Judgment No. HB 98/06
Case No. HCA 186/03

VUSUMUZI DUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA & NDOU JJ
BULAWAYO 12 SEPTEMBER 2005 & 12 OCTOBER 2006

R Ndlovu, for the appellant
A V Mabhande, for the respondent

Criminal Appeal

NDOU J: On 12 September 2005, we allowed the appeal against conviction and quashed the conviction and set aside the sentence. We indicated that our reasons for doing so will follow. These are the reasons. The respondent does not support the conviction. We hold the view that the concession was properly made. Briefly the background facts are the following. The appellant was employed as a clerk of court at Bulawayo Provincial Magistrates' Court. His co-accused Simbarashe Jagada was employed as a public prosecutor at the same court. The appellant was jointly charged with Jagada of theft or alternatively, attempting to defeat or obstruct the course of justice. The allegations were that on 9 May 2003 and at Bulawayo Magistrates' Court, the appellant and Jagada unlawfully and intentionally stole a court record book, number 431-432/02, the property of the state in the lawful custody of the Provincial Magistrate, John Masimba. Alternatively, they unlawfully and with intent to defeat or obstruct the course of justice took and destroyed or concealed the above-mentioned record in a partly heard matter in which one Danny Maseko was facing 565 counts of fraud. The offence was discovered on 21 May 2003 when the trial of Danny Maseko was supposed to continue. When Jagada was asked about the record,

as he had signed it out of the clerk of court office, he indicated that he was going to collect it. However, he disappeared and was later arrested in Nkayi. Thereafter, the appellant was arrested. The two were convicted by a Provincial Magistrate and they were each sentenced to 24 months imprisonment of which 6 months was suspended for 5 years on conditions of good behaviour. The state case against the appellant is fraught with doubtful inferences in favour of the appellant. It cannot be gainsaid that there was completely no evidence whatsoever that the appellant actually stole the criminal record book in question. The appellant in his defence outlined that by the time the court record book was taken and signed for by Jagada he was stationed in the Maintenance Office. The piece of evidence was corroborated by a state witness one Mbiko Ndlovu, a clerk of court. Mr Ndlovu testified that Jagada came to their office (number 114) on 9 May 2003, and uplifted the court record in question, stating that he wanted it and even signed for it. The evidence of that transaction was recorded in the Record Movement Register, which was produced as exhibit I during the trial. This witness also testified under cross-examination that he did not recall seeing the appellant at the material place and time. The evidence of other state witnesses Gibbins Nyamakope, Andrew Marimo, Tafadzwa Masendu, Peter Madhibha and S Banda does not incriminate the appellant of theft charge. This finding is confirmed by the trial magistrate in her judgment under sub-topic, “Evidence Taking Of Record” [sic] On the alternative charge, once more there is no evidence proven sufficient to successfully and judicially engage in conviction. It is clear that the appellant’s “association” with Jagada was used as an essential part of the chain of inferences to the appellant’s conviction. Put in another way, the appellant was convicted, as an accessory after the fact to Jagada purely on inferences drawn from their association,

on that day. However, a thorough reading of the record of proceedings will reveal that after Jagada uplifted the court record, he also equally associated with Peter Moyo, Peter Madhibha, Simba Mabasa and Tafadzwa Masendu on that same day as he did so with the appellant. All these associates being employees of the Ministry of Justice, Legal and Parliamentary Affairs based at Bulawayo Magistrates' Court. Thus to single out the appellant on the basis of association, would undoubtedly require further evidence which is not existent, but is only inferred. The trial magistrate misdirected herself in concluding that the appellant's association alone was evidence of a criminal role in the disappearance of the court record. The circumstantial evidence in this case did not give rise to the appellant being involved in the theft or attempt to defeat or obstruct the course of justice. The evidence accepted by the trial court was not incriminatory circumstantial evidence. Circumstantial evidence may comprise of a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion, but when taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of – *R* v *Exall* (1866) 4F & F 922 at 929; R v Thomas (1972) NZLR 34; *S* v *Labuschagne & Another* HB-41-03; *S* v *Shoniwa* 1987(1) ZLR 215(S); *S* v *Marange & Ors* 1991(1) ZLR 244 (S) and *R* v *Blom* 1939 AD 288. The appellant gave an explanation of innocent association with Jagada but the trial magistrate rejected the explanation out of hand. That was wrong. His explanation cannot simply be rejected out of hand. No onus rested in the appellant (as the accused) to convince the court of the truth of any explanation that he gave. The court does not have to believe the accused's story, still less has it to believe it in its details, it is sufficient if the court thinks that there is reasonable possibility that it may be substantially true – *S* v *Kuiper* 2000(1) ZLR

113(S); *R* v *Difford* 1937 AD 370 at 373; *R* v *M* 1946 AD 1023 at 1027; *Chindunga* v *S* SC-21-02 and *S* v *Zvobgo* HB-136-05. The court *a quo* wrongly reversed the onus of proof and ended up convicting the appellant on mere speculation or conjecture. All that the state proved during the trial was a mere suspicion, not even a strong one for that matter, and the trial magistrate readily convicted thereon. It seems that the appellant was convicted for spending "lavishly" on beer with a colleague who had committed a crime. There is no legal basis for arriving at the conclusion that appellant knew that Jagada was spending proceeds of corruption or that his own spending emanated from the theft of court record. What is the legal basis of the trial magistrate concluding that a prosecutor and a clerk of court can only spend "lavishly" on beer after stealing court records or acting corruptly? None from the evidence in this case. Trial magistrates should always bear in mind that the onus is on the state to prove its case beyond a reasonable doubt and not the other way round.

It is for these above reasons that we held that the appeal should succeed.

Cheda J …….. I agree

James, Moyo-Majwabu & Nyoni, appellant's legal practitioners
Criminal Division of the Attorney-General's Office, respondent's legal practitioners