IN THE HIGH COURT OF ZIMBABWE

HELD AT HARARE

In the matter between:

THE STATE

versus

BENJAMIN PARADZA

CORAM:	MTAMBANENGWE, AJ
Assessors:	Mr Musengezi and Mr Kuwana
For the State:	Mr *Phiri* with Mr *Musona*
For the Accused:	Adv. *E. Matinenga* led by Adv. *Gauntlet (SC)* with Mr *Hwacha*
Heard on:	22 – 26 August 2005
Delivered on:	10 January 2006

JUDGMENT:

MTAMBANENGWE, AJ: The accused, a judge of the High Court of Zimbabwe, is arraigned before the Court on two main counts and two alternative counts of incitement. The indictment states that the accused:

"is guilty of the crimes of:-

1. CONTRAVENING SECTION 4(a) OF THE PREVENTION OF CORRUPTION ACT [CHAPTER 9:16] AS READ WITH SECTION

360 (2) (b) OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT [CHAPTER 9:07] – (TWO COUNTS)

ALTERNATIVELY

2. ATTEMPTING TO DEFEAT OR OBSTRUCT THE COURSE OF JUSTICE (TWO COUNTS)

COUNT ONE

In that on or about 15th and 16th of January 2003 and at Harare the accused, being a public officer, that is to say a Judge of the High Court of Zimbabwe, in the course of his employment as such unlawfully and corruptly incited Justice Maphios Cheda to do an act that was contrary to or inconsistent with his duties as a public officer for the purpose of showing favour or disfavour to another person, that is to say, the accused incited Justice Maphios Cheda to corruptly release the passport of Russell Wayne Labuschagne, who was facing murder allegations and whose passport was being held by the Registrar of the High Court Bulawayo as part of Labuschagne's bail conditions.

IN THE ALTERNATIVE

On or about 15th and 16th of January 2003 and at Harare, knowing that Russell Wayne Labuschagne was on bail on murder allegations and that part of Labuschagne's bail conditions were that his Zimbabwean Passport number ZL017923 was surrendered to the Registrar of the High Court Bulawayo and that the course of justice would be defeated or obstructed if his passport was released to him the accused unlawfully and with intent to defeat or obstruct the course of justice, incited Justice Maphios Cheda to exercise favour towards Labuschagne by releasing his passport in order to enable him to travel abroad to source customers for a hunting business in which the accused had an interest."

Count 2 and the alternative thereto are framed in the same words as count 1 and the alternative thereto, except for the dates and the name of the judge concerned.

When one looks at the particulars of the charges, it is clear that in essence the accused is charged with contravening s. 360 (2)(b) of the Criminal Procedure and Evidence Act – that is with incitement in all instances; for clarity sake therefore, the indictment should have read:

"accused is guilty of:-

1. CONTRAVENING SECTION 360(2)(B) OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT [CHAPTER 9:07] AS READ WITH SECTION 4(a) OF THE PREVENTION OF CORRUPTION ACT [CHAPTER 9:16] – (TWO COUNTS)

2. ATTEMPTING TO DEFEAT OR OBSTRUCT THE COURSE OF JUSTICE – (TWO COUNTS)"

The way the indictment was framed was not, however, a fatal defect, but it had the effect that the State tried to prove, or appeared to be trying to prove the contravention by accused himself of section 4(a) of [*Chapter 9:16*] which does not accord with the particulars of the charges, unless on the basis of the maxim:

Qui facit per alium facit per se

The sections involved in this matter provide respectively as follows:

Section 360(2)(b) of [*Chapter 9:07*]:

"Any person who –

(a) ….

(b) incites any other person to commit; any offence; whether at common law or against any enactment, shall be guilty of an offence …"

Section 4(a) of [*Chapter 9:16*]:

"If a public officer, in the course of his employment as such -

(a) does anything that is contrary to or inconsistent with his duty as a public officer;

(b) ……

for the purpose of showing favour or disfavour to any person, he shall be guilty of an offence…"

Although accused's counsel appreciated that in all instances the accused is charged with incitement, "an ancillary offence", as they put it, the way the indictment was framed and the way counsel for the State went about proving their case led to some untenable propositions from both sides.

It is clear that when the two main counts use the phrase "*to corruptly release the passport of Russell Wayne Labuschagne*," they refer to corruption as defined in section 4(a) of [*Chapter 9:16*] namely, a public officer, in the course of his employment as such doing anything contrary to or inconsistent with his duty as a public officer, for the purposes of showing favour or disfavour to any person.

The State took the stance of trying to prove as regards the two main counts, the incitement in terms of s 360(2)(b) of [*Chapter 9:07*] and the doing of anything by the accused as a public officer and in the course of his duties as such for the purpose of showing favour to any person. They were entitled to try and do the latter following the words of the indictment, in which case the State would have to prove that what it alleges accused

did, he did in his capacity as a public officer, that he did so in the course of his employment as such, and of course, that he did so for the purpose of showing favour or disfavour to any person and in a manner contrary to or inconsistent with his duty as a public officer.

The defence, as a result of the way the indictment was framed, took the stance of emphasizing, first that no inducement was offered to Justice Cheda or Justice Chiweshe, maintaining that an inducement or offer of a reward was an element of the offence of corruption in terms of section 4(a) of [*Chapter 9:16*]. Properly understood, however, the accused did not have to offer any reward or inducement to the two judges; it would be sufficient if his intention in approaching them was that they, contrary to their duties or inconsistent with their duties as public officers, did Russell Wayne Labuschagne a favour by releasing his passport, or did the accused the favour of releasing Labuschagne's passport: In terms of s 360(2)(b) of the Criminal Procedure and Evidence Act it is irrelevant whether the accused himself was a public officer, or whether he did approach the two judges in his private or official position as a judge.

In *S v Chogugudza* 1996(1) ZLR 28 (SC) Gabbay C.J. pertinently remarked at 34 D:

> *"Under section 4(a) of the Prevention of Corruption Act a crime is committed when –*

(i) a public officer

(ii) in the course of his employment

(iii) does anything contrary to or inconsistent with his duty

(iv) for the purpose of showing favour or disfavour to any person".

Only the common law crime of bribery requires a reward or inducement to be offered.

In the second place the defence, also as a result of the way the indictment was framed, or, perhaps, per *abantante cautela,* emphasized the fact that accused was acting in his private capacity as a businessman when he approached the two judges.

I now turn to briefly expand on our reasons for refusing the application for a discharge at the end of the case for the prosecution. The application was made in terms of section 198(3) of the Criminal Procedure and Evidence Act (the Act). The defence argued that at that stage no case had been made out on which the court might convict the accused on any of the four counts he is facing. Mr Matinenga referred the court to *S v Kachipare* 1998 (2) ZLR 271 (S) where it was held that:

> *"the wording of s 198(3) of the Criminal Procedure and Evidence Act made it clear that where, at the end of the State's case there is no evidence upon which a reasonable court might convict, the court has*

no discretion: it must discharge the accused. The court may not exercise its discretion against the accused if it has reason to suppose that the inadequate State evidence might be bolstered by defence evidence". (Head note)

It is sufficient to say that it must be accepted that the above is the correct statement of the Law on the subject in Zimbabwe. In that case the court (per Gabbay C.J.) went on to say (at 276):

"Section 198 (3) of the Criminal Procedure and Evidence Act provides that if at the close of the case for the prosecution, the court considers that there is no evidence that the accused committed the offence charged or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty.

There is sound basis for ordering the discharge of the accused at the close of the case for the prosecution, where:

(i) there is no evidence to prove an essential element of the offence: see *Attorney-General v Bvuma & Anor* 1987 (2) ZLR 96 (S) at 102F-G;

(ii) there is no evidence on which a reasonable court, acting carefully, might properly convict: see *Attorney-General v Mzizi* 1991 (2) ZLR 321 (S) at 323B;

(iii) the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it: see *Attorney-General v Tarvirei* 1997 (1) ZLR 575 (S) at 576G.

It is significant that s 198(3), unlike its precursor s 188(3) of *Chapter 59*, uses the word *"shall"* and not *"may"* – *"it shall return a verdict of not guilty"*. The amendment was probably occasioned by the *dictum* in *Attorney-General v Bvuma & Anor supra* at 102F that it is:

> *'not a judicious exercise of the court's discretion to put an accused on his defence in order to bolster the State case in a case which, standing alone, cannot be proved'.*

Hence, so far as the law in Zimbabwe is concerned, there is no longer any controversy as to whether a court may properly refrain from exercising its discretion in favour of the accused, if at the close of the case for the prosecution it has reason to suppose that the inadequate evidence adduced by the State might be supplemented by defence evidence".

In dismissing the application, I gave brief reasons and said that I would expand on the reasons for coming to the conclusion that the accused had a case to answer. The application was based both on legal principles and

on an analysis and evaluation of the evidence led by the State up to that stage.

As regards Count 1 and Count 2

In support of the application Mr Matinenga, in his written submissions and in oral argument, laid emphasis on the words *"to corruptly release the passport of Russell Wayne Labuschagne"* and submitted, quote,

> *"in the first instance that the State has established no case such as the accused is required to answer as regards the essential requirement that he must have acted 'corruptly'."*

He went further to say:

> *"7. Justice Cheda expressly conceded in cross-examination that the only discussion of any financial loss or gain was in relation to what Judge Paradza stood to lose. He expressly conceded that, in contrast with the approach made by Anand on 5 January 2003, there was no offer of money or any other inducement by Judge Paradza to him.*
>
> *8. 'Corruptly' requires a benefit unlawfully to be given as promised (See Joubert (ed) Law of South Africa Volume 6 (1st reissue 1966) Para 411 at Page 444; Snyman Criminal Law* (1984) 319 Milton

SA *Criminal Law and Procedure Volume 2 Common Law Crime (3rd Edition 1996) 220.*

9. *On this basis alone, the State has failed to prove an essential element of the offence and the accused is entitled to discharger on this count."*

Suffice it to repeat that the requirement of a benefit to be given or promised is an essential element only of the common law crime of bribery, and that the corruption here involved is statutory corruption, and that requirement is not an essential element of the corruption charged, that is in terms of s 4(a) of the Prevention of Corruption Act.

Bearing in mind that, as the charge is framed, the accused in this case is, himself, charged with contravening s. 4(a) of the Prevention of Corruption Act and also of inciting others to that end, I refer to what Gabbay C.J. said in *S v Chogugudza, supra* at 34E – 35 C – D thus:

(a) at 34 E: … "by virtue of s 15(2)(c) of the Act, if it is proved in any prosecution for an offence in terms of s 4 that –

(i) a public officer

(ii) in breach on his duty as such

(iii) did anything to the favour or disfavour of any person it shall be presumed, *unless the contrary is proved*, that he did …. the

thing for the purpose of showing favour or disfavour, as the case may be, to that person." (my emphasis)

(b) at 3 C – D: "it is apparent, then that before the State can rely on the presumptive proof of s 15(2)(c) of the Act, it must establish beyond reasonable doubt the following factual premises:

(i) that the accused is a public officer;

(ii) that in the course of his employment and in breach of his duty

(iii) he did something which objectively considered, showed favour or disfavour to another.

This leaves proof of the purpose of showing favour or disfavour to the accused to discharge. It is an element that my be described as:

(a) a particular fact (a state of mind)

(b) a matter which he should know and can easily prove

(c) a mater difficult for the State to prove."

Applied to the facts of this case the presumption in s 15(2)(c) of the Act would oblige the accused to adduce evidence to satisfy the court on a balance of probability that his intention in approaching Justice Cheda and Justice Chiweshe to exercise favour to him or to Labuschagne was an innocent one. In my view the mere fact that, unlike in *S v Choguguza,* the

two judges are not the accused makes no difference in principle, the plain fact being that the accused was seeking to show favour to a business colleague and thereby to have a favour done to himself. *Chapter 9:16* describes "public officer", *inter alia,* as "a person holding or acting in a paid office in the service of the State ….", and says "in the course of his employment as such".

The other broad ground of principle on which the application was sought to be supported was that what accused did when he approached Justice Cheda and Justice Chiweshe was not incitement or did not amount to incitement. In support of this argument, defence counsel heavily relied on *S v Nkosiyana* and Another 1966 (4) SA 655 (A) where at 658 H – 659 A Holmes J.A held that:

> *"… in criminal law, an inciter is one who reaches and seeks to influence the mind of another to the commission of a crime. The machinations of criminal ingenuity being legion, the approach to the other's mind may take various forms, such as suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading, or arousal of cupidity. The list is not exhaustive. The means employed are of secondary importance; the decisive question in each case is whether the accused reached and sought to influence the mind of the other person towards the commission of the crime".*

Once again, in this regard counsel emphasized the word *"corruptly, that is, for the reason explained, against the offer of a benefit"*, to quote counsel's own words. As can be seen from the above passage from *S v Nkosiyana,* 'inducement', which would encompass the offer of a benefit, is only one of the various ways Holmes J.A. listed in describing how the crime of incitement may be committed, and, as the Learned Judge of Appeal emphasized; the decisive question is the intention of the accused. In the present case the presumption operates whether or not the accused is himself charged as contravening s 4(a) of [*Chapter 9:16*] or of influencing others to contravene that Act.

The third ground on which the discharge was sought was the nature of the evidence led so far on behalf of the State. That evidence included the transcript of the conversation that took place between the accused and Justice Cheda 16 January 2003. The submission was that the transcript provisionally then admitted as exhibit 16, was, quote, "so" manifestly unreliable that no reasonable court could safely convict on it, and that on the reasoning in *S v Kachipare, supra,* the court was obliged to grant the discharge".

Justice Cheda was cross-examined extensively on the transcript. At the time this application was made the defence said they no longer sought the exclusion of that evidence. I take this opportunity now to deal with Justice Cheda's evidence.

JUSTICE CHEDA'S EVIDENCE

His evidence was that on the 15th he had spoken to accused on the phone and accused who had initiated the telephone conversation had asked him to release the passport of a business partner of his, one Rusty Labuschagne which passport was held at the Bulawayo High Court as part of his bail conditions, Labuschagne needed the passport to travel abroad to scout for clients for his safari business operations. The conversation was interrupted after accused had mentioned what he stood to lose if Labuschagne did not get his passport released. The evidence went on, and I quote:

> *"what I also recall is that I think I must have told him that this man, the name rings a bell to me. Some three or four weeks ago there is a certain man called Diro Anand who had visited me at my house and told me that he had a friend of his called Rusty and he had wanted me to do him a favour".*

Asked if he told accused that; Justice Cheda answered:

> *"I didn't tell him that. I told him that: 'Look is this the same man whose certain Indian man had been sent to me about' and then Justice Paradza was actually surprised. He said to me – 'Did he send someone to your house?' I said: 'Yes' Then he said: "That is wrong".*

Justice Cheda said that he was surprised and worried that the accused had phoned to request the release of the passport of a man about whom he had been approached three weeks earlier, he felt something was wrong and that possibly Labuschagne was committing an offence and that he was being trapped seeing that Anand had come and now Justice Paradza was phoning about the same issue.

He had then advised the Judge President about these approaches and also related the same to two of his fellow judges, the following day he informed Mr Mandizha, the Commanding Officer of the Police Bulawayo because he felt, quote, *"something wrong was coming to me."* Mandizha arranged for the conversation between the accused and Justice Cheda the following day to be taped, hence **Exhibit 16.**

It is common cause that the transcript has a number gaps and places with dots indicating where the conversation was inaudible. Justice Cheda who was asked to read it into the record said of it first that:

> *"I wouldn't say what has been left out because I would like to believe that this is a correct reflection of what took place and if it was inaudible and nobody else would have filled in what was inaudible and I can't recall what was left out".*

Justice Cheda was taken through some portions of the transcript by the Prosecutor and asked, in the process, what his intention was when he carried out the conversation with the accused on 16th January 2003; he answered, as to his intention in reporting the matter to the police, quote,

> *"My intention of carrying on this conversation was based on the fact that Mandizha wanted to confirm whether indeed what I was telling him about Labuschagne having approached two people in order to have his passport released was in fact true and also whether or not indeed I had spoken to Justice Paradza about his issue".*

He said further, answering a question by the Court:

> *"Mandizha wanted to confirm whether indeed I was telling the truth that a Mr Anand had approached me on behalf of Rusty Labuschagne in order to release his passport to enable him to travel abroad. And also whether indeed it was correct that Justice*
> *Paradza had conducted similar conversation regarding the release of the passport with me the previous day".*

In his further evidence in chief Justice Cheda gave an explanation why he thought the approach to him by the accused was unlawful when he said:

> *"Q.Yes? A. I wish that it should be viewed in the following light:- That I think some time in year, I don't want to commit myself to a year, but well before the accused Labuschagne at the time, Labuschagne was*

brought to trial. He had applied for the relaxation or alteration of his bail conditions. He wanted his passport to be uplifted in order to travel outside the country. That application was argued before me and I dismissed it on the basis that the State had made it clear that a trial date had been set. Therefore if he was released, his passport was released with him, he was not going to stand the trial and I wrote a judgment to that effect. Now, when Anand came to request for the release of the passport, I felt that it was unlawful and I am quite sure that he was aware or they were aware that I had handled that application which I dismissed.

Therefore I got to a stage where I felt that I was being put under unlawful pressure in order to possibly re-visit my decision for the dismissal of the previous application, still on the same issue of the passport. I therefore felt that it was necessary to cover myself up and take precautions".

He said further (of the judgment he had given):

"Yes I think Anand was aware. Labuschagne obviously was aware and I am quite sure even Justice Paradza was aware".

He did not think a normal discussion between judges included requesting fellow judges to do certain things with cases that they are not dealing with.

In explaining that he had no ulterior motive for making the report to the Police, Justice Cheda said that such requests come from either friends or relatives when you are dealing with their matter and you simply tell them you do not do such things this is why he did not make a report to the Police in respect of Anand as he regarded him as one of those who approached judges or prosecutors in the hope that certain matters will be decided in their favour; he went on and his evidence in chief concluded as follows:

> *"But I got concerned when I was now being phoned or the request was being made for the second time and now this time by my colleague. That is why I advised the Judge President and I advised my colleagues. Never at any stage did I ever intend to have my colleague arrested. I went to advise the police simply because I wanted to cover my back in the event that something wrong goes on or comes up. The police in their infinite wisdom therefore decided that I should phone Justice Paradza and they wanted to listen and they taped the conversation. Never at any stage, may I make it clear, never at any stage did I ever tell the police either expressly or impliedly that they tape the conversation or arrest Justice Paradza. Why I told them, I wanted them to have a record of what had taken place."*

He said if he were to deal with the matter, the enquiry by the accused would affect his discretion because either he would accede to the request or turn it down and, quote, *"which ever way, it was going to affect our relationship".*

Suffice it to say his evidence was severely criticized in cross-examination and accused version to the contrary was put to him. But in the end he stuck to his version of events though he made certain qualified concessions, particularly as to whether, in isolation, the conversation on 15th January did form the basis of the charges leveled against the accused. A few of the matters put to him in cross-examination will suffice.

Defence counsel put to Justice Cheda that the issue he was putting to him; quote,

> *"… is a very simple one. At the heart of this case, this court is gonna have to decide, Judge Paradza and the evidence is in and speak to you, what was he asking you to do? Was he as the State was putting to witnesses yesterday, telling you what to do and you have already agreed with me he wasn't, was he?"*

Justice Cheda answered:

> *"No, in those two paragraphs he was not in clear terms, but bear in mind that the gist of this discussion was that he wanted me to release*

the passport in his request. When I then further went on to try to get him into that, that is when he was now saying 'no you can use your discretion' ".

He was referred to a passage in the transcript where accused talks about using his discretion as a judge, including where the accused said he could consult other judges. Counsel then asked him to show where accused, quote, "actually says this is what I am asking for". Counsel continued:

"And you will agree with me that if one takes it on its own, he is asking you to do no more than to act independently as a Judge and if need be go and consult another judge which, I put it to you, would mean double independence. That is what he is asking you, correct, if you take this passage on its own?

Justice Cheda answered:

"*If you take it on its own, fine, but perhaps I can leave that for arguments or for the Court but I am saying that I cannot take it on its own because I had heard the background to this. I knew what was happening, not only from Justice Paradza but from Anand as well and we go back and find out the man behind all this was Mr Labuschagne who was asking people to go, to get into me in order to get the passport released."*

It was suggested he could have, on the 15th January, spoken to accused man to man and asked him if he was trying to interfere with him or offering him money; he answered:

> *"Perhaps if one takes an armchair approach one would have taken it the way you are suggesting now. But picture a situation where I was persistently being haunted about this matter and I thought to myself I better take precautions as well. Because I didn't know why he is phoning me as well and what (it) was all up to. All I wanted is that at the end of the day in the event that there was a problem, it be understood that I actually alerted the authorities about it".*

Justice Cheda was cross-examined on three aspects of the transcript, exhibit 16, and the defence submission in this regard was, subsequently, was:

> "15. Judge Cheda confirmed that, <u>whatever might have been his impression of the discussion on 15 January 2003</u>, Judge Paradza cleared up matters the next day – as he conceded the three passages referred to in the transcript showed. In these passages, Judge Paradza made it very clear that he was <u>not</u> trying to instruct Judge Cheda what to do in any way. The passages (in Exhibit 16) are as follows:

"(*Page 5 Paragraph 7*)

Cheda: *So what do you yourself want me to do now?*

Paradza: *You know, <u>just to assess, you can assess</u> and <u>see whether, do you think that its safe</u> maybe, to give him, just giving him <u>for say some two or so months or just to enable him to sort out</u>".*

"(*Page 9, 2nd Paragraph*)

Cheda: *Ok. So you, yourself you want us to assist in order for you to get your business moving forward?*

Paradza: *If it is possible isn't it? <u>It is entirely your discretion and I mean you are a Judge isn't it, and you will look at the case and …. disagree with me or</u> ……*

Cheda: *Ah, no, no, it is not a question of disagreeing, I mean your yourself must tell me in confidence isn't it about how you want me to handle it.*

Paradza: *How haah, no, no".*

"(*Page 10 Paragraph 4)*

Paradza: *Yourself you are a Judge isn't it? You have the discretion isn't it?*

Cheda: *Ok.*

Paradza: *If you want you can consult with Kamocha, you can talk with Kamocha, that Kamocha look ……. application before me……this and that, do you mind perhaps that I give him for a while".* (my emphasis)

The thrust of the cross-examination based on the above passages in exhibit 16 (appearing at p5, p9 and p10) was to show that in the conversation on the 16th January Justice Cheda was, I quote, *"soliciting from Justice Paradza,* I quote, *constantly more than what he wanted to say."* On this suggestion, as invited, Justice Cheda commented as follows:

"A. That is not correct, because Justice Paradza had phoned me the previous day and even at the beginning of this transcript, he clearly states what he wanted me to do and I then went further to seek confirmation on page 9 and 10 which he was now reluctant to come out clear with. But prior to that the passport and the name of the accused Rusty and the amount of money he was going to lose, that came from Justice Paradza."

……

Q. Alright, we are going to look at that.

A. Just hold on. Therefore, I do not think it is correct in my view to say that I was inciting him. I did not put words into his

> mouth. All I wanted in front of the police there, because of the police wanted me to have that conversation and confirm that, I felt in my opinion that it was necessary for me to ask those questions so that the police should also hear them. If that is called inciting or trapping, I believe this is a question of argument but this is not what was in my mind."

The only comment that can be made for present purposes is that Justice Cheda's evidence in chief and in cross-examination must be read in conjunction with the three passages from exhibit 16 which passages must be read in the context of the whole transcript, the gist of which, notwithstanding the gaps and the inaudibles in it, is clear.

In *S v Bvuma and Another* 1987 (2) ZLR 96 (SC) at 102D Dumbutshena C.J. agreed with the view expressed by Bekker, J at p 723 in *R v Harholdt & Others* (3) 1956 (2) SA 722, namely:

> *"I have no doubt that the discretion which is so vested in a court is to be exercised judicially; and that, as a general rule, but not apparently without exception, an accused person should be discharged if at the close of its case, the prosecution has failed to present evidence upon which he might be convicted. It is, of course, beyond question that in a particular case the attendant circumstances, which I do not propose to circumscribe or to define, might be such that a failure of justice*

could possibly result if an accused person were to be discharged at the close of the case for the prosecution, and though it has failed to present a necessary degree of evidence. But the attendant circumstances in such event should , in my opinion, at least be of such a nature as to afford the necessary grounds upon which that discretion could be judiciously exercised". (my emphasis)

There are special circumstances in this case, of the nature indicated in the above passage, whatever criticism is made of Justice Cheda's conduct and the shortcomings of the transcript, exhibit 16; they are the following:

a. the conversation on 15 January leading to that of 16 January 2003 was at the initiative of the accused;

b. When the approach was made to him, Justice Cheda was not seized with the matter of the application for the alteration of Labuschagne's bail conditions; (as indeed accused was later stress)

c. the request for Justice Cheda to look at the matter and to exercise his discretion and to see if it was safe to relax these bail conditions by releasing the passport, was extraordinary, in the sense that the accused knew that accused's legal representative James Joseph was going to file an application to that end and

accused had a personal interest in a favourable outcome of that application;

d. according to Justice Cheda's uncontradicted evidence, the accused knew that Justice Cheda had given a negative judgment on an earlier application by Labuschagne to the same effect and that application was turned down on the ground that Labuschagne might abscond;

e. when accused approached Justice Cheda, the latter had, three weeks earlier, been approached by Anand with a clear and direct attempt to bribe him, and when, later approached by accused, he felt, understandably, that he was being compromised – a feeling which he described – in cross-examination when he said:

> *"at that stage.... I was able to trace back to Rusty because Anand was talking about Rusty. Justice Paradza was also talking for and on behalf of Rusty and Justice Paradza had nothing to do with that, with Anand's visit to my home but there still remained the question as to what Labuschagne was up to using two in my view, using two different people to try and get me to release the passport and I thought at the time how genuine could this be, why am I, firstly I was sent up this*

person, secondly, the Justice also ask about the same question and it could be that I am being trapped into this matter.

And if not, it could be a crime is being committed. At the end of the day my name might be dragged into this without the relevant authorities knowing about it".

f. Justice Cheda first reported accused's approach to him to the Judge President and also to two fellow judges;

g. There was before the Court the evidence in the form of affidavits put in by consent. I refer in particular to Exhibits 13, 14 and 15 (these explain the process of Labuschagne's trial and the various efforts he made to secure the release of his passport from 18 December 2000 onwards (Exh. 13), the proper procedure in making bail applications (Exh. 14). And the fate of Labuschagne's application for alteration of his bail conditions before Justice Cheda (Exh. 15). There is no need to read them, but they are part of this judgment, proceeding from p 33 to p 40.

Exhibit 13 is a statement by Herbert Sylvester Masiyiwa Ushewokwaze dated 20/02/03 Bulawayo, it states:

"I reside at number 9 Mosal House, corner Herbert Chitepo/6th Avenue, Bulawayo. I am a law officer in the Attorney General's office stationed at Bulawayo.

I am the State Counsel in the matter of the State versus **Russell Wayne LABUSCHAGNE** and **Walter Ryan Claasen** who are jointly facing a charge of murder.

The trial commenced at the Bulawayo High Court on 9-12/7/02 and it continued on 20/08/02, before **Justice Lawrence KAMOCHA**. Mr **Joseph JAMES** of James, Moyo-Majwabu and Nyoni is the defence counsel.

I prosecuted the matter from the initial stages until the 20/08/02 when it was postponed indefinitely for judgment.

During the course of the trial the accused made our different bail applications.

Initially both accused made the first application on 8/12/00 and they were granted bail, with one of the conditions being that they surrender their travel documents.

On 30/01/01 the first accused, **LABUSCHAGNE** made an application for variation of his bail conditions, where he wanted the release of his passport for the reason that he wanted to attend a Hunting Convention in Mozambique and South Africa. **Mrs NYONI** also of the Attorney General's Office

represented the State. The application was dismissed by the High Court.

On the 13/11/02 **LABUSCHAGNE** again made another application for the variation of his bail conditions where he wanted the release of his passport to enable him to travel to South Africa for a hunting trip. The application was dismissed by the High Court. I represented the State in that application.

On 22/1/03 accused made another application for the release of his passport to enable him to travel to the United States of America on a hunting trip.

I filed the opposing papers on 22/01/03 and the matter was to be heard on 23/1/03. On the 23/01/03 **Justice CHIWESHE** before whom the papers were placed, indicated that he was referring the application to **Justice KAMOCHA** to make a decision on the matter".

Exhibit 14 is a statement by one Albert Mtshingwe, the Criminal Registrar at High Court Bulawayo dated 20/02/03 Bulawayo, it states:

"The procedure concerning bail applications is that:-

a) A lawyer files four copies or more of the bail application with the office of the Criminal Registrar.

b) We remain with the original and the lawyer serves the Attorney General's office with the other copies where he leaves one copy with them.

c) The Attorney General's office then responds to the application.

d) If the application is not opposed, then we take the application with the response to the judge and he can either grant it or refuse.

e) If it is opposed we wait for applicant's lawyer to write to us that the application should be placed before a judge.

f) We then take the application, the response and that request to the judge.

g) The judge would then indicate the date and time when he would deal with the application.

h) We then inform the Attorney General's office and the lawyer concerned advising them the date and time the application will be heard.

i) On the date the application is to be heard, we would inform the judge concerned once the parties are ready, then we take them to the chambers or open court, where the application can be granted or dismissed.

As regards the application for variation of bail conditions by **Russell Wayne LABUSCHAGNE**. I remember that I received the application from James, Moyo-Majwabu and Nyoni, legal practitioners on a date I cannot remember.

On a later date I received the response from the Attorney General's office, whereby they were opposing the application. I later received a letter from James, Moyo-Majwabu and Nyoni requesting for the matter to be placed before a judge.

The file was then placed before **Justice CHIWESHE**, who later decided that the application should be placed before **Justice KAMOCHA** who is in Harare, to determine the application.

I would not know how **Justice PARADZA**, came to know that the application was to be heard by **Justice CHIWESHE** at 10:30 hours on 23/01/03".

Exhibit 15 is a statement recorded at Bulawayo on 21/02/02 by Justice Chiweshe's Clerk, one Charles Matsika it, states:

"I reside at number 13878 Nkulumane 12 Bulawayo and I am employed by the Ministry of Justice, Legal and Parliamentary Affairs as a Judges' Clerk at Bulawayo High Court. Currently I am attached to **Justice CHIWESHE**.

I cannot remember the date, but I received an opposed bail application for **Russell Wayne LABUSCHAGNE** from the Criminal Registrar.

I placed the application before **Justice CHIWESHE**. I cannot remember the time, but the application was set for the 23rd of January 2003 for hearing. I informed Mr **Joseph JAMES** and Mr **Herbert USHEWOKUNZE** about the date and time.

I do not know what transpired between **Justice CHIWESHE** and **Justice CHEDA,** the bail application ended up being handled by **Justice CHEDA.**

On the 23rd of January 2003, **Justice CHEDA** informed me that he was now going to hear the bail application and that I should advise Mr **Joseph JAMES** of James, Moyo-Majwabu and Nyoni, legal practitioners and Mr **Herbert USHEWOKUNZE** of the Attorney General's office. The parties concerned came in and it was in the morning. I took them to **Justice CHEDA**.

The hearing commenced in **Justice Cheda**'s chambers. It was agreed by both parties that the bail application be heard before **Justice KAMOCHA** who was dealing with the main trial.

I never communicated with anyone else about this bail application except the parties that I have aforementioned".

h. In his evidence Justice Chiweshe said accused approached him by telephone on 24 January 2003 to say an application for the variation of Labuschagne's bail conditions would be placed before him that morning for the release of the passport. At the time he had no relevant papers before him. He was surprised when later that day the papers came. Accused revealed that Labuschagne was his business partner and that he was standing trial for murder that "had occurred along the Zambezi. He said he told accused that he had dealt with a similar application in

> which Labuschagne sought to uplift his passport in order to attend a fishing convention in South Africa which applications he had refused. (His full evidence will be referred to again later in this judgment).

In my brief reasons for refusing the application I also said I would expand on the probabilities. It is trite law that the probabilities in any case have to be weighed in order to determine the truth of the stories told by witnesses. Georges J.A. in *S v de Lange* 1983 (4) SA 618 (ZSC) said at 624 H:

> *"An appraisal of the probabilities inherent in the story given by a witness is an essential part of the evaluation of the truth of that story."*

And in *S V Schackel* 2001 (4) SA (1) (SCA) at 130 par. 30 it was said:

> *"… of course it is permissible to test the accused's versions against the inherent probabilities; But it cannot be rejected merely because it is improbable: it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."*

The probabilities in this case cannot be considered independently of the position and duties of a judge. See *S v Zeelie* 1952 (1) SA 400 (AD) where at p 402G Schreiner J.A. observed:

> *"The fact that Mariam Myburgh was a prostitute is a factor in assessing her credibility and in weighing the probabilities of the case."*

During his address on the question of a discharge I asked Mr *Mutinenga* if what accused did in approaching Justice Cheda and Justice Chiweshe did not amount to asking for a favour, and in reply counsel said:

> *"One needs to go further because one need to ask whether that approach is being made corruptly."*

The proper question, in my view, is whether the approach was with the intention that they act corruptly, i.e. in terms as s 4(a) of [*Chapter 9:16*] prescribes.

My view then was, and still is, that the statutory corruption created by section 4(a) of the Prevention of Corruption Act, contains no such element (See Chogugudza's case, *supra*, at p 34 D and 35C – D).

As Mr *Matinenga* later conceded:

> *"The two judges were asked by Judge Paradza … to do a particular thing as a way of exercising their respective judicial discretions and one therefore cannot only look at that which they were asked to do in*

their judicial functions, without looking at the circumstances surrounding it."

I agree.

The submission in respect of count 2 and the alternative thereto was on the same principles and argument as on count one and the alternative count of the same.

That the taping of the conversation between accused and Justice Cheda on 16 January 2003 and the resultant transcript were of a poor quality is amply testified to by those who dealt with these matters. The Court itself tried to listen to the tape and discontinued the attempt because of the poor quality of the recording. However, defence counsel did not in the end insist on the transcript being excluded, and, as said earlier, the Court had ruled it provisionally admissible. The main reason for the ultimate position taken by the defence vis-à-vis this evidence is that counsel could and did make use of parts of the transcript that reflected points counsel felt were in favour of the accused, and cross-examined Justice Cheda on the same to great effect. So, in the final analysis the transcript, Exhibit 16, is part of the evidence the Court took into account at this stage, and has to take into account when, at the end, it comes to make an overall assessment of the evidence as a whole.

According to State Counsel, Mr Phiri, the State had established the factual premises mentioned in Chogugudza's case, *supra*, at p 35 for the presumption in s 15(2)(e) to kick in. Section 15(2)(e) of [*Chapter 9:16*] provides:

> *"(2) If it is proved in any prosecution for an offence in terms of section three or four that:*
>
> *(e) any public officer, in breach of h is duty as such, did or omitted to do anything to the favour or prejudice of any person, it shall be presumed, unless the contrary is proved, that he did or omitted to do the thing for the purpose of showing favour or disfavour, as the case may be, to that person."*

In Chogugudza's case, *supra*, at p 42 Gabbay C.J. said:

> *"The actus reus of the offence of contravening s 4(a) of the Prevention of Corruption Act having been proved by the State, it was for the appellant to displace the presumption by satisfying the trial court that his purpose of showing favour was legitimate that in doing what he did, he had acted with an innocent mind. It was not for him to establish that his evidence on this aspect was necessarily true – only that on a preponderance of probabilities it was true."*

Mr *Phiri* submitted that it was now up to the accused to prove he had done what he did "with an innocent mind", i.e. with innocent intent. In the

circumstances of this case the intention would in my view refer to what the accused intended the two judges to do when he approached them.

Mr *Matinenga* argued for the defence that *S v Chogugudza* did not apply to the facts of this case because, according to him, everything was already before the court, and everything pointed to the accused not having committed an offence. He asked if the accused was being called upon to till the gap in the evidence of the State. He did not, however, expressly argue that the presumption in s 15(2)(e) of the Act did not apply, nor is there any such mention in the written submissions he presented to the Court at that stage, nor did he say so in his reply to Mr Phiri's submissions.

The question of accused's intention in asking Judge Cheda and Judge Chiweshe to entertain the application for the variation of Labuschagne's bail conditions, or, as he would have the Court to believe, to look at and assess the record in Labuschagne's matter, is a matter of inference in this case, in as much as is the alleged knowledge on his part that the ends of justice would be defeated or obstructed, if Labuschagne's passport were released. As was said in *S v Chogugudza* at p 35 "proof of the purpose of showing favour or disfavour is an element that may be described as:

(a) a particular fact (state of mind)

(b) a matter which he should know and can easily prove

(c) a matter difficult for the State to prove"

It was on the consideration based on circumstances outlined above and the evidence so far led that the Court exercised its discretion to the effect that the accused be put on his defence.

I now turn to the trial as a whole. The accused gave evidence. He was the only witness called in support of the case for the defence. In the presenting the accused's evidence as well as Justice Cheda's evidence I have to quote in *extenso* and verbatim certain aspects of that evidence because, I believe that any attempt to summarize the same would not give a proper and full impact of it, but would distort a number of important points that I feel emerge from the evidence. I will also make some necessary comment on the evidence as I go on.

THE ACCUSED'S EVIDENCE

It will be noticed that, in amplifying the Court's reasons for the ruling on the application for the discharge of the accused at the end of the case for the prosecution, I have covered as much as possible the evidence of most of the main State witnesses. I will refer to that evidence where further reference to it is necessary and in comparison with accused's evidence.

Accused was appointed a judge of the High Court in 2001, before that, he had run a legal firm called Paradza and Partners. Prior to his appointment he, together with other ex-combatants of the Liberation Struggle, had been

a beneficiary of a land redistribution exercise carried out by the Government; they had been offered pieces of land in the Kwekwe Area called Circle G which is part of a Conservance called Midland Black Rhino Conservance, the principal activity there being hunting. His involvement in that commercial enterprise was known to the Government when he was appointed as a Judge, and it is common knowledge that other judges engage in and have business interests and carry on activities such as farming; Judges discuss such personal activities in the course of their work.

The accused said that Justice Cheda was a close friend and that he phoned him on 15 January 2003 'primarily' in *"a personal capacity,"* he did not hide his personal interest in Labuschagne's matter, he said, and continued:

> *"Basically if I had done that I think I would have been extremely dishonest."*

When he phoned Justice Cheda he had not done so in his 'public office', he was pursuing an interest which was purely personal, which had nothing to do with *"my functions as a Judge".* He was not seeking to do any favour or disfavour to Justice Cheda; he added:

> *"In fact, I am fairly surprised, concerned, I think is the better word, about the way the charge has actually been framed. My view, my*

understanding of that charge is that it deals with me in my capacity as a public officer and not in my personal capacity doing something which is contrary to the execution of my duties which results in showing favour or disfavour to somebody else."

Russell Wayne Labuschagne was referred to him by Acting Director of Wild Life, Brigadier Kananga, as he and others at Circle G had requested his assistance to secure clients to come and hunt at Circle G sine he and his partners were new in that business.

Brigadier Kananga had phoned to say he had found someone he was sending across who was interested in taking up Circle G's hunting quota, Labuschagne came with his business partner, Ralph Nkomo. This was just over a week before the telephone call to Justice Cheda. When he first met Ralph Nkomo and Russell Wayne Labuschagne in his chambers he had no prior knowledge of them nor was he aware of the "brush with the Law which Labuschagne had," it was there he got to know Ralph Nkomo as the Late Vice President Joshua Nkomo's son. He was asked if subsequent to the first meeting with the two he eventually became aware of the brush Labuschagne had had with the Law; his answer was:

"It was much later, but can I say quite a lot did transpire before I actually got to know. Quite a lot transpired between us in pursuit of this business arrangement before I got to know".

He said he asked Ralph and Russell to put the proposal in writing, and a few days after, Ralph brought the written proposals, he went and discussed the proposals with other members of the board that ran Circle G and made a few changes, and when he came back to Harare he phoned Ralph. Eventually he Ralph and Russell met and they accepted the changes, the final agreement was that they would take over Circle G's entire quota and would pay 75% of the trophy fee per annum and the agreement was for 5 years. Russell was to come up with a written contract which they would sign and which would thereupon become of force and effect. At end of that first meeting Ralph had asked Russell to leave the chambers, as he wanted to discuss something confidentially in Russell's absence. Ralph then told him of Russell's problem – that he could not go to a convention starting 27th January to 7th February and Ralph could not go in his place because he was not a professional hunter; the convention was an annual event held at the start of the hunting season and Russell cold not go because his passport was held in Bulawayo *"possibly at the High Court or the Clerk of the Court. It was not so very clear to me,"* he said, and continued:

> *"Russell Labuschagne and somebody else are appearing before the High Court in respect of a matter which happened at Kariba* and he said this matter involved certain people who attempted to invade Russell's fishing camp and he said to me, *'Look, in the process of*

> *trying to remove these invaders one of the people was attached by a crocodile.'* And he explained to me that this is the reason why the passport was being held in Bulawayo."

He said he was not given details as to the charges Labuschagne was facing but said the matter was being continuously postponed by Justice Kamocha. Asked if given details as to the stage the matter had reached, he said:

> *"Not at all. In fact as a Judge I understood it to mean that the matter was still pending, it had not even gone anywhere because a matter which continues to be postponed and postponed, to me it meant that it was not even before anybody."*

He went on to say he thought the record of proceedings in the matter was still in Bulawayo and the matter was going to be allocated to some other Judge, quote, "bearing in mind that Justice Kamocha was now in Harare next door to me" (my emphasis)

He said that Ralph Nkomo was kind of inquiring from him if there was anything that could be done, as it was important in the business interest. This bit of evidence, if true, raises a number of obvious questions, such as why not ascertain from Labuschagne himself, why not ascertain with Justice Kamocha who was next door, and who was dealing with the main matter, as indeed Mr Gauntlet, leading counsel for the defence, had

occasion to suggest was the proper course, when cross examining Justice Chiweshe (see p 222 of record).

Asked what his reply to Ralph Nkomo was, he said:

> *"Yes, I said to Ralph 'Look the record is in Bulawayo. As a starting point, the only thing I can do is to phone a colleague in Bulawayo and find out about the details of the matter' And I said to him 'Look, if this record was here in Harare I could first call for the record from the Registrar and look at it myself and then I could be able to advise you where you stand."*

He said he wanted a colleague in Bulawayo to look at the record, *"form some kind of an impression as to whether it is advisable that Rusty can make an application for a variation of his bail conditions"*. He first phoned the Bulawayo Court to find out if any Judge was available that day. He was advised that only Justice Cheda was available but he was not in the office. He had his cell number in his phone and he was a very close friend, quote, *"I was very comfortable talking to him and asking him to check up the record."* When he phoned Cheda the first time he had difficulty with the signal, he, Cheda, said to me he would phone me *"as soon as he got to the office."* After saying it was Justice Cheda who suggested the idea to phone when he got to his office he said I said to him:

> *"Look Maphios, there is a matter which I wanted you to look at. There is a record which I want you to look at' and he said it is okay, <u>phone me as soon as I get to the office</u>"*

Asked *"what did you want him to do in the process of looking at the record,"* he answered:

> *"Basically I wanted him to look at the record, acquaint himself with what Russell's matter was all about as far as things like the charges, the seriousness of the charges (are concerned) (sic) and what charges they are, if any and basically what stage the matter is, whether it is still pending or the trial has commenced or anything. Just to simply acquaint himself on my behalf of what was the state of affairs as far as the matter was concerned."*

The question and answer later continued as follows:

> "Q. Did he call you?
>
> A. Yes.
>
> Q. What did you talk about?
>
> A. As I told him, I wanted or I was maybe requesting him as a friend to look at the particular record, I gave him the name of Russell Labuschagne and I asked him to look at it and tell me

what it was all about. I also informed him that:- "Look, Labuschagne intends to make an application for variation of the bail conditions and it is with a view to look at his chances of success that he was supposed to check that record for me.

Q. You wanted to establish, if I may use the legal terminology, his prospects of success in the bail application which you believed was going to be placed before the court?

A. Yes."

Q. Now, when you spoke to Judge Cheda on the 15th, in what capacity did you speak to him?

A. In my personal capacity. It was not anything to do with our offices as judges.

Q. You are a judge?

A. Yes.

Q. Did you specifically instruct Judge Cheda to do or to grant a favour or disfavour to Labuschagne?

A. No. Basically, I think it is important to know and understand that. It would make no sense for somebody as a judge or even a fellow judge and say:- Look there is a matter called a, b, c, versus c, d, e, in that matter, I want you to grant, or to, I mean release a passport belonging to so and so before I even have a chance to look at the record. It just does not make sense, does it?

Q. You say you did not do so in your official capacity as a public officer, did you do so in your personal capacity?

A. Yes.

Q. Let me rephrase the question, you have said you wanted Judge Cheda to assess report back?

A. Yes.

Q. You have already said that you did not direct the judge to do anything to show favour or disfavour?

A. Yes.

Q. In your public position and I am saying in your personal position, did you ask Judge Cheda to do anything to show favour or disfavour?

A. No."

He said the above was all they discussed on the matter, all he asked Cheda was to acquaint himself with the record before they could discuss anything further. Justice Cheda was supposed to phone him back after that.

I pause here to say if this part of his evidence is true it is very strange that Justice Cheda would report the matter to the Judge President or to his fellow Judges, let alone to the police, or that it would engender the alarm in Justice Cheda that he was being trapped; the probabilities strongly suggest that that evidence by the accused is false.

On the 16th when Justice Cheda phoned back he thought he was now reporting back. He was surprised that Justice Cheda started asking for details or information about Labuschagne and the charges he was facing, he got the impression he had not been able to look at the record.

He was given Exhibit 17 composed of 5 documents, all renderings of the conversation on tape of the 16th January 2003, including the document produced as Exhibit 16 (document E). He commented that the recording was not accurate and that there were many portions missing. He had tried to fill in the gaps here and there without much success. He had done so before the Tribunal appointed to enquire into his conduct to assist to

produce a record with as much information as possible for that Tribunal or any Court that would hear the matter.

He said there was nowhere in the transcript where he asked Cheda to conduct himself in a particular manner, quote, *"in your office as a Judge"*. At the time he had never heard of the name Anand; for the first time then he had heard Anand had brazenly tried to bribe Justice Cheda on the 5th of January. He had, according to the transcript, expressed revulsion at Anand's approach and was surprised that "in this world there are people who could approach Judges and offer a bribe". *He had never or "I had never experienced it" he said.* He had not on the two days indicated to Justice Cheda that he was going to get some benefit; he added:

> *"In the transcript I notice there is a portion where he is trying to lure me into saying we are going to join together and hunt or whatever. I did not really take him seriously. I did not then think that he was really serious about it; it was just a light moment, a passing talk."*

Then followed this exchange with Counsel:

> "Q. When you phoned Judge Cheda and he phoned you back on the 16th, was it your intention that that application filed on behalf of Labuschagne must go before Judge Cheda and nobody else?

A. Maybe we need to (be) very careful here, when I phoned on the 15th, I did not know at the time yet that an application had been filed. I wanted to get information about the state of affairs from the record itself from a fellow judge of mine in Bulawayo who had access to the record so that I can advise Russell whether to proceed with an application for variation of the bail conditions or not. So let us be very clear and distinguish the record itself, the record proceedings in the murder case and the application in respect of the variation of the bail conditions.

Q. I appreciate that explanation you give judge. The question nevertheless must follow:- Did you at any stage indicate to Judge Cheda from your own initiative that you wanted this application for variation to be placed before him and that he must show favour or disfavour to Labuschagne?

A. No. It had never even crossed my mind.

Q. Judge you are aware of passages which have already been quoted to this court where you make reference to the exercise of a discretion, where you make reference to an assessment, where you make reference to consultation. Would you want to explain yourself what you meant by those, please and why you came to make those comments?

A. You see those comments arose, as far as I am concerned, unexpectedly from Judge Cheda. You see the tenor or the way he was tearing (steering) the conversation between me and him and the way he ended up asking, how am I covered, how am I, I mean, is it safe, or whatever or what exactly do you want me to do? You must tell me exactly what you want me to do. To me it was rather disturbing. It really worried me and I was left with no option but to remind him, to say:- Look, judge those are issues which are known between you and me. You are a judge, you have a discretion, you exercise your discretion as best as you can and the like, it is not for me to tell you what to do or how to conduct yourself as a judge, no. And passages in the transcript will show that I stood by that position right through to the end. (Highlighting mine).

Q. Did you intend or would you have intended that even if Judge Cheda was going to have this application, he must conduct himself differently?

A. No, you don't tell a judge what to do, even if you are colleagues, even if you are friends, you don't go round and, it is an abuse of your friendship. You are trying to tell him things which you know if somebody told you, it would kind of

make you angry or upset. It would disturb you. I wouldn't want to be told by any judge what to do." (My emphasis)

When Justice Cheda did not come back to him after the 16th as the transcript indicated (at the last page), he would, the accused said, time lapsed and he assumed, quote,

"that maybe Rusty and Ralph had gone ahead in their application in any case they were the people who were supposed to leave the country. It was really not much of my concern at that stage."

The very next question after this was:

"We know that you phoned Judge Chiweshe.

A. Yes.

Q. The Court would like to know please why in light of what you say you phoned Judge Chiweshe?"

His answer was:

"A. Right, I will say in between, in between my last call with Cheda and the call which I made to Chiweshe, I kept contact with Ralph and Rusty himself. We used to phone each other where necessary and as time went on ….: (my emphasis)

MTAMBANENGWE, J: You say with Ralph and?

A. And Rusty Labuschagne. We kept on phoning each other as people who hoped that we would one day get involved in a business venture together and it was during those discussions and sometimes we would meet over coffee and the like. I was advised that:- Look, we still have not been able to make any progress as far as that application is concerned. So simply put, I got to know that nothing had happened as would make them know whether they were going to travel or not." (highlighting, double highlighting mine)

The accused went on to say that his approach to Justice Chiweshe was for the same reason as to Justice Cheda:

"All I wanted is somebody to tell me the state of affairs, state of affairs and record as far as Russell was concerned."

Reminded that Justice Chiweshe had said he wanted him to exercise a discretion in favour of a business partner, he replied:

"A. Yes, he said so but it was not like he was reporting what exactly what I said to him. He was kind of expressing his own opinion, not reporting in that sense of saying Paradza said this

and that. So to me, maybe with my experience as a judge, he was kind of putting more or his opinion as opposed to facts."

What Justice Chiweshe said was read out to him and accused was asked to comment, he commented by still insisting that Justice Chiweshe was expressing a *"personal opinion"*. As to Justice Chiweshe's apparent surprise that the accused had a personal interest in the matter, the accused said he did not hide that, he would not hide that to a fellow judge. Asked as to the manner of his approach to Justice Chiweshe, he related:

"A. I am not saying these are the words but this is the purport of what I told Judge Chiweshe. I said:- "Look, I have this mater where I have an interest. It involves Russell Wayne Labuschagne. He wants to make an application or he could have already filed an application with the High Court there in Bulawayo for the variation of his bail conditions to enable him to retrieve his passport so that he travels abroad. Did he know anything about that matter. If not, could he check it up for me and come back to me."

Again I pause to remark that if this evidence is true, it is very remarkable that after the several contacts he had with Nkomo and Labuschagne after the 16th January 2003 he still had not verified with them how far the

matter involving Labuschagne had gone – a remarkable lack of enquiry by a man of his standing.

In concluding his evidence in chief he was asked a series of questions which led him to deny:

(i) that he had sought to corrupt Justice Chiweshe or Justice Cheda;

(ii) that he had sought to influence Justice Chiweshe to show favour or disfavour to any person;

(iii) that he had sought here to have either Judge to conduct himself in a manner that would have the effect of defeating or obstructing the course of justice.

He agreed that his defence outline, Exhibit 3 be placed before the Court as part of his evidence:

The defence outline reads (in relevant parts) as follows:

"3. Accused pleads not guilty to both the main and the alternative charges brought against him.

4. Accused is now aware that Judge Cheda, with the assistance of the Police and at his special instance, audio taped the telephone conversation he had with him on 16 January 2003.

"***the defence does not accept that the tape recording was made with prior authority required by Section 98 (2) and 103 of the Posts and Telecommunications Act (both of which provisions have in any event been held to be unconstitutional by the Supreme Court in LAW SOCIETY OF ZIMBABWE vs MINISTER OF TRANSPORT Case SC 59/03***" (as added)

5. The copy of the audio tape made available to the Accused is of extremely poor quality. It is inaudible and the conversation allegedly recorded is difficult to follow.

6. The transcript of the audio tape made available to the Accused confirms its unreliability.

7. Despite the audio tape's unreliability, those audible portions clearly show that Accused did not incite Judge Cheda to corruptly release Russell Wayne Labuschagne's passport. On the contrary, the audible portions of the audio tape show a deliberate and despicable attempt by Judge Cheda to incite and entrap the Accused.

8. Accused denies inciting Judge Chiweshe to act corruptly as alleged or at all.

9. Accused is unable to say why his colleagues, Judges Cheda and Chiweshe, have conducted themselves in the manner they have towards him.

He can only surmise that his colleagues may have succumbed to pressure to "build" cases against certain judicial officers who are perceived to have handed down judgment unfavourable to government. He will give specific instances of such harassment of Judges that are known to
him. Accused believes that he is one of the targeted non-compliant judicial officers.

10. In the event that it becomes necessary, Accused will give evidence on his behalf.

10.1 He will set out the history of his meeting with Mr Labuschagne and Mr Nkomo and state that he was unaware of the nature and extent of the criminal proceedings faced by Labuschagne.

10.2 He will state that Mr Labuschagne and Mr Nkomo were referred to him by the then Acting Director of National Parks and Wildlife, Retired Brigadier Kananga for the purpose of setting up a legitimate business relationship.

10.3 The difficulties being faced by Mr Labuschagne were referred to in passing during the discussions Accused had with Mr Nkomo in Mr Labuschagne's absence. He told Mr Nkomo that he would make enquiries.

10.4 The enquiry with Judge Cheda, as the transcript will show, was simply meant to seek his assessment of the state of affairs regarding the proceedings against Mr Labuschagne.

10.5 Accused would have directed his enquiry to a Judge other than Judge Cheda but for the fact that he was the only Judge available at the time. Judges always communicate with each other in the day to day performance of their duties. The enquiry was therefore made within the context of communication between colleagues.

10.6 Accused will make reference to the transcript confirming the innocuous enquiry he made and how this innocuous enquiry was twisted by Judge Cheda for a purpose which can only be explained by Judge Cheda himself.

10.7 He will sate that in respect of both Judges, he never sought to corruptly influence them or incite them to act outside their judicial powers with a view to defeat or obstruct the course of justice." (emphasis supplied)

In cross-examination accused's attention was directed to the second and third sentences of paragraph 10.5 of Exhibit 3, and he was asked if he was now suggesting that the communications with the judges (in Count 1 and 2) was in his personal capacity and not as stated in these sentences. A series of indirect answers followed in which the accused seemed to be saying it could be in either capacity, quote, "[as one could not say now I am communicating with you in this or that capacity" (my summary)] before accused said:

"A. That statement really says exactly that, I mean, judges will communicate on a day to day basis in the performance of their duties. But that is a general statement it is a general statement without any particular application."

Counsel then explained that he was asking that question because a lot of emphasis had been placed on the fact that when he spoke to the Judges he was speaking in a personal capacity, and accused went on:

"A. Which is true. If I am dealing with an issue pertaining to Circle G, would you call that judicial work? Would you?.....

A. Yah, it is common sense, Mr Phiri. If I am talking about Circle G, I am not talking about the State versus R.B.Z. It is my issue, it is my personal problem. It has got nothing to do with my duties as a judge and that I think it is common sense and the emphasis is obvious on personal involvement, it is very obvious."

In the course of questions in this connection accused asserted that:

"A. *I never asked for the release of the passport. I never made any request in that regard to either Justice Cheda or Justice Chiweshe. I never asked for anything."*

The exchange with State counsel continued:

MR *PHIRI:* Q. So for the avoidance of any doubt in future, your answer stands as that you did not ask for the release of any passport or anything from any of these judges? Correct?

A. Not anything. If you say anything I think it is a twisted way of trying to misrepresent. I know what I asked the judges to do and I have said to this Court.

Q. So anyway you did not ask that the passport be released?

A. That is what I did not do. (My highlighting)

Asked if he had asked Ralph what stage the case had reached when Ralph had initially brought to his attention Labuschagne's problem with the passport, instead of a simple yes or no answer the accused answered as follows:

> *"It was not like it was me asking but he gave a report:- Look there is this matter which is affecting who is a professional hunter who has to travel, but the matter is continuously being postponed. So you see, I understand and, I am sorry, you and me understand that when you talk to lay people who don't know the procedures at court, they will tell you anything. It explains why I took it up myself to phone my colleague to look at the record himself and tell me exactly where we are. I wouldn't expect Ralph to know and tell me and appreciate exactly what stage this matter was but that is what he said to me, that the matter is being postponed and postponed and postponed."*

And did Ralph add that it was being postponed and postponed by Justice Kamocha, he was asked, he answered rather vaguely and circumlocutiously:

> *"A. Yes, yes, he told me that. He said they had, Rusty had appeared before Kamocha whilst still in Bulawayo but by that time Kamocha was now in Harare. You see there is difficulty there. To me, I thought the matter had not even taken off because Kamocha was now in Harare. The record which was*

being postponed, I presumed was still in Bulawayo which you know is normal."

The question and answer continues thus:

"Q. I suppose that you know that the High Courts are not remand courts. You know that?

A. That I know very well.

Q. I see. So what was it that Ralph said which gave you the impression that this case was not before anybody or (it was just case there?) (*sic*)

A. Ralph did not say this case was not before anybody. He simply stated a fact that the last time they had been at court, the matter was postponed by Kamocha.

Q. In answer to a question by your legal representative, you said that you got the impression that the case was not before anyone?

A. Yes.

Q. So where did you get that impression, I probably erroneously thought that you got it from what Ralph had said but anyway tell me:- Where did you get the impression?

A. Let us not forget that I am a judge and I know the proceedings as far as the various types of matters that come before judges. Criminal matters are not assigned, like in Harare, criminal matters are not assigned to a particular judge until such time as they take off. If a matter is set down in Court A here today and the matter fails to take off, it will be taken by the next judge who is assigned in Court A. It is not like the opposed matters where judges are allocated opposed matters and they set them down as and when they next appear on the opposed roll. That is different. You know that. You are a prosecutor. It only becomes a partly-heard matter when it is partly heard by a particular judge. So if a matter is postponed by Kamocha today in Bulawayo, I don't expect him to hear that matter, the next time it comes back to court in that same court.

Q. Okay. My question to you is:- Where did you get the impression that this matter was not before any judge?

A. Because the matter was being repeatedly postponed. It is a simple process. If it is being repeatedly postponed, as far as I am concerned, the matter has not been partly heard by anybody.

Q. Did not the fact that Ralph told you that it was being kept being postponed by Justice Kamocha, tell you that it was before Kamocha and that therefore it was partly-heard?

A. That is why I phoned Cheda. I wanted to find out for myself. It was a very simple thing. It is common sense. If you want to know the state of affairs about any any matter you will find out and like I told you, if this matter was in Harare I would have found out myself, I would have sent my clerk to go and look at the record, bring it up and I peruse it myself. That is why I wanted Cheda to peruse that record and tell me what that record was all about. It is a very simple thing."

One may observe that the simplest thing would have been for him to find out from Kamocha J 'next door' who had been 'continually postponing' the matter. It is also far-fetched to say Ralph Nkomo who had been in court with Labuschagne would not know whether Labuschagne was before Kamocha J on trial. The explanation accused gives above is simply untrue beyond reasonable doubt.

There was another long and rambling exchange between State counsel and the witness when the next question was asked. It went as follows:

"Q. Yes, and then when you phoned Cheda, I presume that was also in your personal capacity?

A. Yes.

Q. I see. Yes, and you never asked him to release a passport. Correct?

A. No.

Q. And therefore you did not discuss with Cheda what you stood to benefit or lose by the release or refusal to release a passport, correct?

A. I did not discuss with him. I answered his question, the question which he asked in that regard, but I didn't discuss with him. It was not on my mind to discuss with him that kind of an issue. He was probing me.

Q. Incidentally who was it between you and Cheda that brought up this US$60 000?

A. It was Maphios Cheda. The transcript is very clear on that. He asked me …

Q. And it turned out to be an accurate……."

The accused insisted that when he phoned Justice Cheda he was doing so in his personal capacity. He said he never asked for the release of a passport, nor did he say that he stood to gain or lose US$60 000 by the release or refusal to release a passport, he did not discuss with Cheda the

issue of a passport it was not on his mind to discuss such, he merely answered Cheda's questions, it was Cheda who was probing him.

The question as to who first mentioned or brought up the US$60 000 which he said he stood to lose if the passport of Labuschagne was not released took another lengthy series of questions with accused initially saying *"It was Maphios Cheda,"* it was him who made an assessment and finally saying:

> *"My answer is the issue of US$60 000 was introduced by Justice Maphios Cheda through the questions he asked me and I gave him the answer."*

The record on this part of his evidence is replete with evasive and quibbling answers which it would be tedious and unnecessary to repeat. The transcript, Exhibit 16 shows the following context in this regard (p6):

"Cheda: You are going to tell who in particular, Joseph James?

Paradza: I will tell Ralph Nkomo, Nkomo will then talk with James.

Cheda: That James should make sure that it comes before me?

Paradza: Ehe, ehe. (yes, yes)

Cheda: Okay.

Paradza: Yah.

Cheda: And what does the White man in question help you with White men like farming isn't it?

Paradza: (Laughter).....I mean apart from that alone, just that he supports Hunters, isn't it, with money, I mean forex isn't it.

Cheda: There at your place.

Paradza: At my place, ehe.

Cheda: Okay.

Paradza: Ehe.

Cheda: How much are you expecting? How much do you stand to lose or make?

Paradza: Aah, I think the entire I mean our quota, we are looking at about US$60 000.

Cheda: 60 000?

Paradza: Haa or more.

Cheda: So you stand to lose isn't it?

Paradza: Why?

Cheda: If at all he is not given the passport you stand to lose 60?

Paradza: I will lose 60.

Cheda: Okay."

But for the quibbling the answer to the simple question State Counsel was asking could have been given briefly: some of the quibbling was as follows:

"MR *PHIRI*: The issue of $60 000 as the amount to be gained or lost as a result (of) the release or refusal to release the passport?

WITNESS: Yes, just looking at your question, if you are asking me who first came up with the issue of $60 000, who first came up with it, I don't think you are saying:- Who first mentioned the figure of 60 000? I don't think you are saying that. I take that to mean you are saying:- Who brought up the issue or who made it possible that you ended up discussing the issue of the $60 000, isn't it, who came up with that idea of $60 000. That is the way I hear you and that is why I said it is Maphios Cheda because he is the one who asked me the question first how much ……..

MTAMBANENGWE, J: Judge Paradza, I don't really want to remind you as a Judge. You know that you are required to answer question direct. If you don't understand the question, you have

every right to pause and think if you understand the question.

WITNESS: Yes, my Lord. My apologies.

MR *PHIRI*: Q. Yes, you were still saying something?

A. Yes, I was still saying the way I understand that question is very simple, the way you phrase it, I understand that to mean who first introduced the topic.

MTAMBANENGWE, J: Are you explaining the way you understand the question before this repetition of the question because you asked if he could repeat the question and he has now repeated the question. Now, I am lost as to whether you are explaining how you misunderstood the question initially or how you understand the question now being repeated?

WITNESS: Yes, my Lord, I asked for help. I said:- Could you please help me by repeating the question to enable me to ……..

MTAMBANENGWE, J: Yes, that is what he has done now.

WITNESS: Yes, I am just trying to show him that the question, the way he has framed it right now would make one think that he is asking as to who fist introduced the topic of the $60 000 and I am saying to him:- That is why I said it was Judge Cheda. So I don't know where his confusion, My Lord, is. As far as I am concerned, it is a very clear question where I gave a very clear answer which I understood in its ordinary sense. (my underlings)

"MR *PHIRI*: Q. So what is your answer to the question since I have repeated it now?

A. My answer is the issue of the $60 000 was introduced by Justice Maphios Cheda through the question he asked me and I gave him the answer.

Q. What was the question he asked you?

A. I will quote it word for word:- His question was:- Let me just refer to it. His question was:- *"How much are you expecting?"* I am looking at page 48, my Lord, page 48 of exhibit 17. *"How much are you expecting, how much do you stand to lose* or

make?" And then that is when I said:- *"Ah, the entire"* Well it was inaudible initially but after we found out it was referring to:- *"The entire quota, I mean our quota, we are looking at about US$60 000."* Page 48. Exhibit 17, page 48, if your Lordship can just look at, just below halfway.

Q. So you understand that it was Cheda therefore who mentioned the $60 000?

A. Yes."

Exhibit 17 (with Document E – Exhibit 16) is attached to this judgment as Appendix 'A'.

Further in cross-examination accused repeated his earlier evidence that on 15 January 2003 he asked Justice Cheda to look at and peruse the record of Russell Labuschagne's matter, quote, *"to enable him to advise me about the state of affairs as far as that matter is concerned since Russell Labuschagne had indicated to me that he wanted to make an application for variation of bail condition"*. He did not know what charge Labuschagne was facing. Yet earlier on he had said that when Ralph Nkomo told him about the invasion of Labuschagne's fishing camp, quote, *"Labuschagne was standing outside my chambers in the corridor"*. He went on to answer another question by State counsel:

"A. What I was told is the passport is being held at the Bulawayo Court as a result of an incident arising out of an invasion of a fishing camp. I was not told what the charge was by Ralph or Rusty and that is why I phoned to find out. It could be any charge, it could be culpable homicide, it could be assault, it could be murder, it could be anything. I didn't know and Ralph being what he was, he was not a lawyer. He couldn't tell me anything."

Counsel asked again:

"Q. So when you phoned Cheda and asked him to look into this matter for you, just what did you say he was to look for?

A. Just to brief me on the matter. It was as simple as that, to look at the record and brief me and look at it and brief with a view to telling me whether this issue of the application for variation of the bail conditions was something advisable or feasible and then I could then tell Rusty. It was a very simple exercise, something which I could have done myself."

Justice Cheda did not tell him the matter was being dealt with by Justice Kamocha, that he heard first from Justice Chiweshe; the only other time

was when Ralph told him the matters was, quote, *"being continuously, postponed and postponed by Justice Kamocha",* he said.

The insistence that all he requested Justice Cheda to do was what he says in the last answer above runs through all his evidence in cross-examination. The passage at page 5, Exhibit 16 or p 47 document "E" Exhibit 17, as corrected by him, where he says *"you can assess and see whether do you think it is safe to maybe to give him, just him for say two or so months just to enable him to 'get organised' (his correction) and Cheda says 'Okay to attend to his bail application' and he says 'No! consider only his passport. He is on bail"* - was put to accused and he was asked "<u>what were you suggesting he give him for two months</u>?" The accused answered:

> *"Yes, the thrust of that sentence, it summarises what I wanted him to do, to asses. After assessing he would then look at it and say, and after knowing the nature of the charges and the details about the case, he would then decide whether, under those circumstances, in his own opinion, whether he thinks it is safe. <u>But I am not asking him that he must give him the passport. There is nowhere in that sentence where I say "Give him</u>". I am saying:- "whether it is safe to give him". "Whether it is safe" that is the most important words to underline there."*

That evasive and prevaricating answer provoked further questions and more evasive answers as follows:

"Q. Yes, what were you suggesting he give him?

A. I was not suggesting anything. I was just telling him what I wanted him to do, to look at the record and assess, end of story. I was simply asking him to look at the record and apply his mind. And that must read (be) in conjunction with …….

Q. Hold on, hold on please. Yes, all I am asking you, I will read it. I am saying fourth Paradza, it reads:- *"You know, just to assess. You can assess and see whether do you think that it is safe maybe to give him, just him for say some two or so months just to enable"*. I am asking you simply:- What were you asking him to give him for say two months?

A. I was not asking him to give him anything.

Q. I see.

A. *I think it is very clear there. Two very important words there. "Assess and tell me whether what he thinks" he should assess and apply his mind and decide whether it is safe or it is not safe.*

Q. So he was to assess and give him nothing for say some two or so months. Is that hat you are saying?

A. Sorry assess and?

Q. And give him nothing, for some two or so months?

A. *Well, I believe if you, it is not proper to run away from the thrust of the meaning of a sentence. The issue of giving and for how long or anything, those are thoughts which come to one's mind*.

Q. We are in agreement that it is not proper to run away from the thrust of the sentence?

A. Yes.

Q. So I am saying that this sentence says *"to give him, to give him, just him for say some two or so months."* I am saying what is this, this which he has to be given for some say two or so months?

A. Surely, if I am talking to you and say:- *Look, a friend of mine needs his passport, I think he will need it for a couple of weeks, can you look into this matter and see whether it is safe to do so. Am I telling you to give that passport for two or three weeks, am I? I am just stating the obvious. I am stating something which*

obviously Ralph and Rusty had impressed it upon me, he will need it for so much because there were so many conventions happening at that same time.

Q. Should I take it that your answer then is that he should be given the passport for some two or so months? Is that what you are saying?

A. No. I am just repeating or expressing……

Q. So he should be given nothing?

A. *Can I answer? I am just simply expressing what I know Russell wants, what I had been told by Ralph, not that I am telling Cheda to give him for two or three months. All I am asking Cheda to do is clear there – assess the matter and tell me whether you think it is safe. That was the thrust of that statement. We cannot run away from it.*

Q. So you know that Russell wants his passport?

A. Yes.

Q. And in your conversation you say he should be given for two or so months, that passport?

A. I am not saying he should be given.

Q. Right, I will just read it as it is. *"Give him, for him, some, say some two or so months"*, give him the passport, correct?

A. You better go back a little where it says:- *"Consider whether it is safe to give him."* The task, (thrust) there is to decide on the safeness of giving him."

This exchange went on until accused said, at long last, that what he was asking Justice Cheda to do was, quote, *"he must consider whether it was safe to give him the passport for two or so months".*

The accused was next asked to point out where in the transcript it showed that it was Cheda who was the first one to mention giving him the passport. This again led to further evasive answers thus:

"A. *Sorry you are saying I said that? To me that question is not clear. It is as if you are saying to me:- I have told this court that it was Cheda who first mentioned the aspect of giving a passport.*

Q. You said he said he cleverly put himself ahead and started talking about the passport. That is what you said yourself, not me?

A. I said the bail application. I didn't say the passport.

Q. So you had asked him yourself to give the passport for two or so months?

A. Yes, when he said ……

Q. So when he stood there and testified to that effect, Justice Cheda was not lying. Correct?

A. What?

Q. That you asked him to release the passport for some two or so months?

A. *Well, if Justice Cheda understood that statement to mean that I was asking him to give the passport for some two or so months, then it is very sad. He missed the point completely. That sentence is very clear. It is self-explanatory. If Cheda thought that sentence means I was instructing him to give away the passport for two or so months, then it is unfortunate. He is a judge. He should be able to understand simple language there.*

Q. I thought you yourself has now agreed to say it is common cause that we are talking about the passport, so that statement when it says:- *"Consider giving him for some two or so months"*, it means giving him the passport?

A. *You are again misunderstanding. You deliberately misunderstand things which are so clear. I don't know why. Surely you can do much more than that.*

Q. Are we going to go back *to "giving him nothing"?*

A. I think you better ask the next question.

Q. I prefer that you answer this one before I go to the next one?

A. *It is a manner of asking, I think which will take us nowhere. We seem to be going round in circles and circles.*

Q. So should we have it placed on record that you have refused to answer that question?

A. *Yes, if you think you have asked a question which I have not answered so be it.*

Q. Thank you.

MR *PHIRI*: May it be placed on record that the witness has refused to answer that question.

WITNESS: I have answered all your questions very clearly. And I don't think the court will go along with you. I think I have answered all the questions you asked me, unless if I am mistaken."

He was obviously mistaken to say he answered *"all your questions very clearly.* And, I may add, it is very sad indeed that a judge (the accused himself) could not understand simple language".

As to his evasiveness the following questions and answers are a further illustration:

"MR *PHIRI*: Q. Did you believe that there was a possibility that Cheda would not apply his mind, would not exercise his discretion?

A. Well, the way I understand you, I think you seem to have lost focus of why this conversation was going on. This conversation was going on because I believed Cheda was gathering further information to enable him to look at the record. He was not seized with anything at that time. He was not seized with the matter itself, the main matter, the murder case. He was not seized with the application. So there is no way I could have believed that he was not going to apply his mind, to what? Apply his mind to what?

Q. You see you are the one who told us in your own words that I was only asking him to apply his mind to exercise, now I am asking you about that, you seem to maybe it is

something from the blue that I am bringing up. I am only asking you on what you said yourself?

A. M*r Phiri, you are getting yourself mixed up. I made a very simple straightforward request to Justice Cheda which was a very simple thing – look at that record, apply your mind, tell me what you think, come back to me so that I can advise my friends. So there is no question of him applying his mind, to what? You seem to be asking like …….*

Q. Do you hear yourself as you talk? You might assist us if you listen to yourself even as you are talking. *"Look at the record, apply your mind."* You turn around and say:- *"Apply his mind to what?"* You are the same person talking. Look, please, please let us try to concentrate. It would assist if we do.

A. Your question seems to suggest that I was of the view that Justice Cheda was not going to apply his mind to the application, isn't it? If you can clarify?

Q. Yes, yes?

A. That is the way I understood you.

Q. Yes?

A. *So my point is that is out of the question because Cheda did not have that application before him, isn't it? That is the simple answer to it.*

Q. So you were not asking him to exercise his discretion? So the whole thrust of your defence, as I understood, was that all you were asking was that he should exercise his discretion. So you were not asking him to exercise any discretion or even applying his mind, correct?

A. *My answer to that is very simple. The issue of exercising the discretion came later in the conversation after Cheda had assumed or was pretending in a very deceitful manner, pretending that it was even possible for him to consider the application itself. He had suggested that, not me. It was entirely his idea. This is when we discussed the aspect of discretion otherwise my request ended right there. That is where the telephone conversation should have ended on page 47 where I asked him to assess and come back to me.*

Q. According to the transcript it comes after, his mentioning the application for bail comes after your asking him to do an assessment?

A. Sorry?

Q. According to the transcript, he mentions the bail application only after you have asked him to assess and give for say two or so months?

A. Yes.

Q. You see that?

A. Yes.

Q. So the exercise of his discretion, isn't it the one that you were talking about when you were talking about whether to consider whether it is safe to give him for two or so months?

A. No.

Q. No?

A. *Those are two different things. The assessment was to assess the record.*

Q. Anyway, let us make some progress. Now, the issue of discretion, according to you, comes later?

A. Yes.

Q. So now when you ask him to exercise his discretion later, was it because you felt that he might not do so?

A. *I had no reason to think that he might not do so at all. I was just reminding him after he kind of showed or said some things which tended to suggest to me that I should instruct him what to do."*

Q. He was to exercise his discretion? You see let me explain why I am asking that. You see I understand that judges always exercise their discretion whenever they are dealing with a matter, so that it would not be necessary for anybody to be telling them to exercise their discretion except where there is maybe evidence that they might not be inclined to do so?

A. I don't want to believe that you are suggesting that judges don't talk to each other at all about the exercise of their judicial discretion. That happens everyday.

Q. I was going to get to that one, but now that you have brought it up maybe we can deal with it and proceed. According to Justice Chiweshe, it is proper, I am using his own words, it is proper for a judge who is dealing with a

matter to approach other judge and seek advice on a point of law but it is improper to approach a judge who is seized with a matter and seek to persuade the judge to deal with the matter in a certain manner. You heard him say that?

A. Yes.

Q. Do you or do you not agree with that?

A. I agree with that.

Q. So in this case you were not seized with the matter? You were not dealing with the matter yourself, correct?

A. You see the difficulty there is you have asked a very long question which deals with firstly, the first parts deals with Chiweshe saying that it is only the judge who is seized with a matter who can or who is allowed sort of to approach another judge, isn't it ? And the second part deals with a judge who asks the next judge to deal with a matter in a particular way.

Q. I thought that we had agreed that you agree with that?

A. Yes, I am trying to answer you. If you can give me the chance. There is no hurry. What I agree with is the aspect of telling another judge to deal with a matter in a particular way. That I agree with, but the first part which deals with:- It is only a judge who is seized with a matter who can approach another judge, that is incorrect. That doesn't happen. Even Chiweshe himself in his evidence accepted that when he was asked about a matter which he phoned me about. He said:- I may have, in fact I have already indicated that judges discuss. If you check your record, you will find that. Chiweshe himself said that. In other words he accepts that it is not only a judge who is seized with a matter who can approach another judge. Even if you are not seized with a matter, you can approach another judge

Q. You see you are taking us back. As far as I recall I asked you clearly that Chiweshe said a, b, c, d, and do you agree with it and you said:- Yes, you agree with it.

Q. Let me rephrase the question, you have said you wanted Judge Cheda to assess and report back?

A. Yes.

Q. You have already said that you did not direct the judge to do anything to show favour or disfavour?

A. Yes.

Q. In your public position and I am saying in your personal position, did you ask Cheda to do anything to show favour or disfavour?

A. No."

The accused agreed that the thrust of his defence was that he was open and straightforward and further disclosed his interests, being that he stood to gain or lose money if Labuschagne's passport were not released but when Mr Phiri asked *"And then you made your request..."* he interjected.

"I did not make a request."

He asked counsel the nature of the request and when counsel obliged and said:

"The request was to release the passport for two or so months?"

He retorted:

"That is the request I say I never made or requested him to look at the record. That is the simple thing which I told you from yesterday until today. Are we going to say this twenty times? Are we? Let us not waste the court's time."

The exchange went on:

Q. So then, let us follow your reasoning. So you disclosed to him that this is a business partner of mine. I stand to lose or gain so much as a result of the position he is in, can you now exercise your discretion about nothing?

A. It is not like that. It was not, it did not……..

Q. So how was it then?

A. *Yes, it did not proceed that way. The way it proceeded was I asked Cheda to look at the record and assess it and come* back to me and then Cheda started to probe. If you look at the transcript, it is a process of deceiving, deceitfulness and probing by Maphios Cheda, through and through up to the very last page. *He is asking me a bout something which had never even come to my mind.* When I was talking to him on the phone, I never said to myself: No, I must tell him what I stand to lose. This is what you want this court to believe. I never said to myself:- No, I must tell

him this and that. Those were questions asked of me by Maphios Cheda and I answered them as best as I could because I believed he was still trying to gather information to enable him to assess, to look at that record and assess."

At this juncture the Court felt obliged to remind the accused as follows:

"MTAMBANENGWE, J: Q. Judge I want to protect you against yourself, if I may say so. Don't forget the record is before the court. The record is before the court with your corrections.

A. Yes.

Q. All that has gone onto the record of these proceedings. If you made overall statements about the record which has been gone into part by part, it only opens the discussions between you and the prosecutor or the question and answer between you and the prosecutor. To prolong questions, series of questions to clarify again, I think you should guard yourself against doing that and exposing yourself to more questions than are necessary.

A. Yes, thank you.

MTAMBANENGWE, J: I am not preventing you from answering questions. Mr Prosecutor don't understand me as preventing the witness from answering your questions but what is happening is as you have indicated, you want us to go back, it arises from what I have just said. And also in the interests of the court to save time.

MR *PHIRI:* Thank you, my Lord."

Asked again as to the nature of his defence outline – that it was addressing the enquiry that the State was alleging he made, he said it was "An innocuous enquiry which was twisted by Justice Cheda" and insisted he was not asking anything from the judges other than what he said. Asked if it occurred to him that when he told Justice Cheda of his business partnership with Labuschagne that would influence the way he would have made a decision on that case, he answered:

"Well, firstly it did not occur to me at all and I think it is important to note that Cheda was not seized with the matter. So I did not expect him to make any decision on anything. He was just supposed to assess the matter for me." (My emphasis)

Did you find out from Cheda what stage the case had reached? He was asked; He replied, repeating and adding to his earlier evidence:

> *"No, that is why I phoned him. I wanted him to advise me of all those things, what stage it was, what charge it was, what was involved, how serious were the allegations against Labuschagne and if there had been applications before, on what basis were they refused, all that information is what I wanted to hear from him."*

I could go on and on to illustrate the obvious contradictions and apparent evasions in accused's evidence when in one mouth his protestations are that he never asked either Justice Cheda or Justice Chiweshe to do anymore than ascertain the contents of the Labuschagne file, and in another he says the two judges in both cases had to use their discretion. That would be flogging a dead horse. Suffice it to say further that accused claimed that it was a coincidence that the day he phoned Chiweshe the very application he was talking about was placed before Justice Chiweshe by James Joseph and the accused claims that *"it was not really a thing I was pursuing diligently"*. It will be recalled that Justice Chiweshe's clear and undisputed evidence was that accused called to say an application was going to be placed before him that day.

This means either Justice Chiweshe was lying or it was the accused who was lying! Justice Chiweshe's evidence was not disputed nor was it suggested to him that he might have been mistaken.

Confronted with the suggestion that he was doing what he knew James Joseph was doing who was representing Labuschagne, accused again became evasive in his answers to the extent he ended up by saying he did not know who exactly in that firm was handling the matter. Mr Phiri drew his attention to the transcript where accused mentioned *"lawyers from Joseph James they should be coming up with some application*" he insisted it meant he didn't know who exactly was bringing the application. In answer to further question he said it did not matter that legal practitioners were handling the matter.

When he learned that Justice Kamocha was writing a judgment the application was not pursued. He said it was not the first time he mentioned he had reverted to Ralph and Rusty to advise them and insisted that the record would show he had *'said it'* yesterday. James Joseph is a partner in the legal firm Moyo-Majwabu and Partners. The accused had not then reverted to Rusty and Ralph, to tell them that Anand had offered Justice Cheda a bribe. He explained why as follows:

> *"I was talking to Cheda as a colleague, as a judge: Whatever I discussed with Cheda was between judges and I think it would be wrong for me to thereafter go round and tell the world that:- "Do you know, my friend Maphios Cheda was approached with a bribe." I have got a responsibility as a judge to protect the reputation of my colleagues and their integrity."*

Asked why would Cheda's integrity need protection when he did not accede to *"the request for the bribe",* he answered:

> *"I just did not think this was meant for the public. I just did not think this is the kind of things you would discuss with the public."*

He was asked to confirm that after his conversation with Cheda on the 16th and before his conversation with Justice Chiweshe on the 24th he saw Ralph and Labuschagne; his answer was:

> *"Well it is possible I saw them, but as I said earlier in my evidence we kept on communicating."*

Do you or did you not see them? he was asked, and he came back:

> *"I don't' remember".*

He was asked whether when he spoke to Justice Chiweshe he was at least aware "that these people you were going into business with, partnerships with had made an attempt to bribe Justice Cheda" the accused retorted:

> *"I did not know. Cheda had mentioned it in our telephone conversation but for you to say I knew that as a matter of fact that Anand had tried to bribe Cheda, it is a situation where we could be stretching things too far."*

Did you believe Justice Cheda when he told you that somebody had tried to bribe him, he was asked, he answered:

> *"I was surprised. I was really surprised that something like that can happen or might have happened but I had no independent verification and I did not want to discuss that with Russell and Ralph. These are just people I had just known for a week."*

He went on to say he never said he did not believe Justice Cheda. He further said:

> *"It was not my concern, it had nothing to do me with it".*

The following was put to him:

> *"MR PHIRI: Q. Yes, you see your conduct suggests that you dismissed off hand his story that he was approached with a bribe by one of these people because you met them afterwards and you did not mention it at all to them and further when you spoke to Justice Chiweshe, you did not mention that. In fact, you conducted yourself as if that did not exist. It had never happened?"*

Mr *Phiri* continues:

> *"Q. So it was not your concern that people you were going into a business partnership with had approached a brother judge about, and had offered him a bribe and that you had asked that same judge yourself to inquire and do an assessment into that same matter for which he was being bribed and you went actually further and spoke to Justice Chiweshe about it and again because it was not your concern, you didn't mention that to Justice Chiweshe?"*

The question was repeated after accused said it was a very long question and suggested how counsel should ask the question: the question was repeated and still accused answered:

> "*Maybe, maybe it is a thing which did not even preoccupy my mind. It is something which really had nothing to do with me."*

In the same vein, on the same issue, accused later explained that he did not find the situation unusual because one thinks so many things such as if Cheda was offered a bribe why did he not report it, in the end you just dismiss it. Why worry, he did not even think about whether the story of the offer of a bribe was untrue; the State, he said, could have called Anand to testify if it thought it was important; Anand had denied meeting Cheda according to a statement given to the defence which could be produced if need be. He went on denying the suggestion that he had known of

Anand's attempt to bribe Cheda and was in cahoots with him, by saying the contents of Exhibit 17 (E) showed his surprise and revulsion at the idea.

As to his approach to Justice Chiweshe, accused said he did not think it was unlawful. When he approached Justice Chiweshe he would not allow himself to be bogged down by the fact that he had been informed of the bribe attempt; it was nothing to him and of no concern to him, the accused said in answer to a question in that vein.

I must say his whole nonchallant attitude to this issue as reflected in the above answers to counsel's questions is surprising, to say the least.

The accused understandably was reluctant to mention any names in respect to what appears in the defence outline as to compliant and non compliant judges unless the Court authorized him to do so, fearing it would embarrass his colleagues and the judiciary as a whole. The Court's attitude was to the same effect and that such an answer in any case would not take the matter any further one way or the other.

The accused finally denied he had intended to influence Justice Cheda and Justice Chiweshe and disagreed that when on the 16th January Justice Cheda began to ask him questions he had become *"suspicious and did .....*

about turn on your previous discussion on the 15th with him." He ended up - reverting to his denial that he had requested Justice Chiweshe or Justice Cheda to do anything other than look at the record and brief him on it. It was also put to him that he knew the effect of his approach to the two Justices would be to defeat the course of Justice apart from being in contravention of the Prevention of Corruption Act; he disagreed, saying:

> *"In both instances, I completely disagree with you. As far as I am concerned, I don't see how justice would have been defeated if Labuschagne had been given his passport. My understanding was assuming that or assuming I go along with what you are alleging I did, if Labuschagne had been given his passport, he would have gone away to sell the animal quota and come back and bring money for the country and stand judgment."*

When the accused was re-examined he said on the 16th Justice Cheda had not mentioned the Indian, Anand, by name and he first became aware of the name when he was served with witnesses statements for the purposes of the inquiry which was set for last year. He said he would have expected Justice Cheda to cause Anand's arrest immediately by the Police detailed to guard him at his house.

At pages 50 to 51 of Exhibit 17 (E – Exhibit 16) appears the following:

"Cheda: He sent some Indian fellow the other day to me (saying to me) he can give money you see.

Paradza: Aah, no, no, it is wrong.

Cheda: He is wrong?

Paradza: Yes, if he is the one who sent him he is wrong.

Cheda: So you, yourself you want us to assist in order for you to get your business moving forward?

Paradza: if it is possible isn't it. It is entirely your discretion and I mean you are a judge isn't it and you will look at the case and disagree with me or……"

Accused's attention was drawn to the above and he was asked what was his understanding of the question from Justice Cheda, and this prompted him to answer the question asked, quote, *"within the context …. That an Indian had offered a bribe*", he answered:

> *"Yes, I took it up on that same basis; on the same thought of Cheda asking me or inviting me to say to him:- Assist and maybe in the process offer him something".*

If by this answer accused was insinuating that he thought Justice Cheda was inviting him to offer a bribe as Anand did, it should be remembered that Justice Cheda did not succumb to Anand's attempt to bribe him.

Next he was referred to what he was cross-examined about at length, namely as to what he was asking Cheda *"to give him Labuschagne for say two or so moths (P 47 of Exhibit 17) as to enable him to sort out.."* and asked to *"explain the meaning of that statement"* when he made it to Justice Cheda; his explanation was:

> *"Yes. The words I used in that sentence show the simple nature of the request which I was making to Cheda. It was simply "just, just to assess". I think the emphasis must come out clearly – just to assess and formulate your own mind, whether it is safe to give him, formulate your mind and then come back to me. If we read that in conjunction with the way I say agree or disagree, the passage which we have just been looking at, he had to come back to me and tell me whether he agrees or disagrees with me."*

The follow up question was whether within the context of that conversation Justice Cheda was seized with the application for alterations of Labuschagne's bail conditions, which accused answered as follows:

> *"No. I have said this before. I have said this before – Cheda was not seized with the matter, that application was not before him and sometimes you wonder how you can influence the mind of a judge who is not seized with a particular matter. It is difficult to understand as a judge how that is or how that could be possible."*

Asked about his reference to lawyers from Joseph James at further down the same page and whether he deliberately placed this application before Justice Cheda, he explained that where it says *"I mean if you are on what do you call it……like now….."* I meant *"if you are on duty like now"* because Cheda must have told him he was the duty judge.

He denied that he deliberately placed the application before Justice Cheda. Lastly he agreed that according to the statement of the Registrar Mr Mtshingwe and the clerk Mr Matsike the placement of the record before Justice Chiweshe was done in the normal course of business and was above board.

The reference is to Exhibit 13, 14 & 15. Asked by the Court when it was that he became aware the lawyers James Joseph were bringing an application before Justice Chiweshe for the alteration of Labuschagne's bail conditions, the accused could not give a specific date, he said:

> *"I think, it is a bit along time ago. It is not easy to remember."*

And later:

> *"Well I can't recall but basically what I can recall is at some stage either before the 15th or may be at the time I discussed with Ralph, I did indicate to them that: Look, if you have a genuine reason to have*

those bail conditions varied you go to your lawyers, you instruct them, they make their application."

It could have been earlier than the 15th he agreed. He again said the question of entertaining the bail application was entirely Justice Cheda's initiative; he would not have brought it up in the conversation on the 16th if Cheda had not probed him on the issue. The accused said before Ralph mentioned the Labuschagne matter he had heard nothing about it at all. The question relevant to that was asked by the Court because Mr Gauntlet had in fact put it to one State witness that the matter had received extensive media attention.

JUSTICE CHIWESHE'S EVIDENCE

Justice Chiweshe's evidence was that on 23rd January 2003 he received in his chambers at the High Court a call from the accused in Harare to advise that a bail application was going to come before him that morning by an accused person who sought to have his bail condition amended so that he might retrieve his passport from the Criminal Registrar's office. He advised accused there were no papers before him yet and before accused mentioned the name of the person

"He said to me that he was known to the accused in that application, that the applicant was a friend of his and a business partner, I believe in the hunting business and it was in the interest of the business that

he be allowed to collect his passport and proceed to the United States where he was going to source customers for the business."

When he asked for particulars (since he had no papers before him accused said that the applicant was standing trial for murder and that the murder had occurred along the Zambezi, and gave him the name.

He advised him that he had dealt with a similar application by the same accused but had refused his application to uplift his passport to go to South Africa, that the trial had been before Justice Kamocha in Bulawayo, before he was transferred to Harare; and that he (Justice Kamocha) was the best person to speak to as he was the judge in the main trial. He asked the accused if the only reason he wanted this man to have his passport back was that he himself and the business would benefit and accused said *"yes";* he was expecting to earn United States dollars from the trip. Having advised him the best person to handle the matter was Justice Kamocha *"particularly because I had previously dealt with a similar application"* accused said "well it could be heard by either Justice Ndou or Justice Cheda who were in Bulawayo. He persisted in this view and subsequently instructed that the file be returned to Harare, and it was. At the time he was aware that Justice Cheda had been approached and that the matter had been reported to the Judge President and to the Police ,but he did not disclose this to the accused, because he felt doing so would jeopardise the investigation. He said, in answer to a question, the approach, quote:

> *"....wasn't normal thing between judges in the sense that it was improper. As far as I understood the request, the request was made to me, he wanted me to exercise my discretion in favour of his friend and that was the only reason that he gave me and I thought he had a personal interest in the matter."*

He continued, answering questions:

> *"Well I think it would have been improper (had he acceded to the request) and I think we would have tended to defeat the course of justice because we would have acted corruptly."*

He said when the file was subsequently put on his desk ... *"and I assumed it would have been brought in the usual course of events by* my *clerk or by the Registrar",* he was surprised because:

> *"a judge in Harare was telling me that the matter was being brought before me. I did not have the papers and he <u>insisted that the papers were coming</u> and there they had come."*

In cross-examination Justice Chiweshe confirmed the procedure in bail applications as reflected in Exhibits 13, 14 and 15.

In the telephone conversation the accused did not suggest or indicate that he would receive any benefit from doing anything, it never went further

and the accused immediately disclosed that he had a personal interest in the matter.

In brief Justice Chiweshe agreed accused was *"up front"* about his commercial interest in the matter, and he said the application could be heard by either Justice Ndou or Justice Cheda. After Justice Chiweshe admitted that accused did not offer him any benefit to do anything, the cross-examination continued as follows:

"Q. And what he wanted you to do was to look at this application and to form your <u>view as a judge and the exercise</u> of your discretion, what to do?

A. No.

Q. Not?

A. He wanted me to grant the application because his business and himself would stand to lose if I did not do that.

Q. You see, I want to put it to you Judge Chiweshe that it is not quite right, that he was asking you, he was saying to you:- <u>Please consider this in the exercise of what you are going to do</u>. This is a factor, please consider this?

A. No, that is not what he said.

Q I see. So let us be clear. He wasn't from what you have already said, he wasn't as a junior judge trying to tell you what to do, was he?

A. He was making a request.

Q. I see. And judge isn't that what happens all the time before judge who have discretions?

A. I wouldn't say that. We consult a lot as judges on how certain matter should be disposed of but it is not usual that judges phone for favours such as the one that he phoned for.

Q. Let us leave aside the, and I think (thank) you for your answer that judges do consult widely about matters, I am busy with a slightly different question and I didn't put it clearly enough. I asked you whether it isn't in the nature of what happens when a judge is faced with any application in which discretion in involved, he is being asked for good or bad reason, he or she is being asked to do something, to grant a postponement, to do whatever you like, vary a bail condition. That is in the nature of the application, not so?

A. Yes, we expect that from the parties themselves, not from judges.

Q. So leaving aside whether or not it is proper, you have put out a concern about whether it was proper, what he was doing without any inducement, was to say to you:- Please know that I do stand myself to suffer as a consequence of a decision. I am asking you to exercise your discretion, decide what to do, you as an independent judge? (my underlining)

A. That is not the impression that I got of this discussion.

Q. But then what hold could he have had on you, if it wasn't money or if it wasn't a threat? There is nothing he could do other than say:- Please would you think about this, not so?

A. The impression I got was that he thought that since we are known to each other, etc, I could give him or grant him that favour.

He also agreed that the propriety or impropriety of what accused did was for another tribunal to decide but as to the benefit or indecent he denied accused said *"Please this is the exercise of what you are going to do".* He repeated what he had said earlier, namely;

"We consult a lot as judges how certain matters should be disposed of but it is not usual that judges phone for favours such as the one that he phoned for."

This was in answer to defence counsel's suggestion that it happens all the time that judges have discretions and that the accused was not telling him what to do. He said accused was making a request. When counsel tried to clarify his question and equated a request as embodied in an application the witness insisted:

"Yes we expect that from the parties; not from judges".

He went on when counsel insisted that all the accused was asking him to do was to exercise his discretion, and said:

"The impression I got was that the thought that since we are known to each other etc, I could gave him or grants him that favour."

When counsel gave an example of one being stopped for speeding by a traffic officer who has a discretion to issue a speeding ticket and one says he has no money or it will delay him, please do not issue a ticket, there is no corruption if you offer no inducement, Justice Chiweshe answered:

"I think it is a wrong example to give, he did not stand any charge, he was asking……

He was not being charged with anything, he was asking for my judicial discretion."

In short he insisted accused was asking him to do him a favour. Justice Chiweshe agreed that in the end there was no consequential irregularity arising from accused's approach to him but this was so he said, because he refused to accede to the request. It was put to him that accused had no reason to believe he would do anything corrupt or that he would be a party to the defeating of the ends of justice; he replied:

"I got the impression that that is precisely what he was asking me to do."

And later when asked if he felt so in circumstances where accused was open about *'his request'* and offered nothing and did not even know if the file was coming to you is that right:

"He phoned me with a request so that I grant this application because he stood to lose. That was the request that came to me."

It would appear in an effort to discredit Justice Chiweshe, or at least to contradict his evidence – that he would expect such an approach as accused made to him from the parties and not a judge, Justice Chiweshe was asked about a certain Mutsonzini matter that accused was supposed to be dealing with in 2000 and Justice Chiweshe was said to have

approached the accused to the effect that the accused in that case was a fellow CIO colleague. Justice Chiweshe denied any knowledge of such a matter. The allegation was not pursued any further. Justice Chiweshe's evidence read together with Exhibit 13 (last two paragraphs) and Exhibit 14 (last four paragraphs) shows accused was pursuing the matter very closely.

JUSTICE KAMOCHAS' EVIDENCE

Justice Kamocha also testified and his evidence was, briefly, the following. Whilst in Bulawayo he had dealt with the trial of Russel Labuschagne and another up to the stage he had postponed the matter *sine die* for judgment. The two accused were remanded on bail granted on 8 December 2002. One of the conditions of bail was that Labuschagne surrenders his passport to the Registrar of the High Court in Bulawayo. While in Harare working on the judgment he had heard sometime in mid December that Labuschagne had made an application to have his bail conditions varied so he could uplift his passport to enable him to go attend a fish convention in South Africa. Justice Chiweshe had dealt with that application and had dismissed it. In January 2003 Labuschagne had made another application to the same end but this time he wanted to travel to the United States to attend a fishing convention. That application was placed before Justice Cheda who decided to forward the application to him (Kamocha) in Harare. The application arrived late on 27th or 28th

January 2003 when the convention was supposed to have started on 25th January. The application appeared to have been abandoned. Justice Kamocha said at end of January accused phoned him wanting to know what had happened to the application. He did not know then that accused knew Labuschagne so he asked if he did and accused said he knew Labuschagne *"from safari operations. S*ince he dealt with the case he knew that to be so. He said he advised the accused that *"the matter had been overtaken by events, time had run out, the convention was over and the application in fact appeared to have been abandoned"*, that was the end of the conversation. He had subsequently convicted Labuschagne and sentenced him to undergo 15 years imprisonment.

In cross-examination Justice Kamocha said he did not think accused was trying to tell him what to do with the matter but that he just wanted to find out. When he had asked if accused knew Labuschagne accused had *"immediately and frankly"* told him he knew Labuschagne and that *"he has got some sort of business association with him"*, he did not try to conceal anything. He agreed Labuschagne's case had "received a lot of media publicity. He said if a colleague behaved improperly he would say to him "you don't do that kind of thing, you don't do that. Please stop it. He would do so as a colleague and would not go to the police, but if the colleague persisted in the wrong conduct he would then think of going to

the Judge President to say why does he do this it is improper. He did not think he would go to the police straight away.

I refer to Exhibit 17, document "E" or Exhibit 16; starting at page 2 to the end because, in my view, inspite of the heavy criticism that has been directed at this document, it answers a lot of crucial questions. I produce the whole document as Appendix "A" to this judgment. Many references have already been made to its contents. I need not read it.

This then was the totality of the evidence in this matter.

I now turn to consider the law. But before doing so I would like to make some preliminary observations on various aspects of the evidence.

The first point I would like to make is in the form of a question: What motivated Justice Cheda to go to the police on 16th January 2003?

The answer to the question is, in my opinion, to be found in the evidence of the two judges, that is Justice Cheda and Justice Chiweshe.

Justice Cheda explained why an explanation rightly or wrongly merely criticized by the defence with the suggestion that he was used to trap Justice Paradza. Going by the accused evidence the alarm Justice Cheda felt would not be explicable in terms of, accused evidence, - that he asked him to do two things only, on 15 January 2003.

(a) to check the record of the Labuschagne matter and to advice him how far the matter had gone, and what the charges were;

(b) to check the record and see what Labuschagne chances of success were if he should apply to have his bail conditions altered.

These objectives of accused when he approached Justice Cheda on 15 January 2003 would not cause any alarm in a friend; they are in themselves quite innocent objectives or enquiries by a friend and fellow judge, not worth reporting to the Judge President let alone the Police. Justice Cheda's evidence finds corroboration in Exhibit 16 which reflects in its imperfect way that it is a follow up to that first telephone conversation despite Justice Cheda's hazy recollection thereof. The Exhibit does not in anyway corroborate accused's version of what he said transpired during that conversation. The probabilities as to where the truth lies in this connection are heavily weighted against accused's' version. And for a number of reasons, which I will detail later when I come to consider the probable value of Exhibit 16, I find that the accused version cannot be accepted as reasonably possibly true: I do not agree that, as defence counsel submitted, the transcript supports accused's version. Justice Chiweshe's evidence read with the two exhibits 13 and 14 and Justice Kamocha's evidence reveal such keen interest and persistence

in the matter by accused that it cannot be doubted he was bent on assuring a favourable outcome to Labsuchahne's application. That inference is inescapable.

The next preliminary point I would make is that when the application to exclude the transcript was made, it was after some evidence was led on behalf of the State. The defence did not renew the application to have the Court rule the transcript inadmissible as evidence obtained illegally. I have already given the reason why and stated that the transcript is part of the evidence to be considered in the totality of the evidence in this case at the end.

The point was made by defence Counsel that Justice Cheda's conduct in going to the Police was despicable in that, as a Judge, he allowed himself to be used to trap a fellow judge instead of resolving the matter in-house with the Judge President. Rightly, in my view, Justice Cheda described the suggested options that was put to him as viable if one took an armchair approach to the situation he was in.

The defence placed a lot of emphasis on the concessions made by Justice Cheda under cross-examination as to whether the two conversations supported the charges levelled against the accused, to argue, at the stage the application for a discharge was made, that if the principal state witness conceded that much, how can there be proof beyond reasonable

doubt. Though this submission was not repeated at the end i.e. in the defence's closing submissions, the fact is those concessions were hedged, briefly, to the effect that only of the said concessions are taken in isolation can that be said to be the case. Justice Cheda repeated that observation several times in cross-examination.

INCITEMENT

It is true, as defence Counsel submitted, that both the main counts and the alternative counts thereto are based on the allegation that accused incited Justice Cheda and Justice Chiweshe to commit an offence. I have also indicated earlier in this judgment that, although the State tried to prove, apparently in accordance with the way the indictment was framed, that accused himself contravened s 4(a) of the Prevention of Corruption Act, the indictment, for clarity's sake could have been framed as contravening s 360(2)(b) of the Criminal Procedure and Evidence Act as read with Section 4(a) of the Prevention of Corruption Act, unless one applied the Latin Maxim – *qui facit per alium facit per se*.

It is clear, however, that which ever way one looks at it, in essence the accused, in both the main and the alternative charges is charged with an ancillary offence of inciting. Thus:

In Count 1 and 2

Accused is charged with inciting Justice Cheda and Justice Chiweshe respectively to commit an offence, namely that they (the two judges):-

(i) as public officers;

(ii) in the course of their employment as such;

(iii) release Labuschagne's passport;

(iv) in a manner contrary to or inconsistent with their duties as public officers;

(v) for the purpose of showing favour or disfavour to Labuschagne or the accused.

(It makes no difference which as both had an interest in the release of the passport)

The evidence of the accused is that he approached both Justice Cheda and Justice Chiweshe in his personal capacity and not in his capacity as public officer. This much was emphasized in his evidence in chief and was repeated by him in cross-examination, and in the cross-examination of State witnesses, Justice Cheda and Justice Chiweshe in particular. Section 360(2)(b), however, provides:

"Any person who:……

(a) ……

(b) incites any other person to commit; any offence, whether at common law or against any enactment, shall be guilty of an offence……."

The issue therefore is whether what the accused did in approaching either Judge amounts to incitement and whether what he requested each to do was, for the purpose of showing favour or disfavour to Labuschagne or to accused, and in a manner contrary to or inconsistent with their duties as public officers; in other words, corruptly. I have said earlier in this judgment that "corruptly" in this context has nothing to do with any offering a benefit. Any such notion is alien to the elements of the statutory corruption as defined in the Prevention of Corruption Act. A public officer who in the course of his employment as such does anything that is contrary to or inconsistent with his duty as a public officer acts corruptly if what he does is for the purpose of showing favour or disfavour.

Counsel for the accused referred the Court to the Law of South Africa. First Reissue Vol 6 Criminal Law where at p 443 – 444 the provisions of the South African Corruption Act of 1992 are discussed. Under paragraph 411 the Authors say:

"Corruption is an offence under the Corruption Act. The Act has repealed the Common Law relating to bribery as well as the Prevention of Corruption Act."

The Corruption Act provides that any person:

> (a) who corruptly gives or agrees to give any benefit of whatever nature which is not legally due, to any person upon whom ……. will be guilty of an offence.

The Authors go on at to say (at p 444):

> *"The elements of this are (a) unlawfulness; (b) the act; (c) the benefit; (d) the person in respect of whom corruption may be committed; and (e) the intent."*

It will immediately be noticed that the benefit element is missing from our Prevention of Corruption Act [*Chapter 9:16*]. It follows that the great emphasis laid by the defence on whether the accused offered or promised Justice Cheda or Justice Chiweshe any benefit is misplaced.

I have already quoted how Holmes, JA described an inciter in *S v Nkosiyaua, supra* at 658 H – 659 A. In *Rex v R* 1949 (2) SA 237 (TPD) at 39 Mullin, J considered the meaning of the word *'incitement'* and observed:

> "Mr *O'Hagan* has referred the Court to a definition of the word *"incitement"* which was offered in the case of *Rex v Welcome* (1936, E.D.L. 26) and which has been adopted in *Gardiner & Lansdown* at

page 102 of the first volume of the present edition, and in the words there cited it was said that an ordinary request was not necessarily incitement but that there ought to be proved some element of persuasion or inducement. Then Mr *O'Hagan* has referred the Court to the Shorter Oxford Dictionary in which *"incitement"* has been defined as *"The action of inciting or rousing to action; an urging, spurring, or setting on; instigation, stimulation." "Persuasion"* or *"inducement"* is not there mentioned.

It is not necessary and, infact, it would be undesirable to attempt to lay down an exhaustive definition of what is meant by the word *"incite"* or *"incitement"* in the section. I shall assume with Mr *O'Hagan* that at any rate an element of persuasion or inducement is necessary. If that is so I find that such elements are present on the evidence in this case. These women, according to the attitude adopted by them, were not willing to have intercourse with the appellant unless he offered some inducement. When he proposed intercourse one of them said in effect *"that is all very well, but how much are you going to pay?"* and he then offers 10s. she bargained and said *"you mean 10s. for each us?"* and he said *"yes",* and she remarked that the prices was satisfactory. He then asked if he could sleep with her that night and she answered that it was a little early. It seems to me that this contains the element which Mr. *O'Hagan* says is necessary. There is clearly persuasion and inducement, and

> the appellant by his conduct can rightly be said to have incited these women to commit a contravention of Act 5 of 1927."

Although in that case the learned Judge assumed that the element of inducement was necessary, his remarks are consonant with Holmes, J.A.'s remarks in the passage quoted above from S v Nkosiyaua, namely:

> *"The machinations of criminal ingenuity being legion, the approach to the other's mind may take various forms, such as suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading or arousal of cupidity. The list is not exhaustive."*

And, as Holmes, J.A. went on to say:

> *"The means employed are of secondary importance; the decisive question in each case is whether the accused reached and sought to influence the mind of the other person toward the commission of a crime."*

In *R v Zeelie* 1952 (1) SA 400 (A) at 402F Schreiner, J.A considered *"an offer or proposal the minimum requirement for an incitement".*

An article on the crime of incitement by Profession C.R. Snyman University of South Africa was brought to my attention. Unfortunately it is in

Afrikaans but the English Summary contains the following useful indication of what the article discusses:

> " **The crime of incitement**
>
> The subject of this article is the crime of incitement. First, attention is drawn to the *raison d'être* of the offence, namely to enable the authorities to nip criminal activities in the bud at an early stage, before such activities can result in harm, as well as to dissuade people to influence others to commit a crime. Thereafter the act of incitement is discussed. The different ways in which it can be committed, such as by encouragement, persuasion and the making of a proposition, are considered. *The requirement that the wording of the incitement must not be vague, but be sufficiently concrete to enable the incitee to understand the import of the words, is examined. The inciter must describe the crime he or she wants the incitee to commit as well as the identity of the proposed victim in sufficient detail for the incitee to understand what is expected of him or her."*

With these observations in mind, I proceed to examine the accused's conduct more closely in order to answer the two questions indicated above, namely:

1. Did accused's approach and request to Justice Cheda and to Justice Chiweshe amount to incitement to contravene s 4(a) of the Prevention of Corruption Act.

2. For this exercise I accept that accused approached both judges in a personal capacity as he insisted. This does not suggest of course that he is divested of his position as a Judge, merely that he was acting in his personal capacity as a Judge conducting his legitimate business affairs.

The evidence established beyond reasonable doubt the following facts:

(a) **In the case of Justice Cheda**

(i) That Justice Cheda was not seized with an application to alter Labuschagne's bail conditions – a fact which accused knew when he approached him by telephone on 15th and 16th January 2003.

(ii) According to accused the approach was to Justice Cheda as a friend the accused was comfortable to approach.

(iii) At the time the accused approached Justice Cheda, Labuschagne's murder trial before Kamocha J had been postponed for judgment.

(iv) What the accused said he asked Justice Cheda to do on the 15th January 2003 was not the same as he requested him to do in the taped telephone conversation on 16th January 2003. The accused initiated the conversation on the 15th January 2003.

(v) At the time the approach was made, Justice Kamocha, to the knowledge of the accused was stationed in Harare at the High Court in Harare next door to accused. The accused had been told by Ralph Nkomo, Labuschagne's business partner, at least that Justice Kamocha had been dealing with the Labuschagne matter. (See Exhibit 16 at pp 5 and 10)

(vi) At the time of approaching Justice Chiweshe the accused knew Joseph James of the Bulawayo legal firm Moyo-Majwabu & Nyoni was representing Labuschagne.

(vii) In the taped conversation on 16th January 2003 Justice Cheda twice asked accused:

"So what do you want me to do there. So what do you yourself want me to do now? (pp 3 and 5, Exhibit 16)

His answer to the first question was:

> *"He wanted his, I mean ……. passport so that at least he can prepare for the hunting, what do you call it, which is coming",*

And to the second question was:

> *"You know, just to asses, you can asses and see whether do you think that its safe maybe, to give him, just to give him for say some two or so months or just to enable him to sort out."*

That means he requested the releasing of Labuschagne's passport full stop.

(viii) According to Exhibit 16 on 16th January accused was twice told by Justice Cheda that an Indian person had approached Cheda about Labuschagne's passport and offered him a bribe or suggested *"there is money"* (see p 3 & 8 of Exhibit 16) albeit on the second mention of the money accused expressed some revulsion at the idea and said it was wrong.

(ix) In the taped conversation on 16th January accused mentioned that Labuschagne and Ralph Nkomo were his business partners and that he stood to lose or gain US$60,000 if Labuschagne's passport was not released to enable him to travel abroad to scout for clients.

There is no doubt therefore that accused was requesting Justice Cheda to do him a favour or to do Labuschagne a favour by releasing Labuschagne's passport notwithstanding that he indicated the application for the release of the passport could be placed before another Judge. In brief the accused was urging, requesting and suggesting that Justice Cheda should release Labuschagne's passport by entertaining an application to that effect. Were that not the fact the talk about exercising discretion, which features a lot in exhibit 16, and in the cross-examination of both Justice Cheda and Justice Chiweshe would be completely meaningless, and both to no purpose.

(b) **In the case of Justice Chiweshe**

(i) The accused knew that Labuschagne was appearing before Justice Kamocha on a murder charge.

(ii) When he approached Justice Chiweshe accused knew the application for the alteration of Labuschagne's bail conditions (specifically for the release of his passport was going to be placed before Justice Chiweshe that day. Justice Chiweshe did not know that fact.

(iii) The accused did not directly deny Justice Chiweshe's evidence that accused requested him to release Labuschagne's passport, or exercise his (Chiweshe's) discretion to that end;

he did not deny the evidence either expressly or when Counsel cross examined Justice Chiweshe.

(iv) The accused also told Justice Chiweshe that he had an interest in the matter.

(v) The bail application was placed before Justice Chiweshe as accused had said. This means accused was in the know regarding developments either from Ralph and Rusty or from Joseph James or from the Registry officials at the High Court Bulawayo: he could have found out what he wanted to know about the matter other than by going to Justice Chiweshe if his intention was not to influence him.

I find that accused's talk about the two judges exercising their discretion is a mere pretext because the accused, as a judge, would know that either judge as a judge would exercise his discretion – why then approach Justice Chiweshe when he got to know the application was coming before him if not to seek a favourable outcome, in other words to seek to influence the Judge to rule in his favour. That inference is inescapable in both instances.

In determining whether the accused was activated by a guilty mind regard must be had to the extent to which accused's evidence was weakened,

rather totally, nullified by the cross-examination. This is so particularly in regard to accused's claim that all he asked of Justice Cheda and Justice Chiweshe was that they look at the record in the Labuschagne matter and advise him what the charges were and how far the matter had gone. etc, etc.

Looked at in this way the Court had no doubt whatever that the accused lied in that regard. That was a crucial aspect of his evidence, and if the accused was prepared to lie in this regard, as the Court finds he did, the inference that the accused was actuated by a guilty mind becomes completely inescapable.

If his evidence is to be believed, one finds most remarkable two other aspects of accused's evidence – If his endeavours in approaching Justice Cheda and Justice Chiweshe were other than to influence them, he could easily have found out from Ralph Nkomo the day he was told of Labuschagne's need, (Labuschagne himself being present at his chambers), so why not hear from the horse's mouth, or he could have easily got that information from Justice Kamocha next door after he was told that the matter was being postponed by Justice Kamocha. This lack of enquiry is matched by his extra ordinary nonchalant attitude to the information that an Indian chap had tried to bribe Justice Cheda. According to him he met and had coffee with Ralph and Labuschagne after the 16th January and before the approach to Justice Chiweshe on the 24th

January 2003; he gives the lame excuse that he could not discuss with the public the attempted bribery of Justice Cheda. But Labuschagne and Ralph Nkomo were not the public in that sense, they were his business partners who had approached him on that very basis. If, as he said, he thought of many things, the possibility that these people, Ralph and Rusty, might compromise him should have crossed his mind, and should have led him to at least verify if indeed Labuschagne had sent Anand, the Indian, to do what Justice Cheda complained he did, and if his expression of revulsion when appraised of that particular incident during the conversation on the 16th January was genuine, one would have expected him to mention it to Labuschagne and Ralph Nkomo during the time he met them after the 16th of January 2003.

It was contended on accused's behalf that:

(i) he was open to both Justice Cheda and Justice Chiweshe about his business interest involving Ralph Nkomo and Labuschagne;

(ii) that he approached them in his personal capacity;

(iii) that the impropriety of his conduct was a matter for another forum, the Tribunal set up in terms of Section 87 of the Constitution to Investigate that conduct;

(iv) that the transcript of the tape recording of his conversation with Justice Cheda on 16th January 2003 was of such poor quality it could not be relied upon;

(v) that despite the three passages singled out from the conversation on 16th January, namely:

Page 5 paragraph 7;

Page 9 paragraph 2; and

Page 10 paragraph 4.

Reading as follows:

"(Page 5 Paragraph 7)

Cheda: *So what do you yourself want me to do now?*

Paradza: *You know, just to assess, you can assess and see whether, do you think that its safe maybe, to give him, just giving him for say some two or so months or just to enable him to sort out."*

(Page 9, 2nd Paragraph)

Cheda: Ok. So you, yourself you want us to assist in order for you to get your business moving forward?

Paradza: If it is possible isn't it? It is <u>entirely your discretion and I mean you are a Judge isn't it, and you will look at the case and …. disagree with me or</u>……

Cheda: Ah, no, no it is not a question of disagreeing, I mean you yourself must tell me in confidence isn't it about how you want me to handle it.

Paradza: How haah, no, no."

(Page 10 Paragraph 4)

Paradza: Yourself you are a Judge isn't it? You have the discretion isn't it?

Cheda: Ok.

Paradza: If you want you can consult with Kamocha, you can talk with Kamocha, that Kamocha look …….
application before me ……. this and that, do you mind perhaps that I give him for a while."

and despite pressure by Judge Cheda, accused refused to make the direct request suggested by Justice Cheda, as Cheda had to concede, that this cannot be incitement and that these three passages are evidence that accused was consistent in the request that Justice Cheda 'considered the matter independently and report back to him";

(vi) that as regard the critical event of 16th January 2003 the Court is left with a recording of very poor quality, such that it itself cannot verify what in fact passed or also cannot rely

exclusively on the evidence of persons like Cheda (because he says he has no independent recall outside the transcript) … the Court is placed in an impossible position in this regards, and that there is - in relation to 16th January 2003 – no evidence which could form even a potentially reliable basis for a conviction.

(vii) that to urge or encourage an official to carry out an act is not enough to constitute incitement in respect of statutory corruption because variation by a Judge of a bail condition is not a crime; the matter only becomes a crime if the State has proved beyond reasonable doubt that there was a request by the accused that the bail condition be changed by Justice Cheda (or Judge Chiweshe under Count 2) "for the purpose of showing favour or disfavour".

I turn to deal with these contentions one by one.

That accused was open about his business connections and interests was not disputed by Justice Cheda or Justice Chiweshe, but of course, that was the motivation behind his approach to the two Judges. This point and the next point, namely that he approached them in his personal capacity were in the context of the incitement charged, but steps that led to him approach the two Judges: He was personally motivated by his business

interests to approach them as he did because, as he said to both Judges he stood to lose US$60,000 if the passport of Labuschagne was not released. To argue that any credit should be accorded him for his openness, in assessing his credibility would appear to be making virtue out of necessity. In any case section 360 (2)(b) of the Criminal Procedure and Evidence Act talks of 'any person' with no reference to capacity or station of the person; it is all embracing. The accused had to reveal his business interests in order to move or persuade the two Judges to act in the manner he intended.

Whether the accused's approach to the two Judges was improper merely in the sense that it did not amount to incitement, is a point that Counsel for the accused highlighted throughout in cross-examining State witnesses like Justice Cheda or Justice Chiweshe. That to the extent that the said conduct does not amount to criminal incitement is a matter for the said Tribunal to deal with goes without saying. This Court is not constituted to judge acts of public officials that is or may be improper in that sense. However, this Court is fully competent to adjudicate whether any such conduct amounts to an offence, like the offence here charged. As appears from the charges levelled against the accused that is essentially what this Court has to decide. In *R v Milne and Eleigh* 1951 (1) SA 791 (A.D.) Cenlivres, C.J. had the following to say at 22 C – D:

"It would, I think, be straining the language of the Legislature to hold that, when an inciter incites an incitee to do an act which to the knowledge of the inciter would not be a crime on the part of the incitee on the ground that he had no mens rea but would be a crime on the part of the inciter, the latter is guilty of contravening the section. It is true that the inciter has a guilty mind and is morally culpable, but, speaking generally, the law is not concerned with punishing persons with guilty minds unless such persons do some act of a criminal nature.

It cannot, in my view, be said that the object that the Legislature had in mind when enacting sec. 15(2) (b) of Act 17 of 1914 was to punish in every case where an inciter has a guilty mind."

His Lordship was there dealing with s 5(2)(b) of Act 17 of 1914 which is in similar language to the language of s 306(2)(b) of [*Chapter 9:07*] providing:

"Any person who incites, instigate commands or procures any other person to commit any crime ….. shall be guilty of an offence."

In the present case for the two Judges to accede to accused's request would constitute the offence created by s 4(a) of [*Chapter 9:16*]. It is common cause, or it cannot be disputed that the recording of the conversation between the accused and Justice Cheda on 16th January is

very poor; the transcript thereof shows many gaps which even the accused could not fill; what was said in those places cannot be guessed. The point is, however, that despite those gaps the gist of it is clearly discernable from the rest. Both the defence and the State were able to cross-examine the concerned witnesses to great effect using those parts that came out clearly in the transcript. It is true, of course, that the Court cannot rely on the transcript alone. This deals with points (iv), (v) and (vi) above.

As to the three passages singled out (quoted above), to say that they show that accused was under pressure from Cheda is an unwarranted exaggeration. Sight must not be lost of the fact that the conversation was a follow up on the conversation on the 15th January which the accused initiated. Also sight must not be lost of the fact that a fellow judge, a friend of the accused, felt he was being trapped and the improbability that he would report the approach on 15th January 2003 to anyone if that approach entailed nothing more than what the accused said it entailed.

It is true that accused's request as reflected in those passages was not direct, it was hedged or guarded, nevertheless it was not as if Justice Cheda put words into the accused's mouth. Mr Phiri for the State remarked that accused became suspicious. The cordial or close friendship that existed between accused and Justice Cheda before the 15th January 2003 was characterized by the accused describing Justice Cheda as the man he was *"comfortable"* to talk to about the matter he approached him

on: the reasonable inference to be drawn is that on 15th January accused indicated what he wanted Justice Cheda to do clearly enough to alarm Cheda. Otherwise it is completely incomprehensible why Justice Cheda would react the way he did and would go to the extent he did just because a friend and fellow judge had asked him to verify the contents of a file he was interested in. The above comments are merely meant to emphasise the point that the transcript must be understood or interpreted with proper regard to it as a whole and to other evidence adduced in the matter, and of course to the probabilities inherent in the circumstances and otherwise.

It is true that Justice Cheda made number of concession in regard to various issues put to him by Counsel in cross-examination, but the concession were carefully qualified. The concessions which I list hereunder were made on the following back ground:

1. In evidence in chief Justice Cheda said on 15th January accused's request to him was that he should release Labuschagne's passport. He said:

> "He asked me to release Mr Labuschagne's passport in order to enable him to go overseas and scout for business for him. That was the request.

2. Justice Cheda said he had phoned the Judge President and advised him what had happened; he had also advised his *"colleagues, Justice Ndau and Chiweshe* who were surprised about what had happened."

3. The above was not directly denied in cross-examination. When in cross-examination he was taken to task about him being used to trap the accused, he said:

"You should bear in mind that the reason for the telephone call (of the 16th January) was to confirm what he had told me the previous day."

The Concession 1

The first major concession was that in the conversation on 16th January the accused was not telling him *"do this or you must do this for me"* but that he *"must asses; you can asses and see if whether you think it is safe to allow Labuschagne bail conditions to be changed" and that "it is entirely in your discretion"* (see p123 -4).

The whole series of question was directed at the three passages – Justice Cheda was asked to elaborate and he elaborated:

"You should bear in mind that the reason for the telephone call was to confirm what he had told me the previous day… "And the police had wanted me to phone him in order for him to repeat the previous day's conversation.… I wanted that answer to come clear."

When referred to two of the passages quoted above again Justice Cheda answered and the further question whether the accused was telling him what to do:

"No, in those two paragraphs he was not in clear terms, but bear in mind that the gist of this discussion was that he wanted me to release the passport in his request. When I then went further on to try to get him into that, that is when he was now saying 'No, you can use your discretion' But at the end of the day there was no discretion really as far as I am concerned because it was a request to release the passport."

Concession 2

He conceded that the approach by Anand was the *"most gross example of an attempt to bribe a Judge…"* and explaining why he did not report that to the police or to the Judge President – the reasons was, he said, Anand was no longer a client of his and "because many a time(s) we are often innundated with such requests by people. Asked what the difference was

between Anand's approach and accused's since accused approach was *"a partial telephone conversation with insufficient details"*; he said:

> *"The difference being that the background of the matter is that I had refused this man the upliftment of the passport. Anand comes in requesting me to revisit the matter, I forget about him. I discussed with him and forget about it. Two, three weeks down the line my own colleague comes in with the same request. I started feeling that there was something amiss here. I must take precautions. That is why then I took the steps which I did."*

Concession 3

Justice Cheda agreed he did not leave accused's alone when accused said he was a Judge he should use his discretion, but disagreed that he was inviting him (accused) to tell him (Cheda) what to do when he (Cheda) said, *"Oh, no, no, it is not a question of disagreeing I mean you yourself must tell me in confidence isn't it, about how you want me to handle it"* he answered:

> *"Right it is correct, but let's go further let me qualify the answer."*

When allowed to qualify the answer he said:

> *"….. if that answer is left as it is it creates a problem. If you may allow me to go further, page 9 and if you go further and go to page 10, you will see where I said:- 'Well in case it goes wrong'. Then he says:-*

Yourself, you are a judge, isn't it. You have a discretion isn't it. You see that."

He went on:

"Right my interpretation of that is he was saying that 'Look you have got to do it, nobody is going to quarrel with you. You have a discretion."

This ended up in what amounts to an argument between Justice Cheda and defence Counsel, with Counsel ending up saying:

"Well Judge I must first put it to you that you are the most energetic incitee in the history of Criminal Law. You have asked to be incited repeated in the passages we have looked at. Do you have any response to that proposition?"

After some interruption Counsel repeated that Justice Cheda was not being incited, he was asking to be incited, he was constantly asking accused to say more than he wanted to say; Justice Cheda responded:

"That is not correct; because Justice Paradza had phoned me the previous day and even at the beginning of this transcript he clearly states what he wanted me to do and I then went further to seek confirmation on page 9 and 10 which he was now reluctant to come out with. Prior to that the passport and the name of the accused

Rusty and the amount of money he was going to lose, that came from Justice Paradza".

Concession 4

The last concession I wish to mention related to the questions as to whether the conversations on 15th and 16th in isolation supported the charges and in answer Justice Cheda admitted that they do not but went on to say, 'if looked at in isolation but he was not looking at it in isolation.

It is true Justice Cheda conceded or admitted further that without Exhibit 16 he would not be able 'to say we talked about this and we talked about the other and he said this and I said this and I said the other' his memory depended on the transcript. At this point I pause to say Justice Cheda was cross-examined at length on the content of Exhibit 16, but despite a series of questions and answers touching on the 16th and 15th January Counsel never put it to him that accused would deny that on the 15th January he had asked Justice Cheda to release Labuschagne's passport; the nearest he came to doing that was in yet another series of questions and answers that went as follows:

"Q. We know on your version, the 15th was in fact, interrupted by some other person coming into the room, correct?

A. Yes.

Q. So in these circumstances , given your entirely appropriate acknowledgement Judge that you can't remember the exact words, you can't say to the court that you are confident as to exactly what was said on the 15th, can you?

A. Not all of it.

Q. So if Judge Paradza says that on the 15th what he asked you to do was in fact to look at this matter, to look at the record of proceedings and he wanted to know whether you had as to whether there was a chance that bail condition might be adjusted? You are not in a position categorically one way or the other to deal with that, are you?

A. I would distinctively remember that because the use of your discretion at that particular moment and the use of a request – please release, I would have remembered.

Q. You were not listening to me Judge. I'm saying to you what he asked you on the 15th was to look at the record of proceedings in relation to this matter and give an assessment as to whether you thought there was a chance that the bail condition might be released?

A. No.

Q. I see. So when on the 16th he repeatedly said: *"I want you to assess, would you see if it is safe." You didn't say* but yesterday you said something different, did you?

A. No, didn't say that."

The cross questioning on Exhibit 16 was prolonged because Justice Cheda persisted throughout to explain the questions he is reflected as asking accused in the transcript, and the request that he said accused had made to him on the 15th January. The lack of any direct denial of that on request by or on behalf of accused, it would appear, was because Counsel had no instruction to put a direct denial to Justice Cheda in that regard. In another series of questions after what I have quoted above, counsel put to Justice Cheda more questions which the witness answered, as follows:

"Q. You see what it comes down to Judge Cheda is this:- let us accept for the moment that you and Judge Paradza agree to differ about what happened on the 15th, Judge Paradza as I have said to you says that he asked you to assess this matter and see whether you thought there was a prospect of the bail condition being alleviated. Let us accept that you think you heard something different?

A. On what date?

Q. On the 15th? Let us accept that. What I am saying to you is that not once, not twice but about three times in the course of the 16th, it has been cleared up?

A. Yes."

In his further attempts to get more favourable answers from the witness counsel put to the witness his statement to the police and remarked that in his opinion it differed from what he was now saying; the question and answer continued up as follows:

"Q. Now, Judge, even if you were correct and you thought, may I ask you this:- Arising from your conversation of the 15th of January, it was already then apparent to you, wasn't it that Judge Paradza was not making to you the same blunt proposal as Mr Anand, correct?

A. Sorry?

Q. Judge Paradza, in the conversation of the 15th was not making to you the same blunt proposal as Mr Anand, correct?

A. He was making that request.

Q. I see. So that was already clear to you?

A. To a certain extent, yes.

Q. But to what extent, Judge, because you must now choose which version? To what extent or clearly or not clearly?

A. Yes, to an extent that he was requesting me to release the passport and also that he was a business partner with Rusty and also that he stood to lose 60 000.

Q. You see Judge I put it to you yesterday already that Judge Paradza was phoning you on the 15th to ask you if you would look at this matter and indicate to him whether you thought there was any chances of this bail condition being varied. Remember, I put that to you?

A. Yes.

Q. To assess the matter and to come back to him and tell him whether you thought that there was a chance that this bail condition could be varied. Remember I put that to you as regards the 15th?

A I don't remember……

Q. Well, I am putting it to you Judge?

A. Alright fine.

Q. Okay. Now, are you seriously suggesting to my Lord and learned assessors that Judge Paradza on the 15th, then and there without you even having looked at the matter, was trying to tell you what to do with the matter?

A. Yes.

Q I see. It doesn't say much for his respect for you if he was trying to boss you around like a messenger on the 15th, correct?

A. I wouldn't say he was trying to boss me around. He was requesting."

Q. You must accept Judge that it sounds very improbable that Judge Paradza on the 15th, without you even having looked at the matter, would be trying to give you some kind of direction in relation to it?

A. Improbable as it may sound, but this is what happened.

Q. Well, thank you for that concession, improbable as it may sound?

A. But this is what happened.

Q. I see. So we have here a version of what happened which you concede is improbable which is also inconsistent, I put to you, in relation to what you said at the time and the words you chose in your police statement. Correct? It is inconsistent, in your police statement you said you hadn't hear clearly, you hadn't understood and that is why you phoned again, correct?

A. Yes.

Q. So it is inconsistent with what you are saying now? Is it consistent, Judge?

A. I don't think I understood your questions again. May you please repeat it."

The statement he made to the police was brought up by counsel with the remark that it was inconsistent with what Justice Cheda was now telling the Court. It was suggested that:

"you formed an impression on the 15th which in fact was corrected on 16th, not so?"

He answered and the exchange continued:

"A. It was not corrected on the 16th. The impression I had on the 15th, there are two aspects to it. It was confirmed in as far as

the previous discussion is concerned, namely the request, the amount and the name of his business partner and how much he stood to loose. That is the confirmation. But with regards to the impression I had had with his associate or his knowledge of the involvement of Anand as well in Rusty's matter, yes, I confirm that it appeared he knew nothing about that.

Q. So he straightened it out on the 16th, whatever ?

A. Yes, he did.

Q. So Judge to take an example is if I have a conversation with you, which is interrupted and, as you put it in your statement, choosing your words:- *"I didn't make out what he was saying and hadn't understood. I phoned to clarify."* And you think if I had said in the first conversation that:- Judge it would be god idea to rob a bank. We have a conversation the next day and you follow this up with me and I say:- *"Hooh, no, no,"* It is clarified, isn't it ? I don't want you to rob the bank, not so?

A. Yes.

Q. So that is why you agree that once the 16th of January was over, the record was straightened out as between what the

impression you had been under regarding Judge Paradza, however that arose?

A. With regards Judge Paradza and involvement, and his knowledge of Anand, yes.

Q. But more than that you told the Court twice already that by the end of the 16th of January, after that the second phone conversation, that you yourself didn't have a basis, you didn't support the charges against Judge Paradza, not so ?

A. Yes.

Q. Because whatever had happened on the 15th, the record is not straightened our, correct?

A. Yes.

Q. Yes, good. Now, Judge Cheda one or two last aspects, if you would be so kind, you agreed with me yesterday as regards what happened on the 16th of January that you had deceived and indeed I put it to you that you had lied twice to your colleague Judge Paradza in the telephone conversation ?

A. Yes."

The question whether he supported the charges against Justice Paradza after what happened on 16th was posed, he said he did not. In re-examination he said he was expressing a personal opinion.

He further explained what he did not understand on the 15th January as follows:

> *"Amongst which that, remember he was asking me to release the passport and also mentioned that – he was going to lose; etc etc but thereafter, at that particular moment, I didn't know how this was going to be done bearing in mind that with regards to procedure at the High Court it is the Registrar of the High Court or his deputies who allocate files to particular Judges and him being based in Harare, I didn't understand how he was going to do that."*

At the time he did not have the file or the record; on 16th the issues discussed on the 15th were still fresh in his mind. This explanation ties up with at least one of the questions Justice Cheda asked during the conversation on the 16th January, namely (at p5 of Exhibit 16): "So how am I going to get hold of the record?" and accused's answer: *"I think the likes of Joseph Jams they should be coming with some application*." (See also pp 10, 11 of the Exhibit 16).

The full context in which the question arose includes what appears:

(a) at p 5 - 6:

"Cheda: So how am I going to get hold of the Record?

Paradza: I think the likes of Joseph James, they should be coming with some application.

Cheda: Okay and then they will give it to me?

Paradza: Yah, yah. If they come to see you, I mean if you are on what do you call it, like now ..... so, I mean.

Cheda: Yah, yourself, are you going to tell them now that, or you are going to tell them that it should be brought before me?

Paradza: Yah.

Cheda: Okay.

Paradza: Yah.

Cheda: You are going to tell who in particular, Joseph James?

Paradza: I will tell Ralph Nkomo, Nkomo will then talk with James.

Cheda: That James should make sure that it comes before me?

Paradza: Ehe, ehe.

Cheda: Okay.

Paradza: Yah.

(b) <u>at pp 10 – 11</u>

Cheda: Okay but then how then are you going to relate my response to them? You will then phone the white man in question or ..... that he goes to talk with the likes of James?

Paradza: In fact they are ..... I am sure where they are isn't, they could have filed the papers because they were saying they were supposed to have gone yesterday.

Cheda: Okay.

Paradza: They could have done something.

Cheda: Alright.

Paradza: But I will just phone to Ralph and ask that what's up, did you submit this and that, this and that.

Cheda: So that is goes to James then James will engineer it comes to me?

Paradza: Yes."

Looked at objectively and in context of the whole document, I disagree that the three passages singled out by defence counsel show consistency in the request by accused to Justice Cheda. One has to approach this document the same way one puts a construction to any other document; in this case the background to it plays a significant role in its interpretation. Almost at every turn Justice Cheda insisted that regard had to be had to what

transpired on the 15th January 2003. He was quite correct to so insist. Much as defence counsel deprecated Justice Cheda's conduct as:

(a) lying to a colleague when he asked the accused to tell something confidence;

(b) probing for answers or luring him; and

(c) simply complying with the police.

When the contents of the document are objectively analysed the accused does not come out as just a victim of a trap. In fact he appears as a person willing, albeit guardedly, to go in and have Justice Cheda carry out the request Cheda said he made to him on the 15th January i.e. release the passport. That the request was not an innocent request comes out clearly in the document itself in that, first, accused suggested:

> *"If you want you can consult Kamocha you can talk with Kamocha, that Kamocha look ……. application before me …… this that, do you mind perhaps I give him for a while …… to enable him to go out and get in touch with his clients,"*

When immediately asked: "Why did you not ask Kamocha himself?
He says: "Aah, no, no."

Further down he asked if he had not discussed with James and he answered and emphasised:

"No, nothing, nothing…….

I only talked with you only I have talked to you only. I don't want to phone James and say go to Cheda."

This is repeated later in the conversation when he again says:

"I have only talked to two people those one, talked to one person. I talked to you only."

That the three passages counsel singled out as showing consistence of his requests are a mere smoke screen is demonstrated by the fact that the accused is shown to be aiming for one and only one outcome – the release of Labuschagne's passport. The secretive note in the above underlined portions of the conversation is striking.

That aim is inconsistent with the mind of a person asking another to exercise an unfettered discretion, particularly when that other person is a Judge who is not seized of the particular matter. If it is true, as accused repeatedly said, that he never asked either Judge to release Labuschagne's passport, why would he, so easily be drawn into a conversation like the one he carried out with Justice Cheda on the 16th January 2003, a conversation which, despite the imperfections of the transcript thereof, clearly contradicts his evidence.

To sum up I find accused's story, that all he asked either Justice Cheda or Justice Chiweshe was to look at the record of the Labuschagne matter to see what the charges he was facing were, how serious they were, and how far the matter had progressed, and that he never asked them to release Labuschagne's passport, but to look at the record merely to assess Labuschagne's prospects of success were if he should apply for the variation of his bail conditions, to be untrue beyond reasonable doubt.

The mere act by a judge who should know better, of approaching another judge to ask him to exercise his discretion

(a) in entertaining an application, coming before him, as in the case of Justice Chiweshe, or

(b) arranging for him to entertain an application which is not before him, as in Justice Cheda's case, coupled with statement or expression of what you stand to lose if an unfavourable or negative result should ensue, is no less than an urging or request for the other judge to exercise his discretion in a particular way; in other words to do an act which is contrary to or inconsistent with his duties as such.

I find that the accused was an evasive witness and that he contradicted himself in various material respects. These considerations lead me to

reject his evidence as not reasonably possibly true, that is where that evidence differs from that of the main State witnesses.

To come back to the four counts; the State led no evidence whatsoever to show that if Labuschagne's passport were released to him he would abscond. I cannot draw any adverse inference from the fact that the trial of Labuschagne and his co-accused had reached a stage where Justice Kamocha had postponed the matter apparently *sine die* for judgment, or that Labuschagne had made two previous applications to have his bail conditions altered so he could have this passport and travel abroad. In the result, accused is acquitted on both the alternative charges. The accused is found guilty on the two main counts.

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