Judgment No. HB 188/11
Case No. HCA 302/11
Xref No. REG 188-9/03

BENJAMIN MAKETO

AND

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU AND MATHONSI JJ
BULAWAYO 14 NOVEMBER AND 1 DECEMBER 2011

Appellant in person
Mr K. Ndlovu for the state

Criminal Appeal

MATHONSI J: On 27 December 2001 a serious armed robbery was committed at Johannesburg International Airport, South Africa in which cash and jewellery worth ZAR 117 million were stolen. Some of those suspected of having committed the offence were believed to had crossed the border into Zimbabwe where they were believed to be hiding and spending the proceeds of the robbery.

The South African Police sought the assistance of their counterparts in Zimbabwe, the Zimbabwe Republic Police, in tracking down the suspects and bringing them to book. This resulted in meetings being held between the two groups of law enforcement agencies at Bulawayo Provincial Headquarters in January 2002 on the issue and strategies being put in place to investigate the matter and arrest the suspects.

Names of those suspects were provided at those meetings and they included Khulekani Ncube alias Davida Ncube and Ngoneni Mafu alias Sotsha Mafu. The appellant was then a superintendent in the Zimbabwe Republic Police and the officer commanding Criminal Investigations Department (CID) Law and Order Section in Bulawayo. When teams were formed to investigate the matter, he was made the overall commander of those teams.

Much later, on 31 July 2002, the appellant had, in the course of his duties, received information that there was a suspected armed robber who had secured sanctuary at a house in Mahatshula suburb of Bulawayo. He put together a team of detectives from his Law and Order

Section and the Homicide Section of Criminal Investigations Department and instructed them to proceed to the house in Mahatshula with a view to arrest the suspect. The team was led by Detective Assistant Inspector Refias Masuna and included Detective Sergeant Itai Jonathan Muchena.

That team proceeded to the said house and arrested a suspect by the name Khulekani Ncube and impounded a Nissan Hardbody motor vehicle, which had no papers to prove its ownership, as well as a firearm. The appellant was called to the scene and he attended in the company of one Rowen Dube, who was later to be charged with him. After making some inquiries from the team of officers he had sent there and from the suspect, the appellant ordered the release of Khulekani Ncube.

The Nissan Hardbody motor vehicle was driven to Central Police Station for further investigations but the following day, it was released on the instructions of the appellant.

The appellant and Rowen Dube were latter arrested and charged with corruption in contravention of section 4(a) as read with section 15(2)(e) of the Prevention of Corruption Act [Chapter 9:16] it being alleged that, as public officers, they had unlawfully and corruptly released Khulekani Ncube and the Nissan Hardbody motor vehicle, registration number 758-227J for the purpose of showing favour to the said Khulekani Ncube.

After a lengthy trial at the Regional Magistrates' Court they were convicted on 6 October 2003 and each sentenced to 4 years imprisonment of which 2 years imprisonment was suspended for 5 years on condition of good behaviour. Unhappy with the outcome the appellant filed an appeal to this court on 23 October 2003 against both conviction and sentence on the following grounds:

"AD CONVICTION

1. The learned magistrate erred in law in failing to find that the basis for arresting Khulekani Ncube within Zimbabwe was flawed and should have found that there was no legal basis upon which the Zimbabwe authorities could have authorised the police to effect an arrest.
   Accordingly, as the arrest of Khulekani Ncube was in effect unlawful then any action taken by the appellants in effecting his release could not have been unlawful.
2. The learned magistrate erred in accepting the evidence of the state witnesses.

(i) more particularly as to the appellant's knowledge of the identity of Khulekani Ncube;
(ii) the learned magistrate erred in ignoring the inconsistency in the evidence of the two principal state witnesses and therefore the absence of corroboration;
(iii) the learned magistrate ought to have found that the authenticity of the alleged minutes of the meeting between the Zimbabwe Republic Police and the South African Police Section was questionable and therefore unreliable;
(iv) in particular the learned magistrate erred in finding that the first appellant ever held out that Khulekani Ncube had been cleared of involvement with the offence in South Africa;
(v) the learned magistrate erred in finding that at the time Khulekani Ncube was released either the first or second appellant were aware of his identity or ought to have been aware of his identity and the fact that he was required in South Africa.
(vi) the learned magistrate erred in finding that release of the Nissan hardbody and the pistol was unlawful or improperly authorised by either of the appellants;
(vii) the learned trial magistrate ought to have found that any act carried out by the first appellant was done lawfully and that any act done by the second appellant was done under the lawful instruction of his superior.
(viii) the learned magistrate overlooked the fact that Khulekani Ncube was subsequently arrested, placed on remand and then released with no charges having been brought against him, the South African Police service having advised that he was not in fact wanted by them.

AD SENTENCE

The sentence imposed induces a sense of shock more particularly (in the case for the second appellant) the sentence ought to have been ordered to run concurrently with that imposed in CRB (sic) and that in any event a fine (as provided by the Act) would have been appropriate coupled with a suspended sentence".

It must be stated that when the appeal was filed it was filed for both the appellant and his co-accused Rowen Dube but the latter did not pursue his appeal. The appellant, on the other hand, appeared in person after being granted leave to prosecute the appeal in person.

Section 4(a) and section 15(2)(e) of the Prevention of Corruption Act under which the appellant was charged were repealed by Act No. 23 of 2004 and are no longer in our statute books but at the time of the trial they were still our law. Section 4(a) provided;

"If a public officer, in the course of his employment as such does anything that is contrary to or inconsistent with his duty as a public officer for the purpose of showing

favour or disfavour to any person, he shall be guilty of an offence and liable to a fine not exceeding level 10 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment."

Section 15(2)(e) read:

"If it is proved in any prosecution for an offence in terms of section 3 or 4 that any public officer, in breach of his duty as such, did or omitted to do anything to the favour or prejudice of any person, it shall be presumed, unless the contrary is proved, that he did or omitted to do the thing for the purpose of showing favour or disfavour; as the case may be, to that person."

The appellant's first ground of appeal is premised on the argument that he was not lawfully entitled to arrest Khulekani Ncube and for that reason he did not act unlawfully when he released that person. The fallacy of that argument is self evident. Khulekani Ncube was suspected of having committed a robbery in South Africa and repatriating the proceeds to Zimbabwe where he was suspected of prodigally frittering those proceeds away purchasing expensive motor vehicles for cash.

Faced with that situation the learned trial magistrate concluded that he was covered by the provisions of section 25(2)(e) of the Criminal Procedure and Evidence Act [Chapter 9:07] which provides:

"Any peace officer may, without any order or warrant, arrest any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in any act committed at any place outside Zimbabwe which, if committed in Zimbabwe would have been punishable as an offence, and for which he is, in terms of any enactment relating to extradition of fugitive offenders or otherwise, liable to be arrested or detained in Zimbabwe."

The conclusion of the trial court in this regard cannot be faulted. The attempt by the appellant to rely on the judgment of Cheda J in *Khulekani Ncube and Another v Minister of Home Affairs and Another* HB 50/03 (not reported) is not sustainable at all.

In that case, the court ordered the release of Khulekani Ncube and his co-accused because the extradition of the accused persons had taken longer than the 2 months period

allowed by section 33 of the Extradition Act [Chapter 9:08] for the holding of a suspect in custody.

By any stretch of the imagination, that judgment cannot be interpretated as meaning that the arrest of Khulekani Ncube was unlawful. In my view, the appellant had a duty to apprehend the suspect if he was aware that he was wanted in connection with the armed robbery which occurred at Johannesburg International Airport.

The appellant has submitted that he did not know that Khulekani Ncube was wanted in connection with the robbery when he went to Mahatshula on 31 July 2002 and that the minutes of meetings held between the Zimbabwe police and their South African counterparts in January 2002 were not authentic and therefore unreliable. He has maintained that any action he took including the release of Khulekani Ncube and the Nissan Hardbody motor vehicle, was lawful.

The court *a quo* made a lot of findings on the events which unfolded at Mahatshula on 31 July 2002 and the release, the following day, of the motor vehicle. These findings were made on the credibility of witnesses. Having considered the evidence of state witnesses, including Detective Assistant Inspector Masuna, the court a quo accepted it as credible and rejected that of the appellant and his co-accused. The witnesses testified that the appellant had been present at the house in Mahatshula when Rowen Dube greeted Khulekani Ncube affectionately and told the other officers that he was one of those wanted in connection with the airport robbery in South Africa. The court believed them and disbelieved the appellant.

At page 18 of its judgment the court *a quo* reasoned:

> "For these reasons the court will not attach any due (sic) weight to the first accused's (appellant) contention that Masuna had a reason or cause or motive to falsely implicate him. This would mean Masuna told the court the truth that he found accused person with Khulekani Ncube the following day of the 31st of July 2002 when he ordered him to release the vehicle.
> The first accused's attempt to deny being seen with Khulekani Ncube on this day by Detective Assistant Inspector Masuna besides affecting his credibility is also inconsistent with his contention throughout the proceedings that he was not aware that Davida Ncube was one and the same person with (sic) Khulekani Ncube at any stage until his arrest."

Regarding the minutes of the meetings held between Zimbabwe Republic Police and South African Police service which contained the name of Khulekani Ncube as one of the suspects being sought after, the court *a quo* said;

> "With the exception of minutes of the 8th of January 2002 that is exhibit 1 and 2, the rest of minutes clearly show that Constable Mharadze who is now a sergeant at the time of trial recorded all of them, that is from exhibit 3 to 5, the court will accept it as a fact that he recorded this (sic) minutes and will treat evidence to the contrary by the first accused as an after thought."

It has not been shown that there was any misdirection on the part of the court *a quo* in believing the evidence presented on behalf of the state. The trial court is in a better position than an appeal court to make a finding on credibility of witnesses as it has the opportunity to observe the demeanour of witnesses and to assess the nature of their delivery of evidence. Where a trial court has made a finding that a witness was credible the appeal court should not and cannot interfere with that finding unless it is shown that there was a misdirection on the part of the trial court.

In the present case, the trial magistrate went to great lengths in assessing the evidence of both the state witnesses and the appellant. He concluded that the state witnesses had no reason to falsify evidence against the appellant and that one of them, Detective Inspector Doro, had unsuccessfully tried to protect the appellant. The court accepted the evidence of the state witnesses that the appellant knew that Khulekani Ncube was a wanted person but went on to release him from custody.

The appellant did not impress the trial court as a witness. At page 24 of the judgment the trial court concluded;

> "The first accused's prevarication through out the proceedings starting from his denial of being found with Khulekani Ncube by Detective Assistant Inspector Masuna in his office combined with all the other discrepancies I have highlighted; is not consistent with his assertion that he never came to know that Davida Ncube was also known as Khulekani Ncube."

The appellant was therefore disbelieved. This meant that when he ordered the release of Khulekani Ncube at the Mahatshula house he knew he was wanted in connection with the robbery in South Africa. When he gave him back the Nissan hardbody motor vehicle which had been impounded, the appellant knew that he was obligated to investigate whether it had not been purchased from the proceeds of the crime especially as the police were investigating the lavish expenditure of the suspects at the time.

In light of all that the court *a quo* was entitled to draw the conclusion that the appellant had shown favour to Khulekani Ncube and therefore guilty as charged. The conviction was therefore proper.

Regarding sentence, the court *a quo* paid lip service to the fact that at the time the appellant was sentenced he had been in custody for a continuous period of more than 12 months he having been arrested on 12 September 2002. It is now an accepted principle of our law that pre-trial incarceration is a factor to be taken into account when assessing sentence. Therefore the appellant should have been credited with the almost 13 months he had spent in custody before sentence.

In its reasons for sentence the court *a quo* overemphasised the aggravating factor that the appellant was a senior police officer and ignored the fact that at the time of the trial Khulekani Ncube had already been re-arrested and therefore there was not much prejudice suffered by the state. This should have weighed in favour of the appellant. Indeed the moral blameworthiness of the appellant was substantially reduced by the fact that the South African Police did not show any keen interest in having the suspect extradited to that country resulting in an order for their release being made by the High Court.

In any event, having assessed an effective sentence of (twenty four) 24 months imprisonment, the court a quo had a duty to consider community service *S v Mabhena* 1996(1) ZLR 134(H); *S v Gumede* 2003(1) ZLR 408.

The appellant was a first offender who had a clean record of (twenty seven) 27 years in the police force and this incident occurred at the sunset of his carrier when he had been pensioned off. Judicial officers have been criticised for failing to take into account factors of

mitigation and for paying lip-service to those factors. *S v Madembo and Another* 2003(1) ZLR 137 at 140 B-D; *S v Buka* 1995(2) ZLR 130(S).

Mr *Ndlovu* for the respondent has also conceded the fact that 8 years has lapsed since the appeal was launched. The appellant has been awaiting the day of reckoning all that time and as such it would be a travesty of justice to expect him to commence serving a term of imprisonment now. He has suggested that other forms of punishment be considered. I agree.

As already stated, this is a case where community service should have been considered. However due to the lapse of time, I am of the view that even community service would be too harsh if it has to be served 8 years after conviction.

The record shows that the appellant was granted bail on 3 November 2003 meaning that from the time of his arrest on 12 September 2002 he had been in custody for 1 year 22 days when he was released. In my view, the appellant has suffered enough and that pre-trial incarceration should be credited to him so that he does not have to serve any further sentence.

In the result, it is ordered that:

(1) The appeal against conviction be and is hereby dismissed.

(2) The appeal against sentence succeeds with the result that the sentence is set aside and in its place is substituted the sentence of (twelve) 12 months imprisonment which is wholly suspended for (five) 5 years on condition the appellant does not, during that period, commit an offence involving dishonesty and for which he is sentenced to imprisonment without the option of a fine.

Ndou J agrees.....

Criminal Division, *Attorney General's Office*, respondent's legal practitioners.