DHIN'INDLELA NYASHA MTETWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 29 May 2014 & 15 October 2014

Criminal Appeal

T Magwaliba, for the appellant
J Uladi, for the respondent

HUNGWE J: The appellant was convicted of theft as defined in s113 of the Criminal Law (Codification and Reform) Act, [*Cap 9: 23*] involving US$30 178-00. He was sentenced to 5 years of which 3 years imprisonment were suspended on condition he made restitution in that sum before 30 December 2013. He appealed to this court against both conviction and sentence.

After hearing counsel we allowed the appeal and indicated that our reasons for that decision will follow. These are they.

The brief facts upon which the learned trial magistrate found the appellant guilty of theft of cash may be stated as follows. The appellant was the local co-ordinator of Cordaid, a non-governmental organisation with provincial offices in Mutare for its Manicaland operations. On 8November 2012 one Ian Nyamande and the appellant carried out a cash count. There was US$ 30 178, 00 on hand. That sum was left in appellant's custody as his co-administrator, Nyamande was proceeding on time off that weekend. The safe inside which the money was placed has a double lock system which would require that they both operated it to lock or unlock. Ian Nyamande did not lock it since he was proceeding on time off leaving the task to the appellant. On 11 November 2012, the appellant unlocked the safe using his key and stole cash in the sum stated above.

In his grounds of appeal the appellant states that the learned trial magistrate erred in convicting the appellant on the basis of circumstantial evidence when more than one reasonable inference could be drawn from the proven facts. He also states that the learned trial magistrate erred in rely wholly on the evidence of Ian Nyamande without treating it with caution as he is a possible accomplice to the commission of the crime. These two grounds of appeal, in our view, sufficiently cast doubt on the soundness of the conviction by the court a quo. I will demonstrate.

The appellant in his defence pointed out that Ian Nyamande had the keys to the safe and had locked the safe prior to him proceeding on his days off. He had discovered the theft on the following Monday and reported it to police. He also pointed out that the office inside which the safe was located could be accessed by several other people besides himself and Nyamande. Insiders as well as outsiders could have perpetrated this offence.

The learned trail magistrate in his reasons for judgment emphasised the apparent contradictions in the appellant's testimony regarding whether the appellant had his key to the safe at the relevant time. He noted that appellant had suggested that he had lost his key after 8 November 2012. The learned trial magistrate also relied on the evidence of Phyllis Mandizvidza that upon entering the office on Monday 12 November 2012, she noticed that the safe door was open. In her words "it was the most visible thing." Therefore, the magistrate reasoned, the appellant delayed reporting the theft because he had stolen the money. Yet Addlight Mukubvu says she did not notice anything unusual upon her entry into the office on Monday morning. There was no attempt to reconcile these two ladies evidence on this point yet the magistrate used it to make an adverse finding of credibility against the appellant. If Addlight did not notice anything unusual on Monday morning, no inference ought to have been made against the appellant on his failure to notice the break in timeously as the magistrate did. He also placed reliance on the supposed malfunction of the door to the office which was not closing properly as noticed by the witnesses on the day prior to Monday 12 November. There was no evidence as to the general security of this particular office so as to exclude the possibility of an outsider having broken into the office then into the safe. That the appellant had the key to the safe and therefore custody of the money is not the only reasonable inference which could be made on the facts before the court. It appears that the magistrate placed emphasis on the fact that Nyamande made a call from South Africa

regarding his absence at work on Monday therefore he was in South Africa at the time the theft occurred. I note that there was no acceptable evidence that indeed Nyamande was in South Africa when he made that call. The magistrate erred in concluding that Nyamande was not in Mutare when the theft occurred. He relied on Nyamande's say so to arrive at the conclusion. He therefore concluded that it was the appellant who had stolen the money as he was the custodian of this money.

The record demonstrates beyond doubt that there are several possible inferences as to when the money could have been stolen. At record p 8- it is recorded that after counting the money Ian Nyamande placed it back into the safe and locked it. Ian Nyamande says he had not locked it because the appellant needed to access the safe during his absence. So he left it up to the appellant to lock using his key only. But could it not be possible that Nyamande did not lock it for another reason? The record shows that he had reason to visit the office alone in order to place some US$900-00 inside appellant's drawer for appellant's use. What this shows is that he also had access to the safe before 12 November 2012 when he was supposedly off-duty. The other ladies came to the office between Saturday and Sunday for different reasons. Nyamande was required to lock the safe in terms of the established procedure. He did not do so. Nyamande's leave forms permitted his absence from duty only on Friday; so, on Monday he was expected to be in the office. That being so there is no reason why he had to make the US$900-00 accessible by the appellant by visiting the office alone on Friday after work.

I wish to point out that the appellant correctly states that the State case against the appellant rested on circumstantial evidence. I would however wish to point out that even in the most straightforward of cases, one must ultimately nevertheless draw inferences. As an example, where X fired his gun which hits and kills D, it is the only fair and reasonable inference to conclude that the bullet fired by X hit and killed D since it is not possible to see it travel its line of trajectory and hit D with fatal consequences. Zeffert and Paizes explain that:-

> "All evidence requires the trier of fact to engage in inferential reasoning." (*The South African Law of Evidence*, p99).

Some evidence requires fewer inferences, this would be traditionally so-called direct evidence, whereas other evidence, traditionally circumstantial evidence, will require more

inferences. The point must be observed that the court is never free of drawing inferences and therefore the rules that govern the drawing of inferences govern the court in its ultimate evaluation of all evidence. The question ultimately becomes: how is a court to evaluate the evidence?

The law draws no distinction between circumstantial evidence and direct evidence in terms of weight or importance. Either type of evidence may be enough to establish guilt beyond a reasonable doubt, depending on the facts of the case. Because circumstantial evidence requires the drawing of inferences, it is incumbent for this court to restate the process involved in analysing that evidence and what a court must do before returning a verdict of guilty based solely on circumstantial evidence. Initially, the court must decide, on the basis of all of the evidence, what facts, if any, have been proven. Any facts upon which an inference of guilt can be drawn must be proven beyond a reasonable doubt. After the court has determined what facts, if any, have been proven beyond a reasonable doubt, then it must decide what inferences, if any, can be drawn from those facts. Before they may draw an inference of guilt, however, that inference must be the only one that can fairly and reasonably be drawn from the facts, it must be consistent with the proven facts, and it must flow naturally, reasonably, and logically from them.

Again, it must appear that the inference of guilt of the accused is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence. If there is a reasonable hypothesis from the proven facts consistent with the accused's innocence, then the court must find the accused not guilty. If the only reasonable inference the court finds is that the accused is guilty of a charged crime, and that inference is established beyond reasonable doubt, then the court must find the accused guilty of that crime.(*S* v *Marange & Others* 1991 (2) ZLR 244 (S) @249: *Teper* v *R*(1952) AC 480 489; *S* v Shonhiwa 1987 (1) ZLR 215 (S) @ 218F; *R* v *Harry*(1952) NZLR 111; *McGreevy* v *Director of Public Prosecutions*(1973 1 ALL ER 503 (HL)); *Shepherd* v *The Queen* (1990) 170 CLR 573 @ 579).

The court must always bear in mind that the standard of proof in a criminal case is “beyond a reasonable doubt.” If a piece of evidence cannot measure up to this standard, then the court will discard it; if it does the court will rely upon it. Thus the so-called “cardinal rules of logic” are an exhortation to always bear in mind the rationale behind evidence. The

"cardinal rules of logic" in *S* v *Blom* 1939 AD 188@ 202-203 represent the law on the drawing of inferences in criminal trials. They state that (to paraphrase):

1. The inference sought to be drawn must be consistent with the proved facts.
2. The proved facts must exclude all other inferences except the one sought to be drawn.

In attempting to refine this "cardinal rule of logic" I suggested as follows in *Wilson Muyanga* HH 79-13 (unreported):

> "The law regarding circumstantial evidence is well-settled. When a case rests upon circumstantial evidence, such evidence must satisfy the following tests:
>
> (1) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
>
> (2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (3) The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no-one else; and
>
> (4) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilty of the accused but should be inconsistent with his innocence. See *S* v *Shoniwa* 1987 (1) 215 (SC) and the cases therein cited."

The courts are clear that in the drawing inferences they must take into account of the totality of the evidence, and must not consider evidence on a piecemeal basis. (*S* v *De Villiers* 1944 AD 493; *S* v *Reddy* 1996 (2) SACR 1 (A); *R* v *Mtembu* 1950 SA 670 (A))

It seems to me that the possibility that someone else besides the appellant stole the cash from the safe was not reasonably and fairly excluded by the evidence placed on record. Besides the appellant, the main State witness, had the opportunity to steal the money just as the appellant had. The possibility of an intruder was similarly not excluded by the evidence. A more thorough and exhaustive investigation might have excluded both h the appellant as well as Ian Nyamande and the ladies. It did not. In other words, the evidence does not

unerringly point exclusively to the appellant as the culprit in the theft of the money subject of the charge. As such the conviction cannot be said to be safe as the evidence has not gone past the accepted threshold of proof beyond a reasonable doubt.

It was for these reasons that we allowed the appeal and quashed the conviction and set aside the sentence imposed by the court *a quo*.

BERE J agrees _____

Bere Brothers, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners