WISMON MARUFU
and
MEMORY MARUFU
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA, MUSAKWA JJ
HARARE, 3 July 2017

CRIMINAL APPEAL

N Mushangwe, for the appellant
E Nyazamba, for the respondent

CHATUKUTA J: On 3 July 2017, we dismissed the appellants' appeal against both conviction and sentence. We gave *ex tempore* reasons for our decision. The appellants have requested written reasons. These are they.

The appellants were convicted after contest of contravening *s* 170 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter* 9:23] (the Code). Each was sentenced to 18 months of which 6 months were suspended on condition of future good behavior.

The facts upon which the conviction was based are as follows. One Clifford Chikomboya, who is the 2nd appellant's husband, was arrested and detained by the police for being found in possession of property believed to have been stolen. In a bid to have him released, the appellants offered to one Detective Sergeant Hweta a sum of US$250 as a bribe. Detective Sergeant Hweta invited another police officer to witness the appellants handing over the money upon which the two appellants were arrested. The appellants in their defence had stated that Detective Sergeant Hweta had promised to assist them secure a lawyer for Clifford Chikomboya. The amount handed to the Sergeant was meant to be legal fees for the lawyer.

The following is a summary of the main ground of appeal against conviction; the court *a quo* erred in convicting the appellants:

a) on the basis of a trap not sanctioned in terms of the relevant police instructions;
b) where there were inconsistencies in the evidence of the state witnesses;
c) where the appellants had proffered a reasonably possible defence and that the appellants may have misunderstood the purpose of the money they were asked to bring to the police station.

Mr *Mushangwe* submitted in the main that Detective Sergeant Hweta was required under the Police Duties and Investigations Manual to seek authority from a senior officer of the rank of superintendent or above to mount a trap. The setting up of the trap was authorized by an inspector. The entrapment was therefore flawed hence the conviction was equally flawed. Detective Sergeant Hweta had assured the appellants that he would assist them to engage a legal practitioner to represent Chikomboya. Hweta admitted under cross examination that he was aware that the sum of US$250 was intended for legal fees for the lawyer. The appellants were not aware that the mount was to be used to trap them. The court a quo did not adequately assess the credibility of the state witness.

The respondent conceded, in very brief heads of argument that entrapment was a defence to a charge of bribery where it was not properly sanctioned. Mr *Nyazamba* summarised in the heads the procedure set out in the Police Duties and Investigations Manual (by Masango, 1st ed). He concluded that the procedures were not complied with hence the conviction was improper.

The Code provides that entrapment is not a defence to any crime. Section 260 of the Code provides as follows:

> **"260 Entrapment no defence to crimes**
> It shall not be a defence to a crime that the accused was trapped into committing the crime concerned, that is to say that the police or other authority or person, by using any inducement or encouragement, caused the accused to commit it for the purpose of obtaining evidence of its commission, but a court may, where it considers that unfair or undesirable entrapment methods were used by the police or other authority or person, take the manner of such entrapment into account as a factor in mitigation of sentence."

Entrapment can only be a mitigating factor and only where unfair or undesirable entrapment methods were used.

Despite bringing to his attention the provisions of *s* 260 of the Code, Mr *Mushangwe* persisted with his argument that the appellant should not have been convicted because the procedures that the police are required to comply with in setting up a trap were not followed. We were constrained to understand the difficulties that he was exhibiting in understanding that entrapment was not a defence in view of the clear wording of s 260. He however ultimately conceded that entrapment is not a defence to any crime.

Mr *Mushangwe* did not only concede that entrapment was not a defence, he also conceded that there were no major inconsistencies in the evidence of the state case. He however persisted with his submissions that Detective Sergeant Hweta admitted that the money was intended for a lawyer to represent Chikomboya. Mr *Mushangwe* referred to the cross examination of Detective Sergeant Hweta by the 1st appellant. The following is the relevant cross examination at p 17 of the record:

"Q Don't you know a young man who was said to the (*sic*) bringing money for a lawyer?
A No I don't.
Q Didn't I talk to you about the lawyer in the absence of Moyo
A No
Q Do you deny I was asked about the person who had called me?
A I wasn't there
Q Did I not tell you I had come in response to a phone call
A Which phone call?"

It is clear from the above that Detective Sergeant Hweta professed lack of knowledge of any arrangement for a lawyer. Mr *Mushangwe* again conceded that the above did not reflect that Hweta had accepted that he was aware that the money was for a lawyer.

Regarding the adequacy of the reasons for judgment, whilst the judgment is brief, Mr Mushangwe yet again conceded that the trial magistrate commented on the credibility of the state witnesses. At p 7 of the record, the trial magistrate, after summarizing the evidence of the state witnesses, made the following assessment:

> "I am impressed by the coherence and consistency of the 3 state witnesses. They calmly presented their evidence and remained with the tune even during the emotional cross examination."

Mr *Nyazamba*, following the exchange between the court and Mr *Mushangwe* and the concessions made by Mr *Mushangwe*, withdrew the respondent's concession and supported the

conviction. The withdrawal of the concession was in our view proper. Given all the concessions by Mr *Mushangwe*, the appeal against conviction cannot therefore succeed.

Turning to the appeal against sentence, it is trite that sentencing is within the discretion of the trial court. The appeal court will only interfere with the sentence where it is manifestly excessive so as to induce a sense of shock or where the court's sentencing discretion has not been exercised judiciously.

The appellants' counsel submitted that the court a quo did not give "earnest" consideration to the other sentencing options such as a fine or community service. The court did not give due regard to the mitigating factors. In particular, it did not consider that both appellants were first offenders and the 2nd second appellant, being a female offender should have been treated differently. It further did not assist the appellants to adequately address it in mitigation. Had it done so, it would have established that the 2nd appellant, had recently lost a child and this was mitigatory.

The reasons for sentence are indeed very terse and lack the detail that is expected of a judicial officer. This, in my view, amounts to misdirection. However, in order for us to interfere with the sentence, the misdirection must be gross and result in substantial miscarriage of justice. (See *s* 38 (2) of the High Court Act [*Chapter 7:06*] & *S* v *Gono* 2000 (1) ZLR 63.)

We are of the view that the sentence was not manifestly excessive. The offence is doubly serious. Firstly, had Detective Sergeant Hweta succumbed to temptation and accepted the bribe, the effective administration of justice would have been adversely compromised with the release of Chikomboya without following due process. Secondly, the reputation and integrity of the police force would equally have been compromised. The court takes judicial notice of the concerns of the public at large over the levels of corruption. As stated in *S* v *Chogugudza* 1996 (1) ZLR (S) 28, corruption is viewed with abhorrence and calls for imprisonment unless there are cogent reasons to the contrary. At p 43 A - D, GUBBAY CJ (as he then was) remarked:

> "This brings me to the matter of sentence. Any form of corruption is rightly viewed by the courts with abhorrence. It is a dangerous and insidious evil in any country, particularly in a developing one. It is difficult to detect and more so to eradicate. If unchecked or inadequately punished, it will disadvantage society by depriving it of good, fair and orderly administration. Deterrence and public indignation are the factors which must predominate above all others in the assessment of the appropriate penalty. See the remarks of Baker J in *S* v *van der Westhuizen* 1974 (4) SA 61 (C) at 65G, quoted with approval in *Attorney-General* v *Chinyerere & Anor* 1983 (2) ZLR 329 (S) at 332E-G and *S* v *Paweni & Anor* 1985 (2) ZLR 133 (S) at 141B-D. As a general rule, therefore, it

is right to approach such cases on the basis that imprisonment is called for unless there are cogent reasons which indicate the contrary. See *S* v *Newyear* 1995 (1) SACR 626 (A) at 628i-629a."

The sentence imposed cannot under the circumstances be said to be manifestly excessive. Whilst the 2nd applicant is a female first offender, that is not a basis for or entitlement to a non-custodial sentence. (See *S Muchamba* 1992 (1) ZLR 102 at 106 F.) The 2nd appellant was present at all times when the offer of a bribe was made. She would have been a beneficiary of the offence with the release of her husband. She therefore does not deserve any lesser treatment than the 1st appellant. The appellants therefore did not offer any cogent reasons why an effective custodial sentence was not warranted.

In the result, we dismissed the appeal against both conviction and sentence.

MUSAKWA J concurs……

Mushangwe & Company, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners