

TYRON MAKAYI
Versus
THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE DJP & ZISENGWE J.
MASVINGO, 23 February & 28 June 2024

Criminal Appeal

JB Makhosi, for the appellant
E Bavaria, for the respondent

MAWADZE DJP: This matter remains ingrained in our minds

After hearing submissions from both counsel on 23 February 2024 we gave an *ex-tempore* judgment dismissing the appeal both in respect of conviction and sentence. The appellant, who now as practice was in attendance during the hearing of the appeal was keenly following the proceedings. As a member of ZRP CID he should have fully appreciated that the dismissal of the appeal meant that he was to be committed to prison. To our utter shock and dismay, and in a movie like style the appellant sprouted out of the dock and headed for the exit door of the court room. The prison officers were clearly taken by surprise and were helpless. Credit is due to a small built female police officer who was the court orderly who to our amazement jumped from the benches. In a flash she held the appellant by the trousers belt from the back, as appellant was almost at the exit door. She tackled him single handedly and immobilized him. As they say the rest is history. The appellant's bid for improper freedom was foiled as he was dragged to prison holding cells to commence serving his sentence.

The appellant was arraigned before the Magistrate sitting at Beit Bridge with two other officers who were however discharged at the close of the prosecution case as the material two state witnesses failed to identify the two co accused.

In the main the appellant was charged of Contravening Section 170 (I) (a) of the Criminal Law [Codification and Reform Act] (*Chapter 9:23*) [the Criminal Law Code] which relates to Bribery. In the alternative he was charged of Contravening Section 174 (I) (b) of the Criminal Law code which relates to Criminal Abuse of duty as a Public Officer. The appellant was convicted of the main charge after a protracted trial (and logically acquitted of the alternative charge).

The appellant was sentenced to 36 months imprisonment with 10 months imprisonment suspended for 5 years on the usual conditions of good behavior, thus leaving an effective prison term of 26 months. He was granted bail pending appeal.

After being convicted and sentenced on 17 May 2023 the appellant who was aggrieved by both the conviction and sentence lodged on appeal with this court on 22 May 2023.

The appellant raised 4 grounds of appeal against conviction and also 4 grounds of appeal against sentence.

The 4 grounds of appeal against conviction can be summarized as follows;

1. That the court a quo made an improper finding of fact that the appellant was on duty on 8 April 2024 the alleged date of the offence when the duty roster produced was for 7 April 2022 the day he was on duty.
2. That the court a quo erred when it found as a fact the appellant drove the complainant's motor vehicle when he is not a driver (sic)
3. That the court a quo erred in dismissing the appellant's defense more so as the money offered for the bribe was not recovered and made an incorrect finding that it was returned.
4. That the court a quo erred to convict the appellant in the absence of an identification parade and when essential elements of the offence were not proved.

In relation to sentence all the appellant is saying is that in view of the mitigating factors he should have been sentenced to a non-custodial sentence as the effective 26 months imprisonment induces a sense of shock.

The grounds of appeal in respect of conviction largely attack the factual findings by the court a quo and do not relate much to legal issues.

The facts of the matter are largely common cause to the extent of what happened. All the appellant is saying is that he was wrongly identified as the culprit probably due to mistaken identity and or unsubstantiated malice.

The sequence of events are as follows;

The 32 year old appellant is a member of ZRP, CID based at Victoria Falls. At the material time was deployed at Beit bridge border post together with other security officers from different parts of the country who included members of the Army, Central Intelligence Organization and Prison Officers. Their mandate was probably to curb corruption at the Beit bridge border post.

The complainant Kenias Mugabe resides at Renco and is a vendor who buy goods for resale from South Africa. At times he resides with his sister Nomatter Mahachi in Beit Bridge who is employed by Freight World.

On the night of 7 April 2022 the complainant who was in the company of his nephew Martin Severino (Martin) arrived at Beit bridge border post from South Africa. They were driving a Toyota Lexus registration number KT2 934 GP registered in Martin's name.

At the border post some two men approached them purporting to be clearing agents who could facilitate their quick clearance by issuing a Temporary Import Permit (TIP) license for R1 500 or US \$100 together with duty for R13 500.

The complainant and Martin took the bait. They paid the fee. They were issued with a TIP license Number PV83 89 receipt number 2022 R 101352. Thereafter the complainant drove towards the exit gate and Martin had walked to Engen garage to look for food.

The officers at the exit gate took the TIP and advised the complainant that it was fake. The unknown clearing agents who were hitherto close by suddenly disappeared. The complainant was advised he was now under arrest and that the motor vehicle was to be impounded. The complainant

protested his innocence. The officers demanded a bribe of R6 500 in order to release the complainant and the motor vehicle. The bargaining started as the complainant sought to get his freedom and to have the motor vehicle released. He no longer had much money on him except R2 500. He was told by the 3 officers that such an amount was only for one officer. This prompted complainant to telephone his sister Nomater Mahachi. One of the officers took to the wheel and drove complainant to Nomater Mahachi's residence where the 3 officers were paid R6 500. The complainant was driven back to the border where the complainant was released and handed over the motor vehicle.

Meanwhile Nomater Mahachi contacted her brother Takavinga Mahachi a councilor for ward 3 and resident of Beit Bridge who was in Bulawayo. Takavinga Mahachi was advised of the conduct of the 3 officers and he took up the matter with Kenneth Mungati ZIMRA Regional Manager. The ZIMRA Regional Manager advised Assistant Commissioner Ngulube who then engaged the various commanders to deal with the issue together with the Army, Prison and CIO commanders. This culminated in a report to Deputy Police Commissioner Lenny Ncube who tasked Givemore Mutanzira of CID anti-corruption unit to investigate the matter. The 3 officers on duty at the material time were arrested for receiving the R6 500 from the complainant and they included the appellant. In the interim senior police officers called the complainant and returned the R6 500. The trial court did not however interrogate who actually recovered R6 500 and who physically handed it over to the complainant. Due process was however followed for the motor vehicle to be properly cleared.

During the course of the trial evidence was led from the following state witnesses, all 6 in number. Note should be made that an identification parade could have been held but overallly this is not fatal to the state case.

The state witnesses are as follows;

- a) The complainant Kenias Mugabe, a key witness who implicates the appellant.
- b) Nomater Mahachi; the complainant's sister who also implicates the appellant and paid R4 000 to top up on the R2 500 already paid.

- c) Takavinga Mahachi the brother of Nomater Mahachi and a local councilor who fought tooth and nail to bring this case of bribery to the attention of the authorities until R6 500 was refunded and the motor vehicle properly cleared.
- d) Kenneth Mungati the ZIMRA Regional Manager was engaged Assistant Commissioner Ngulube, other commanders from ZNA, Prisons, and Senior CIO Officials thus triggering investigation by the Task force. This was after Takavinga Mahachi's report.
- e) Sgt Major Progress Chiurimbo the female officer was in charge of all members on duty at the border post on the night in question. She confirmed appellant was on duty and she explained the duties the appellant was carrying out which are in sync with what complainant said.
- f) Givemore Mutanzwa who investigated the matter and explained that the task force arrested appellant and two other officers since they were the officers on duty at relevant time.

The appellant in denying the charges pointed out that he was indeed on duty on the day in question with other 8 officers. He however denied meeting the complainant or soliciting or receiving any bribe. He denied abusing his office. The appellant confirmed being summoned by their Senior officers in connection with the case. He however could not understand the basis of his arrest as he believes an identification parade should have been done. He denied ever leaving his workplace on the day in question

However in his evidence later in court the appellant sought to argue that he was not on duty on the day or time the offence was committed. He attributes his arrest to inexplicable malice or mistaken identify. He however failed to call his crucial defense witnesses despite being afforded the opportunity to do so.

I now turn to the grounds of appeal in respect of conviction *seriatim*.

1. The appellant blows hot and cold as to whether he was on duty at the material time. As stated in the defence outline this fact was never put in issue only for the appellant to turn around later raising this issue. My view is that the officer in charge Progress Chiurimbo was clear on the deployment of the appellant, the duties assigned to him and

- is not supportive of the appellant's belated *alibi*. The reason the appellant gives for his arrest is a lame one and devoid of any logic.
2. The question as to whether the appellant can drive a motor vehicle or not was never raised throughout the trial. It is simply a new issue manufactured in the grounds of appeal. It is not clear what the appellant even implies. Is it that he cannot drive at all or he is simply saying he does not possess a valid driver's licence. It is fool hardy to believe appellant could have omitted to raise such a critical issue more so with clarity.
 3. It is unclear as to why appellant alleges no bribe money was paid and that none was returned. The complainant, Takavinga Mahachi and the investigating officer confirmed the return of the R6 500. Why appellant denies this fact boggles the mind. One would have thought that appellant's defence is simply that he is not the culprit.
 4. The allegation that the essential elements of the offence of bribery were not proved is without basis. Clearly if a public official purports to arrest a complainant and impound a vehicle for which he or she demands money in order to release the motor vehicle and frees the complainant, is that not soliciting for a bribe? If that money is paid how one can seriously argue that bribe money was not received. Whether that money is later recovered or returned is inconsequential as the offence would be complete.

In relation to the identification parade I agree it would have been proper to conduct one. However if none was held is this fatal to the state case?

I do not believe so. The appellant outlined the role the appellant played and how he interacted with the appellant. One may highlight the following;

- i) The complainant said it is the appellant who talked to the complainant first and took the fake T.I.P licence on day in question late at night.
- ii) The complainant explained that it is at this stage the bogus clearing agents fled.
- iii) Complainant said it is the appellant who pronounced that the T.I.P license was fake, that the motor vehicle had been impounded and that the complainant was under arrest.

- iv) The complainant said he discussed and bargained with the appellant about the quantum of the bribe money required for the release of the motor vehicle and complainant's freedom until a figure was fixed.
- v) The complainant said since his battery was flat he was given appellant's handset to use in order to contact both Martin and Nomatter Mahachi for the bribe money.
- vi) Most importantly the complainant said it is the appellant who drove the motor vehicle from Engen Service Station to Nomatter Mahachi's residence to receive the money and back after which appellant surrendered the motor vehicle to the complainant

Given all this interaction why would the complainant fail to identify the appellant. To his credit the appellant who was occupying the passenger front seat said he did not see the faces of the other two occupants of the motor vehicle who were in the back seat.

Nomater Mahachi also identified the appellant. He is the one she engaged with at close range as appellant occupied the driver's seat at the gate of her house. She was leaning on to the car conversing through an open car window. The place was well lit and there was moon light. Again there is no basis as to why one can say she failed to identify the appellant.

I find no misdirection on the part of the court *a quo*. The court *a quo* was alive that the identity of the appellant was the critical issue. It addressed its mind fully to it. One cannot falter its findings.

In relation to sentence the appellant's argument is a feeble one. A custodial sentence cannot be avoided. The appellant is a public official. He is a police officer. He fully appreciated the magnitude of his wrongful conduct. Various officers from different security apparatus of the state were probably deployed at the border post to fight corruption. The appellant proceeded to do what he was supposed to fight against. It is clear the appellant was determined to get the R6 500. He bargained hard. He left his place of duty and even drove to the residential area and back in order to get the bribe money. Corruption is a cancer and government policy in that regard is clear. Harmful and wrong signals would be sent if persons who behave like appellant are given a slap on the wrist as it were by imposing non -custodial sentences.

The court *a quo* was proper to impose an effective custodial sentence and its discretion can not be said to be injudicious.

It is for these reasons that the appeal against both the conviction and sentence was dismissed in its entirety.

MAWADZE DJP.....

Zisengwe J Agrees.....

Masawi & Partners, appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners