DESMOND BANDA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 20 May 2014 & 28 January 2015

Criminal Appeal

P Kwenda, for the appellant
S Fero, for the respondent

HUNGWE J: The appellant, together with his two accomplices, was convicted of armed robbery as defined in s 126 of the Criminal Law (Codification & Reform) Act, [*Cap 9:23*], it being alleged that he and two others had, on 7 April 2009, robbed one Jane Mutasa of her sedan Mercedes Benz S350, cash in the sum of US$20 000-00, two Nokia mobile phone handsets, three sets of gold necklaces, a ladies handbag with a purse inside. He was sentenced to 12 years imprisonment. His legal practitioners at the trial timeously filed a notice of appeal to which were attached several grounds of appeal. Subsequently another set of legal practitioners abandoned the initial set of grounds of appeal and applied for the reinstatement of the new grounds. It is these new grounds which the appellant relied upon in the present appeal.

The basis of the appeal was that the court *a quo* erred in relying on inadmissible evidence in convicting the appellant for armed robbery. The inadmissible evidence under attack relates to the co-operation which the appellant demonstrated in the recovery of the Mercedes Benz as well as the Nokia mobile handset which was in his possession at the time of his arrest.

The facts found proved against the appellant in the court *a quo* were the following. After the robbery one detective Nyangoni who was part of the investigating team received a telephone call on his mobile handset. The caller indicated that he knew about the robbery which he was investigating. The caller wanted to know something about the fourth accused,

who by then had been arrested. The caller also indicated that he had the motor vehicle in question. He enquired about yet another vehicle which police had impounded during their investigations. He was prepared to meet up with the police and co-operate with them. This caller was the appellant. According to the finding of the court a quo, by then the appellant's name had already been given to the police. The investigating team agreed to meet with appellant and he led the team to Mbizi Game Park, Harare, where he had parked the motor vehicle. It was recovered.

His explanation to the court is part of the defence which he proffered to court. He stated that he had been asked by the fourth accused to assist in the registration of a motor vehicle which had recently been imported but had no papers. He operates two companies and as part of the operations, he registers imported motor vehicles for a fee. The fourth accused person at that time indicated that he had no space to keep the motor vehicle. He again agreed to take and keep it while he processed the registration. He had no idea that this was a stolen vehicle at the time. The first accused then drove up to his residence driving the motor vehicle in question. He was in the company of fourth accused who was driving a Toyota Rav4. He agreed that he had the complainant's Nokia phone but explained that he had bought it from the second accused. He professed ignorance at the time of the fact that it had been stolen during the robbery. When quizzed about his earlier statement to police that he had told Nyangoni that he had bought the mobile phone handset from South Africa, he denied having said so. He also told the court that the three accomplices would be lying if they denied that they knew him. He explained that he had learnt of the arrest by police of the fourth accused by the latter's neighbour who indicated to him that the arrest was in connection with a Mercedes Benz motor vehicle. Since he was a friend of Nyangoni, the detective, he had decided to call him to enquire about the arrest and indicate that he had the vehicle in question.

The motor vehicle robbed from the complainant on 7 April 2009 was recovered from the appellant on 17 April 2009 at his instance. The appellant called the police involved in the investigation leading to his arrest. There can be no question of assault or undue influence arising. The findings by the court a quo cannot be criticised in this regard. The court *a quo* rejected the explanation given by the appellant regarding how he came into possession of the two stolen items soon after the theft. It concluded that the circumstantial evidence led to the inescapable conclusion that the four suspects had robbed the complainant. The Toyota Rav4 used in the robbery was driven to the appellant's residence where appellant, by his own

admission, took delivery of it prior to driving it to a game park for safe-keeping. The court was not persuaded that it was mere coincidence that he had acquired a phone stolen in the robbery from the same people asking for a service from him. Again I find no reasonable basis to reject the finding as unwarranted. Although the trial magistrate did not demonstrate that there were facts which inexorably linked the appellant to the robbery, this is apparent from his reasoning. He demonstrated the basis of the factual findings he made. It is clear that he did not base appellant's conviction simply on the indications he made to police which led to the recovery of the motor vehicle.

A statement which is made "*extra-curiam*" is inadmissible in criminal proceedings unless the rules of admissibility have been satisfied. Thus an extra-curial statement is admissible if tendered in evidence by the State during trial if that statement is proved to have been made (a) by the accused; (b) freely and voluntarily in the sense that it was not induced by any threat or promise from a person in authority: *R* v *Barlin* 1926 AD 459 @ 462**;** and (c) without the accused having been unduly influenced to make it. Put differently, there must not have been external influences that operated to negative the accused's freedom of volition. As in tradition, the onus of proving that an extra-curial statement is admissible rests with the prosecution and it must be proved beyond a reasonable doubt. It would be a fatal misdirection were the trier of fact to admit such a statement into evidence without ensuring that the rules of admissibility have been adhered to. This would be especially so where the trial court proceeds to rely on the inadmissible evidence to found a conviction. *S* v *Muzanenhamo* 2000 (1) ZLR 347 (H).

The rationale behind the rule against relying on extra-curial statements is not hard to fathom. Section 258 of the Criminal Procedure and Evidence Act, [*Cap 9:07*] provides:

> "258. **Admissibility of facts discovered by means of inadmissible confession**
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> (1) It shall be lawful to admit evidence of any fact otherwise admissible in evidence, notwithstanding that such fact has been discovered and come to the knowledge of the witness who gives evidence respecting it only inconsequence of information given by the person under trial in any confession or statement which by law is not admissible in evidence against him on such trial, and notwithstanding that the fact has been discovered and come to the knowledge of the witness against the wish or will of the accused.
> (2) It shall be lawful to admit evidence that anything was pointed out by the person under trial or that any factor thing was discovered in consequence of information given by such person notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him on such trial."

At first glance it would appear that the pointing out by the appellant fell into the category of inadmissible evidence referred to in s 258 (1). The basis of the attack on grounds of inadmissibility put forward by Mr *Kwenda*, for the appellant, is that the court accepted into evidence extra-curial statements by the appellant's accomplices implicating him without first satisfying itself that the rules of admissibility had been satisfied. He proceeded to recite p (s) 93 – 97 of the record in support of what he deems inadmissible matter. If truly the matter he recites at length is inadmissible he ought not to have repeated it in his heads of argument since, by so doing, he has inadvertently persisted with the same matters which, he contends, the court *a quo* ought not to have considered, in deciding the guilt of his client the appellant. He would be better advised to have drawn this court's attention to the relevant page and demonstrate how the magistrate relied on it in the assessment of evidence. Be that as it may, it is clear to me that in his well-reasoned judgment the learned trial magistrate did not rely, in convicting the appellant, on something said by his accomplices implicating the appellant but the appellant's act in pointing out the Mercedes Benz as well as his recent possession of the stolen phone handset. He was careful to avoid using the inculpatory portions of the evidence by Mr Nyangoni, the detective, in which he refers to prejudicial matters without indicating whether, by that time, the maker of the statements had been properly warned and cautioned as is required by s 256 of the Criminal Procedure and Evidence Act.

The dangers in permitting the extra-curial statement into evidence lies in the subconscious approval of the use of torture as a legitimate tool of investigation. Our Constitution prohibits torture. Zimbabwe is a signatory to the United Nations Convention Against Torture (UNCAT). It is, therefore in terms of its international obligations, obliged to take all necessary steps, including legislative steps, to outlaw torture. For this reason, all statutes, including the Constitution must reflect this position. In this spirit, therefore, the courts will interpret all legislation in a manner that reflects Zimbabwe's compliance with its international obligations. Consequently, this has led our courts to tread carefully on the subject as governed by s 258. In interpreting as permissible, the admission into evidence matters or facts discovered by means of inadmissible confession, the court in *S* v *Nkomo*1989 (3) ZLR 117 (S) interpreted ss258(2) to mean that the pointing out of a thing or place will only be admissible in evidence if it is not preceded by an assault or threat of assault. It went on to state @131F:

> "It does not seem to me that one can condemn torture while making use of the mute confession (i.e. the pointing out) resulting from the torture, because the effect is to encourage torture. I conclude therefore that s 243(2)(now s 258 (2)) of the Criminal Procedure and Evidence Act must be interpreted in such a way as to exclude what I would describe as a mute confession element of pointing out where the allegation of torture in relation to the pointing out is raised and not satisfactorily rebutted."

In the present matter, the appellant initiated the conversation with Detective Nyangoni *before he was arrested by police.* He pointed out to Nyangoni that he has knowledge of the matter for which fourth accused had been arrested and wished to find out more about one of the other vehicles and another of his acquaintances if Nyangoni would care to consider it. This clearly shows that appellant could not have been unduly influenced to make the indications which led to the recovery of the motor vehicle under investigation by Nyangoni and his team. He was someone known to or familiar with Nyangoni. There is no suggestion in counsel's argument that the indications were preceded by undue influence of any sort. If anything it was an amicable discussion. The only criticism may be that by then the appellant had not been properly warned and cautioned. But do the courts expect all police detectives to warn and caution their own friends each time their friends make a social call? Even if it is suggested that by then Nyangoni was aware of the appellant's involvement in the offence and therefore was duty bound, to warn the appellant, the answer to that is that the learned trial magistrate did not rely on what appellant said in that discussion in order to convict. He relied on the totality of the circumstantial evidence which was placed before him during trial to come the conclusion that the appellant was as guilty as his accomplices.

The circumstantial evidence includes the following facts:

1. That by his own admission the appellant is well-known in Harare for procurement of clearance and registration of vehicles with ZIMRA using unorthodox means;
2. That he managed to clear his five top of the range motor vehicles using those "unorthodox means";
3. That any car whether stolen or not can be cleared by ZIMRA in that manner;
4. That he does not verify whether a vehicle is stolen or not before he processes its clearance;
5. That he received the Mercedes Benz from his co-accused and did not find the importance of questioning and verifying where it had originated from;
6. He did not see the importance of getting accused 1 and 2 's details being the

persons who brought the motor vehicle though they were in accused 4's company;

7. That he moved the vehicle to Mbizi Game Lodge and it remained unclear in whose custody he left it there;
8. That upon getting wind of accused 4's arrest, he prefered calling a police acquaintance instead of heading straight to the nearest police station.

Even if it is argued in appellant's favour that all these facts do not point unerringly towards his involvement in the actual armed robbery, the appellant cannot escape conviction as an accessory after the fact of armed robbery in light of the above. Section 206 and 207 of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*].

The appellant no doubt knew that the kind of assistance he was offering his co-accused when they approached him was unlawful and that his co-accused's conduct was unlawful and most importantly that the motor vehicle in question would have been stolen. In the eyes of the law he is equally guilty of the actual crime of armed robbery as an accessory after the fact. The phone handset only show how closely linked to the crime he was.

In the result the appeal against conviction must fail. It is dismissed.

As for sentence, counsel for the State conceded that the learned magistrate erred in failing to suspend a portion of the sentence he imposed on the appellant in light of the fact that the appellant voluntarily approached the police with information which led to the recovery of the stolen property. Besides there is evidence that he was a first offender. In light of this concession it is our view that this court is at large with the sentence. The sentence imposed by the court a quo is set aside and in its place the following is imposed.

> "Accused 3: 12 years imprisonment of which 4 years is suspended for 5 years on condition that the accused is not during that period convicted of any offence of which dishonesty is an element for which he is sentenced to imprisonment without the option of a fine. A further 3 years is suspended on condition the accused makes restitution in favour of the complainant in the sum of US$6 387-50 on or before 30 June 2015."

BERE J agrees.

Kwenda& Associates, appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners