REPORTABLE (37)

AUXILLIA MANGWAIRA
v
THE STATE

SUPREME COURT OF ZIMBABWE
MAKONI JA, MATHONSI JA & MWAYERA JA
HARARE: 13 JUNE 2023

R. Mabwe, for the appellant

R. Chikosha, for the respondent.

MWAYERA JA:

[1] This is an appeal against the judgment of the High Court of Zimbabwe ("the Court *a quo*") handed down on 30 June 2021, dismissing the appellant`s appeal against both conviction and sentence by the Magistrates Court sitting at Harare. On 13 June 2023, after hearing submissions from counsel and having considered documents filed of record this Court issued the following order:

> "The appeal be and is hereby dismissed."

The court undertook to avail written reasons for the judgment in due course. These are the reasons.

FACTUAL BACKGROUND

[2] The appellant and her co-accused person, one Rosewitter Madembo, were arraigned before the Magistrates' Court ("trial court") charged with bribery as defined in s 170 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Code"). They were alternately charged with criminal abuse of office as public officers as defined in s 174 (1) (a) of the Code. Both the appellant and her co-accused pleaded not guilty.

[3] After a protracted trial, the court convicted and sentenced both the appellant and the co-accused. Aggrieved by the judgment of the trial court, the appellant appealed to the Court *a quo* which in turn confirmed the conviction and sentence of the appellant and acquitted the co-accused.

[4] At the outset, it is important to understand the basis of the charge which led to the conviction and sentence of the appellant. One Caroline Mutendeki's ("Caroline"), brother Shinewell Mutendeki ("Shinewell") was in custody facing a charge of theft of trust property. Shinewell filed an application for bail before the trial court which application was opposed by the State represented by the appellant in her capacity as the public prosecution. Caroline then made inquiries from the appellant on whether paying back the value of the stolen property to the complainant as compensation would occasion a withdrawal of the charge. It is alleged that the appellant advised Caroline that the charge her brother Shinewell was facing was very serious such that even if they paid compensation he would not be released from remand prison.

[5] The appellant then advised Caroline that she was only in a position to help them if they gave her US$1 000.00 by 6 January 2012. This prompted Caroline to report the case to the police. Following the report, the police arranged to trap the appellant. As arranged, Caroline proceeded to the appellant's office to hand over the US$1 000. Upon reaching the office, she was advised that the appellant had directed that she gives the money to another prosecutor her friend and co-accused. The money exchanged hands and was recovered by the police from the appellant's co-accused, in the co-accused's office.

PROCEEDINGS BEFORE THE TRIAL COURT

[6] Having tendered a plea of not guilty, the appellant averred that she did not intentionally and unlawfully request for a bribe. The appellant challenged the manner in which the

police acquired evidence alleging that it was irregular as the trap was done without the consent of their superior.

[7] The trial court found that the money which was solicited from Caroline was for purposes of facilitating the grant of bail for her brother as the appellant was the prosecutor handling the bail application. It further found that the trap procedure is a procedure carried out in terms of the police manual used to guide the police during investigations. It found that the evidence gathered during such a trap was admissible. Further that the evidence of Caroline tallied with that of the appellant's co accused which confirmed that the appellant asked her to receive the US$1 000-00 from her supposed aunt. It further found that Caroline made a police report which led to the arrest of the appellant immediately after the handover and receipt of money. The trial court held that there was sufficient evidence adduced by the respondent warranting the conviction and sentence of the appellant and her co-accused.

PROCEEDINGS BEFORE THE COURT *A QUO*

[8] Aggrieved by the conviction and sentence, the appellant and her co-accused appealed to the court *a quo*. The appellant contended that the trial court erred in placing the onus on the appellant to prove her defence, yet it is the State which has the onus to disprove the defence raised. She further asserted that the State witness, Caroline was not credible and that the evidence was discredited during cross-examination. She further challenged the police trap as being irregular. Further, she contended that the trial court erred in imposing a custodial sentence. The respondent on the other hand submitted that Caroline was a credible witness whose evidence was corroborated by the appellant's co-accused. Further that the report to the police led to the trap and subsequent arrest immediately upon the money exchanging hands.

FINDINGS OF THE COURT *A QUO*

[10] The court *a quo* dismissed the appellant's appeal and upheld that of her co-accused whom it found not guilty and acquitted. It found that there was no direct evidence pointing to the co-accused having knowledge of the nature of the money which she was asked to receive from the appellant's "aunt" on behalf of the appellant. Regarding the appellant the court *a quo* held that this was a typical case of corruption which had to be severely punished. It confirmed the findings of the trial court that there was evidence warranting the conviction of the appellant who solicited money to facilitate release of accused. The appellant was given money per her directions. The police who had been alerted set a trap thereby occasioning the immediate arrest and recovery of money.

GROUNDS OF APPEAL

[11] Aggrieved by the judgment of the court *a quo* the appellant lodged the present appeal against both conviction and sentence on the following grounds.

Ad conviction

"1. The court *a quo* grossly erred and misdirected itself in confirming the conviction of the appellant by the Magistrates' Court when the co-accused was given a benefit of doubt and acquitted in circumstances that warranted equal treatment more particularly in that;

(a) The court accepted that there was no direct evidence pointing to the then second appellant's knowledge of the true nature of the money the witness had told her she had been instructed to leave with her for thereby absenting evidence of the nature of money left which was the subject matter of the charges against both appellants.(sic)

(b) The court accepted that the co-accused had met the threshold of being reasonably possible true defence case warranting acquittal yet failed to

objectively consider that the appellant had also met the threshold as no reasons were proffered. Put differently, the court disregarded the appellant's reasonably possibility true defence that she had no link with the money and that she never solicited for bribe and in so doing by implication sought to reverse the onus in criminal proceedings.(sic)

2. The court a *quo* erred and misdirected itself in confirming the conviction of the appellant where the State had not proved its case beyond a reasonable doubt, more particularly so in that:-

   (a) The court accepted reliance on circumstantial evidence by the Magistrate that the appellant had been in the second appellant's office shortly before the complainant came in where reliance on circumstantial evidence was a basis for believing that the two were acting in concert. However, the court subsequently misdirected itself in disregarding that analogy for the then second appellant.(sic)

   (b) The court *a quo* accepted that the appellant was arrested pursuant to a police trap which was not only irregular but also hearsay, which would render the complainant's evidence inadmissible. However, in its misdirection the court *a quo* proceeded to confirm conviction without making a determination on the legal validity and admissibility of the trap.(sic)

Ad Sentence

1. The court *a quo* erred at law and grossly misdirected itself in confirming the Magistrate court's sentence of 24 months imprisonment when alternative sentences were not objectively assessed, more particularly for a sentence of 24 months, the court was not supposed to impose a direct sentence of imprisonment without objectively assessing the alternative services.(sic)''

RELIEF SOUGHT

11. 1.That the appeal succeeds.

2. That the judgement of the court *a quo* be substituted with the following

(i) That the appellant's appeal against conviction and sentence succeeds.

(ii) The sentence imposed upon the first accused be and is hereby set aside.

(iii) The first accused person and is hereby found not guilty and acquitted.

SUBMISSIONS BEFORE THIS COURT

[12]. Mrs *Mabwe*, counsel for the appellant submitted that the appellant ought to have been treated in the same manner as her co-accused as there were no compelling reasons for differential treatment. She submitted that the appellant ought to have been acquitted as had happened to her co-accused. She argued that the court *a quo* erred and misdirected itself in confirming the conviction of the appellant when the State had not proved its case beyond a reasonable doubt. Further, counsel submitted that the conviction based on circumstantial evidence and an irregular trap was not safe.

[13]. Regarding sentence, counsel submitted that the court *a quo* erred by confirming the custodial sentence imposed by the trial court. She argued that the trial court was duty bound to consider imposing community service where the sentence it decided to impose was 24 months or less. She urged the court to find the appellant not guilty and acquit her Alternatively, in the event of confirming the conviction, then she urged the court to set aside the sentence and substitute it with a community service based sentence.

[14]. *Per contra,* Mr *Chikosha,* counsel for the respondent submitted that the court *a quo* properly accorded the appellant's co-accused the benefit of doubt when it held that there was no direct evidence pointing to the co – accused's knowledge of the true purpose of the money. He submitted that the co – accused's explanation that she was requested to

receive money which was to be brought in by the appellant's aunt was reasonably possibly true. He asserted that the defenses of the appellant and her co-accused were distinct and the evidence adduced was clear in so far as it implicated and pointed to the appellant's guilt. He further submitted that the evidence adduced at trial proved the involvement of the appellant in the commission of the offence.

[15]. In relation to sentence he submitted that sentencing was in the domain of the trial court which exercises its sentencing discretion. He contended that the appeal court does not lightly interfere with the sentencing discretion unless it has been improperly exercised or there is an error, mistake or wrong principle that has been used in the assessment of sentence.

ISSUES FOR DETERMINATION

[16] (i) Whether or not the court a quo erred in upholding the conviction of the appellant.

(ii) Whether or not the court a *quo* erred in upholding the sentence of imprisonment imposed on the appellant.

APPLICATION OF THE LAW TO THE FACTS.

Whether or not the court a *quo* erred in upholding the trial court's conviction of the appellant.

[17]. The appellant's argument that she ought to have been acquitted just like her co-accused would have been valid if there was clear evidence she had no knowledge of the bribe money which was central to the offence. In this case, there was no evidence to prove that the co -accused who was jointly charged with the appellant had acted with common purpose and in concert with her in the commission of the offence. *In casu* however, it is pertinent to note that the testimonies of Caroline and the appellant's co-accused gave a seamless story that the two did not have a common interest to commit the crime. It is apparent from the State evidence that the appellant asked her co-accused to receive the

money on her behalf from her aunt. To that extent the co-accused did not have knowledge what this money was for. The court *a quo* considered the totality of the evidence and found no basis for convicting the co-accused and hence the acquittal. On the other hand, there was evidence linking the appellant to the commission of the offence hence, the confirmation of the conviction. The first ground of appeal cannot be sustained in the circumstances.

[18]. The appellant's second ground of the appeal questioned reliance by the court *a quo* on circumstantial evidence and evidence from a police trap which was alleged to be irregular for want of authorization from police superiors. It is trite that circumstantial evidence is admissible and an accused can be convicted on it provided the court is satisfied that from the circumstantial evidence no other reasonable inference could be drawn. See *S* v *Shonhiwa 1987 (1) ZLR 215 (S).* The cardinal rules on circumstantial evidence were laid out with clarity in *R* v *Blom* 1939 AD 188 and followed in several cases in this jurisdiction including the case of *Simango* v *The State* SC42/14 in which the rules were summarized as follows:

> "(a) the inference to be drawn must be consistent with all proven facts, if it is not the inference cannot be drawn.
>
> (b) the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude reasonable inferences, then there must be no doubt whatever the inferences sought to be drawn is correct."

[19]. In the case of *Chidemo* v *The State, SC* 68 – 24 at pp 7- 8 MUSAKWA JA made the following pertinent remarks.

> "It is trite law that circumstantial evidence is narrowly construed. With circumstantial evidence the inference sought to be drawn must not permit other reasonable inferences. Before the court can draw an inference of guilt, however, the inference must be consistent with proven facts and it must flow naturally, reasonably, and logically from the facts. The evidence must also exclude, beyond a reasonable doubt, every reasonable hypothesis of innocence. If there is a reasonable hypothesis from the proven facts consistent with the accused's

innocence, then the court must find the accused not guilty. If the only reasonable inference the court finds is that the accused is guilty of the crime charged and that inference is established beyond reasonable doubt, then the court must find the accused guilty of that crime. In drawing inferences, the court must take into account the totality of the evidence and must not consider evidence on a piece meal basis"

[20]. Further on p 11, the learned Judge stated that:

> "Inferences to be drawn when circumstantial evidence is involved must be carefully distinguished from conjecture or speculation. If there are no positive proven facts from which the inference can be made, the method of inference falls away and what is left is mere speculation of conjecture, see *Caswell* v *Bell Duffiyn Association Collieries Ltd* 1940 AC 152 *at 169 per Lord Wright.*
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> > 'In order to decide whether the State has proved its case beyond reasonable doubt based on circumstantial evidence, the court need to take into account the cumulative effect of the evidence before it as a whole. It is impermissible and on incorrect approach to consider the evidence piecemeal. See *S* v *Sayman* 1968 (2) SA 582 A at 589F, *S* v *Hassim* 1973 (3) SA 443A at 457H, *S* v *Zuma* 2006 (2) SA CR 191 (W) at 209B -1 .The Court must also not only apply its mind to the merits and demerits of the State and defense witnesses but also to the probabilities of the case. Such probabilities should be tested against proven facts that are common cause. See *S* v *Abrahams* 1979 (1) SA 203 (A); *S* v *Mhlongo* 1991 (4) SACR 207 (A); *S* v *Guess* 1976 (4) SA 715 (A); *S* v *Trainoer* 2003 (1) SA CR 35 (SCA).'"

[21]. It follows therefore that for circumstantial evidence to be relied on the inference sought to be drawn must not permit other reasonable inferences. If other inferences can be drawn from the circumstantial evidence an inference of guilt cannot be drawn. In this case, from the evidence adduced, it is apparent that Caroline engaged the appellant in a bid to facilitate her brother's release on bail. It is also clear that on the fateful day Caroline brought the money and as directed by the appellant handed the money over to the appellant's co-accused in the next office. Money exchanged hands at the behest of the appellant who was the one prosecuting in the bail court. All this and evidence adduced linked her to the offence such that the court *a quo* cannot be faulted for confirming her conviction. Even if the trap was irregular by virtue of not having authorization from an officer of the rank above superintendent in compliance with the Police Duties and

Investigations Manual, the evidence used to arrest the appellant was admissible. In any event the court *a quo's* judgment is clear that even if it were to disregard the evidence of the police trap, an inference of guilt would still be drawn based on the evidence adduced from the State witnesses, the co-accused and the appellant herself. The inference of guilt was consistent with the facts of the matter. The court *a quo* therefore correctly upheld the conviction.

Whether or not the court a *quo* erred in confirming the sentence of 24 months.

[22]. The appellant contended that the sentence imposed was inappropriate as the court failed to consider the option of a fine or community service where the effective sentence 24 months was contemplated. It is a well-established principle that sentencing lies within the discretion of the trial court. See the case of M*unakamwe* v *The State* SC 121/23 p 7 this Court stated that:

> "Having said that it must also be stated that the position is settled at law that sentencing is first and foremost, pre-eminently in the discretion of the trial court. The purpose of discretion is certainly to allow the sentencer to select the sentence which he or she believes to most appropriate in the individual case having regard to the facts and circumstances of the offender.
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> As to when an appeal court can interfere with the discretion of a trial court it is also settled that the interference can only be done where the sentence is disturbingly inappropriate or where the discretion has been exercised capriciously or upon a wrong principle. The law is impressively captured by MALABA DCJ (as he then was) in *Muhamba* v *The State* SC 57/13 at p 9 as follows:
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> > 'On the question of sentencing, it has been said time and again that sentencing is a matter for the exercise of discretion by the trial court. The appellate court would not interfere with the exercise of that discretion merely on the ground that it would have imposed a different sentence had it been sitting as a trial court. There has to be evidence of a serious misdirection in the assessment of sentence by the trial court for the appellate court to interfere with the sentence and assess it afresh. The allegation in this case is that the sentence imposed is unduly harsh and induces a sense of shock. In *S* v *Mkobo* HB 140/10 at p 3 of the cyclostyled judgment, it was held that:
> >
> > 'The position of our law is that in sentencing a convicted person, the sentencing court has a discretion is assessing an appropriate sentence. That discretion must be exercised judiciously having regard to both the factors in mitigation and aggravation. For an appellate tribunal to interfere with a trial

> court`s sentencing discretion, there should be a misdirection. See *S* v *Chiweshe* 1996(1) ZLR 125(H) at 429 D; *S* v *Ramushu & Ors* SC 25/93.'"

[23]. It is therefore not enough for the appellant to argue that the sentence imposed is too severe because that alone is not a misdirection and the appellate court would not interfere with a sentence merely because it would have come up with a different sentence. The same reasoning was adopted in *S* v *Nhumwa* SC 40/88 where at p 5 of the cyclostyled judgment this Court stated the following with regards to sentence

> "It is not for the court of appeal to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from that imposed. If the sentence complies with the relevant principles, even if it is severe than one that the court would have imposed sitting as a court of first instance, this Court will not interfere with the discretion of the sentencing court."

[24]. The appellant in this case seemed to have been motivated by the preference of a non-custodial sentence to criticise the sentence imposed by the trial court and confirmed by the court *a quo*. The appellant, as the prosecutor in charge of the bail court, was surely in a position of power. She abused her position as an officer of the court and solicited for a bribe. She clearly orchestrated the whole ordeal leading to the money being collected on her behalf by her colleague under the pretext that it was from her aunt. The totality of the circumstances of the offence, mitigation and aggravation were properly weighed before the sentence was imposed. The sentencing discretion in this case was judiciously exercised. Thus the court *a quo* properly found no basis to interfere with the sentence imposed by trial court.

[25]. Both grounds of appeal against conviction and sentence have no merit and cannot be sustained. The court *a quo* properly upheld the conviction and sentence.

[26]. Accordingly, it is for the above reasons that we dismissed the appeal in its entirety.

MAKONI JA : I agree

MATHONSI JA : I agree

Antonio Dzvetero, appellants' legal practitioners

National Prosecuting Authority, respondent`s legal practitioners