MAZVITA EVELYN FATA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MAVANGIRA JJ
HARARE, 16 July 2013 & 20 November 2013

Criminal Appeal

Ms *M Chimhoga,* for the appellant
E Nyazamba, for the respondent

HUNGWE J: The appellant appeals against her conviction and sentence. She denied that she had stolen US$24 000, 00 from her employer but, after a trial, she was convicted and sentenced to 4years imprisonment of which 6 months were suspended for 5 years on condition of good behaviour and 36 months on condition she makes full restitution of the whole amount through the clerk of court on or before 30 April 2012. There is an order annexed to the sentence requiring "household property to be returned to accused."

The case against the appellant was built around the claim by the complainant that she lost US$24 000,00 around the time the appellant worked for her as a house maid. Complainant stated in her evidence that she engaged the appellant as a maid in March 2011. She worked mornings only. She did not stay on the premises. In January appellant told her that she had had a miscarriage. They (appellant and her husband) left their residence which was across the road from hers, to proceed to their rural home. It was then that she picked a rumour concerning appellant's sudden good fortune. As a result she checked her own treasure and found her savings amounting to US$24 000,00 missing. She instantly suspected the appellant and reported her suspicion to the police. Appellant was arrested. Complainant stated in her evidence in court that she kept her savings in a locked built-in wardrobe. She believed appellant found her keys where she kept them and unlocked it before helping herself to this sum of money. This led appellant to brag that she was rich to those in her circle of acquaintances. Police recovered household property. The investigating officer told the courtin evidence that appellant told her that the complainant's husband had given her some money after they fell in love. Appellant also told her that she believed a house belonging to the

appellant was recently built using the proceeds of theft since it was a newly-built three-roomed house. Another state witness, Patricia Magadu appellant's sister-in-law, told the court that appellant advanced her a sum of US$3 000, 00. According to this witness, complainant's husband had raped her and they were caught in the act. She paid her off in the sum of US$7 000, 00.

In her defence the appellant told the court that in August 2011 whilst employed by the complainant, she had been raped by the complainant's husband after which the complainant's husband gave her US$5 000, 00. He had given her another US$2 000, 00 after another sexual escapade in their computer room. From the two amounts she had built her three-roomed house in the communal lands and lent her sister-in-law, Patricia Magadu, US$3 000, 00. She bought household effects using the remainder. She stated that this happened well before the complainant allegedly lost her savings. She denied that she could have stolen the complainant's savings as she had never been left alone inside her main bed-room where complainant claimed she kept the money. In any event she stated that there was a screen door to the bed-room which would always be locked. She had no knowledge of where this money was kept or how it was secured.

No-one saw the person who took complainant's savings from wherever it was. No-one, besides the complainant, knew how much she kept and therefore how much was stolen from her, not even her husband. No-one knows when the complainant lost her money including the complainant herself. So, at the outset, there is no proof that complainant had the amount of money in the house that she claims she had kept locked away for a rainy day. Not even her husband, who stated that he gave her money to keep, was able to corroborate her as to the amount she kept in the house. As to the date of the theft, whilst it is not an essential element of theft, the particulars of when the crime allegedly occurred would assist the accused in preparation of her defence. Presently,the averment is that theft occurred "during the period extending from August 2011 to 14 January 2012".

The case against the appellant was therefore based on circumstantial evidence.The evidence tendered by the prosecution is not sufficient to prove unerringly that the accused was responsibleforthecrime. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person.

In *S* v *Hartlebury &Anor*1985 (1) ZLR this court (per MCNALLY J)@ p7 set out what constitutes circumstantial evidence in the following terms:

"Now, all this evidence may be described as "circumstantial evidence". As regards the inferences to be drawn from such evidence, I have accepted that one must ask oneself whether a reasonable man might draw the inferences sought to be drawn by the State and it is perhaps useful in this connection to cite the remarks made in S v Cooper & Ors 1976 (2) SA 875 (T) at 888H to 889C as follows:

> When triers of fact come to deal with circumstantial evidence and inferences to be drawn therefrom, they must be careful to distinguish between inference and conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, a method of inference fails and what is left is mere speculation or conjecture...One often gets cases where the facts proved in evidence - the primary facts - are such that the tribunal of fact can legitimately draw from them an inference one way or the other, or, equally legitimately, refuse to draw any inference at all. But that does not mean that when it does draw an inference it is making a guess. It is only making a guess if it draws an inference which cannot legitimately be drawn; that is to say if it is an inference which no reasonable man could draw."

In *Attorney-General* v *Paweni Trading Corp (Pvt) Ltd* 1990 (1) ZLR24(per KORSAH JA)the Supreme Court held @p 32:

"It seems to me that, in determining the parameters of the phrase under consideration, the court is in a way concerned with the rules governing circumstantial evidence; for the court is merely drawing inferences from the proven facts. And as BEADLE CJ observed in *R* v *Sibanda & Ors* 1965 RLR 363 (A) at 370 A-C; 1965 (4) SA 241 (SRA) at 246 B-C:

> 'Generally speaking, when a large number of facts, taken together, point to the guilt of an accused, it is not necessary that each fact should be taken in isolation and its existence proved beyond a reasonable doubt, it is sufficient if there are reasonable grounds for taking these facts into consideration and all the facts, taken together, prove the guilt of the accused beyond reasonable doubt: See *R* v *de Villiers* (1944 AD 493). Where, however, there is a particularly vital fact which in itself determines the guilt of an accused, it must be proved beyond reasonable doubt.'

To my mind, then, if there are reasonable grounds for taking certain facts into consideration, and all the facts, when taken together point inexorably to the guilt of an accused beyond peradventure, but the trial court nonetheless acquits the accused, then the trial court has taken a view of the facts which could not reasonably be entertained. Put another way, if, on a view of the facts, the court could not reasonably have inferred the innocence of the accused, then the verdict of acquittal is perverse, and the Attorney-General is entitled to attack it."

In *S v Maranga* 1991 (1) ZLR 244 the Supreme Court(per KORSAH JA) expressed itself on the subject thus;

"Before I answer this question, I wish to draw attention to the dangers inherent in drawing conclusions from circumstantial evidence. LORD NORMAND observed in Teper v R [1952] AC 480 at 489 that:

> 'Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast doubt on another. Joseph commanded the steward of his house, 'put my cup, the silver cup, in the sacks' "mouth of the youngest," and when the cup was found there Benjamin's brethren too hastily assumed that he must have stolen it. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'

I ask myself, is the inference that the first appellant was hunting at Twin Tops Ranch the only one to be drawn from the circumstantial evidence? While the circumstantial evidence leaves me with a strong suspicion that he was up to no good, it cannot be said that the circumstantial evidence proffered excludes any other conclusion. Even if the first appellant's explanation that he was on his way to purchase vegetables from the resettlement area does not have a ring of truth about it, it still is not inconsistent with the circumstantial evidence and remains a possible explanation of his presence on a public thoroughfare adjacent to the ranch. At best, the circumstantial evidence raised no more than a very strong suspicion that the first appellant was there to hunt. The learned trial magistrate could not have been satisfied that the explanation was false. R v Difford 1937 AD 370." (@ p249.)

In the Indian Supreme Court matter of*Bhagat Ram* v*State of Punjab*, AIR (1954) SC 621 it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.

The same Court in*C. Chenga Reddy* v*State of A.P.*, [1996] 10 SCC 193, observedthus:

> "21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

In *Padala Veera Reddy* v *State of A.P.*, AIR (1990) SC 79 it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests, which in my respectful view aptly summarise the approach of the courts here as well as in South Africa and in England:

(1) The circumstances from which an inference of guilt is sought to be drawn, must becogently 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 none 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 the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

It is important to carefully scrutinise the evidence of the complainant regarding the charge of theft faced by appellant. The complainant was unable to prove the amount of money that she claims she lost. It was critically important in view of the explanation given by the appellant that the amount be proved. The period during which the theft occurred must have been proved to coincide with the period during which the appellant became "rich". There was no proof that these periods coincided. Her claim that she built her house long before the theft remained unchallenged.Appellant stated that she had been given a total of US$7 000, 00 by complainant's husband. She claimed this was the source of her sudden show of opulence. It was incumbent to show by evidence that this explanation was not only improbable, but in all respects false. The falsity of her explanation, given her known income at the time, would have gone a long way towards giving a lie to her whole evidence thereby creating an only reasonable inference that she, and only she, stole the complainant's money.Complainant's husband confirmed the appellant's evidence that there were other maids who worked for the complainant during the same period the money was lost.There was no proof that, unlike the appellant, they did not enjoy access into the main bed-room where the money was kept. Her evidence that there were other maids who were employed at the same time with her and even after she left complainant's employ, stick out like a sore thumb. The State did not exclude the possibility raised by this fact of other possible suspects having had the same opportunity as the appellant to access the complainant's savings.

In any event, her explanation of the resources suddenly available to her were not seriously challenged. As conceded by the State, her explanations to how she acquired the assets found at her residence could not be said to be reasonably beyond all probability untrue.

In fact it was reasonably possibly true. In that event, the court was not entitled to reject it as false or improbable, let alone convict her of theft.

What I am required to determine is whether there is any possibility that any reasonable court could draw the inferences which the prosecution sought to be drawn from the facts that I have just outlined. It seems to me that no reasonable person could possibly draw inferences of any kind or any relevant kind from the evidence I have referred to and it seems to me to be beyond a shadow of doubt that one can only speculate. The learned trial magistrate fell into error when he concluded that the circumstantial evidence adduced led irresistibly to the conclusion that the appellant was guilty of theft of US$24 000, 00.

In light of the above observations I respectfully find that there was no proof beyond a reasonable doubt. I am unable to conclude that the facts proved at trial are consistent only with the guilt of the appellant and no-one else and inconsistent with her innocence. The fact that the appellant bragged about being rich, or that she had acquired substantial assets or built a three-roomed house in the rural areas could only lead to very strong basis for the suspicion that she stole complainant's money. To hold her liable for the theft could only be based on such speculation and conjecture as revealed in the trial nothing more. The conviction is totally unsafe as there are other inferences which could reasonably be drawn from the same facts besides that the appellant stole US$24 000, 00. She said she sold a piece of diamond. This was not rebutted. It was not an impossibility for her at the time to achieve such wealth this way at the time.

In the result therefore the appellant's conviction for theft is quashed and her sentence is set aside.

MAVANGIRA J agrees……..

Goneso & Associates, appellant's legal practitioners
Attorney-General's Office, respondent's legal practitioners