DAVID MWANJEYA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA, MANGOTA JJ
HARARE, 25 & 30 March, 1 April & 18 November 2015

Criminal Appeal

L Mauwa, for the appellant
F Kachidza, for the respondent

CHATUKUTAJ: This is an appeal against both conviction and sentence imposed on the appellant on 6 May 2011 by the Magistrates Court, Harare. The appellant and his co-accused (George Simbi and hereinafter referred to as "Simbi") were convicted after a fully contested trial of eight counts of c/s 137 (1) (a) (i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Both were sentenced to 3 years imprisonment on each count. Eight years of the total of 24 years was suspended on condition of future good behavior.

The facts giving rise to the conviction are that the appellant and Simbi had been incarcerated on remand on allegations of armed robbery. Upon their release, they forged High Court bail orders and unlawfully facilitated the release of eight prisoners who were on remand. They gave the orders to the prisoners' relatives who in turn paid bail at the magistrates' court. The court *a quo* found that there was evidence which proved that the appellant directly participated in the release of two remand prisoners in counts four and five. The court made a finding that although there was no such direct evidence implicating the appellant in the other six counts, the forged bail orders bore a striking resemblance to the ones that were directly attributed to him. The resemblance permitted no other evidence other than that the appellant had participated in the forgery of the orders and ultimately in the unlawful release of the six prisoners. The court therefore applied the similar fact evidence rule. The court found that the appellant's co-accused to have directly facilitated the release of the all eight prisoners. The court also applied the common purpose doctrine in finding the appellant guilty of the six counts.

The accused was not satisfied with the conviction and sentence and hence the present appeal. The main ground of appeal was that the court *a quo* improperly applied both the similar fact evidence common purpose doctrine against the appellant. It was contended that there was no evidence linking the accused to the offences. It was further contended that the conclusion that the appellant was linked to the offences was not the only conclusion that would be derived from the circumstances of the case.

The appeal was opposed. The respondent contended that the evidence adduce before the court *a quo* was such that the court cannot be said to have misdirected itself in relying on the two principles.

The appellant was granted leave to prosecute his appeal in person. He did so until midstream when he engaged counsel.

During the oral submissions, the appellant abandoned his appeal against conviction in respect of counts 4 and 5.

The appellant did not advance any submissions regarding sentence. It can therefore be safely concluded that the appellant abandoned his appeal against sentence, more particularly in view of the fact that he was represented towards the end of the appeal. It is therefore not necessary to make reference to the grounds of appeal on sentence suffice to observe that the abandonment was in my view proper.

The facts of this case which are common cause are that the appellant and Simbi were known to each other as they were at one time incarcerated at the same time at Harare Remand Prison. Simbi was released first sometime in October 2009. The appellant was released later on the strength of a forged bail order similar to the bail orders giving rise to his conviction.

The appellant was arrested after one Sandisiwe Ndlovu had presented a forged bail order at the magistrates court for the release of her husband, one Caesar Garadze. Garadze was in remand prison on allegations of theft of a motor vehicle. He was in prison together with the appellant before the appellant's release. Garadze's legal practitioners had unsuccessfully applied for bail in the High Court. Ndlovu received a call from the appellant indicating that he knew a lawyer who would assist Garadze to secure bail. He indicated that the lawyer was charging between $400 and $500. She advised him that she did not have the money. He assured her that he would assist and Garadze would pay him upon his release. The appellant went to Marondera where she resided and gave her the bail order. She took the order to the magistrates court so as to pay bail. The clerk of court told her that she wanted to make

inquiries with the High Court on the authenticity of the bail order. Ndlovu left the court under the pretext that she had received a call that her child had been taken ill. She left the bail order with the clerk of court. It is that order that led the police to her. She in turn implicated the appellant leading to the arrest of the appellant.

Upon his arrest, the appellant implicated his co-accused, Simbi. The appellant was asked by the police to call Simbi under the pretext that he wanted a fake order for the release of one Raymond Matiyenga who was in remand prison on allegations of robbery. The two agreed to meet at Machipisa Shopping Centre in Highfield. Simbi was arrested when he arrived at Machipisa Shopping Centre. He was searched and found to have on his person the tools of his trade, a fake High Court date stamp and a bail order for one Cainmore Ngorima. The bail order appeared to be authentic. The stamp was fake in that it was different from the High Court date stamp. The date had to be written in by hand on the order after the order had been stamped.

After investigations, the police obtained the bail orders used for the release of the prisoners cited in the eight charges. All the bail orders were similar. All the orders bore a signature that appeared to be identical although it was not the signature of the Registrar, a Mr Mutogedzwa. They bore a date stamp that appeared identical but which was different from the High Court date stamp. The stamp was the same as the date stamp recovered from Simbi upon his arrest. Another similarity is that the name of the state representative appeared on the face of each bail order as the appellant's legal practitioner. An example is that Mr Chikosha, who is employed by the state, appeared as the appellant's legal practitioner. The respondent (which is the State) was recorded to have appeared in person. The orders were alleged to have been granted by either Justice Karwi or Justice Uchena. The orders for the release of prisoners in counts 4 and 5 which the appellant admits to have facilitated to obtain bore the same similarities with the other six orders that he denies to have processed or assisted in their processing.

All the prisoners in the eight counts were facing allegations of serious offences. Except for the prisoner in the eighth count who was facing allegations of theft of motor vehicle, the other eight were facing allegations of robbery (with 5 prisoners facing allegations of armed robbery). The appellant and Simbi were also facing allegations of armed robbery.

Both the appellant and Simbi stated in their defences that they had engaged the services of a lawyer by the name of Samusodza to obtain the orders. All the state witnesses

testified that they never saw or talked with any person by the name of Samusodza. Their transactions were with either Simbi, the appellant or both.

The appellant admitted to his involvement in obtaining the bail orders in counts 4 and 5 but denied any involvement in the processing of the orders in counts 1 to 3 and 6 to 8. As indicated earlier, it is common cause that there was no direct evidence linking the appellant to these counts. The issue for determination in my view is therefore whether or not the trial court erred in relying on the similar evidence rule and the common purpose principle in convicting the appellant in counts 1 to 3 and 6 to 8.

In order to convict an accused on the basis of the common purpose doctrine, there must be sufficient circumstantial and other direct evidence tending to link the appellant to the offence. This is clearly provided for in terms of *s* 196 of the Criminal Law (Codification and Reform) Act. The section provides for the liability of a co-perpetrator in the commission of an offence. It reads:

> (1) Subject to this section, where
>
> (*a*) two or more persons knowingly associate with each other with the intention that each or any of them shall commit or be prepared to commit any crime; and
>
> (*b*) any one of the persons referred to in paragraph (*a*) ("the actual perpetrator") commits the crime; and
>
> (*c*) any one of the persons referred to in paragraph (*a*) other than the actual perpetrator ("the co-perpetrator") is present with the actual perpetrator during the commission of the crime;
>
> the conduct of the actual perpetrator shall be deemed also to be the conduct of every co-perpetrator, whether or not the conduct of the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator.

Whilst there is no direct evidence of the appellant's involvement in the six counts, the circumstantial evidence that Simbi and the appellants were acting in common purpose is overwhelming. Firstly, the appellant admits having been released on bail with the assistance of Simbi on the strength of a fraudulent bail order. He was released soon after Simbi had been released.

Secondly, Simbi stated in his defence outline that it is through the appellant that he arranged, with the assistance of a lawyer called Samusodza, the release of Arnold Kwarira, (the prisoner in the first count). The appellant was in prison and knew the prisoners who

required his assistance to secure bail. Simbi stated in his defence outline that:

> "Whatever arrangements that were made for bail in respect of Ernest Chikate I did not know because I was no longer there. Since the first accused was the one in custody he was the one who knew some other people who were there.
>
> He told me there was another Arnold Kwarira who needed bail application processed for him. I then went to the Remand Prison in the company of Samusodza."

The appellant did not challenge Simbi's assertion during trial regarding the role that he played of scouting for clients in prison. The appellant attempted to explain during oral submissions that the purpose of cross examination had not been explained to him during trial and hence he did not cross examine Simbi on the issue. However, it is apparent from the record of proceedings that the purpose of cross examination was explained to the appellant not only once but each time a State witness testified. In some instances the appellant cross examined the witnesses and in other instances he opted not to do so. When it came to Simbi, the purpose of cross examination was explained again. The appellant raised questions regarding the bail orders for Ernest Chikate. He further challenged Simbi's evidence that when he called him after his arrest he wanted to arrange a Christmas party. Simbi had stated in his evidence that the discussions leading to his attendance at Machipisa Shopping Centre and the purpose for the attendance leading to his subsequent arrest was to discuss the party and not the processing of a bail order for Raymond Matiyenga. The appellant maintained, during his cross examination of Simbi, that the purpose of the call and Simbi's attendance was to process Matiyenga's bail order.

Secondly, the appellant admitted facilitating the release of prisoners in counts 4 and 5. The two orders, as indicated earlier, were similar to the orders in the disputed counts and were also fake.

Thirdly, the appellant initially testified that he was assisted in obtaining the orders in counts 4 to 5 by a lawyer called Samusodza. He however conceded under cross examination that he did not know any lawyer by the name of Samusodza. This is the same lawyer he had stated in his defence outline to have visited him in prison in the company of Simbi. It is the same lawyer he had stated had assisted him to obtain his own fraudulent bail order. His concession before the court *a quo* was proper in view of the fact that Samusodza's name does not appear in any of the fake orders as the legal practitioner who represented any of the prisoners.

The appellant admitted during trial that following his arrest, he phoned Simbi and told

him that he wanted to arrange for a bail order for Matiyenga. It is this call and the proposed arrangement that led to the arrest of Simbi and the recovery of the fake date stamp similar to the one used on all the fraudulent bail orders. The appellant conceded in cross examination that he was not induced by any duress to implicate Simbi and that all the information that he gave the police leading to the arrest of Simbi was offered voluntarily.

The appellant's association with Simbi, as articulated above, was sufficient to bring him within the ambit of the common purpose to fraudulently release prisoners from remand prison. The reliance by the court *a quo* on the common purpose doctrine cannot therefore be faulted.

The court's reliance on the similar evidence principle cannot be faulted either on the basis of the same evidence relied on above. The similarity of the evidence linking appellant and Simbi to the disputed fake orders is overwhelming. The fake orders in all the charges (including those he admitted to have facilitated) were almost identical in the errors therein contained. The date stamp used in the orders appears to be same. There is also a similarity in the signatures on the fake orders.

The sheer cumulative nature of incriminating evidence against the appellant does not leave one with a reasonable doubt that he participated in the commission of the disputed offences.

The appeal is accordingly dismissed.

MANGOTA J concurs……