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FEATHERS MUKONDO
v
THE STATE

SUPREME COURT OF ZIMBABWE
MAKARAU JA, HLATSHWAYO JA & PATEL JA
HARARE: JUNE 18, 2018.

D. C Ngwerume for the appellant

No appearance for the respondent.

MAKARAU JA

At the hearing of the above appeal, despite having been duly served with a notice setting the matter down, there was no appearance on behalf of the respondent. The appellant successfully applied that the respondent be held to be in default and duly barred but that the matter be determined on its merits.

After hearing submissions from counsel, we, on the turn, dismissed the appeal in its entirety and gave brief reasons in an *ex tempore* judgment that was read out in court. We have been requested to furnish the full reasons for the judgment and these they are.

This is an appeal against the judgment of the High Court, handed down on 10 May 2017, upholding the conviction and sentence imposed upon the appellant by the magistrates court.

The appellant was charged with one count of bribery as defined under s 170 (1) of the Criminal Law (Codification and Reform Act), [*Chapter 9.23*]. It was alleged that on 3 April 2014, in Guruve, the appellant unlawfully received a sum of money as a bribe from one Biggie Chipfunde in order for him to influence certain court process that was before the court in favour of Biggie Chipfunde. The appellant denied the allegations. In his defence outline he admitted receiving some money from Biggie Chipfunde, but genuinely believing that this was a donation towards his fund raising campaign to procure a map of the Guruve policing area.

After trial, the appellant was convicted and sentenced to 12 months imprisonment of which 4 months was suspended on condition of good behaviour. Dissatisfied with both the conviction and the sentence, he appealed to the High Court. Before the High Court he raised five grounds of appeal against his conviction as follows, and I quote these verbatim:

1. The learned magistrate erred in ignoring the glaring inconsistencies that were exhibited by the State witnesses that created doubt within the State's case.

2. The learned magistrate erred in failing to uphold and apply the basic principles of criminal law that the State must prove its case beyond any reasonable doubt.

3. The court *a quo* misdirected itself in failing to realise that there was no trap given that the State failed to produce the application for trap as required by the law.

4. The court *a quo* erred in failing to realise that there were gross violations of the police standing orders which were 7.0 of the ZRP Police standing Order Manual Volume 1, pp334; 27.1-4 of the ZRP Standing Order Volume 1, Manual, pp131.

5. The court *a quo* also failed to consider that the defendant's case stood by its defence outline and its evidence strongly reflected that there was no offence committed at all.

Against sentence, the appellant also raised five grounds, attacking the severity of the sentence and the exercise of the discretion of the trial court in imposing a custodial sentence in the matter.

As stated above, the court *a quo*, finding no merit in all the grounds of appeal, dismissed the appeal in its entirety, prompting the appellant to note this appeal.

Before this Court, the appellant raised 5 grounds of appeal against conviction and two against sentence.

At the hearing of the appeal, counsel for the appellant quite properly abandoned grounds of appeal 3, 4 and 5 against conviction and ground 2 against sentence. This left grounds 1 and 2 relating to the conviction and ground 1 relating to the sentence.

Against conviction, the remaining grounds of appeal were as follows:

1. The court *a quo* erred on a point of law by relying on s 170 (2) of the Criminal Law (Codification and Reform) Act [*Chapter 9.23*] which casts a reverse onus on the appellant to prove his innocence, to dismiss the appeal against conviction. The section breaches s 70 (1) (a) of the Constitution which guarantees the

appellant the right to be presumed innocent until proven guilty beyond a reasonable doubt by the State.

2. The lower court erred on a point of law by upholding a conviction which relied on s 170 (2) of the Criminal Law (Codification and Reform) Act, an unconstitutional provision which breaches an accused's right to remain silent and not to be compelled to give self-incriminating evidence.

In relation to both grounds, counsel for the appellant conceded that the unconstitutionality of s 170 (2) of the Criminal Law (Codification and Reform) Act was not an issue before both the trial court and the court *a quo*. His concession in this regard was properly made. The record confirms this to be the position.

More importantly, it is clear from the record that the provisions of the section were not invoked and relied upon by the trial court in convicting the appellant. Rather, the trial court found that the evidence that had been led from the State witnesses against the appellant was overwhelming and that the State had duly established its case beyond a reasonable doubt. At no stage in its determination of the guilt of the appellant did the trial court advert to the reverse onus imposed on the appellant by the section.

It was the finding of the trial court that the evidence of the State witnesses against the appellant went largely unchallenged as the appellant focused on challenging his entrapment, alleging that the proper procedures of setting up the trap had not been followed. The defence thus failed to put in issue the essential evidence led on behalf of the State, so found the trial court.

It is also clear from the record that the court *a quo* upheld the conviction of the appellant by the trial court without relying on this provision. In its determination of the appeal, the court *a quo*, and correctly so, did not find a basis for interfering with the factual findings that were made by the trial court. Regarding the trap, the court was of the view that the appellant's case was not one where it could be said that, but for the trap, the accused would not have committed the offence. It thus confirmed the finding by the trial court that there was other evidence apart from the trap that proved beyond a reasonable doubt that the appellant had committed the offence. It was during a discussion of the trial court's treatment of the evidence led by the State on how the appellant solicited the bribe that the court a quo made the following remarks:

> "*The evidence shows that it was the appellant who solicited the bribe. The learned magistrate demonstrated the length to which the appellant went in order to make sure that he personally received the money from the complainant. See S v Fisher 1971(1) SA 745 (RAD) S v Katsande1983 (1) ZLR 302. There is in my view no basis to interfere with the conviction by the magistrate as it is proper. The appellant in any event failed to discharge the reverse onus set out in ss 170 (2) above. Once he accepted that he received money from the suspect in a matter pending at the police station, he had to discharge the onus cast by the presumption created in the State's favour that he had received the money in contravention of the provisions of s 170. This the magistrate correctly found he failed to do,"* (The under lining is mine).

It is clear from a reading of the record that the remarks by the court *a quo* were made *mero motu* and were not based on any submissions that had been made for and on behalf of the respondent before that court. Secondly, the remarks were incorrect as far as they purported to confirm a position that the trial court had taken on the matter. The trial court did not make any finding on the reverse onus that is created by s 170 (2).

Finally, and more importantly, the remarks by the court *a quo* on s 170 (2) were made after the court had concluded that the conviction of the appellant was proper on the basis

of the weight of the evidence that the State had led against him. Thus, the *ratio decidendi* of the court *a quo* was its finding that it could not interfere with the factual findings of the trial court, which findings were that the State had led overwhelming evidence against the appellant.

It is our finding that the remarks constitute an *orbiter dictum* and had no effect on the court's *ratio decidendi*. Being such, the remarks cannot form the basis of an appeal. This is the trite position at law. An appeal lies against the decision of the court. It does not lie against statements or remarks made by the court during the determination of the matter and which statements and remarks do not form the *ratio* of the judgment.

Accordingly, we took the view that there were no proper grounds of appeal before us against the conviction of the appellant.

In the result, all the grounds of appeal against conviction having been either abandoned or raised improperly, the appeal against conviction could not succeed.

Against the sentence, the appellant raised a single ground of appeal as follows:

> "It is submitted that the Honourable Judge erred and misdirected himself by upholding the sentence by the court a quo despite the fact that there were cogent reasons which indicate the contrary. Appellant is a first offender, did not realise that he was committing an offence and a non- custodial sentence would have been imposed to meet the justice of the case and the rehabilitation and reformation principle of sentencing were not considered."

Before us, the appellant was unable to identify any misdirection on the part of the court *a quo* in affirming the reasons for sentence by the trial court. It was not for the court *a quo* to reassess the appropriate sentence in the matter as the ground of appeal suggests. The

court *a quo* correctly determined the matter on the basis of whether or not there was a misdirection on the part of the trial court in assessing sentence. It found no such misdirection.

The court *a quo* was persuaded, as was the trial court, that because the appellant was a police officer, in the absence of cogent reasons to the contrary, a custodial sentence was appropriate. In this regard both courts relied on the case of *AG v Bryan Johnson and Another* SC 119/98, where Gubbay CJ had this to say:

> "….where corruption is resorted to, especially where the offender is a police officer, agent of the State, a custodial punishment is called for unless there are cogent reasons which indicate the contrary."

Accordingly, the appeal against sentence also failed.

It is on the basis of the above that, on the turn, we dismissed the above appeal in its entirety.

HLATSHWAYO JA **:** I agree

PATEL JA **:** I agree

Ngwerume Attorneys at Law appellant's legal practitioners;

National Prosecuting Authority, respondent's legal practitioners.