

SIYAMOMBO MUGANDE

Versus

THE STATE

HIGH COURT OF ZIMBABWE

MUZOFA & BACHI- MUZAWAZI JJ

CHINHOYI, 29 May & 10 July 2023

Criminal Appeal

F Murisi, for the appellant.

G T Dhamusi, for the respondent.

MUZOFA J: This is appeal against both conviction and sentence of a judgment of the Provincial Magistrate sitting at Karoi Magistrates Court. The appellant who initially appeared before the court jointly charged with two others who were subsequently acquitted was convicted after a trial for bribery in contravention of s170 of the Criminal Law Codification and Reform Act 9 (Chapter 9:07). He was sentenced to 24 months imprisonment of which 5 months imprisonment was conditionally suspended for 5 years.

Background

The appellant was employed by Zimbabwe Electricity Distribution Company (ZETDC) as an artisan. He was based at the Magunje satellite depot. According to the state, when one Tulani Chinanzvavana ‘Tulani’ completed constructing his house in Magunje he approached ZETDC for electricity connection. He was referred to the appellant who was based in Magunje. The appellant initially demanded US\$150 and later upped it to US\$800 for his superiors for the provision of the service. This was money outside the normal connection fees. It was bribe money. Tulani managed to raise US\$600 which was given to Munyaradzi Chimboora ‘Munyaradzi’ Tulani’s nephew for collection by the appellant. Munyaradzi alerted the police who set a trap and arrested the appellant. US\$300 of the trap money was recovered from the appellant’s possession, US\$200 was recovered from the second accused who was acquitted.

The accused denied the offence and alleged that the money was a loan from Tulani. His arrest was masterminded by Munyaradzi and Constable Machinyaifa, a police officer at Magunje who wanted to cause his downfall. Tulani was just used as a conduit to achieve this grand scheme.

Proceedings before the court a quo

Tulani gave evidence that he built his house in Magunje 2017. In 2018 he approached the Karoi ZETDC office for installation of electricity. He paid the connection fees in the sum of US\$92. He was referred to the appellant. The appellant advised him of the required materials for installation which he bought. The appellant asked for US\$150 but later he requested for US\$800 alleging that his superiors wanted the money to install electricity. To show his resolve to get the money the appellant actually advised him that the electricity would be installed in 2030. As a result the appellant kept on giving lame excuses and no electricity was installed. He eventually decided to comply. He secured US\$400 from his mother's savings and US\$200 from his nephew one Munyaradzi. These two were in Magunje. He was at the time in Hwange where he worked. He asked Munyaradzi to give the money to the appellant. He asked Chimboora to use the law.

Although the appellant alleged that the money was a soft loan. Tulani denied this. Under cross examination it emerged that the money was paid when the process had started with the construction of the line.

Brenda Nyamupahuma, Tulani's mother also gave evidence. She confirmed that Tulani advised him of the money demanded by the appellant. Tulani requested for US\$400 for payment to the appellant. She was asked to take the money to Munyaradzi for further transmission to the appellant. He did so. Her cross examination did not elicit much except to try and establish that she could not have saved US\$400 from her trade of selling mice. Obviously, this was irrelevant because sources of money differ. Besides Tulani said as a family they knew that their mother would always save money even what they sent her for upkeep.

Munyaradzi was the key witness. At the relevant time he resided in Magunje. He received a call from Tulani requesting for US\$200 to top up the US\$400 for installation of electricity at his house. Tulani sent him a recording where the appellant requested for the bribe money. Tulani asked him to give the money to the appellant.

Brenda gave him US\$400 to which he added the US\$200 to make a total of US\$600. Since he had learnt that this was bribe money, he went to report the matter to the police. The police then organised a trap and that's how the appellant was arrested.

Under cross examination he denied any knowledge of a loan between Tulani and the appellant. He also denied that he reported the matter out of malice since he had a borne to chew with the appellant.

Constable Machinyaifa was the last state witness. He received the report of bribery and carried out investigations. Munyaradzi filed the report, he had US\$ 600 meant to be given to the appellant as bribe money. They decided to set a trap. The money that

Munyaradzi had was used as trap money. He applied to set up the trap to Inspector Chikonje, who in turn sought and obtained authority for the trap to be conducted. The authorisation was done by the Officer Commanding Chief Superintendent Karuru. The approved authorisation and application for a trap was produced before the court a quo. The photo copied money together with the seizure forms were also produced by consent through this witness.

Munyaradzi proceeded back to his office and communicated with the appellant. The police were keeping watch to pounce on the appellant immediately after receiving the money. That was not to be. The police unwisely were looking out for the appellant's car unfortunately he did not use the car but walked to Munyaradzi's office. When the appellant eventually went to Munyaradzi's shop and happily received the money, they did not see him. Since the police did not see the appellant entering Munyaradzi's shop, they did not immediately arrest him. Munyaradzi had to send a text message advising that the appellant had collected the money.

The police then proceeded to the ZETDC offices where they interrogated the appellant. The appellant refused to hand over the money. He was searched and US\$350 was recovered. Of that money US\$300 matched the photocopies held by the police. The appellant indicated that he had given US\$200 to the second accused and US\$100 to the 3rd accused who were acquitted. They managed to recover the US\$200 from the 2nd accused. The money matched the photocopied money. The 3rd accused denied receiving any money from the appellant and nothing was recovered from him.

His cross examination interrogated the authority to conduct the trap. It was suggested that there was no authority to conduct the trap. Also, he was cross examined with a view to establish that he shoddily investigated a case against one Munyaradzi Ngandini a politician in the area in order not to secure a conviction.

After the closure of the state case an application was made for discharge at the close of the state case in terms of s198 (3) of the Criminal Procedure and Evidence Act. The court discharged the 3rd accused and the trial proceeded with the appellant and the 2nd accused.

The appellant gave evidence in his defence. He said he knew Tulani from 2019. He treated Tulani as his young brother since Tulani went to school with his young brother. They had a good relationship. They used to lend each other money. Eventually Tulani introduced him to Munyaradzi his nephew a local businessman in Magunje. Whenever Tulani intended to loan the appellant money he would collect from Munyaradzi. He would always repay the money.

In respect of the transaction forming the basis of the charge, he said Tulani advised him of his intentions to build his house and his need to install electricity. He did not want to subvert the system to show favour to Tulani. He advised Tulani of the procedures. That was all he did. He was based in Magunje a satellite office. He would receive instructions from Karoi. At the end of June 2022 Tulani's mother approached the office with a request for installation of electricity. He advised her that there were no resources. She went to Karoi. She was promised that resources would be availed. Indeed, on 6 July 2022 they received resources and the power line was constructed.

He asked for a soft loan of US\$500 from Tulani. They agreed on a 25% interest. Tulani advised him to collect the money from Munyaradzi's shop. He did so and was later arrested.

He denied completely the charge of bribery. He believed that Munyaradzi used Tulani to cause his arrest. There was bad blood emanating from the appellant's perceived failure to manage the electricity supply situation in Magunje. Munyaradzi was vying for the post of a councillor so he did not want to be discredited by the intermittent supply of electricity. In particular Munyaradzi was not happy by the way the appellant handled the supply of electricity at the AFM Church where he attended church. Secondly there were allegations that the appellant had caused the arrest of a politician one Munyaradzi Ngandini. He was warned not to cause trouble for 'big fish' otherwise he would go down. So, this prosecution is a manifestation of the warning. Constable Machinyaifa and Munyaradzi collaborated to take him down using Tulani. Tulani simply took the side of his relative.

In its judgment the court a quo found the state witnesses to be credible. It found the trap to have been properly authorised and relied on the cases *The State v Musuna*¹ and *The State v Admire Chikwayi*² that it is proper to conduct a trap where the accused is already committing the offence. It dismissed the appellant's defence of false incrimination on the basis that it was unreasonable.

Dissatisfied by the decision of the court a quo. The appellant noted this appeal.

The grounds of appeal

Five grounds of appeal were set out impugning the court a quo's decision in respect of the conviction. The issues raised are that the court a quo misdirected itself in making a finding that the trap was properly authorised, that there was no evidence of a corrupt agreement between the appellant and Tulani and in any event the money was paid after the installation of the electricity. The grounds also impugn the court a quo for dismissing the appellant's defence and making a finding that the case was not fabricated by some other people who had issues with the appellant and not the actual complainant.

In respect of sentence, the bone of contention was that the court a quo relied on cases where the accused persons were civil servants thus it settled for an effective imprisonment term. The sentence induces a sense of shock considering that the appellant was not employed in the public sector.

The submissions before this court.

The appellant's heads of argument read together with the oral submissions synthesise the case that the trap was illegal, it was not properly authorised. The trap money was not properly secured and the appellant was not arrested immediately which compromised the

¹HB 112/07

² HB 166/16

trap. Counsel for the appellant detailed how the trap money must have been secured but he had no authority for the submission. The court was referred to the case of *Jecheche v The State*³ for caution in dealing with trap evidence. It was submitted that, in this case the court *a quo* must have rejected the trap evidence. Further it was submitted that the money must be paid to induce a favour or an omission to be made. In *casu* the money was paid after the service had been provided. It was also submitted that the appellant's defence was reasonable and the court must have accepted it.

For the respondent it was submitted that the court *a quo* did not misdirect itself. It properly assessed the evidence and it found it credible particularly on the purpose of the money given to the appellant. On the trap evidence it was submitted that the appellant failed to refer to any law or case which supported the submissions on how the trap money must have been secured.

Factual and legal analysis

We will address the grounds of appeal as set out.

Before addressing the merits of the case I address the point taken *in limine* by the appellant in the heads of argument that the court *a quo* failed to meaningfully respond to the grounds of appeal to properly guide the appeal court. This court was requested to remind Magistrates to meaningfully respond to the grounds of appeal.

Order 100 (7) of the High Court Rules ,2021 requires the Magistrate, 'so far as may be necessary having regard to any judgment or statement already filed of record' to file a response to the appeal. The requirement is purely procedural particularly for the appeal court to know whether the Magistrate still abides by the decision made or not upon consideration of the grounds of appeal. The rule must not be interpreted as to require the Magistrate to justify his or her decision in detail. The Magistrate as an arbiter is not a litigant. It is our considered view that the Magistrate would have expressed himself or herself in the matter in the judgment and need not revisit the matter. The appeal court is not in any way guided by such response. The appeal court's decision is based on the record of proceedings in so far as what transpired before the Magistrate. The Magistrate's views in the statement does not in any way influence the appeal court.

In this case the Magistrate simply opted to abide by the judgment issued and the reasons for sentence. This cannot be taken as a concession that the appeal must be allowed as suggested by the appellant's counsel. An appeal court cannot expect more or another judgment from the Magistrate. It our view the Magistrate is required to exercise his or her discretion on what is necessary to include in the statement. There must be no hard and fast rule on the contents of the statement.

On the merits of the appeal, the issues raised shall be addressed *in seriatim*.

Whether the trap evidence must be rejected since it was fabricated against the appellant

³ HH781/15

Under this head the 1st and 5th grounds of appeal shall be considered. Despite all the submissions made on this issue we were not referred to any authority on the standard procedure for setting up a trap. The objections were really based on what the legal representative believed must have happened which would certainly not sway the court.

As a matter of fact, the factual background in this case is not in dispute. The appellant was found in possession of the trap money. He had collected the money from Munyaradzi. Munyaradzi had reported the solicitation of the bribe money. The appellant was arrested after a trap was set up.

The submission that the trap was not properly authorised is factually incorrect. Exhibit 1 on page 125 of the record placed before the court *a quo* is an application to carry out a trap. On page 126 thereof there is a provision for the authorising officer to sign. There is an option for 'authorised' and 'not authorised'. The 'Not Authorised' part was cancelled leaving the 'Authorised'. With that evidence one wonders why the appellant believed the trap was not authorised. It was not disputed that Chief Superintendent Karuru had authority to authorise the trap. There is therefore no merit in the point taken that the trap was not properly authorised.

The second issue is on the trap evidence. It is correct that trap evidence can be treated with caution but it is not in all the instances that it should be taken as such. As rightly pointed out in *Musuna v The State*⁴ there are different forms of traps. The most common instances where courts should be cautious is where a person proposes a criminal conduct to entice the other to commit a criminal offence with a view to arrest him. See *Gardner & Lansdown*⁵. In such a case the proposer has an interest in securing a conviction and their evidence should be treated with caution. This is what informed the sentiments in the *Jecheche* case (supra) relied upon by the appellant.

The circumstances of this case are different. The police did not propose a criminal enterprise to the appellant, neither did Munyaradzi do so. The appellant had set in motion the commission of the offence. He was the proposer in the commission of the offence. This was not 'a trap' in the strict sense of the definition of a trap. This was the case in the *Musuna* and *Chihwayi* cases (supra) referred to by the State. In *S v Pallis*⁶ the court held that where the trap did not induce the accused to commit the offence the matter is not a trap case. In this case Munyaradzi was just a conduit to deliver the money after the initiative by the appellant to Tulani. As a result, the evidence from Takesure the police officer would not be tainted at all. He simply arrested the appellant and recovered the money.

It was submitted that police must not have kept both the recovered money and the photo copies. They must have taken these to the Clerk of Court to avoid tempering.

This is what transpired, Munyaradzi reported the matter on the 7th of July and the paper work was prepared and the trap money photocopied with the serial numbers. The photocopies were certified and date stamped 7 July 2022. The trap money was from

⁴ HH112/07

⁵ South Africa Criminal Law and Procedure Volume 1 6th Ed

⁶ 1976(1) SA 235

Munyaradzi. Although it was argued that the money should have originated from the Police there was no authority for that proposition. Even if the money was from Munyaradzi, it could be used as trap money. There is no law prescribing where the money should come from. Any money can be used as trap money if the Police using their discretion decide to do so. The accused was arrested on the 8th of July with part of the money bearing the serial numbers recorded by the police. He signed the 'Exhibit Seizure Confirmation Receipt' ZRP FORM 390 which recorded the serial numbers of the money he was found in possession of.

In our view by affixing his signature on the ZRP Form 390 the appellant confirmed that the money with the recorded serial numbers was recovered from him on the 8th of July 2022. The process therefore would not allow for any interference at all. In the absence of any evidence disputing the veracity of the process the court *a quo* was correct to accept the money and the evidence.

There is no legal obligation on the police to deposit exhibits with the clerk of court except when the matter is about to be heard in court. Section 58 (1) of the CPEA requires a police officer who seizes an article to take it or cause it to be taken and deliver it to a secure place under the control of a police officer and record all the relevant details of the article. The Police are therefore authorised at law to keep articles that they recover pending the trial proceedings. No exception is made about money. For the appellant to succeed in challenging the Police's authority to keep the money he must have established some proper ground showing interference. The article is only delivered to the Clerk of Court when the criminal trial commences and the article is required at court. There was no legal basis to challenge the police's continuous holding of the money until the trial day in this case.

We must consider if Constable Machinyaifa and Munyaradzi had an interest to secure the conviction of the appellant as argued that they had orchestrated the appellant's arrest due to bad blood. The court *a quo*'s finding cannot be impugned. The fact that Constable Machinyaifa investigated a case involving one Ngandini in which case the appellant was a complainant and did not complete the investigations cannot be a basis to infer bad blood against the appellant. No allegation of impropriety was made by the appellant against the officer such that he could personally take up the issue to falsely implicate the appellant. The officer explained that matter was re allocated to another officer after he had done his part. The court *a quo* accepted this explanation and we find no fault in that.

In respect of Munyaradzi, it was alleged that he was the one who reported the case instead of Tulani. The insinuation is that Tulani must have reported as the aggrieved party. Also, that Munyaradzi reported without Tulani's consent. Apart from the submission finding no authority at law as to who must report a case it is not supported by the facts. Tulani's evidence was that he advised Munyaradzi to use the law. At all material times Tulani had knowledge that the appellant was arrested and as the complainant he could have done something about it like withdrawing the matter. The fact that he did not even try to withdraw the matter but proceeded to give evidence against the appellant shows that he identified with appellant's prosecution. So, there was no basis for the appellant to continue to believe that Tulani did not identify with the arrest and prosecution. The appellant on his part did not

allege any bad blood between him and Tulani except to say Tulani decided to go along with his relatives which allegation had no factual basis.

From the foregoing the court a quo did not misdirect itself in accepting the trap evidence. There was no evidence of any fabrication against the appellant. The 1st and 5th grounds of appeal are dismissed.

Whether the appellant solicited for a bribe

The 2nd and 4th grounds of appeal shall be addressed simultaneously since they raise the same issue that the court a quo misdirected itself in finding that the appellant solicited for a bribe. Further, that the appellant did not show favour or disfavour to the complainant and the service had already been provided when the money was paid.

Section 170 of the Criminal Code creates the offence of bribery. The essential elements which can be extrapolated from the section can be summarised as follows;

1. One must obtain or agree to obtain or solicit for an inducement
2. There must be an intention to do or omit to do an act relating to the principal's affairs
3. With an to show favour or disfavour to any person in respect to the principal's affairs
4. Ordinarily the gift would not be due in terms of the agreement between such person and his or her principal.

The section attaches criminal liability to both the recipient and the offeror of the inducement. Subsection (2) thereof provides that where it is proved that a person has obtained or agreed to obtain or has solicited such inducement it shall be presumed that such was done in contravention of the section. So in this case, the State's evidentiary burden was to prove that the appellant solicited for an inducement in respect of his principal's affairs. Once that is proved the presumption operates in favour of the State. The burden of proof shifts to the appellant to show that the inducement was not for purposes relating to ZETDC. Whether the favour or disfavour materialises is not an essential element. The person who solicits for a bribe is liable for the very act to solicit.

The appellant actually linked the provision of the service with the delivery, of course unintentionally. In his evidence he said on the 6th of July the power line was constructed. After the construction of the power line, he phoned Tulani who was in Hwange on the 7th of July advising him of the developments. Then they spoke about the money and on the 8th of July the appellant received the money. The coincidence on the timing of the delivery of the money and the installation of the power line is too high to absolve the appellant. The court a quo did not misdirect itself in accepting Tulani's evidence. The appellant clearly solicited for the money for a period of time until Tulani decided to pay up.

We also note that, under cross examination, Tulani was not even asked about the loan arrangement with the appellant. These questions were put to the other witnesses except Tulani who was critical to explain his relationship with the appellant.

The 2nd and 4th grounds of appeal are dismissed.

Whether the appellant's explanation was reasonable

The 3rd ground of appeal was that the appellant's explanation that Tulani owed him some money should have been found to be reasonable. This ground of appeal is misguided, it is not based on what transpired before the court *a quo*. It can be dismissed on that basis. The issue of a debt did not arise at all before the court *a quo*. The court *a quo* did not address the issue, it was not raised. It is trite that a court cannot be impugned for what was not placed before it. Throughout the trial, the appellant said the money was a soft loan. Even if we consider the correct explanation, it was not reasonable.

It is trite that where the explanation given by an accused is reasonable in the circumstances, he or she must be given the benefit of doubt.

In this case the appellant under cross examination said he requested for US\$500 from Tulani and Tulani levied 25% interest to make it US\$600. Arithmetically that is wrong. If Tulani levied 25% interest on the US\$500, he would pay back US\$625. The computation was not well thought out by the appellant.

Secondly, it is highly unlikely that the appellant would have asked for a loan from Tulani in the period 6 – 8 July 2022. This is because under cross examination he said he called Tulani and advised him of the connections on the 7th of July and he continued at page 58 of the record,

'We then continued with our relationship and I asked for US\$500 credit. He said he wanted 25% interest to amount to US\$600. He then told me that I was supposed to collect it at Chimboora's shop'

He then went on the 8th of July to collect the money. According to his statement he must have asked for the loan on or after the 7th. It is not possible that Tulani would have known even before the request that the appellant would ask for money and start mobilising the money. From what the appellant said he wants the court to believe that he asked for the money and Tulani readily availed it. That is not correct, Tulani had to raise the money from his mother Brenda and Munyaradzi Chimboora. He in fact told his relatives why he needed the money, the appellant had requested for it as a consideration for the installation of electricity well before the 7th of July. The court *a quo* rightly made a finding that there was no reason why Tulani would borrow money to lend to the appellant. The reasoning cannot be faulted. The money was not a loan but for a bribe.

The court *a quo* did not misdirect itself on the issue, the ground of appeal is dismissed.

Ad Sentence

The sentence imposed was impugned in that the court *a quo* over emphasized the aggravating circumstances at the expense of the mitigatory factors such as the pre-trial incarceration, that the appellant lost employment, that the offence was a result of a trap otherwise it might not have been committed. Further to that, that the court *a quo* relied on cases based on common law yet under the codified law, the sentencing approach has changed.

At the outset we must correct the misconception about the commission of the offence. The offence was not committed after the appellant was enticed to solicit for a bribe. As already stated, he was the one who approached Tulani. It would therefore be factually incorrect that the court *a quo* failed to take into account that the offence was committed as a result of a trap otherwise it may not have been committed. Legal practitioners should take note of the correct facts in order to properly address the issues.

Sentencing is the preserve of the trial court. An appeal court will only interfere with a sentence where the trial court misdirected itself by applying wrong principles of law or taking into consideration some extraneous factors irrelevant to the case. This was aptly stated in the now celebrated case of *S v Ramushu* S-25/93 at page 5 that:

“But in every appeal against sentence, save where it is vitiated by irregularity or misdirection, the guiding principle to be applied is that sentence is a pre-eminently a matter of discretion of the trial court, and that an appellate court should be careful not to erode such discretion. The propriety of a sentence, attacked on the general grounds of being excessive, should only be altered if it is viewed as being disturbingly inappropriate.”

In this case the trial court was alive to the fact that it was dealing with a matter of public interest one that undermines public confidence in the delivery of service to the public. It properly viewed the case as serious. It referred to a number of cases, albeit as properly stated the cases were based on common law. Nothing turns on the fact that the cases were based on common law. Section 170 of the Criminal Code is the codified position of bribery at common law. The essential elements remain the same. There is no need for the court to be detained by the submission.

The maximum sentence for bribery is 20 years depending on the circumstances. We were told the court *a quo* must have followed the precedence in other cases however most of the cases referred to related to public officials. For instance, in the *Mukondo v The State*⁷ that was referred to, a police officer who demanded a bribe of \$20 was convicted under s174 of the Criminal Code. A sentence of 12 months imprisonment of which 4 months were suspended was upheld. In view of the seriousness of the offence a custodial sentence cannot be said to be inappropriate. It was submitted that the court *a quo* must have followed the precedent in the case of *The State v Adolfo*⁸ where an accused bribed a Regional Magistrate. The accused was sentenced to a fine. That case is distinguishable to the one before the court. The court in that case was dealing with an ordinary member of the public. In this case the appellant was an agent of a service provider of a critical service. He is the one who initiated this corrupt conduct and persisted for some time. His moral blameworthiness is high.

Cases of bribery and corruption are on the increase and they are difficult to detect. Where the accused is properly convicted a custodial sentence is appropriate to send the right message to would be offenders. The courts must be seen to play its part in the fight against this cancer that has permeated society. As pointed out in the *Mukondo* case (*supra*) courts consider the harm to good public administration as well as the public outrage invoked by the

⁷ HH 277/17

⁸ 1991 (2) ZLR 325 (HC)

crime. Since the accused was not a public official the court must have considered suspending the sentence on condition of performance of community service. The accused has already lost his job and he has been in custody for some time pending the determination of his case. The court a quo ordered the appellant to pay restitution in the sum of US\$100 to the state. There was no basis for that order. The evidence showed that the money used as the trap money was from Tulani which he sourced from his mother and Munyaradzi. The order must be vacated.

Accordingly, the following order is made.

1. The appeal against conviction be and is hereby dismissed.
2. The appeal against sentence is allowed. The sentence imposed by the court a quo is hereby set aside and substituted by the following;

‘24 months imprisonment of which 5 months imprisonment is suspended for 5 years on condition the accused does not within that period commit any offence involving dishonesty and for which upon conviction he is sentenced to imprisonment without the option of a fine.

The remaining 19 months imprisonment is wholly suspended on condition of performance of community service. The matter is remitted to the court a quo for placement on community service.

Murisi and Associates, appellant’s legal practitioners

National Prosecuting Authority, respondent’s legal practitioners

BACHI-MZAWAZI J Agrees