AUXILIA MUNGWAIRA
and
ROSEWITTER MADEMBO
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & WAMAMBO JJ
HARARE, 20 February 2018 & 30 June 2021

Criminal Appeal

1st Appellant in person
W Chinamhora, for the 2nd appellant
R Chikosha, for the respondent

HUNGWE J: The appellants were convicted of bribery[1] after a protracted trial. They were each sentenced to 24 months imprisonment of which 12 months imprisonment was suspended for a period of five years on the usual conditions of good behaviour.

They both appealed against conviction and sentence. They were legally represented at their trial. On appeal only second appellant was legally represented. Their trial lawyers filed the grounds of appeal which addressed various issues they intended to argue on appeal.

First appellant's grounds of appeal failed to comply with r 22 (1) of the Criminal Appeals Rules applicable to the present appeal.[2] Although the grounds of appeal filed on behalf of first

[1] As defined in s 170 (1) (a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]
[2] Supreme Court (Magistrates Court) (Criminal Appeals) Rules, 504/1979

appellant were clearly not in compliance with the rules we decided to hear her on the basis that second appellant's grounds of appeal brought out the clearer and more specific grounds.

When she eventually appeared in person to argue her appeal, it was clear that the basis of her dissatisfaction with the judgment of the court *a quo* was that the court had believed the word of the complainant against her word. Being a single witness matter, in the absence of corroboration the court *a quo* was not entitled to accept the single witness evidence when it had been discredited during cross-examination. She was also unhappy with the fact that her arrest was a result of a police trap which police trap was irregularly sought and obtained. As such the evidence given by the complainant, being a result of an irregular process ought to have been ruled inadmissible. Her conviction being based on inadmissible evidence cannot be allowed to remain on the record.

Although she did not address us on the ground of appeal against sentence the Notice and grounds of appeal set out the basis of her dissatisfaction. She submits that the court *a quo* erred in that it imposed a custodial sentence when the penalty provision in the offence –creating statute permitted for the imposition of a fine. Further, because a sentence of 24 months was imposed, the court ought to have considered imposing an order for community service rather than a direct custodial sentence.

The grounds of appeal pressed by the first appellant indicated that she believed that the court *a quo* wrongly found that the complainant was a credible witness.

The judgment of the court *a quo* made the following findings of fact. Caroline Mutendereki ("Caroline") had a brother, Shinewell Mutendereki, who was in custody and was making frantic efforts to be admitted to bail.

She approached first appellant with an enquiry about whether her brother's case would be withdrawn if the family paid the complainant compensation. First appellant told her that her brother was facing a very serious charge. His denial of the allegations made his case worse. Even if they paid compensation, her brother would not be released. She could only help them if Caroline could give her money. Caroline asked her how much she wanted. First appellant told Caroline that she wanted US$1000.00 and asked her to bring it on 24 January 2012[3].

[3] Record page 3

After a careful analysis of the witness demeanor and an assessment of the totality of the evidence placed before the court, the learned magistrate concluded that there was no basis for disbelieving the complainant. He found, too, that there was corroboration of what the complainant told the court in that the events of 24 January 2012 fitted only too well with what the complainant had said. Had first appellant not asked for money, the events of 24 January 2012 would not have occurred, he reasoned.

The learned magistrate took notice of the fact that first appellant was the public prosecutor in Court 3 where Shinewell Mutendereki was appearing. First appellant had opposed the grant of bail in an application for bail launched by Shinewell Mutendereki in that court. Clearly, the money which was solicited from the complainant was for the purposes of facilitating the grant of bail. He concluded therefore that there was sufficient evidence upon which to convict the first appellant.

The first appellant made a strong submission against the reliance by the court on an irregular police trap. Even if that police trap was irregular set, the fact of the matter is that Caroline made a report to police which led to the arrest of the second appellant immediately after she had accepted money on behalf of the first appellant. First appellant denies any link with the money. Second appellant says that Caroline came and told her that first appellant had asked her to leave the money with her. There is evidence that in fact first appellant had been to second appellant's office shortly before Caroline came and left the trap money with second appellant.

What remained unclear is whether second appellant was aware that the first appellant had solicited a bribe from Caroline. It is possible that in fact this was a scheme that these two lady prosecutors were engaged in. But then the difficulty is that that remains in the realm of speculation. There was no direct evidence on the record pointing to second appellant's knowledge of the true nature of the money the witness had told her she had been instructed to leave with her.

The applicable principles of law

> The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused person beyond a reasonable doubt. This high standard of proof - universally required in civilized systems of criminal justice - is a core component

> of the fundamental right that every person enjoys under the Constitution, and under the common law, to a fair trial. It is not part of a charter for criminals and neither is it a mere technicality. When a court finds that the guilt of a person has not been proved beyond reasonable doubt, the accused is entitled to an acquittal, even if there may be suspicions that he or she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which the freedom and dignity of the individual are protected and respected. The inverse- convictions based on suspicion and speculation- is the hallmark of tyrannical systems of law.

In order to be acquitted, the version of the accused need only be reasonably possibly true. The position was stated thus by GILLESPIE J in *S v Makanyanga* 1996 (2) ZLR 231 at 236:

> "Whilst it is axiomatic that a conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of a criminal complaint still, the fact that such credence is given to testimony for the State does not mean that conviction must necessarily ensue. This follows irresistibly from the truth that the mere failure of an accused person to win the faith of the Bench does not disqualify him from an acquittal. Proof beyond a reasonable doubt demands more than that a complainant should be believed, and the accused disbelieved. It demands that a defence succeed wherever it appears reasonably possible that it might be true. This insistence upon objectivity far transcends mere considerations of subjective persuasion which a judicial officer may entertain towards any evidence."

This approach to the degree of proof required was similarly expressed by NUGENT J in *S v van der Meyden* 1999 (1) SACR 447 (W) at 448f-g thus:

> "The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond a reasonable doubt. The corollary is that the accused is entitled to be acquitted if it is reasonably possibly true that he might be innocent. (See *R v Difford* 1937 A.D. 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test from opposite perspectives. In order to convict,, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time, no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the corollary of the other."

It is trite that there is no obligation upon an accused person, where the State bears the onus, 'to convince the Court.' If his version is reasonably possibly true, he is entitled to his acquittal even

though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that, beyond any reasonable doubt, it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this court, the test is whether there is a reasonable possibility that the accused's evidence might be true.

The learned trial magistrate fell into error when he concluded that "These things happened by arrangement." Even if second appellant lied that she did not go into office 226, that lie cannot be a proper basis to convict her. It is trite that in any criminal trial before a conviction can be secured, there must be proof beyond a reasonable doubt. Proof beyond a reasonable doubt does not mean proof beyond a shadow of a doubt. It is enough for the prosecution to produce evidence by means of which such a high degree of probability is raised that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the accused's guilt. An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.

In this case we do not think that in respect of the second appellant, that threshold was attained. We hold this because an accused person does not have to prove anything in a criminal trial. The burden of proof lies squarely on the State to prove its case against an accused person beyond a reasonable doubt. Second Applicant's version of how she was arrested was confirmed by witnesses. She did not deny that she received the trap money which was said to belong to first appellant. What was critical for the state was to show beyond reasonable doubt that she knew or ought to have known that this could only be a bribe from a member of the public. Her explanation, even if one doubts its veracity, is a reasonably possibly true explanation in the circumstances. Therefore, in our view, respondent's counsel correctly conceded, after hearing Mr *Chinamora's* submissions, that her conviction may after all, not be safe.

In the result therefore, we confirm first appellant's conviction and set aside that of the second appellant and quash her sentence.

As for the first appellant's appeal against sentence we do not think that the court *a quo* fell into any error nor did it mistake itself in the assessment of sentence. Unless that court adopted a wrong principle in the assessment of sentence or considered factors that it should not have the fact that this court may have preferred a different and lighter sentence is neither here nor there.

Sentencing is within the discretion of a trial court. An appellant court can only interfere with a sentence if an error is established on the manner in which a sentence was arrived at. The fact of the matter is that this is a typical case of corruption within the halls of justice and such acts must be severely punished. Imprisonment, in our view was indicated. A fine or Community service would have sent the wrong signal to the public.

We are therefore satisfied that the appeal against sentence must be dismissed too.

Consequently, it is ordered as follows:

1. First applicant's appeal against both conviction and sentence be and is hereby dismissed.
2. Second appellant's appeal against conviction be and is hereby allowed.
3. The verdict in the Court *a quo* is set aside and in its place the following is substituted:

   "Accused two is found not guilty and is acquitted."

WAMAMBO J agrees…….

Tavenhare & Machingauta, second applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners