THE STATE
versus
YEUKAI CHIEZA

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI
HARARE, 04 November 2022

Criminal Review

Makonese for the State
The respondent in person

BACHI-MZAWAZI

Introduction

This review matter was procedurally allocated to me for consideration in terms of the governing review laws but due to circumstances beyond my control it could not be processed within a reasonable period as is the norm.

Proceedings in the Trial Court

Preliminaries

That being the case, I am of the view that this is a case where both the sentence and conviction where not in accordance with real and substantial justice. To begin with I noted some anomalies which may be of little significance but must be pointed out. On the face of the record the accused person was charged for contravening s 38(2) (a) Railway Act [*Chapter 13:09*], whose import and thrust is on the willful and malicious obstruction, tampering or destruction of any railway locomotive appurtenance with a view to endanger the safety of the passengers or those using the railway, and the constant reference by the trial court of the same section within the body of its hand-written judgment. However, its findings and reasons for judgment reflect the correct charge as borne by the state outline and as pleaded to by the accused person which is the contravention of s 38(4)(a) of the same Act.

These repeated mistakes throughout the judgment culminated in her interchanging the penalty provisions ss 38(4) and 38(3) in justifying her sentence in the absence of special circumstances.

This is a serious offence attracting a very stiff mandatory penalty. As such judicial officers are enjoined to accord the proceedings the seriousness they deserve. The citing of the wrong section repetitively by the trial court does not reflect that seriousness. It may seem of no consequence as already stated, as the charge on the state papers which was eventually pleaded to by the accused person as well as the ultimate sentence were accurately captured but it does not reflect well on the court.

The charge, allegations and the facts

The accused person was charged and convicted following a full trial for contravening s 38(4)(a) of the Railways Act, [*Chapter 13:09]*, after pleading not guilty. He was sentenced to a minimum mandatory imprisonment term of five years. The court stated that there were no special circumstances warranting the reduction of sentence.

Of note however, is that the facts in the state outline are at variance with the evidence that emerged from the state witnesses in court. Whilst the State outline portrays that the arrest was made following investigations which had been made by the detectives from CID Minerals, Flora and Fauna Unit, it is on record that the arrest was made by the railway's security offices in terms of s39 of the Railways Act. Nevertheless, it is alleged that, the security officers acting on a tip-off raided a scrap yard owned by one Gregory Magome and recovered 3 x 1.3 meters of railway sleepers. Further, the state outline gives the impression that upon interrogation, it is Gregory who *mero mutu* indicated that he had purchased the railway sleepers from the accused person leading to his arrest. However, the evidence from the arresting officers speaks to little boys manning the said scrap yard, who informed them of the owner of the scrap yard, and two individuals including the accused person who were involved with the said railway sleepers. It is on record that, though Gregory *alias* Grigo eventually told them that he purchased the railway objects from the accused, it is the little boy who informed them of the whereabouts of both Gregory and the accused leading to their subsequent arrests.

These discrepancies in the formulation of the state case cannot be allowed to go un censored. The interests of justice demand that all key participants or stake holders in the criminal justice system play their roles committedly. This lackadaisical approach or *laissez faire* attitude cannot be sanctioned. I am afraid that, I do not subscribe to the notion that the initial statements made to and by the police when events are still fresh can be said to be cured by versions at a later stage of trial or that they do not reflect the accurate version. The danger of the later version being modified and manipulated cannot be ruled out. In *S* v *Mupfumburi* HH 64-14, it was emphasized that the interests of justice are best served when the law

enforcement agencies tasked with both investigations and compilation of initial state papers do their part efficiently.

Accused's defence

In his evidence, which was not rebutted and is common cause, the accused is a known scrap metal dealer. He admitted, that he sold Gregory, scrap metal he had bought in Mazowe but denied that amongst that scrap metal where any railway sleepers. In his defense, he emphasized that the arrest was caused by mere implication as he was never found in possession of the railway sleepers as was arrested whilst playing pool.

The State case

The State led evidence from two witnesses, the Railways security officers involved in the arrest and investigation of the matter. Both witnesses chronicled their interaction with the little boy after conducting their own searches and investigation on railway properties and equipment. It was their evidence that following that lead, the railway sleepers were then found in the possession of one Gregory, at his stand in his scrap yard. They all testified that after arresting Gregory, he informed them that he had purchased the sleepers from the accused. They also mentioned that there was mention of one, Zaki, as the person who initially brought the said items. It was also the witnesses' evidence that, when they accosted the accused person whilst playing pool he told them from the onset that he is in the business of sourcing and scrounging for scrap metal which he then re-sells. Accused also told them that indeed he sold scrap metal to Gregory but it did not include the said railway sleepers.

The trial court's findings

The trial court also confirmed by capturing the above testimonies in its findings renditioning that, the common cause facts were that the sleepers were found at Gregory's place nicknamed Grigo, and that the Railway Security officers, acting on the directions of two young boys located the accused whilst playing pool. The trial court then concluded that it was convinced beyond reasonable doubt that the accused person was in possession of the said railway property and that the State had proved its case against him beyond reasonable doubt.

The issue confronting the trial court as it correctly stated was whether or not the rail sleepers were in accused's possession?

It then went on to state as follows,

> "The case at hand has factually proven accused had in his possession 3 x 1.3 meters of rail metal sleeper's property of the National Railways of Zimbabwe. I am convinced beyond

reasonable doubt accused was in possession of equipment used for the provision of railway services. The State has managed to prove its case beyond a reasonable doubt."

An Exposition of the law, evidence and the facts

From the fore going, if the court made a finding on possession, in my view it would have been prudent to analyze the question of possession as it is clear from the record that it was never established that the accused person was in possession of the railway items at any given time. There is nowhere on record where the court scrutinized the issue of possession which was imperative, in the face of the accused's defense that he was never in possession of the said railway object, had no knowledge that they had been stolen nor the possibility that they could be stolen property? More so when the evidence from the state witness was a rendition of the accused's defense. The failure by the trial court to do so amounts to a misdirection, in my considered assessment.

In *Choruma Blasting and Earthmoving Service (Pvt) Ltd* v *Njanja & Ors* 2000(1) ZLR 85(S), it was held that:

> "An appeal court will generally not interfere with the exercise of discretion by the lower court. However, the appeal court is entitled to substitute its discretion for that of the lower court where the lower court's exercise of its discretion was based on an error, such as where it has acted on a wrong principle, or it took into account extraneous or irrelevant matters or did not take into account relevant considerations or it was mistaken about the facts.

See *Barros of Anor* v *Chimphonda* 1999(1) ZLR 58(S) at p 625-63A, *State v Chikumbirike* 1986 (2) ZLR 145 (S)146F-G.

The dictum resonating in all the cases cited above apply *mutatis mutandis* to review courts. The review court as an upper court is reluctant to unnecessarily interfere with the decision of the lower court unless it is in the interests of justice. From the record of proceedings, the intriguing question is whether or not the court erred or misdirected itself in convicting the accused as it did? In other words, did the trial court act on a wrong principle, or consider extraneous or irrelevant matters or did not take into account relevant considerations, or was mistaken about the facts?

A finding has already been made above that the court erred in not exploring the issue of possession. Hence, before delving into how it erred there is need to examine the law on criminal possession. Inevitably, the critical question for determination is again, whether or not

the accused person was in possession of the railway sleepers in question, given that the crucial aspect of the offence is possession coupled with the fact the court did not analyze what constitutes possession in terms of the Governing Act? Against that background, possession, is not defined in the Railways Act, Chapter [13:09], nor the Interpretation Act. However, s 38(4) canvasses the elements of possession in stipulating that on "person" or under immediate control after the word in possession.

In casu, the accused person was charged for infringing s 38(4) (a) of the Railways Act Chapter which reads:

> "Any person who otherwise than for lawful cause (the proof whereof shall lie on him) has on his person, or in his or her possession, or under his or her immediate control, or upon any land, or in any premises, any equipment used for the provision of a railway service (including but limited) to any locomotive, rolling stock, railway track, sleeper, or telegraph line, telephone line, or power cable, or any part or component of the foregoing that is not being used in connection with any service lawfully provided to him or her by Railways.
>
> Shall be guilty of an offence and if there are no special circumstances peculiar to the case as provided for by subsection (5)(d), be liable to imprisonment for a period not less than five years or ten years."

Apart from what can be inferred from the infringed statutory provision, I encountered difficulties in finding case law specifically addressing the aspect of possession of railway property or equipment. Recourse had to be made to criminal cases dealing with drugs, firearms and other specified statutory offences. As can be deduced or construed from the definitions in those cases, the essential ingredients of possession are thus physical or mental control of the thing or item. It is normally classified into actual physical possession or constructive possession as canvassed in cases dealing with, mainly firearms and drugs and other statutory offences. Notably, in most of these statutes the definition is provided for.

In *S* v *Mpa* 2014(1) ZLR 572H it was noted that:

> "… at law, a person has possession of something if the person knows of its presence and has physical control over it or has the power and intention to control it.
>
> A person may have actual or constructive possession, sole possession or joint possession. A person who has direct physical control of something on or around his person is then in actual possession of it. A person who is not in actual possession but who has both the power and the intention to take control over the thing has constructive possession."

In the South African Case of *State* v *Smith* [4] CPD 1966, it was highlighted that there is need to distinguish the mental element (*animus*) and the intention (*mens rea*) of the accused person when dealing with possession. The State was said to bear the onus of establishing

possession whereas the accused has onus of *mens rea*. It was further raised that intention to possess and the physical element must be established.

In *State* v *Young* 1983(1) ZLR 258 (S) and *State* v *Smith* 1963(4) SA 166 it was pronounced that:

> "The concept of custody or possession comprises of two main elements, firstly, the physical element corpus i.e. physical custody or control over the "*res*" in question, exercised either immediately or mediately and the mental element of *animus*, i.e. the intention to exercise control over the things at the same time. There is a general rule that, ordinarily speaking, a crime is not committed it the mind of the person doing the act in question is ….*actus facit reum nisi mens sit rea*."

In the present case, applying the law to the facts, there is no doubt that physical or actual possession are ruled out. The accused person was not found in possession of the railway forbidden property in question. If all things where equal, from the facts on record, it is Gregory or Grigo who was in actual possession of the items found at his stand on his scrap yard. It is not clear as to why he was not criminally charged after having been initially arrested. What further complicates the whole issues is that, Gregory was not called as a witness so that his evidence could be tested against that of the accused who consistently maintained that the recovered railway objects were not among the scrap metal he sold to Gregory. In addition, no evidence was led from the little boys who seemed to be well acquainted with the events leading to the acquisition of the railway sleepers. Why the evidence of these key witnesses was left out is baffling. Especially, in light of the evidence of the only two state witnesses which was in essence a duplication of the accused defense. There was no other investigation further than the implication of the accused by Gregory who was let loose and did not testify. Technically, the evidence before the trial court was that of the accused and that of Gregory reproduced by the state witnesses.

What is more surprising, as already alluded to earlier on, of note, the State outline in para 6 states that the detectives from CID Minerals Flora and Fauna figured out from their investigations that the railway sleepers belonged to the accused person a day after recovering the same from one Gregory mentioned earlier. There is clear mention of the involvement of a specialized branch of detectives but their work started and ended in what is mentioned in the state outline. They too were never called to testify. Had this expert branch of law enforcement done what they are at law mandated to do there would have been more answers than questions. In *S* v *Mupfumburi* HH 64-14, the court bemoaned the ineptitude of investigating officers. They have the know-how but they do not deliver. This court has taken judicial notice that a person named, Zaki, was also mentioned as a key player in the acquisition of the railway sleepers. Apart from the mere mention, the involvement of this person was never interrogated or explained away.

Even if the element of constructive possession is to be stretched in within the above assessment of the proceedings can it be reasonably concluded that accused was in possession of the said railway sleepers. In the Canadian case of *R* v *Pham* (3005) 2005 Con LTR 44671 C.C.C. (3d) 326(Ont. C.A.), the Supreme Court confirmed that,

"in order to establish constructive possession, it must be shown that the accused had knowledge of the object beyond mere of quiescent knowledge that discloses some degree of control of the item. Constructive possession is a question of fact and may occur where there is no evidence of actual possession, but where there is sufficient circumstantial evidence to show that the accused may still be attributed to."

In yet another Canadian case, *Her Majesty the Queen and Jason Walter Callan* 2014 SKOB 173 Q.B.A. Can L, it was highlighted that, constructive possession requires the following:

(a) knowledge of item

(b) intent/consent to possess the item

(c) control of the location of the item.

It was further noted that, the crown must prove knowledge extending beyond "quiescent knowledge" that discloses such degree of control of the item.

Back home, whilst it is competent for a trial court in case where one is charged with contravening s38(4)(a) to make a finding and convict in terms of s 38(5) which incorporates essential elements stipulated in s38(3), that is possession of stolen railway equipment specified therein or with knowledge of the theft and that of the possibility that it may have been stolen, there is no evidence on record supporting that the accused person was in receipt or possession of the stolen railway equipment.

Section 38(3) provides for a person who receives or takes possession of stolen equipment used for the provision of railway services – knowing that it had been stolen or realizing that there is a risk or possibility that it had been stolen. In the absence of special circumstances, a minimum mandatory sentence of no less than ten years.

Section 38(4) addresses the issue of possession, on the person, or under the immediate control of the person, of any railway equipment specified herein. The proof is on the person to disprove possession thereof. The penalty is a custodial term of not less than five (5) years with a maximum of ten years in the absence of special circumstances.

On further, analysis, the essential ingredients of possession are thus physical or mental control of the thing or item. There is nothing on record that links the accused person to the

stolen railway sleepers or the possession thereof apart from the implication by a supposedly co-accused who did not testify. It was crucial that he be called to place his cards on the table before the court. His implication is what led to the accused person's arrest yet he was the one found in actual and physical possession of the property in question. It also not clear as to why Gregory was unceremoniously released after having been the first to be arrested and cuffed. Possession in all its facets, *corpu*s and *animus* was thus, never established from the evidence which was placed before the trial court. The State bore the onus to lay out evidence in support thereof but it failed. The state thus dismally failed to establish beyond reasonable doubt the guilty of the accused person. The benefit of the doubt should have gone to the accused person. This oversight, in my view, was an error on the part of the trial court. See, *S v Chikanga and Another* HH233/2022 and *S v Mutsure* SC62/21.

DISPOSITION

It is my finding that the evidence on record does not show that the accused was in possession of the railway sleepers at any given time. He testified and maintained that he sold scrap metal which did not include the railway property in question. The railway sleepers were not found with him but with the owner of the premises, Grigo or Gregory. It is this person who was not called to testify who implicated the accused person who was in actual possession of the items. It was his word against the accused's. The little boy as has already alluded to worked for Gregory and did not testify. For one to qualify to be charged under s 38(4) or to stretch it to s 38(3) or s 38(5) one has to be in possession. The court did not establish actual possession.

Even if we were to venture into constructive possession as already explored, there is no evidence on record that accused person did sell or bring to the scrapyard the railway sleepers. He therefore had neither knowledge, intent to possess or control over the items or their location. Further, assuming, (which has not been established or proved) that he did sell the stolen item, the sell itself relinquished him of control over the item. Case law abundant dictate that for possession to be established there must be the presence of mental or physical, control. If it is to be further, stretched, there is no proof that he knew that they had been stolen or the risk of the probability that they would have been stolen. I am not therefore convinced that both the conviction and sentence were proper. Accordingly, both conviction and sentence are quashed as not in accordance with real and substantial justice.

The verdict of the trial court is set aside and substituted with the one of not guilty and acquitted.

The Registrar is directed to issue a warrant of liberation forthwith.

MUZOFA J, agrees…….

National Prosecuting Authority, State's legal practitioners