XU YAZHOU
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA, MUSAKWA JJ
HARARE, 3 July & 20 November 2017

CRIMINAL APPEAL

Z Chadambuka, for the appellant
F I Nyahunzwi, for the respondent

CHATUKUTA J: The appellant was convicted of contravening s 157 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to pay a fine of US$400 in default of payment to undergo four months' imprisonment. The court further ordered that the appellant be held by prison authorities and be handed over to the Immigration Department for immediate deportation soon after payment of the fine or serving the term of imprisonment.

The appellant was arrested after the police received a tip off that the appellant was in possession of minerals without a relevant licence. The police waylaid the appellant at his home. They conducted a search on his person and in his vehicle. Substance believed to be cocaine was recovered on his person. The substance was taken to the ZRP Forensic Science Laboratory where it was confirmed to be cocaine weighing 0.94 grams with a street value US$75.20.

The appellant denied the charge alleging that the cocaine had been planted by the arresting police officers. He alleged that upon his arrest he was contacted by phone a Commissioner Magejo of the Zimbabwe Republic Police. Magejo spoke with the arresting detail Evidence Hanya. The appellant overheard Hanya telling the Commissioner that the cocaine had been recovered in the car under the seat and not on his person. The appellant produced before the court what he purported to be a recording of the telephone conversation. Hanya disputed the contents of the recording. He testified that the recording had been doctored.

The state called four witnesses, all police details who were present when the appellant was arrested. The appellant and one Erick Regai Magejo, a Commissioner in the Zimbabwe

Republic Police, testified for the defence. The trial magistrate concluded after hearing evidence that the four police officers were credible witnesses. He disregarded Magejo's evidence on the basis that he was not present when the cocaine was recovered. He further concluded that possibility that the telephone recording, given advances in technology, might have been tampered with could not be discounted.

Aggrieved by both the conviction and the sentence, the appellant filed the present appeal. The appeal was not opposed and the respondent filed a notice in terms of s 35 of the High Court Act [*Chapter 7:06*] conceding to the appeal. The basis for both the appeal against conviction and the concession by the respondent was that it was too much of a coincidence that the appellant was searched and found in possession of the cocaine when in fact the reason for the raid was that the appellant did not possess a licence authorising him to possess and export gold. All that the police officers should have done was ask the appellant to produce his licence and search his home for illegally held minerals. It was further contended that the court misdirected itself by disregarding the telephone recording which exonerated the appellant.

The court *a quo* cannot be faulted for finding the state witnesses to be credible. Whilst there were some discrepancies in the evidence of the witnesses the discrepancies were not material to render the witnesses not credible. Although, the appellant went to great lengths in making submissions on the discrepancies, it appears to me that the determination of this appeal rests on whether or not the trial magistrate misdirected himself by disregarding the telephone recording.

The law on the admissibility of video and audio tape recordings was considered in *S* v *Ramgobin & Others* 1986 (4) SA 117 where it was held that for the recording to be admissible in evidence, it must be proved that the exhibits are original recordings and that there exists no reasonable possibility of "some interference" with the recordings. (See also *S* v *Adolfo* 1991 (2) ZLR 325 (HC) at 328 F-G T, *S* v *Tsvangirai* 2004 (2) ZLR 210 and *Mlungisi Mdlongwa* v *The State* [2010] ZASCA 82 at para 23.)

It is not clear from the record whether the recording was being played directly from the receiver the appellant had used or the recording was a reproduction from the phone. The recording was admitted into evidence despite the State persistently opposing its production questioning its originality and authenticity. Hanya testified that when the appellant phoned Magejo, he had to walk for some distance from where they were standing. The appellant walked back to hand over the phone to him so that he would speak with Magejo. Hanya moved some distance as he spoke with Magejo and had to walk back to the appellant to give him back the

phone. It was not in issue that the movement was not heard on the recording. Further, Hanya persisted that the voice appeared to be his but part of the conversation attributed to him was false. He denied ever telling Magejo that when he went to raid the appellant, it was after a tip off that the appellant was in possession of cocaine and that he recovered the cocaine in issue under a seat of the car. He further testified that Magejo never referred to him as "shamwari" (meaning "friend") when he spoke on the phone.

The appellant conceded that when Hanya identified himself as the police he searched his vehicle not for cocaine but for minerals. It was therefore inconceivable that Hanya would have told Magejo that the search was for cocaine. Magejo also conceded that it was unprocedural to address Hanya as "friend". Police protocol required that he address him by his rank and Hanya would in turn be expected to address him as "Sir". The explanation that he called Hanya "friend" because he wanted to "break the ice" raises the question what ice needed to be broken if the conversation was innocent. It was uncharacteristic of a senior talking to a junior in the manner that he did and particularly to an officer who was discharging his duty.

In the present case the originality, authenticity and accuracy of the audio recording was not tested and remained in doubt. The onus rested on the appellant who produced the recording to establish the originality and authenticity. Mr Chadambuka conceded that this is a case that cried out for the appellant to have called an expert witness to establish the originality and authenticity of the recording. The concession was in my view proper for two reasons. The first reason is that Hanya disputed that the voice in the recording was his and the contents of the conversations were also not his. Secondly, the relationship between the appellant and Magejo impacted of the credibility of Magejo. Magejo, being a Commissioner, is a very senior officer in the Zimbabwe Republic Police. A commissioner ranks third in the police hierarchy, after the Commissioner General and the Deputy Commissioner Generals. The appellant and Magejo have known each other for almost six years since the appellant came into the country. They were friends. When the appellant requested to phone his legal practitioner, he instead phoned, his friend and senior officer in the Police. His evidence was that he wanted advice on how to proceed yet he would have obtained that advice from his legal practitioner. Magejo, who was in a meeting with other police officers was willing to abandon the meeting long enough to talk with both the appellant and Hanya. The import of his testimony in this regard was that assisting the appellant as he did was more important than attending the meeting. The inescapable conclusion is that the appellant wanted Magejo to pull rank and extricate him from the situation he had found himself in. The appellant and Magejo met soon after the appellant was released

on bail. It is this last interaction that prompted Magejo to phone the Officer Commanding Minerals making follow ups on the matter. Magejo testified that the Officer Commanding advised him to let the law take its course. That is precisely what Magejo ought to have done from the onset. After he became aware of what he alleges was a change in Hanya's evidence he considered it prudent to wait for the hearing to testify for the appellant instead of providing the investigating officer with his statement of the nature of his conversation with Hanya.

The inescapable conclusion of the manner the appellant and Magejo communicated is that there was an attempt to defeat the course of justice. The appellant was fortunate that the State did not prefer such charge against him.

It is for these reasons that I am of the view that the trial magistrate did not misdirect himself in discounting the audio recording. The trial magistrate had erred though in admitting the recording not withstanding that its originality and authenticity had not been proved. Both Magejo and the appellant who were vouching for the originality and authenticity of the recording were at the centre of the suspicious dialogue and in no way experts. The trial magistrate however redeemed himself by not according the recording any probative value on the basis that the record may have been tampered with. In the result, the conviction is safe. We therefore do not find favour with the concession by the respondent.

Turning to appeal against sentence, the appellant raised in his notice of appeal two grounds: that the sentence was so excessive as to induce a sense of shock. It was further contended that the order relating to deportation had no basis at law. The appellant abandoned the first ground in his heads of argument and persisted with the second ground. The respondent did not address the court on sentence.

The Magistrates Court is a creature of statute. Consequently it is bound by the four corners of its enabling legislation (*Founders Building Society* v *Mazuka* 2000 (1) ZLR 528 (HC) and *Nyaguwa* v *Gwinyayi* 1981 ZLR 25). Section 157 of the Criminal Law Code does not empower the trial magistrate to order the deportation of the appellant. A convicted person may only be handed over to Immigration officers for deportation in terms of *s* 48 of the Immigration Regulations, 1998 (SI 195 of 1998) where there person is a prohibited person in terms of the Immigration Act. It is not in issue that the appellant became a prohibited person by virtue of s 14 (1) (e) (i) of the Immigration Act. The section provides that a person convicted of an offence specified in Part I of the Schedule to the Immigration Act is a prohibited person by virtue of the conviction. Possession of a dangerous or habit-forming drug, of cocaine is such a drug is an offence under Part I of the Schedule.

Section 48 provides that:

> "If a prohibited person who has arrived in Zimbabwe or a person who is being detained in terms of subsection (1) of section 8 of the Act is arrested upon a criminal charge, he shall be handed over to the custody of an Immigration Officer at the conclusion of the criminal proceedings or at the expiration of any sentence of imprisonment imposed upon him, as the case may be, and shall thereafter be detained under and subject in all respects to this Act and these regulations."

The section allows for the handing over of a convicted person to an Immigration Officer for deportation in two instances. The first instance is where the person is already a prohibited person before arrival in Zimbabwe and enters Zimbabwe anyway and is then arrested upon a criminal charge. The second instance is where the person has been detained by an immigration officer in terms of s 8 of the Immigration Act on reasonable suspicion of having entered into Zimbabwe in violation of the Immigration Act. He was not, under the circumstances, empowered to prescribe how to deal with a prohibited person. The trial magistrate exceeded his jurisdiction. Further, he did not explain the legal basis for directing the release of the appellant to the Immigration Officer.

The State did not lead evidence that the appellant fell under any of the two instances. Despite the trial magistrate's response to the grounds of appeal, that because the appellant is a foreigner who had been convicted he should be deported, it was not within his powers to order the deportation.

In the result, it is ordered that:

1. The appeal against conviction be and is hereby dismissed.
2. The sentence is amended with the deletion of all reference to referring the appellant to the Immigration for deportation.

MUSAKWA J agrees……

Magwaliba & Kwirira, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners