THE STATE

versus

MICHAEL NYAMUKONDIWA

HIGH COURT OF ZIMBABWE

HUNGWE AND MAVANGIRA JJ

HARARE 11 SEPTEMBER and 3 OCTOBER 2012

**Criminal Appeal**

*S.A. Taona* for the appellant

*F.I. Nyahunzvi* for the respondent

MAVANGIRA J. The appellant was arraigned before the magistrate on a charge of theft of trust property as defined in section 113(2) of the Criminal Law (Codification and Reform) Act. He pleaded not guilty but was convicted after a trial and sentenced to 6 months imprisonment of which 3 months imprisonment was suspended on condition of future good conduct. The remaining 3 months imprisonment was suspended on condition of restitution.

The appellant now appeals against both conviction and sentence. As against conviction the appellant’s first ground of appeal is that the trial court erred in convicting him when the evidence did not warrant a conviction. Needless to say this is not a proper ground of appeal as it does not clearly and specifically set out the ground of appeal as required by rule 22(1) of the Supreme Court (Magistrates Courts) (Criminal Appeals) Rule, 1979. (S.I.504/79). See also *S v Ncube* 1990 (2) ZLR 303 (SC) where at 304C-D MCNALLY ACJ, as he then was, commented on a ground of appeal against conviction that was couched in the following terms:

“The learned magistrate erred in accepting the complainant’s evidence.

The learned judge commented:

‘... I need only quote one passage from *R v Emerson, supra,* at 748D-E to show that such a ground is unacceptable. BEADLE CJ, with the concurrence of the Full Bench of the High Court of Southern Rhodesia, said this:

I do not consider that such general grounds of appeal as ‘the conviction is against the weight of evidence’ or ‘the evidence does not support the conviction’ or ‘the conviction is wrong in law’ are a compliance with the rule. ... .”

The second ground of appeal is that the trial court misdirected itself and erred at law by accepting the uncorroborated evidence of the complainant particularly on the fact that he was in possession of an E90 Nokia cellphone on that particular day. The third ground raised is that the trial court misdirected itself on matters of fact when it rejected the evidence of Nunurai Mudzverengi as being inadmissible yet the witness gave consistent and honest evidence.

With regards to sentence the first ground of appeal is that the trial court misdirected itself when it sentenced the accused to 6 months imprisonment; the sentence being improper because evidence had not been adduced satisfactorily to warrant such sentence. Like the first ground of appeal as against conviction, and for the same reasons, this is not a proper ground of appeal. It does not “set out clearly and specifically” the ground of appeal being raised. The second ground is that the sentence imposed by the trial court is so unduly excessive as to induce shock and alarm.

The appellant’s prayer is for the setting aside of his conviction and for his acquittal. Alternatively, that he be sentenced to a wholly suspended term of one month’s imprisonment.

A brief summary of the facts of the matter as alleged by the State is that on 10 February 2009, the complainant, a junior officer in the Zimbabwe Prison Service, reported for duty at Harare Remand Prison. He had his Nokia E90 cellphone with him. Beneath the cellphone battery the complainant had allegedly placed a US$100 note. The accused (now appellant), officer in charge of the Zimbabwe Prison Service and with the rank of Chief Superintendent, based at Harare Remand Prison Service noticed that the appellant was using a cellphone whilst inside the prison complex. He confiscated it, citing the Standing Rules which did not allow the complainant to have on him a cellphone whilst in the Remand Prison. At a disciplinary hearing on 3 March 2009 a different cellphone, a Vodafone 125 was produced.

The appellant denied ever taking or receiving from the complainant a Nokia E90 cellphone. He maintained that what was handed to him was the Vodafone that was produced at the disciplinary hearing. He denied seeing or taking and misappropriating the alleged US$100 note.

In his reasons for judgement the learned trial magistrate stated *inter alia,* that it would not have been expected of the complainant that before the day in question he would have made people know that he owned or possessed a Nokia E90 cellphone. The learned magistrate further went on to find corroboration of the fact that the complainant possessed a Nokia E90 from the evidence of the second state witness, one David Makwenjere. It is however clear on the record, that Makwenjere did not see the Nokia E90. His evidence was to the effect that he was merely told by the complainant, after the event, that his phone was a Nokia E90. This witness’ evidence was therefore hearsay evidence.

As correctly submitted by Mr Nyahunzvi, the evidence or adduced before the trial court was effectively therefore that of a single witness and it is on that basis that the appellant was convicted. Respondent’s counsel has also aptly cited the case of *S v Gwanzura* SC 44/91 where EBRAHIM JA stated at: -

“It is apparent that the State case consisted of a single witness and as this was the case the evidence of a single witness must be treated with caution and requires careful scrutiny. See *R v Mokoena* 1932 OPD 79 at 80, *R v Ellis* 1961 R & N 468, *S v Bvundura* SC 125/82, *S v Muranda* Sc 86/84, *S v Jabangwe* SC 25/89, *S v Corbett* SC 33/90, *S v Shoko* SC88/90 and *S v Mpofu* SC 161/90.”

In *casu,* a perusal of the complainant’s evidence reveals the following issues: The complainant stated that he bought the cellphone from an unknown person for US$1000 at the Ximex Mall Harare. I agree with Respondent’s counsel that US$1000 is a lot of money by any standard. It is highly unlikely that the complainant would have parted with such a substantial amount of money without obtaining the seller’s details in case the cellphone malfunctioned or turned out to be stolen property. Another aspect or issue that emerges is that the complainant was found by his superior using a prohibited gadget within the prison premises and this resulted in his trial and punishment in terms of the Prison regulations. The complainant was clearly thus a witness with a possible and probable reason to falsify evidence with a view to getting back at the appellant. He was clearly a witness for whose evidence, independent and confirmatory evidence in support thereof ought to have been sought and found before the appellant could properly be convicted. There is no such evidence on record.

The complainant’s evidence cannot thus be said to be clear and satisfactory in every material respect as highlighted in *S v Zimbowora* 1992 (1) ZLR 41 (S) where the following was stated at 42E:

“The court *a quo* was entitled to convict on the single evidence of the complainant, but it was necessary for such evidence to be clear and satisfactory, in every material respect.”

and further at 42G:

“The complainant, however, was a witness with an interest to serve and therefore the learned trial magistrate was not only required to approach her evidence with caution but should have sought corroboration of her evidence. See *S v Nhemachena* S 89/86; *S v Mupfudza* 1982 (1) ZLR 271 (S) at 273; *S v Wheeler& Anor* S162/87 and *S v Shoniwa* 1990 (1) ZLR 311 (S) 314.”

There having been a dispute as to the type of cellphone that was confiscated from the complainant, there was thus the more reason for corroboration of the complainant’s evidence that it was a Nokia E90. Makwenjere’s evidence, being hearsay, does not corroborate the complainant’s evidence on this aspect.

The trial court ought not to have convicted the appellant on the basis of the evidence placed before it. Furthermore, the trial court wrongly ruled inadmissible the evidence of the defence witness Nunurai Munzvengi who confirmed that the cellphone that was taken from the complainant and given to her for safekeeping was a Vodafone and not a Nokia E90. I have no hesitation in agreeing with the Respondent’s counsel that the fact that the defence witness was the applicant’s secretary and was known to him for a long time does not make her evidence inadmissible. The question would only be as to what weight the court would place on it. As also correctly submitted by the Respondent’s counsel, regarding the inconsistencies referred to by the learned magistrate, the position at law is clearly stated in *S v Svosva* SC 209/88 where the following was stated:

“…there is no rule that a credible witness is one who remembers all the minor details of an incident when she testifies. The clear memory of circumstances surrounding an incident grows dim with the passage of time, and sometimes mere forgetfulness may be responsible for a witness’ failure to mention minor detail surrounding an occurrence but does not make the witness any less credible.”

The learned magistrate stated in his reasons for judgement that it was the appellant’s word against that of the complainant and his witness. This was after he or she had wrongly ruled inadmissible the evidence of the defence witness and also failed to realise on the other hand that the second state witness’ evidence was hearsay evidence. If anything, it was the complainant’s word on the one hand against that of the appellant and his witness on the other. The appellant was thus convicted on the basis of a single witness whose evidence was not clear and satisfactory in every material respect and which evidence was not corroborated.

For these reasons the appellant’s conviction is unsafe and will therefore be quashed.

In the result, the appeal against conviction is allowed. It is ordered that the conviction be and is hereby set aside. The verdict of the court *a quo* is altered to read as follows:

“The appellant is found not guilty and acquitted.”

Hungwe J agrees.