

PHILLIP MURWIRA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
HUNGWE & BERE JJ  
HARARE, 25 November 2014 & 8 January 2015

### **Criminal Appeal**

*R Mahuni*, for the appellant  
*I Muchini*, for the respondent

HUNGWE J: The appellant was convicted of robbery as defined in s 126 of the Criminal Law (Codification and Reform) Act (*Cap 9:23*). He was sentenced to 9 years imprisonment of which two years imprisonment was suspended for five years on the usual conditions. He appeals against both conviction and sentence.

The facts upon which the conviction was based are the following. The complainant was walking along Fourth Street, Harare around 2100 hours. He was accosted by two unidentified men who quizzed him why he was expectorating around government buildings at that time. They inquired about his political allegiances and promptly “arrested” him on the pretext that he possessed certain gadgets which posed a security risk to the State. They bundled him into a vehicle driven by yet another unidentified person. They drove towards the Central Police Station in Harare. Before they got there, they stopped their motor vehicle somewhere along Orr Street and robbed him of a Samsung mobile handset among other possessions. They removed their handcuffs and released him. The complainant told the trial court that he was unable to identify any of the three men as it was dark and the scene was mobile. There was no lighting inside their motor vehicle. The appellant and his erstwhile co-accused were arrested as a result of a mobile handset tracking system usually available on the Samsung handsets which, an hour later, sent messages to the complainant’s girlfriend showing a change of sim card on it.

The only witness who testified as to the link between the appellant and the stolen handset was one Tashinga Vincent Lee. He told the court that he had at one stage been asked by one Jacob to insert his mobile number sim card into a Samsung handset which Jacob had brought. He wished to retrieve his “Whatsapp” software code for the phone. He obliged and Jacob immediately took it back upon completion of the process. It was an old handset, not a new one which the complainant described. He knew the appellant as a cell phone vendor. He did not know the complainant. The other witness, a police officer testified as to how the police linked the appellant to the commission of the offence through the tracking system. The service provider usually is able to give a print-out of the data or call history of a particular line. No such history was relied upon or produced in the trial. The appellant’s defence was that the police were covering up for their own who had committed the offence as he had done nothing to deserve prosecution for armed robbery. This defence could have been rebutted by a chain of evidence that pointed convincingly to the appellant as the person who at the relevant period had removed the sim card of the handset stolen from the complainant. No such evidence was produced. The complainant’s handset was never recovered.

Circumstantial evidence is evidence that is put forward to establish a fact that can be used to suggest an inference that other facts exist that would resolve a matter at issue.

In a case based on circumstantial evidence, it is often said that the rule in Hodge’s applies. The rule says that one can only convict on circumstantial evidence if the evidence is consistent with guilt and inconsistent with any other rational conclusion. Other rational conclusions must be based on inferences from facts and not merely speculative. Underlying the rule is the principle of reasonable doubt.

Circumstantial evidence is based on reasoning and inference-drawing through probability. The court must apply logic, common sense and experience to the evidence. It must consider the inherent probabilities and improbabilities, frequently eliminating the possibility of coincidence.

Circumstantial evidence may be used to support the inference of innocence as well, as long as the probative value outweighs prejudicial effect and it is not given undue weight. In the present case, there was no sufficient evidence adduced from which it could be inferred that the appellant was part of the gang that robbed the complainant. The complainant did not suggest that he was able to identify his assailants. The evidence of the tracking system relied upon by the police was not adduced to the level of certainty required in a criminal case. One

would have hoped that the State would have led evidence from the service provider on which the tracker was based to show the movement of the complainant's handset from the time it was stolen to the time it was recovered. Had this been done, there would have been some chain of evidence strongly linking the appellant to the commission of the offence. To begin with, the complainant's girlfriend to whose cellphone the tracker relayed alerts was not called to testify. She probably would have shed useful light on this aspect. More importantly, the central figure who features most, Jacob, and was said to have kept the cellphone on appellant's behalf, was similarly not called to testify.

Even if one were to accept grudgingly, that the appellant was at some point, in possession of the stolen cellphone, it does not follow that he had robbed it from the complainant. As such there are other possible inferences which can be drawn from his possession of it, were this fact proved beyond a reasonable doubt. It seems to me that the position remained throughout that the appellant may have handled the cellphone. But that handling was not proved to be so closely related to the robbery as to lead to the only conclusion that he and others had robbed the complainant. It needed to be shown when, relative to the robbery, he came into possession of the cellphone before such an inference could be safely made. As matters stand it cannot be said that the State had proved its case beyond a reasonable doubt. As long as there are other possible inferences which can be drawn from the proven facts, other than the appellant's guilt, the inference of guilt cannot be made.

In the circumstances, the conviction remained unsafe. It is therefore quashed. The sentence imposed consequent to this conviction is similarly quashed.

BERE J agrees.

*Mahuni & Mutatu*, appellant's legal practitioners  
*National Prosecuting Authority*, defendant's legal practitioners