TAURAI DODZO
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU and CHIKOWERO JJ
HARARE, 18 November, 2021 and 07 February, 2022

Criminal Appeal

Appellant, in person
R Chikosha, for the respondent

CHIKOWERO J: This is an appeal against conviction on six counts of unlawful entry into premises as defined in s 131 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The appellant was sentenced to 5 years imprisonment on each count. Of the total 30 years imprisonment 2 years imprisonment was suspended for 5 years on the usual condition of good behaviour. A further 8 years imprisonment was suspended on condition of restitution. The appellant's motor vehicle was forfeited to the state.

The appeal against the sentence is a nullity for want of a prayer in the notice of appeal.

Stanley Makombe and Webster Dodzo, who were the second and the third accused persons at the same trial, were similarly convicted and sentenced.

The court below found that the state had proved beyond reasonable doubt that:

In respect of count one

The appellant, in connivance with the co-accused persons, had unlawfully entered Susan Kahwemba's house in Mabelreign, Harare, by jumping over the pre-cast wall, forcing open the dining room window and, having effected entry into the house, stole the following property:

- 39 inch plasma TCL television set
- HP Laptop
- two nokia cellphones
- six dinner plates

This offence was committed around 2:00am on 9 February 2013.

In respect of counts two to six

This same *modus operandi* was used in committing the offences in counts two to six. Counts two and three were committed at two different houses in Sunridge, Harare. Counts four and five were committed at two different houses in Rhodesville and Greendale, Harare while count six was committed at a certain house in Highlands, Harare.

The offences were committed, respectively, on 25 January 2013, 14 March 2013, 23 January 2013, 21 December 2012 and 10 March 2013.

In the course of committing the various offences, the following property was stolen:

Count two

- three piece black leather sofa
- telefunken plasma television set
- clothes
- three pairs of shoes
- black wallet

Count three

- Defy upright refrigerator
- Pasun KVA medium sized generator
- bike
- five garden chairs

Count four

- 42 inch sony bravia television set
- three piece brown leather sofa
- Kelvinator deeper freezer
- KIC upright refrigerator
- carpet
- Kipor generator

Count five

- 40 inch samsung plasma television set
- JVC radio
- Play station
- Sony Hi-fi disc player with 2 big speakers
- clothes
- iphone charger and adaptor

Count six

- samsung deep freezer
- cadac gas stove
- microwave
- capri deep freezer
- 4 plate stove
- compaq laptop
- JVC radio
- cadac cooler box
- LG radio
- nexus generator
- clothes
- groceries

Most of the facts in all the six counts are common cause. These are:

- there were break –ins at all the six houses.
- such break-ins were effected during the night.
- at all the dwelling houses large items of property including sofas, refrigerators, generators and television sets were stolen.

- in respect of count four, a mazda pick-up truck with registration number beginning CA 797 was perceived by a guard loading sofas from the premises.
- those sofas were recovered from the third accused.
- at all the houses the dogs were killed after being fed with meat and bones laced with a black substance which appeared to be rat killer granules.
- in respect of all six counts some of the stolen property was recovered either from appellant's house in Glen View, Harare or from the third accused's residence in Norton
- the police recovered rat poison from the appellant's motor vehicle.
- the appellant's motor vehicle was a mazda B2200 registration number CA797985.
- all the accused persons were present when the appellant sold the stolen laptop.
- that laptop belonged to the first complainant.
- it was stolen during the commission of the first count of unlawful entry into premises in aggravating circumstances.
- the second accused led police officers to the respective houses of the appellant and the third accused where most of the stolen property was recovered.
- the second accused volunteered the names of the other accomplices. These included Fabian Chavhunduka. The appellant's defence was that he had purchased some of the stolen property from Chavhunduka without knowing that such property was stolen.
- The property in question was recovered by the police and identified by the respective complainants as theirs.

Having assessed the evidence as a whole, the court below concluded that the appellant, the two other co-accused persons and others then at large connived to and did commit all the six counts. Their mode of operation was the same. On all six occasions they first of all silenced the dogs by killing them, using food laced with rat poison. Thereafter, the appellant and his accomplices would jump over the pre-cast wall. Once inside the premises they proceeded to break into the dwelling houses wherefrom they stole the goods that we have listed elsewhere in this judgement.

The appellant's grounds of appeal read as follows:

"1. The court *a quo* erred in convicting the appellant when all the complainants failed to identify him as the one who stole from them.

2. The court *a quo* erred by drawing an inference of guilty from the appellant's possession of the property in question yet:

(i) the appellant gave a plausible and inconvertible explanation as to how appellant come (*sic*) to possess the property.

(ii) none of the complainants were able to positively identify the property through serial numbers, receipts or unique and distinguishing marks.

(iii) appellant's possession of the said property was not recent possession whereby guilty would not have been conclusive and also not all items found in possession of the appellant was identified by witness.

3. The court *a quo* erred on a point of fact when it found that:

(i) in all counts where dogs were killed, they were killed by appellant using rat poison.

(ii) the black substance alleged to have been recovered from his vehicle were (*sic*) rat poison and that the appellant was the owner of the same.

4. The court *a quo* erred when it failed to consider convicting the appellant of a lesser offence of contravening s 125 of the code since the evidence adduced in court could possibly not lead to a conviction on the main charge.

5. The court *a quo* erred by convicting the appellant on the basis that appellant failed to prove his ownership of the property by producing receipts yet at law the onus of proof in a criminal case is upon the state."

The first ground of appeal is both misplaced and misleading. The conviction does not rest on a finding that the six complainants identified the appellant. These offences were committed at night. The complainants only discovered the following morning that their respective dwelling houses had been unlawfully broken into and property stolen therefrom. The complainants did not see the persons who committed the offences at the time the offences were being committed. So they could not be said to have failed to identify the appellant because they never claimed to have seen him in the first place. The complainants could neither have failed nor succeeded in identifying the appellant because identification was never an issue at the trial. Indeed, there was completely no need to hold an identification parade. No such parade was held. This ground of appeal is misplaced. It does not arise from the evidence adduced at the trial. It is dismissed.

The second, third and fourth grounds of appeal impugn the findings of fact and credibility made by the court a quo. The role of an appellate court in such an appeal is settled. In *S* v *Mashonganyika* 2018(1) ZLR 216 H at 217 G – 218E HUNGWE J with the concurrence of BERE J [as both then were] said:

> "Where an appeal is based on an attack on the findings of fact by the trial court, which findings are a result of an assessment of the credibility of the complainant and other state witnesses, it is important to recall the time honoured practice and role of an appellate court. It is this. The

assessment of matters relating to credibility is a matter for the trial court. An appeal court will not lightly interfere with such findings unless these are outrageously irrational and not consistent with the evidence led. See *A-G* v *Van Aardt* 1975 (1) RLR 89 (A). 1975 (2) SA 372 (RA). Where the appeal is based on an attack on the factual findings by the trial court, as here, there are recognised principles which are applied. These may be summarised as follows:

a) Where there has been no misdirection by the trial court, the presumption is that the conclusion is correct, the appeal court will only interfere and reverse the trial court's findings where it is convinced that the finding is wrong;
b) Where the lower court's finding is based on demeanour and credibility of the witness, an appeal court will be reluctant to upset the finding, provided that the evidence of the witness is otherwise satisfactory;
c) Similarly, if the trial court misdirected itself and the misdirection seriously affected the court's view of the appellant's credibility, the appeal court should ignore the lower court's findings on credibility and approach the appellant's evidence as it stands on the record and see whether the evidence on the record justifies the conviction (*R* v *Sibanda* (1) 1964 RLR 360);
d) Even in drawing inferences the trial court may be in a better position than the appeal court, in that it may be more able to estimate what is probable or improbable in relation to the particular people who it observed at the trial;
e) However, sometimes the appeal court may be in as good a position to draw inferences as the trial court was, where the inferences are drawn from admitted facts or facts found by the trial court;
f) There may be a misdirection of fact by the trial court where the reasons are either on their face unsatisfactory or where the record shows them to be such, there may also be a misdirection where though the reasons as far as they go appear satisfactory, the trial court overlooked other facts or probabilities;
g) An appeal court should not seek anxiously to discover reasons adverse to the conclusions of the trial court. No judgment can ever be perfect and all- embracing. Simply because something was not mentioned, it does not mean that it was not considered. See *S* v *Swanhak* (Pvt) Ltd 1973 (2) RLR 70, citing *R* v *Dhlumayo* and Another 1948 (2) SA 677 (A) at 705-6"

With these principles in mind, we examine grounds of appeal two, three and four.

We also bear in mind that proof beyond reasonable doubt does not require that each fact must be proved beyond reasonable doubt. A trial court looks at the evidence as a whole and makes findings of fact on an assessment of all the evidence. It does not consider the defence in isolation from all the other testimony placed before it.

In respect of count one, the appellant, in the presence of accused two and three, sold the complainant's laptop to a certain individual in Norton. On being arrested for possessing the stolen laptop, that purchaser led the police to accused two. The purchaser knew that doing so would assist the police in identifying the laptop seller (the appellant). Indeed, the second accused led the police to the respective residences of both the appellant and accused three, where property stolen pursuant

to the unlawful entry into premises in respect of the rest of the other counts was recovered and identified by their owners.

While the laptop was recovered and traced to the appellant in respect of count one, a generator was recovered from the appellant in respect of count three. Another generator was recovered from the appellant in respect of count six. In his defence outline, the appellant averred that he purchased the laptop and the two generators from Fabian Chavhunduka without knowing that these were stolen items. The appellant himself did not therefore dispute that the laptop and the two generators belonged to the respective complainants, stolen on the occasions of the unlawful entry into premises in circumstances where the dogs were killed with the offenders having thereafter jumped over the pre cast walls, at night, before breaking into the three different premises. Through counsel, he briefly cross-examined the complainants on how they had identified the property as theirs. Those efforts were misdirected. The reason is this. His defence was that he had bought the property from Fabian Chavhunduka without knowing that the property had been stolen. This means that he was accepting the complainants' identification of the property as theirs, stolen in the circumstances set out in the charges. Whether the appellant's possession of the property was recent or not was immaterial. Similarly, since the appellant himself averred in his defence outline that he had innocently purchased stolen property, identification of such property through serial numbers and receipts did not arise. Serial numbers and receipts are not the only features and methods by which property is identified, particularly where there is no competing claim to ownership of such property and where the possessor avers that he bought such property without knowing that it was stolen.

As already indicated, the appellant was jointly charged with two others. One of those others led the police to the houses of the appellant and accused three. It was from those residences that some of the property which was stolen during the commission of the offences in respect of every other count was recovered.

The appellant never put it to Fungai Kwirira, the second complainant that the recovered sofa did not belong to her. He never put it to her that what was recovered was not a three piece black leather sofa. Yet in his defence outline he clearly spelt out that what the police took from accused three's residence was the appellant's rexene sofa that the appellant had delivered to accused three for safe keeping. Kwirira described how she identified the recovered property as

hers. At the end of the day, the appellant never pursued his defence, despite outlining it, with this witness.

The fourth complainant also identified her three piece lounge suite. It too was recovered from the appellant. The property had cracks, was juice-stained and had malfunctioning zips on the cushions. This evidence was unchallenged. Mhondiwa, the guard, testified that he saw a vehicle which appeared to be a Mazda pick-up truck or a Mitsubishi at the fourth complainant's house. Sofas were loaded into the vehicle. About thirty minutes later the same vehicle returned. This time it ferried a generator from the same premises. Mhondiwa captured part of the registration number of the vehicle as CA 795. This was at night. He was ten metres away. Our perusal of the record demonstrates that this witness' evidence was not discredited under cross-examination.

As for the two JVC speakers identified by the fifth complainant as part of her missing property the appellant's defence outline reads as follows:

> "1……
> 2. 1st accused denies ever having JVC speakers in his house at any given time or at the time that a search was conducted by the police at his place of residence. There were other speakers at his house but never JVC speakers.
> 3. The JVC speakers are planted evidence."

Jaison Shereni, as the investigating officer, testified. He recorded in his diary all the property that was recovered from the appellant's house. With the consent of the appellant's defence counsel, he opened his diary and read the list of property recovered into the record. Record page 67 discloses the sheer multitude of the property. It includes:

> "….JVC speaker cream in colour serial number 06606F …another JVC speaker with serial number 86606F…"

The Public Prosecutor, on the same page, asked the witness:

> "Q. Did Accused 1 acknowledge that this property was recovered from his house?
> A. Yes."

The magistrate, in finding that the two JVC speakers were positively identified by the fifth complainant and that the same were among the property recovered from the appellant's house, made a finding of fact based on an assessment of the credibility of the witnesses who appeared before him.

In terms of property, nothing was recovered from the second accused in respect of all six counts. In these circumstances, it seems to us that if the police officers were malicious they would rather have planted the two JVC speakers at the residence of the second accused to make up a case against him. Why bother to plant evidence on the appellant when there already was other evidence militating against his innocence?

In view of the defence of the appellant, the fact that the recovered property was not produced as exhibits does not detract from the adequacy of the evidence on which the conviction is predicated.

The complainants testified that they found their dogs dead on the morrow. In each case, the offences of unlawful entry into the same premises in respect of which the dogs should have provided security had been broken into, under cover of darkness. The dogs were not only dead but swollen. None of the animals were injured. Bones and meat, laced with what appeared to be granules of black rat killer, had been fed to the dogs. The appellant had been evasive on the location of his vehicle. Police investigations led to the recovery of the car from a car park in the appellant's neighbourhood. Inside the vehicle the police recovered some black granules which appeared to be rat poison. The rat poison was found in the ash tray.

On p 119 of the record the appellant's defence outline reads as follows:

> "Count 4
> 1…….
> 2…..
> 3….
> 4. **The rat poison found in 1st accused's vehicle** does not belong to him or the 3rd accused. The vehicle was recovered 6 days after his arrest and was being used by someone else during the said 6 days." (underlining for emphasis)

It was thus common cause at trial that the black granules were rat poison. It was common cause that the rat poison was found in his car. He cannot, on appeal, seek to put in issue that which he admitted at trial. That is impermissible. It was unnecessary to conduct a post-mortem of the dead dogs. This was not a murder trial. The link between the dead dogs, the remnants of the poisoned food, the offence charged, the rat poison found in the appellant's car and the recovered property is clear. The finding that the appellant poisoned the dogs is sound. It was unnecessary to prove that it was the appellant himself who had actually laced the food with the poison. That act,

even if executed by any of the accomplices, was in furtherance of the common purpose of committing the offence of unlawful entry into the six premises in aggravating circumstances.

Fabian Chavhunduka did not testify. Without casting any onus on the appellant to prove his innocence, the nature of the appellant's defence was such as required him to call Chavhunduka as a defence witness. This was so because the cummulative effect of all the other facts of the matter, most of which were common cause, proved that the defence was beyond reasonable doubt false.

The factual finding that the appellant used his Mazda B2200 to ferry the stolen property in respect of all the counts has not been taken on appeal. There is no ground of appeal attacking that finding. We proceed on the basis that the appellant accepts the finding.

On an application of the principles in *S* v *Mashonganyika* (*supra*) there is no basis for us to interfere with the factual findings of the court below. The court relied on common cause facts and drew the inference that the appellant was a co-perpetrator in committing the six counts. Therefore, there is no merit in the second, third and fourth grounds of appeal.

On the fourth ground we add this. In terms of the Fourth Schedule to s 275 of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*] the permissible verdicts on a charge of unlawful entry into premises as defined in s 131 of the same Act are criminal trespass and any crime of which a person might be convicted if he or she were charged with criminal trespass. The permissible verdicts on a charge of criminal trespass as defined in s 132 of the Act are possessing an article for criminal use (section 40) and malicious damage to property (section 140). Even if the evidence had proved that the appellant was guilty of possessing property reasonably suspected of being stolen as defined in s 125 of the Act the trial court could not have convicted him of that offence since that crime is not a permissible verdict on a charge of unlawful entry into premises (section 131). For this reason, too, ground four is unmeritorious.

The fifth ground of appeal is not based on the judgment. Nowhere did the court *a quo* find that the appellant had failed to prove his ownership of the property as he had not produced receipts. It did not convict on the basis of such finding because no such finding was ever made. The court did not advert to the production of receipts by the appellant at all. The fifth ground of appeal, being without merit, is likewise dismissed.

In the result, the following order shall issue:

The appeal against the magistrates court's judgment convicting the appellant on counts 1,2,3,4,5 and 6 be and is dismissed.

ZHOU J: agrees ……..

The National Prosecuting Authority, respondent's legal practitioners