NOMSA KANYOKA **1ST APPELLANT**

And

RICHARD NDLOVU **2ND APPELLANT**

And

PHATHISANI NKALA **3RD APPELLANT**

and

ANTHONY MUMBA **4TH APPELLANT**

Versus

THE STATE **RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE

NDOU J AND CHEDA AJ

BULAWAYO 12 MARCH 2012 & 12 JULY 2012

C. Dube-Banda for 3rd appellant

W. Mabhaudi for respondent

Criminal Appeal

CHEDA AJ: The four appellants were charged with theft as defined in section 113 of the Criminal Law (codification and Reform) Act Chapter 9:29). It was alleged that they stole ZESA copper cables from the electricity line at the Chapfuche area of Beitbridge. After conviction they were sentenced to eight (8) years imprisonment with labour.

Although the notice of appeal was filed in the names of all four accused, the appeal that was pursued and argued was that of the 3rd appellant Phathisani Nkala. He appealed against both conviction and sentence.

1. On conviction he said that the learned magistrate had erred in convicting them based on the circumstantial evidence that was not corroborated. The pieces of evidence he took to be circumstantial and corroborative of each other lacked the integrity and credibility to sustain a conviction.
2. The learned magistrate further erred in holding the 1st state witness to have been credible when material inconsistencies protruded quite glaringly from his evidence when weighed against the state and other witnesses.
3. The learned magistrate further erred in ignoring without any reason, the inconsistencies in the state case and went on to ignore the appellant's version of events.
4. The learned magistrate failed to objectively look into the facts before him as would be expected of him thereby convicting the appellants in the clear face of a case judged on preponderance of probabilities and not beyond reasonable doubt. The learned magistrate failed to exercise extreme caution, in the interest of justice, to the appellants who had, due to depleted means, failed to secure legal service and become self actors.

Ad Sentence

5. The learned magistrate erred, and grossly so, in failing to gather sufficient pre-sentencing information from the appellant including failing to ask why they committed the offence.
6. The learned magistrate's sentence was excessive and included a sense of shock when regard is had to the circumstances of the case; the failure to ask as stated in 5 above; that appellants did not benefit anything; that everything was recovered and especially in light of their personal circumstances. Subsequent to the above notice of appeal an amended notice of appeal was filed complaining that appellants were denied a fair trial, the cross-examination of the appellant was unfair, the appellants' rights with regard to cross-examination was explained, evidence amounting to a confession by accused 5 was admitted, attaching weight to the evidence of the 3rd appellant when the state had not shown that it was false, and the state had not proved the guilt of the appellant beyond a reasonable doubt.

The first ground of appeal deals with circumstantial evidence. What is circumstantial evidence? It is evidence of surrounding circumstances which, by undersigned coincidence, is capable of proving a proposition with accuracy of mathematics. It is that set of facts or events which, if put together, will lead to a compelling conclusion. It is a set of facts or events pointing in one direction and so leading to a reasonable belief that those facts point to, or represent the correct position regarding the situation or matters under consideration. It is a set of facts that leave no doubt in a reasonable mind about what they portray. It is a series of undersigned, unexpected coincidences that would compel a reasonable person's mind to one conclusion. If the evidence does not meet that standard then it should not be relied on. See *R* v *Sibanda and Others* 1965 RLR 363

In this case the circumstantial evidence was that: (1) the appellant was found in a motor vehicle parked at the lay bye near the place where ZESA cables had been cut, (2) conflicting explanations for being at that spot were given, and under cross-examination were admitted to be untrue, (3) the tyre marks of that vehicle were observed at the scene of the crime by an experienced tracker and the defence accepted his evidence on the size of the tyres, (4) the vehicle had scratch marks, (5) some twigs of vegetation similar to that at the scene of the crime were seen stuck on parts of the vehicle, (6) there were old receipts in the vehicle indicating some previous dealings or sales of copper cables, (7) calling a witness who eventually admitted she was called to give false evidence. Given such circumstantial evidence a reasonable mind could not have reached a different conclusion.

The evidence of the main state witness Solomon Sithole was quite impressive and cannot be faulted. He is a very experienced tracker. He was trained in tracking when he worked for the National Parks Department. He knows how to analyse and identify spoors. His evidence regarding the tyre marks of the appellant's vehicle leaves no room for any doubt. Even defence counsel said he was a very good witness. When he initially came across the parked vehicle he had no suspicion against the people in the vehicle but approached them in order to warn them of robbers in the area. It was only when the appellants gave conflicting reasons for being parked there that he became suspicious. He said he was told that one of the persons was ill, but later told that they were waiting for a different vehicle with a sick person. One person said they were going to buy maize while the other said they were resting. The rest of the evidence was discovered following that conduct of the appellants. In the end there was really no reliable version from the appellants that could be believed. There was therefore no misdirection in rejecting their evidence.

When the trial commenced the appellants were represented by a legal practitioner who drew up and presented to the court their defence outlines.

As for the evidence of the 5th accused, it is correct that in terms of the Procedural Code one accused person's confession cannot be used against the other. Nowhere in the judgment does the magistrate refer to any evidence of accused 5 implicating accused 3, the appellant. The evidence of the 5th accused relates to accused 6-9 who are not involved in this appeal. That evidence was given in the trial and in the presence of the parties concerned. While the court should have guarded against any hearsay evidence from the witnesses, no hearsay evidence was led relating to accused 3, the appellant, which the court *a quo* can be said to have relied on in convicting him.

Cross-examination of a witness is the procedural form by which an opponent puts under scrutiny the credibility of the other party's evidence. I cannot read anything in the questions and answers between the prosecutor and the appellant that can be said to be unfair cross-examination. The appellant was able to answer all the questions put to him.

As far as his rights in cross-examination of witnesses, the question whether the accused person understood the purpose of cross examination can best be raised by the accused person himself. It is on that basis that the issue would arise as to whether an explanation was made or not and whether he understood the purpose or not. It is not the kind of issue which someone not involved in the trial can raise from outside the record of proceedings. If it is observed that the accused person either failed and just did not ask any questions to the witnesses then the question might arise as to whether the explanation was made and understood, and what explanation was made. Where the record of proceedings says the explanation was made and understood, and where the record shows that following the explanation the accused person proceeded to cross examine the witnesses, there would be no basis for suggesting that the explanation was not made without saying what in the circumstances prompted the accused person to cross examine the witnesses in the absence of the explanation being made and understood. Otherwise it cannot be said that the magistrate was not being truthful when he recorded that it was made and understood. The accused has not put that point in issue and there is nothing that points to him having not understood the purpose of cross examination.

The confession made by accused 5 to Sithole is not disputed by accused 5 who confirmed it in his own evidence. It does not fall within the ambit of confessions whose admissibility requires a trial within a trial. He admitted that his hands were greenish and explained that was because he had been rolling copper cables. He talked about doing this with other accused persons and not the appellant, and this appeal is not by those persons. Only the persons concerned can challenge such confessions if used against them. The items found in the vehicle did not need to be possessed by each or one of the accused persons. They constituted items that were in the vehicle used. The receipts for example showed that there were previous dealings in copper cables, an act very much related to the offence the appellant was charged with.

I am satisfied that with the totality of the evidence, though circumstantial, and the conduct of the appellant and his colleagues, the trial court was justified in reaching the conclusion that the accused persons were guilty of the offence charged, and there was no misdirection in that finding.

The appeal against conviction is dismissed.

On sentence, the trial court made reference to the prevalence of theft of cables in that area and I cannot add more. A total of 8,1 kilogrammes of copper cables was cut and rolled. Electricity supply was disrupted. The effect of cutting electricity cables on members of the public, industry and the economy is well known.

In my view the court erred on the side of leniency as far as the sentence is concerned. There is no basis for interfering with this sentence. The appeal against sentence is also dismissed.

Ndou J ……. I agree

Dube-Banda, Nzarayapenga, 3rd appellant's legal practitioners

Criminal Division, Attorney General's Office, respondent's legal practitioners