

STATE

Versus

BRIGHTON NCUBE

And

KHULEKANI TSHUMA

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 12 FEBRUARY 2025

Review Judgment

KABASA J:- The 2 offenders were convicted after a full trial of unlawful entry committed in aggravating circumstances.

Whilst there was evidence linking accused 1 to the offence, accused 2 was only arrested after being implicated by accused 1. Nothing was recovered from him, as was the case with accused 1.

The state was allowed to lead evidence from the arresting officer who prattled on about what he was allegedly told by the accused. Such evidence was inadmissible. Whenever a police officer is testifying and proceeds to say “The accused then said ...” He must be stopped, if not by the prosecutor, then by the court. He ought to be re-directed to only say “The accused then made a statement ...”

If the state intends to get him to say what the accused said, a proper foundation must be made. Such seeks to show the admissibility of that statement. It is no less a statement because it was not recorded and christened “warned and cautioned statement.”

Only after the court has ascertained from the accused that he made the statement freely and voluntarily without being unduly influenced thereto, can that police officer repeat what

was said. If this is not done or the accused alleges duress, the police officer cannot repeat the statement.

S v BC & Anor HH 255-84 and *S v Nkomo & Anor* 1989 (3) ZLR 117(S) are useful cases to look at when it comes to the issue of admissibility of warned and cautioned statements.

Accused 1 did not repeat the alleged implication of accused 2 in his evidence which led to accused 2's arrest. Accused 1's alleged confession to the police cannot be taken as evidence against accused 2. Section 259 of the CPEA [Chapter 9:07] provides that no confession made by any person shall be admissible as evidence against any other person. *In casu*, there really was no confession to talk about.

The learned Magistrate, in response to my query regarding what evidence there was to sustain a conviction of accused 2 stated that accused 1's confession that one "Sama Tshu" gave him the property which was stolen after the break-in, the fact that accused 2 is accused 1's good friend and that accused 2 is a neighbour to the complainant was evidence to prove accused 2's guilt.

Suspicion, no matter how strong, can never be evidence. A case against an accused is proved beyond a reasonable doubt. Circumstantial evidence can only lead to a conviction if the inference sought to be drawn is consistent with all the proved facts and the proved facts are such that they exclude every reasonable inference from them save the one sought to be drawn (*R v Blom* 1939 AD 188).

The accused has no onus to prove his innocence. Whatever explanation he gives, which may leave the court with some doubt as to its truthfulness, the court cannot dismiss it unless it has been shown to be not only improbable but beyond doubt false. (*S v Kurauone* HH 961-15, *R v Difford* 1937 AD 370).

In casu there was no evidence at all to link accused 2 to the offence. He ought not to have been convicted. His conviction is not safe and certainly not sustained by the paucity of evidence that was led against him.

The 2 accused were sentenced on 3 November 2023 to 24 months imprisonment of which a total of 7 months was suspended on conditions of good behaviour and restitution, leaving an effective 17 months.

I caused the Registrar to check with Prisons and was advised that the offenders completed serving their sentence. It is not clear why it took so long for the record to come back after I raised a query on 15 November 2023, the day I reviewed the proceedings. The response only came on 6 March 2025. This is disturbing and defeats the whole purpose of the review process. It should never happen.

Unfortunately accused 2 served a sentence he ought not to have served. The reversal of his conviction is academic now and of no benefit to him except that such should not be seen as a previous conviction against him.

The conviction and sentence for accused 1 is confirmed.

Accused 2's conviction is quashed and the sentence set aside.

Kabasa J.....

Ndlovu J..... I agree