HENRY MOYO

And

NTOKOZO MOYO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA AND MAKONESE JJ
BULAWAYO10 JUNE 2013 AND 8 MAY 2014

Mr *Mguni*, for the appellant
Mr *W. Mabhaudhi*, for the respondent

Criminal appeal

KAMOCHA J: After hearing legal representatives of both parties this court held the view that the appeal was devoid of any merit and accordingly dismissed it in its entirety. The appellant noted an appeal to the Supreme Court against this court's decision and requires the court's detailed reasons. These are they.

The appellant who was aged 34 years was jointly charged with one Henry Moyo also aged 34 years with contravening section 188 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] conspiracy, to which they both pleaded not guilty. They were, however, found guilty despite their protestations.

Both were sentenced to undergo 4 months imprisonment. The first appellant who was no stranger to the courts had a sentence of 3 months imprisonment suspended on 7 July 2012 brought into effect. The previous conviction was for fraud.

Both were dissatisfied with both conviction and sentence and noted this appeal. They assailed the decision of the trial court on these grounds:-

"Ad conviction

(1) The learned magistrate erred in law in convicting the appellants when the said conspiracy was not supported by the State facts which are all but imagination and dangerous assumptions.

(2) The learned magistrate in the court *a quo* erred in fact by alleging that appellants were in agreement and acted in common purpose when infact the evidence of the State was deficient in that regard.

(3) The learned magistrate in the court *a quo* erred in convicting on the complainant's evidence which was doubtful with regard to the presence or otherwise of 2nd appellant and instead relied heavily on assumptions that they could have hatched a plan.

(4) The learned magistrate erred in convicting the appellants based on complainant's wrongful assumption that the appellants had conspired when 2nd appellant did not even talk to the complainant and where the evidence for the State as to what was discussed by the appellants before 1st appellant met complainant.

(5) Consequently, the absence of proof of a meeting between 1st and 2nd appellants and the absence of the 2nd appellant from the meeting between 1st appellant and complainant leaves doubt as to whether conspiracy as envisaged by the Act can be established. This therefore entitled appellants to an acquittal.

AD sentence

(a) The learned magistrate paid lip-service to the principles relating to first offenders with regard to the 2nd appellant and wrongfully imposed a custodial sentence when it was not due.

(b) The learned magistrate put excessive devotion on 2nd appellant's pending sexual offence and wrongfully considered the same as an aggravating feature in sentencing.

(c) Consequent to (a)-(b) above and in conclusion thereof, the sentence imposed by the learned magistrate in the court *a quo* is so excessive as to induce a sense of shock.

Wherefore appellants pray that-:

(1) The conviction in the court *a quo* be set aside and substituted for an acquittal.

Alternatively

(2) The sentence imposed by the learned magistrate in the court *a quo* be set aside and is substituted for a non-custodial sentence which this Honourable Court is now at large to impose."

The appellants had the following to say in their respective defence outlives.

Accused : Ntokozo Moyo stated:-

"It was on 28th I came from Bulawayo dropped off at Lupane at 1300 hours as I had commitments. On arrival I phoned complainant and asked if he was coming for his lunch at the shops as I wanted to see him. Infact I wanted to meet him for advice as he is legally knowlegded. I am related to accused two I wanted complainant to advise me as to what action I should take in view of fact I was contributing money to bail out accused two as he was continuously being made to pay monies and a beast had been paid over issue of a girl he had impregnated. So I wanted to get advice to have a solution. After the beast had been paid to the mother of the girl she remained with it for two weeks then brought it back saying the beast was sick also small, so she now wanted US$600-00 on top. So I decided to come see complainant here if he could help me find legal advice. My sole reason was to seek advice whether it was proper for us to continue paying the monies or whether we were also entitled to go to court and lodge a complainant. When I phoned complainant he advised me he will come to the shops around 5pm. I said he would meet me at Country Side bar where I would be drinking. On his arrival 4:45pm I met him there. I asked if we could sit down at a corner but he said no, we go inner where there was a room I did not know.

Once inside I presented my case to him, told him I have a brother who has a problem that he impregnated a girl below 16 years, now it is 3 years since. I went on to explain matter was resolved by elders. Monies were charged, we paid. I went on to pay surprisingly after a year the girl's mother has decided to go to police and report. That prompted us to look for two elders to approach the girl's mother on our behalf considering monies had been paid before. When the elders spoke to the woman she accepted our story, seemed to have come to her senses and she advised the elders we pay her a beast to have the matter withdrawn. I went further to explain to complainant now problem is the woman had decided to bring back the beast, is demanding more money. I said this is reason I have come to see complainant. I had advised accused two that I was intending to come to talk to complainant. Reply I got from complainant was well, I have not yet received the papers from Jotsholo, I said yes papers are at Jotsholo only wanted advice on what action to take. Complainant went on to say why the lady stayed 3 years without reporting and receiving monies, so she has a case to answer. There is no favour I wanted from him. I wanted advice only whether to go to Chiefs or any law institution. I had no money on me to present to complainant. If not mistaken we only took 2 to 3 minutes in discussion. That is all."

Accused Henry Moyo stated:-

"The matter that I impregnated a girl below 16 years am aware. It occurred 3 years back. Regarding the rest I have nothing to add or subtract. At no time did I sit down with

> accused one to hatch a plan so that accused one comes to talk to the prosecutor. Whatever he did was of his own initiative. He is my brother. Accused one, I can speculate he was pained by monies he was paying each time a demand was made. If I had a mind of seeking favours from complainant then I should have been there moreso I could not send somebody to go talk to complainant on my behalf. Me and complainant both speak Ndebele, I could have gone to him myself. That is all."

When dealing with the evidence led in court I shall refer to the appellants by their names as the record of proceedings reflects the second appellant Ntokozo Moyo as the first accused and Henry Moyo as the second accused.

The key State witness was one Sanders Sibanda who is the public prosecutor in charge at the Lupane magistrate court. He knows accused Ntokozo Moyo- "Ntokozo" as both of them used to play soccer for boozers' club at Jotsholo. He knew Henry Moyo- "Henry" by sight only as he used to see him at Jotsholo.

On the morning of 28 March 2011 when he was at work at the magistrate's court, Lupane he was approached by a certain lady called Manyoni. She approached him on behalf of Ntokozo whom she had met at Lupane Business Centre between 1000 hours and 1100 hours. Her story was that Ntokozo had sent her to request the mobile phone number of the witness without stating why he needed the number. The witness did as requested and gave her the mobile telephone number.

It turned out to be true that Ntokozo had indeed sent her to make that request. Before the lunch hour Ntokozo called him on his mobile phone inviting him for lunch at the Business Centre. The witness turned down the invitation and told him that he could not get to the business centre as he had already arranged for his lunch somewhere.

Ntokozo was not deterred by the fact that his invitation for lunch had been rejected. He went on to tell the witness that he would wait for him at Country Side bar and requested him to meet him there after work.

The witness proceeded to the meeting place after work and found Ntokozo there as promised. He was in the company of Henry Moyo. After the witness and Ntokozo had exchanged greetings, Ntokozo introduced Henry as his friend Moyo who was employed by Arex at Jotsholo.

Ntokozo called the bar lady and told her to give the witness a drink of his choice. The witness opted for a soft-drink.

Shortly thereafter Ntokozo requested to have a private discussion with the witness at some secluded place. The request was made within the hearing of the bar lady who then offered a small waitress room within the premises.

Ntokozo and the witness proceeded to the waitress's room. Whilst they were there Ntokozo told the witness that Henry had a problem. He said the two had been referred to the witness by Assistant inspector Moyo of Zimbabwe Republic Police (ZRP), Jotsholo. His story was that Henry had impregnated a young girl in the Jotsholo area. They had failed to reach an amicable solution with the girl's mother and the matter had been reported to the police but the docket had not yet been forwarded to the prosecutor at the Lupane court for prosecution.

Ntokozo suggested that they discuss the matter before the docket was forwarded from Jotsholo Police to the prosecutors at Lupane. The reason being that at the time the docket was forwarded for prosecution the witness would have been appraised of the matter and decline to prosecute. He went on to promise the witness that Henry was prepared to offer something if prosecution was declined. When Ntokozo wanted to call Henry to the room to give the details the witness did not allow him to do so. He told Ntokozo that he would wait for the docket to be forwarded from Jotsholo before a decision was made. Thereafter he parted with both appellants leaving them in the bar.

The following morning he reported the matter at C.I.D Lupane leading to the arrest of the appellants.

When it was suggested that the accused was only seeking for advice from the witness and had no intention to bride him and he infact never produced the money to attempt to do so. His reply was that he held a public office, the accused could have just gone there to see him. There was no need to invite him for a lunch at the Business Centre. There was no need for Ntokozo to wait for the witness at the Business Centre from 10am up to 5pm. He could have simply gone to the office. The witness believed that Henry was determined to offer something as suggested by Ntokozo for the offence to be compounded. The two appellants had agreed

between themselves to go and bribe the witness. They had travelled together from Jotsholo to Lupane a distance of no less than 30 kilometres. The witness said Ntokozo had told him that they had come from Jotsholo on that day in order to see him. They could not have just travelled together from Jotsholo to go and see the public prosecutor without having discussed and agreed to do so. It is idle to suggest that they just found themselves leaving Jotsholo in the morning to go and see the public prosecutor at the Lupane Court without discussing the matter and agreeing to go and do so. The suggestion did not need any serious consideration and was correctly rejected by the trial court.

It was his evidence that the suggestion by Ntokozo that he had travelled from Bulawayo and dropped at Lupane at 1300 hours could not be true. He met Manyoni at the Business Centre between 10am and 11am and requested her to go see the witness at Lupane magistrate court and ask for his mobile phone number.

The witness was cross examined by Ntokozo at some length but his story remained intact. For instance he was asked.

"You said Manyoni came in the morning?

Yes before twelve

You said 10-11 hours?

Between 10 and 1100 hours."

Ntokozo then abandoned that line of cross-examination. It was therefore established that he had been at the Business Centre by that time. The cross-examination did not take the appellant's case any further. It was just argumentative and contradictory. For instance at page 25 of the record of proceedings the following exchange took place.

> "May I know if ever I told you there was an offer from accused two. Are you a prosecutor or a lawyer?
>
> Question is vague.
>
> You indicated I said accused two was going to offer you something?
>
> Yes

So are you a lawyer or prosecutor?

I am a prosecutor

If so, then if I had money to offer, you think I would not then have to go to lawyer than give you?

I do not think for you, am a state lawyer in the performance of my duties, that is why I reported the matter.

I did not came to offer you any money, if I had any, then I would have gone to look for a lawyer?

You were in the forefront of the matter yourself.

I only wanted you to help me find way forward.

I was pumping money over the issue, the mother continuously demanding money.

You contradict yourself, you said am not a lawyer, then why did you not go to a lawyer for advice. Why come to the prosecutor over a criminal matter, you wanted a consideration from me."

The trial court cannot be faulted for accepting the evidence of this witness. It reads well and is clear. It admits of no doubt that appellants who are brothers left Jotsholo which is 30km plus to go to Lupane. The purpose of the journey was to go and see the public prosecutor of the Lupane court. They planned not to go and see him at his work place. Ntokozo played a leading role. He sent Manyoni to go and see the public prosecutor and ask for his mobile phone number on his behalf. Through Ntokozo the two firstly invited him for lunch at the business centre. When that failed they promised to wait for him at country side bar after he had finished work.

At the bar Ntokozo led the discussion of how Henry had been arrested in connection with a case of impregnating a girl under the age of 16 years.

He told the witness that Henry would make an offer if the witness declined to prosecute.

He clearly had discussed and agreed with Henry on what they were going to do. The two had even gone beyond conspiracy. They infact attempted to bribe the witness when they made it clear that Henry was prepared to make an offer if the witness had declined to prosecute him.

The trial court cannot be faulted in finding the appellants guilty of conspiracy. Similarly the sentence imposed by the trial court is unassailable. Ntokozo knew that Sanders Sibanda was the prosecutor in-charge at the Lupane magistrates' court. He deliberately and with a lot of resolve conspired with Henry to corrupt a state prosecutor. He set out from Jotsholo to Lupane to go and do that:-

He was prepared to send Manyoni to the public prosecutor. He invited him for lunch but when his invitation was rejected he was still persistent. He waited for him from 10am to 5pm. Shortly after the arrival of the witness Ntokozo made his intention to bribe the witness known.

In *Ngara v The State* 1987(1) ZLR 19(SC) GUBBAY JA (as he then was) stated that:-

> "Corruption is a crime difficult to detect and more difficult to eradicate. If unchecked or inadequately punished it will disadvantage society by depriving it of a good, fair and orderly administration. Deterrence and public indignation are the factors which must predominate above all others in the assessment of the penalty."

The two appellants were trying to bribe and corrupt a public official- a public prosecutor. That is a very serious matter. In *S v Paweni and another* 1985 (2) ZLR 133(S) at 140 BECK JA had this to say:-

> "Bribery of public officials is a most serious evil in any society and it is particularly to be guarded against in a developing country ----. Is a corrupt and ugly offence striking cancerously at the roots of justice and integrity, and it is calculated to deprive society of a fair administration. In general, courts view it with abhorrence."

There is nothing wrong with the sentence that was imposed against the appellant by the trial court. The appeal against sentence is also without merit.

In the result the appeal was dismissed in its entirety at the end of arguments by both legal practitioners.

Makonese J.....I agree

Hwalima, Moyo and Associates, appellants' legal practitioners
Attorney-General's Office, respondent's legal practitioners