HB 220/16
HCA 279/12
CRB MBE 228/12

THOMAS ZHOU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA & MOYO JJ
BULAWAYO 14 MARCH & 4 AUGUST 2016

Criminal Appeal

L. Jamela for the appellant
N. Ngwenya for the respondent

TAKUVA J: The appellant, despite protesting his innocence, was convicted of theft as defined in section 113 (2) (a) of the Criminal Law (Codification and Reform) Act Chapter 9:23 by a magistrate sitting at Zvishavane. He was sentenced to 12 months imprisonment of which 6 months imprisonment was suspended on the usual conditions of good behaviour and a further 6 months were suspended on condition that he repaid the whole amount in the sum of US$6 890,00 to the Ministry of Education, Sports and Culture, Mberengwa District on or before 30 September 2012.

Aggrieved by the conviction, he now appeals to this court for redress on the following grounds;

"The court *a quo* erred in:-

(1) Convicting appellant on the basis that he was in the possession of administration block door keys and safe keys when the money was stolen and did not give weight to the fact that the safe spare key was missing, and that the school headmaster and the senior teacher on many times had possession of the same keys when appellant was away and might have made duplicate keys.
(2) Convicting appellant on the basis that the state witness' evidence was suggesting that he is the one who stole the money without explaining the evidence adduced by the witnesses. Not even a single witness suggested that it might be appellant who stole the money.

(3) Convicting appellant on the basis of circumstantial evidence yet there were some inconsistencies in the evidence presented before the court."

Appellant prayed for the setting aside of his conviction and that he be found not guilty and acquitted.

Appellant was employed by the Ministry of Education, Sports and Culture as a deputy headmaster at Chizungu High School. He was jointly charged with Nhlanhla Alfred Ndlovu, the headmaster with theft of US$6 890,00. His co-accused was discharged at the close of the state case on the basis that unlike appellant, he did not have access to the safe since he did not possess the "safe keys". Appellant was not so lucky as he was put on his defence resulting in his conviction.

The allegations centered on the following facts.

During the period extending from 24th day of February to the 1st day of April 2012 appellant and his co-accused received money as payment for examination fees from the school clerk which money they should have, but did not bank. On 1st day of April, the two counted the money intending to bank it the following day. Appellant kept the "strong room key". On the 2nd day of April 2012, the second accused (the headmaster) "staged a case of unlawful entry and reported at ZRP Mberengwa where they lied that the school safe was broken and cash amounting to US$6 980,00 was stolen together with the cash deposit book".

Subsequently, police visited the school and discovered that no break-in had taken place since "no scratch marks were found on the screen door of the strong room neither on the door of the inner compartment and the safe also had no scratch marks but was open, the handle of the safe was damaged such that the user has to use another device to move the locking levers of the safe when opening it." It was alleged that this fact was only known to the appellant who "in this case used a screw driver after and or before locking the safe."

On the 3rd day of April 2012, the cash deposit book was recovered by appellant's maid "on an open space near a foot path, however there were some showers" during the evening but surprisingly the book was dry. This led to the arrest of the accused person.

The state relied on the evidence of four witnesses namely:

(a) Germination Moyo
(b) David Ndavayona
(c) Lorraine Masaletulini
(d) David Gapare

The 1st witness Germination Moyo (Moyo) is employed by the Ministry of Education as an Inspector. He was informed of the crime by the headmaster on 2 April at approximately 0430 hours. Since he was attending a workshop at the time, Moyo could not visit the school immediately. He only did so on 13 April 2012. At the school he met appellant who identified "a metal door which had been bent so that a person could get underneath. There was also a wooden door which he said was forcibly opened. There was also a wooden door to the clerk's office and a wooden door to the head's office which he said were forcibly opened. At the strong room was a metal door which had 2 pad locks. One of the padlocks was down and was locked. He told me they failed to find the other key. Another wooden door and a metal door were also forcibly opened. Accused 1 also identified the safe which he said contained the money. He told us the safe was locked and that is what happened."

Under cross-examination, the following exchange occurred:

"Q Would you deny that the padlock was locked by the police?
A I can't deny for I was not there but I talked to accused 1 who identified the key to me.
Q There was substantial breaking on the main entrance?
A Yes
Q Force had been used on that door?
A Yes

Q Would you say all the other doors did not have marks to show they had been tempered with?
A I have little knowledge to investigate but I was told (thing) *sic* by accused 1
Q What was the purpose of the visit?
A We wanted to confirm the breaking and confirm whether they had been arrested or not
Q Did you check for marks on the other doors?
A We did not because we didn't have the knowledge of investigating
Q If I say there were scratch marks, you cannot deny?
A I can't agree or deny"

Quite clearly, this witness' evidence was premised on appellant's indications which he himself agreed with *in toto*. As a result, his testimony did not take the state case any further.

David Ndavayona was the state's next witness. He is employed by the school as a security guard. On the night in question he was on duty having commenced work at 7pm. It is instructive to reproduce his testimony verbatim. He stated; "It was on a Sunday in the evening on 1 April 2012. I had started work around 7pm as usual. I went around the yard and check particularly the computer room. During the night around 0100 hours it was cloudy and drizzling. It was windy and I heard windows banging. I went around to close the window which is near the office, I saw that the burglar door had been bent. I got close and checked. I observed that a person wearing something wet had got into the office. I then went to accused's house and knocked at the window. Accused quickly heard me and I rushed back to the office and stood by the door to the office and accused 2 then told me that there was nothing for he had removed the money yesterday. He then went to awake other teachers and they came including accused 1. When they gathered, I just heard accused 2 crying that people's money had been stolen. We both got under the bent burglar (*sic*) and a padlock key was on the ground. They then opened the office by just pushing and the door opened." (the underlining is mine)

Under cross-examination he stated;

"Q Do you think any staff member knowing you were there could come and steal?
A I don't know
Q All the staff members know you are always there?

A Yes
Q Do you have any idea as to what time the breaking took place?
A I don't know
Q What marks or damage is done to a forcibly opened door?
A I do not know how it is done.
Q Any inside door which had burglars?
A Yes where the money was
Q Did you check that door?
A We saw the key on the ground
Q Would you suggest the theft was stage managed?
A I don't know what happened …"
(my emphasis)

The totality of this witness' testimony is that something was certainly amiss at the scene. The outer screen door had been forcibly tempered with to create an opening into the building. Also the burglar bars to the door where the safe was had been interfered with in that one of the padlocks was on the ground. He could not volunteer any opinion on the validity or otherwise of the claim that someone had broken into the administration block. However, his evidence shows that he believed there had been an unlawful entry into the offices that night.

Appellant's maid, one Loraine testified next. Her testimony is simply that on the 2nd April 2012 at approximately 1700 hours she was coming from a borehole 500m away from where she lived. She saw a book written T. Zhou and she picked it up and gave it to appellant's wife. According to her the book was dry although it had rained. She was in the company of two other women when she picked up the book. Lorraine also said on her way to the borehole the book was not on this foot path that is used by many people.

In my view this witness' evidence does not assist at all in answering the critical question of who stole the money. Its relevance is that it shows that whoever stole the money decided to throw away the deposit book along this foot path. It also shows that the scene was not properly examined on the following morning. It appears nobody bothered to search for foot prints which could have been easily observed in view of the texture of the ground if indeed it had rained the previous night.

The last witness was David Gapare a police officer attached to CID property section in Zvishavane. His *viva voce* evidence went like this:

> "The accused person (s) took money from a safe and reported a theft case. When I received the report, I went to the scene and there was nothing to show that there was a burglary, doors were just open. I was in the company of Detective Sergeant Ndlovu. At the scene, the main door had a screen door which was twisted. The wooden door was opened but there was no sign of it being opened by force. There were no scratch marks … From the wooden door was a screen door locked by padlocks. It was open and an unlocked padlock was on the ground. Inside was a wooden door which was open. There was (*sic)* no scratch marks or a sign of force. The safe was open and it showed that a key was used. The safe had no handle and we had been told by the accused persons. I was also in the company of the accused persons."

He gave the following answers under cross-examination;

"Q Did you ever enquire from the accused persons how the doors were opened?
A They agreed that no force was used
Q Who was the custodian of the keys to the doors?
A It is the 1st accused person
Q What was your conclusion?
A I was convinced that it was an inside job because they reported a breaking and there was no break in.
Q Where were the duplicate keys?
A We were told there were no duplicate keys
Q Accused persons are saying there was substantial damage to the doors
A I did not see any such damage
Q Accused persons allege you promised to uplift fingerprints and did not come?
A We never promised that
Q Do you deny officers at Mberengwa promised to uplift fingerprints?
A Maybe they promised
Q Are you sure they stole?
A Yes
Q There are 5 things you mentioned in your statement to the police. Your screen door was [bent], the wooden doors locking system was damaged, the screen door and one padlock missing and the other one on the ground unbroken?
A Yes
Q You said the safe could be opened by a screw driver?
A Yes
Q What type of damage were you expecting?

A The padlocks were opened without any scratch marks, the inner wooden door was opened without any scratch marks and the safe was opened with easy.
Q There were some damages?
A Yes
Q Should accused persons be blamed for lack of substantial damage?
A They took the money
Q You agree with me that if any other person had keys, he could gain access without damage?
A Yes but there were no duplicate keys
Q Would the 2 proceed to steal at a guarded premise?
A He was concentrating on the computer room
Q Do you appreciate the evidence against the accused persons is circumstantial?
A Yes
Q Do you realise the danger of such evidence
A Yes
Q Why do you insist they stole?
A I am convinced they stole."
(my emphasis)

The witness also said he was definite that Lorraine was given the book she claimed to have picked up by appellant's wife. He totally denied the possibility that someone could have dropped the book. As regards the headmaster i.e. accused 2 he said although he did not have keys, he arrested him because "they planned".

The appellant's evidence is to the following effect. On 1 April he in the company of the headmaster counted the money and placed an amount of US$6 908,00 aside for banking the following day. At approximately 0300 hours on the 2nd April 2012, he was alerted by David Maphosa a security guard on duty that night that there had been a break-in at the school administration block. The appellant attended the scene together with other staff members and observed that indeed there was a break-in. He observed substantial damage on all entry points of the administration block. They include the following;

(a) Outside burglar bars
(b) Main door locking system
(c) Strong room padlocks
(d) Strong room wooden door

(e) Strong room metal door

The safe was broken and cash amounting to US$6 980,00 was stolen together with the cash deposit book. The headmaster immediately made a report to the police who attended the scene and promised to search and uplift finger-prints. He also said the cash deposit book was recovered when he was in police custody following his arrest. Appellant confirmed that all senior staff members, the school clerk and some villagers were aware that there was substantial cash at the school including its precise location.

Appellant vehemently denied that he had staged the unlawful entry. He denied taking the amount in issue insisting that there was a possibility that someone who had spare keys broke into the block and stole the money. The following exchange occurred during cross-examination;

"Q Did anyone have access to the keys?
A If going out I will give it to the senior teacher or headmaster
Q It is alleged you stage managed the burglary?
A I did not do that maybe someone had a duplicate key
Q Germination Moyo told the court there were no scratch marks. Why would he lie?
A Maybe he did not check properly, scratch marks are still there.
Q You had the keys to the administration block and safe and you took that money?
A I deny that
Q But there was no breaking?
A It was there
Q Witnesses told court that the locking systems to the doors are still working
A They were lying." (my emphasis)

It is now accepted that proof beyond reasonable doubt cannot be put on the same level as proof beyond the slightest doubt for the simple reason that the burden of adducing proof as high as that would in practice lead to defeating the ends of criminal justice. Although the words "reasonable doubt" are incapable of precise definition they mean that it is a doubt which exists because of probabilities or possibilities which can be regarded as reasonable on the ground of generally accepted human knowledge and experience.

In *R* v *Diford* 1937 AD 270, 272 the Appellate Division stated;

> "… It is equally clear that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if the explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal." (my emphasis)

In our jurisdiction what constitutes proof beyond reasonable doubt was succinctly put by GILLESPIE J (as he then was) in *S* v *Makayanga* 1996 (2) ZLR 231 (H) at p 235 when he observed that;

> "A conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of a criminal complaint, but the fact that such credence is given to the testimony does not mean that conviction must necessarily ensue. Similarly, the mere failure of the accused to win the faith of the bench does not disqualify him from an acquittal. Proof beyond reasonable doubt demands more that that a complainant be believed and the accused disbelieved. It demands that a defence succeeds whenever it appears reasonably possible that it might be true."

It is trite that a trial court is in a better position to assess the demeanour and credibility of witnesses than an appellate court. This prompted ZIYAMBI JA in *Chimbwana* v *Chimbwana* S-28-02 to state that:

> "It is trite in our law that an appellate court will not interfere with findings of fact made by a trial court and which are based on the credibility of witnesses. The reason for this is that the trial court is in a better position to assess the witnesses from its vantage point of having seen and heard them. See *Hughes* v *Graniteside (Pvt) Ltd* S-13-184. The exception to this rule is where there has been a misdirection or a mistake of fact or where the basis the court *a quo* reached its decision was wrong." (my emphasis)

With these principles in mind, it was incumbent upon us sitting as an appellate court to ascertain whether or not the trial court's assessment of the evidence falls within the above exception. It appears from the court *a quo*'s judgment and reasoning that it convicted the appellant on inferential reasoning arising from circumstantial evidence. The *locus classicus* in the use of circumstantial evidence is the case of *R* v *Blom* 1939 AD 188 where WATERMEYER JA stated that in reasoning by inference in a criminal case there are two cardinal rules of logic which cannot be ignored. The first rule is that the inference sought to be drawn must be

consistent with all the proved facts; if it is not, the inference cannot be drawn. The second rule is that the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn: if these proved facts do not exclude all other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct. See also *S* v *Vera* 2003 (1) ZLR 668 (H); *S* v *Tambo* 2007 (2) 33 (H). The court *a quo* reasoned as follows in convicting the appellant;

> "If keys were used as the witnesses suggests (sic) it follows therefore that witnesses are pointing at the accused person who was the custodian of all the keys including the key to the safe. The court is satisfied from the evidence before the court that keys were used to open all the entry points save for the outside burglar bar. It will be unreasonable or rather fictitious to believe under the circumstances that the culprit who stole the money is out there. …
>
> … It is difficult to tell with accuracy how exactly accused took the money and at what time. It is on the other hand easy to conclude from the evidence that accused took the money and later tried to stage a break-in. The court is satisfied from the evidence before it that the accused committed the offence as alleged. It is hard to believe how someone could have accessed the money without accused's input." (my emphasis)

Herein lies the erroneous basis upon which the court *a quo* reached its decision. It totally ignored the appellant's explanation relating to the possibility that someone else duplicated keys both to the doors and the safe. This in our view was not a fanciful possibility because the appellant repeatedly said in his evidence that whenever he was away from work, he would leave the "keys with the headmaster or a senior teacher". This evidence was uncontroverted by the state. It was also accepted that it was common knowledge at the school and in the neighbourhood that there was some money at the school. I take the view that the court *a quo* misdirected itself by failing to consider all the evidence in order to determine whether there was proof beyond reasonable doubt. The court *a quo* erroneously looked at the evidence implicating the appellant in isolation, at the expense of the exculpatory evidence. It failed to appreciate that these two are inseparable, each being the logical corollary of the other. If it had considered the two together, it would have realised that it was reasonably possible that the appellant's defence or explanation might be true.

This is buttressed by the fact that the court *a quo* unjustifiably relied on the speculative evidence of the investigating officer. This witness did not carry out thorough investigations. This is however not surprising in view of his baseless conclusion that this was a staged break-in by the appellant. He did not bother to take photographs at the scene. He never considered searching for finger prints. He never tried to search for a spoor leaving the premises and most importantly he never investigated the appellant's defence especially that keys would be entrusted to other people. In other words this witness jumped to conclusions, resulting in his failure to properly investigate the crime.

Having done that, the witness smuggled his bug into the court room where he massaged the evidence relating to the unlawful entry. Unfortunately the bemused court fell for the trick and took the bait, hook, line and sinker, side stepping the more probable conclusion that the proved facts did not exclude other reasonable inferences. I say so because the witness' behaviour in this respect can only betray a deliberate mindset to mislead and deceive the court.

In the result, I entertain the gravest reservation about the propriety of the conviction. I am satisfied for these reasons that the evidence was inadequate to support a conviction.

Accordingly, it is ordered that:

1. The appeal be and is hereby allowed.
2. The conviction and sentence be and are hereby quashed and set aside.
3. The trial court's verdict be and is hereby replaced by the verdict that the accused is found not guilty and acquitted.

Moyo J …… I agree

H. Tafa & Associates c/o Mlweli Ndlovu & Associates, appellant's legal practitioners
Prosecutor General's Office respondent's legal practitioners