HAMISH MASOCHA
vs
THE STATE

HIGH COURT OF ZIMBABWE
GUVAVA AND OMERJEE JJ
HARARE 8 November 2001 and 16 January 2002

Mr *Selemani,* for the appellant
Mr *Nemadire,* for the respondent

GUVAVA J: This is an appeal against both conviction and sentence which was imposed by the magistrates court sitting at Mutare on 2 August, 2000. The appellant was charged with contravening section 3(1)(a)(i) of the Prevention of Corruption Act [*Chapter 9:16*] or alternatively Extortion. The appellant pleaded not guilty to the offences but was convicted on the main charge and sentenced to 9 months imprisonment of which 5 months were suspended on condition of good behaviour.

The facts which gave rise to these charges were mainly common cause. It was common cause during the trial that the appellant arrested one Howard Mandiwanza (whom I will refer to as the complainant in this case) on the 11th December, 1999 for a suspected contravention of section 46(1) of the Road Traffic Act [*Chapter 13:11],* commonly known as drunken driving. It was not disputed that the appellant took the complainant to Chipinge Charge Office where he handed him over to traffic details who authorized that blood samples be extracted from him in order to ascertain the alcohol content in his blood. It was not disputed that the following day the appellant enquired about the progress of the case from details in the charge office. It was not disputed that the blood samples which were extracted from complainant went missing from the charge office before any entries had been made in the criminal report book. It is also not disputed that after the complainant was

arrested by the appellant they met on about four occasions around Chipinge town. Although the meetings were unplanned, it was during these meetings that the appellant persistently requested $1 000 from the complainant. At one of the meetings the appellant also requested the use of the complainant's motor vehicle so that he could go to Murehwa to pay lobola.

The appellant averred in his grounds of appeal that the evidence before the court *a quo* was so riddled with inconsistencies that the trial magistrate erred in accepting the evidence of the complainant when it was clear that he had a lot to gain by falsely implicating the appellant.

Secondly he submitted that the trial magistrate erred in finding that the appellant destroyed the blood samples when there was no evidence to that effect, and finally that the trial magistrate erred in rejecting the appellant's story that he had been framed by the complainant and officers from the traffic section. The submissions made by Mr *Selemani* were that if the court *a quo* had properly considered these issues it would not have found that the appellant solicited a bribe from the complainant.

The learned trial magistrate has in his judgement carefully analysed all the evidence before him. The trial magistrate correctly accepted the evidence of the complainant as the inconsistencies between his evidence and that of the other State witnesses were very minor in nature and did not go to the root of the matter. In any event, the evidence of the complainant was corroborated in all material respects by witnesses who did not have an interest in the matter. In our view the court *a quo* correctly accepted the evidence of the complainant. It also found that there was overwhelming evidence that the appellant had interfered unnecessarily with the progression of the complainant's case for drunken driving. Constable Mautsi's evidence that the appellant had collected the complainant's blood samples was corroborated by the evidence of Assistant Inspector Nyahanana, who told the court

that she had phoned the appellant after she had been informed that the appellant had taken the blood samples. Her explanation of the events was that the appellant had told to her that he had cautioned and forgiven the complainant. Although Constable Nyanhete stated that he did not witness the appellant being given the blood samples by Constable Mautsi, he confirmed that he saw a khaki envelope but could not recall whether the envelope was in the appellant's possession or that of his companion. The appellant himself does not deny the meeting on the morning after the complainant's arrest. In our view the trial magistrate correctly found that the appellant had taken possession of the blood samples.

The circumstances surrounding the loan of the $1 000 are clearly suspicious. The trial magistrate found that prior to this incident the accused had never sought a loan from the complainant. The complainant testified that he met the accused on at least eight separate occasions within a space of two weeks after his arrest and on those occasions the appellant requested money as he had made arrangements for his case. The appellant confirms at least four of the meetings and also admits that on one occasion he asked for the complainant's motor vehicle in order to go to Murehwa.

The appellant sought to argue that it was the complainant who offered to give him the $1 000 and yet the appellant had to pester the complainant persistently to give him the money. There is also on the record no explanation on how the money was going to be returned to the complainant and when. The complainant was not a friend of the appellant and therefore it could not be presumed that the money would be returned whenever the appellant wished. Mr *Selemani* for the appellant conceded that the appellant and the complainant were mere acquaintances. It was therefore rather suspicious that an arresting detail would seek a loan from the person whom he had arrested. The explanation that the appellant was not in the traffic section and therefore that there was nothing untoward about him seeking a loan from the

complainant does not appear plausible and in our view is not acceptable. The appellant sought a "loan" from a person whom he had arrested, scarcely 24 hours after the arrest. On his own admission he met the complainant on no less than four occasions in the space of two weeks and on all those occasions he was asking for something from the complainant. The blood samples which had been extracted from the complainant went missing and were never found, and yet there was clear evidence on record that Assistant Inspector Nyahanana sent the complainant to the hospital for the extraction of blood. There was also evidence on record that when she challenged the appellant about taking the blood samples he had indicated that he had cautioned and forgiven the complainant. The only reasonable inference that the court *a quo* could draw from these circumstances was that the appellant had solicited a bribe from the complainant and his explanation that he had been framed by the complainant and other police officers from the traffic section does not ring true in view of all the evidence before the court.

During the hearing there was argument from Mr *Selemani* that convictions based on a trap are not safe and should not be upheld. To that end he cited the case of *R v Clever* 1967 RLR 247. This case can however be distinguished from the present case as the conviction is not based on the evidence of the trap alone, but there was overwhelming evidence other than that of the trap. In fact, from the appellant's own testimony, he does not dispute having sourced the $1 000 from the complainant nor being found in possession of the marked currency. In our view therefore the appeal against conviction has no merit.

Turning to the issue of sentence, it was submitted on the appellant's behalf that the trial court had paid lip service to the mitigatory factors of the case and that if they had been properly taken into account, the court *a quo* should have imposed a non-custodial sentence.

Mr *Nemadire* argued very persuasively that the trial court took into account all the factors before it and imposed an appropriate sentence. An examination of case law shows that the courts have, over the years, always viewed corruption with abhorrence particularly when it has related to police officers or people in the employment of the State. This has been reflected in the sentences which have been meted out.

This case is particularly aggravated because the appellant brazenly took into his possession and destroyed the blood samples of the complainant, thereby destroying the evidence for the drunken driving charge. To date the complainant has not been tried for the offence. The accused thereafter persistently and aggressively pursued the complainant, demanding the $1 000, and on one occasion asked for the complainant's motor vehicle. Such behaviour in our view can only be curbed by imposing deterrent sentences. In the case of *Attorney General of Zimbabwe v Bryan Johnsen & Patrick Maganja* SC 119-98 GUBBAY CJ said about the approach to sentencing on conviction of corruption:

> "Where the offender is a police officer or agent of the State, a custodial punishment is called for unless there are cogent reasons which indicate the contrary."

The courts have taken this position in relation to offences involving corruption because corruption is difficult to detect by its very nature. In *S v Ngara* 1987 (1) ZLR 91 (SC) the court said –

> "Any form of corruption resorted to by government servants, especially police officers whose duty it is to uphold the law and by their conduct set an example of impeccable honesty and integrity, is rightly viewed by the courts with abhorrence."

In *S v Choba* SC 114-92 the appellant solicited a bribe of $135 from the complainant in order to drop the charges and he was sentenced to 12 months imprisonment with 2 months suspended. In *Siwawa v S* SC 195-95 the Supreme

Court confirmed the sentence of 12 months imprisonment with 5 months suspended where the appellant had solicited a bribe of $2 000 from an accused person promising to destroy his docket.

We have found nothing, on the papers before us to persuade us to change the approach which has been taken by the courts in previous cases nor found any misdirection by the court *a quo*.

Accordingly the appeal against both conviction and sentence is dismissed.

Omerjee J agrees.

Messrs Gonese & Ndlovu, applicant' legal practitioners.
The Attorney-General's Office, respondent's legal practitioners.