, terms:

> "Corroborative evidence is…… evidence which supports or confirms the direct evidence of a witness….. the starting-point is that the jury have accepted the evidence of the direct witness as credible and reliable. The law requires that, even when they have reached that stage, they must still find confirmation of the direct evidence from other independent direct or circumstantial evidence…… the evidence is properly described as being corroborative because of its relation to the direct evidence : it is corroborative because it confirms or supports the direct evidence. The starting point is the direct evidence. So long as the circumstantial evidence is independent and confirms or supports the direct evidence on the crucial facts, it provides corroboration and the requirements of legal proof are met.".

In *R* v *Mokoena* 1956 (3) SA 81 (A) at 85-86 it was laid down that the uncorroborated evidence of a single witness should only be relied upon if the evidence was clear and satisfactory in every material respect. Slight imperfections would not rule out reliance on that evidence but material imperfections would. The court stated that single witness evidence should not be relied upon where, for example, the witness had an interest adverse to the accused, has made a previous inconsistent statement, has given contradictory evidence or had no proper opportunity for observation. However, in the latter case of *S* v *Sauls & Ors* 1981 (3) SA 172 (A) the Appellate Division stated that there was no rule of thumb to be applied when deciding upon the credibility of single witness testimony. The court must simply weigh his evidence and consider its merits and demerits. It must then decide whether it is satisfied that it is truthful, despite any shortcomings, defects or contradictions in that testimony. The approach adopted in the *Sauls* case was followed in the case of *Nyabvure S-23-88*. See also *Worswick* v *State* S-27-88, *S* v *Mukonda* HH-15-87, *S* v *Nemachera* S-89-86 and *S* v *Corbett* 1990(1) ZLR 205 (S).

BECK JA in his article in 1986 Vol 1 No 1 *Prosecutors Bulletin* at p 18 says that in assessing the quality of the single witness' evidence, to decide whether the accused should be convicted on the basis of this evidence, the court should be most attentive to the nature of the witness, looking at his apparent character, his intelligence, his capacity for observation, his powers of recall, his objectivity and things like that. The evidence should be carefully weighed against the objective probabilities of the case, and against all the other evidence which is at variance with it. The court must have rational grounds to conclude that the evidence of the single witness is reliable and trustworthy and is a safe basis for convicting the accused.

Thus although an accused can be convicted on the basis of the uncorroborated testimony of a single competent and credible State witness, the court must assess very carefully the credibility and reliability of such a witness to see whether it is safe to convict on the basis of his testimony alone.

The courts have pointed out that proper investigation of criminal cases will usually uncover corroborating evidence and that it is seldom necessary to rest the entire State case upon single uncorroborated testimony. The courts have exhorted police officers and prosecutors not to be content with the production of evidence from a single witness. However, where it appears to a court that there are other witnesses who may be called, it has the power to call these witnesses itself in appropriate cases.

In *S* v *Musonza & Ors* S-217-88 the Supreme Court stated that as a general rule it is undesirable to rely solely and entirely on the evidence of the complainant, particularly in assault cases and more particularly where there are counter allegations of provocation, self-defence or justification in one form or another. The complainant in such cases has a clear bias and a reason to place himself in a favourable light and the accused in an unfavourable light.

In *S* v *Tamba* S-81-91 the Court stated that in assault cases, where there are other witnesses to the incident in addition to the complainant, these witnesses should be called and the case against the accused should not be left to rest upon the testimony of the complainant alone. It is wrong to deal with such cases as if they were a "boxing match" between the complainant and the accused. These two protagonists should not, as it were, be thrown into the ring with the magistrate as referee who, at the end of the bout, having awarded points for demeanour and probability, would name the winner (who would usually be the complainant). It was even worse if the magistrate is, as often seemed to be the case, a biased referee who worked on the unspoken assumption that the police would not have charged the accused if he was not the guilty one. This approach, said the Supreme Court, was dangerous, especially in assault cases where almost invariably the parties give conflicting versions of what was the cause of the fight and often both versions are partially untrue or exaggerated. Without evidence from bystanders, it was almost impossible to determine which version of the facts was the true one.

In *S* v *Zimbowora* S-7-92 the appellant had been convicted of three counts of contravening the Labour Relations Act. The State case had rested entirely on the evidence of the complainant. On appeal, the Supreme Court said that although the trial court was entitled

to convict the appellant on the single evidence of the complainant, it was necessary for such evidence to be clear and satisfactory in every material respect. As the complainant was a witness with an interest to serve, the trial court was not only required to approach her evidence with caution but should also have sought corroboration of her evidence. The conviction was set aside by the Supreme Court as the complainant's evidence was not satisfactory in all material respects and no evidence was led to corroborate her assertions.

In *S* v *Nduna & Anor* HB-48-03 it was held that where a conviction relies on the evidence of a single witness, discrepancies in the witness's evidence are not necessarily fatal. The discrepancies must be of such magnitude and value that it goes to the root of the matter to such an extent that their presence would no doubt give a different complexion of the matter altogether. The fact that the single witness is himself guilty of some unlawful conduct does not make him an accomplice in the crime which is charged. Where the accused, who were policemen, arrested and robbed a person who was crossing the border illegally, that person was not an accomplice.

The present case demonstrates all the reasons why corroboration is required in criminal trials more acutely than the above cases. The following features stick out like a sore thumb:

i) the complainant only had a fleeting encounter with his assailants;
ii) there was virtually no opportunity for observation of any features of the "thief";
iii) no particulars of the commuter omnibus was recorded during the chase;
iv) no reason was given for the failure to call the driver of the pursuing omnibus;
v) no description is given by the complainant to the police of his assailant upon making his initial report at Dzivaresekwa Police Station;
vi) the possibility of an honest but mistaken identification of both the appellant and his omnibus was not eliminated.

The complainant clearly believed that the approaching omnibus was the same omnibus in which the crew which robbed him were using. The court *a quo* did not demonstrate how it had applied the cautionary rule so as to render the conviction safe and reliable as required by s 269 of the Criminal procedure and Evidence Act.

In the result the conviction remained unsafe. It is therefore set aside and the sentence imposed consequent to the conviction is hereby quashed.

BERE J agrees …….

Gahadzikwa & Mupunga, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners