CLEVER HWANDE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAKARAU and KUDYA JJ
HARARE, 17 March 2005

Criminal Appeal

Mrs *Gasa,* for appellant
Mrs *Chimbaru,* for respondent.

MAKARAU J: The appellant was convicted after contest by a magistrate's court on count of contravening s3 (1)(a) of the Prevention of Corruption act [*Chapter 9.16*]. He was sentenced to 18 months imprisonment, 6 of which was suspended on the usual conditions of good behaviour. He appealed to this court against both the conviction and the sentence. The respondent has filed a statement in terms of s35 of the High Court Act [*Chapter 7.06*] conceding the appeal in its entirety. For reasons that follow hereunder, the concession by the respondent, that the conviction of the appellant is insupportable was Properly made.

The appellant was a detective constable in the Zimbabwe Republic Police. At the material time, he was stationed at CID Suspects, Harare. It is alleged that during the month of January 2004, he unlawfully and corruptly solicited or accepted or attempted to obtain from one Richard Nyatsanga and one Titus Pasipachaona, the sum of $640 000-00 as an inducement for not arresting the two.

In support of its case, the State called four witnesses. These were Richard Nyatsanga ("Richard"), Titus Pasipachaona ("Titus"), Cosmas Mukwesha and Peter Chigami. Richard and Titus vend second hand items at Machipisa Market, Harare. During the material time they had in their possession 2 refrigerators, a microwave, a keyboard and a fax machine that were stolen property. The appellant was investigating the matter of the theft of the items.

Richard was the one the appellant was allegedly dealing with directly in committing the offence alleged. One would therefore expect the evidence of this witness

to detail the amount that was involved and the clear circumstances under which the amount was solicited for the charge to be sustained. To the contrary, the evidence of this witness is inconsistent specifically on the material aspects of the offence and generally. He mentioned various figures as having been the amount that the appellant solicited from him. These were $2million, $300 000-00 and $1,5 million respectively. At no stage did he mention the figure of $640 000-00 that appears on the charge sheet. He personally did not hand over any money to the appellant.

In assessing the cogency of the evidence that was before it at the end of the trial, the court *a quo* did not give its assessment of the credibility of this witness. It is important for trial courts to always assess the credibility of the witnesses appearing before it for the guidance of appeal courts. Where a finding of credibility has been done by the trial court, an appeal court is always slow to disregard such a finding[1]. Where such a finding is however not made, the appeal court is placed in the less advantaged position of having to assess the credibility of the witness on the basis of the record without the "evidence of the demeanor of the witnesses, their candour or pertisanship and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial".[2]

Had the trial court assessed the credibility of Richard, it would have realized that his testimony was not safe to rely on. The evidence was glaringly inconsistent even to one reading the record only and not having witnessed the actual trial. On at least three occasions, the witness admitted under cross-examination that he had not told the court the whole story of his interaction with the appellant as the story was long. One wonders what he left out and his motive for so doing.

In his evidence in chief, the witness testified that he had purchased the allegedly stolen items from a hardware in Rugare. Under cross-examination, he alleged that he had purchased the items from two persons whose names were given as Tapiwa and Taguma without any second names. When asked to produce proof of such sale he said it had been destroyed by rain. Later he said the property belonged to someone who was leaving for London who advised him that he was selling the property as he intended to relocate. This

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[1] See *S v Isano* 1985 (1) 62 (S) .
[2] Per LORD MAcMILLAN in *Thomas v Thomas* [1947] 1 All ER 582.

person was allegedly the brother of the appellant. At no stage did he admit that the property was stolen, thereby eroding the basis upon which the charge against the appellant was brought. If the property was not stolen, then the appellant had no right to arrest Richard and Titus for being in possession of such property and could therefore not show the two a favour by not arresting them.

Again, in assessing the credibility of Richard and Titus, the trial court had to bear in mind that these two were accomplices of the appellant in that they also committed an offence in terms of he same section by agreeing to offer the alleged bribe. [3] Hence, the trial court had to warn itself against the danger of being misled by a witness who was closely connected to the commission of the offence and sought to distance himself from any wrongdoing. In *casu*, the trial court did not appear to have done so and thus erred in simply accepting the evidence of these two witnesses in the absence of such caution.

The evidence of Titus, apart from the observations made above that it had to be treated with caution, did not add much to the State case as Titus testified that Richard was dealing directly with the appellant. He thus could not lead evidence as to how much was solicited and for what favour, especially in view of Richard's testimony that the property was lawfully purchased.

The evidence of the remaining two witnesses is on events after the alleged bribe had been solicited and does not plug the holes in the State case as outlined above.

In the absence of cogent and reliable evidence that the appellant solicited the sum of $640 000-00 or any other amount from Richard in return for not arresting him for being found in possession of stolen property, the court a quo ought to have acquitted the appellant. Instead, the trial court embarked on an exercise of applying the *res gestae* doctrine in circumstances that reveal the trial court's limited understanding of the doctrine. The appellant had not challenged the admissibility of any evidence before the trial court. Evidence is admitted in circumstances where it would not ordinarily have been admitted if it is closely related in time and circumstances that not to admit it would prevent the trial court from establishing the truth. The evidence is admitted on the basis that it is regarded as forming part of the *res gestae* or the whole transaction in dispute[4].

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[3] *S v Ngara* 1987 (1) ZLR 91 (S).

[4] see generally, Hoffman & Zeffett: The *South African Law of Evidence* 4th Ed p152ff

The doctrine is an imprecise phrase that is used to justify the admission of ordinarily inadmissible evidence and is not a tool to assist the court in assessing the cogency of the evidence already before it as was sought to be done by the court *a quo*. It had no application in the trial of the appellant.

With respect, it appears to me that the trial court tied itself in knots when assessing the evidence before it. It adopted the wrong approach and sought to put the onus on the appellant to establish his innocence. It also ignored the common sense approach adopted by prudent trial courts of setting out the essential elements of the offence one is trying and establishing seriatim if there is evidence beyond reasonable doubt on each of these elements. Instead, the trial court scrutinised the defence put forward by the appellant and found it "incoherent and unreliable" following which it found that the State had proved its case beyond reasonable doubt. It is trite that the absence of a coherent and reliable defence by an accused does not necessarily translate into proof beyond reasonable doubt as to the guilt of an accused. Assessing the cogency of evidence in a criminal trial is never the act of balancing the State case against the defence case to establish which one is more credible. The onus is always on the state to prove its case beyond reasonable doubt. In saying this, I am keenly aware that s15 of the Prevention of Corruption Act provides that a rebuttable presumption arises that once it is proved that that an agent solicited, accepted obtained, agreed or attempted to obtain a reward for himself or for any other person, he did so in contravention of the Act. The presumption created by this section does not shift the burden of proof from the State to the accused. In any event, in the circumstances of this case and for the reasons already given above, it was not proved that the appellant had solicited for the bribe. The presumption did not come into play and there was nothing for the appellant to rebut.

In the result and on the basis of the foregoing, the appeal is allowed in its entirety.

Kudya J concurs.

Mushonga & Associates, appellants' legal practitioners,
Attorney-General's Office, respondent's legal practitioners.