FELIX CHAUROMWE
And
THE STATE

HIGH COURT OF ZIMBABWE
CHINHOYI, 10 July & September 2023
MUZOFA & BACHI- MZAWAZI JJ

Criminal Appeal

F. Murisi, for the appellant
W. Mabhaundi, for the respondent

MUZOFA J: This is an appeal against the decision of a Regional Magistrate sitting at Chinhoyi Magistrates Court. The appellant was convicted after a protracted trial on a charge of abuse of duty as a public officer in contravention of s174 (1) of the Criminal Law Code. He was sentenced to 36 months imprisonment of which 12 months imprisonment was conditionally suspended for 5 years.

The appellant was a Magistrate at Karoi Magistrate Court until his conviction. He was therefore a public officer. To put the charge against the appellant into perspective some background is necessary. The State relied on three infractions by the appellant to prove its case.

Three accused persons Alois Togarepi, Obvious Vheremu and Mussa Enesi officers employed at Vehicle Inspection Department (VID) Karoi were arrested 'hereinafter referred to as the accused persons'. They were appearing before the Magistrates Court, Karoi on remand.

As they appeared on their routine remand they applied for bail which application was to be presided over by the Provincial Magistrate, Mr Godswill Mavenge 'Mavenge'. The State alleged that, the appellant approached the Provincial Magistrate with a request to consider granting the accused persons bail .He was related to one of them.

Secondly, that the appellant presided over an application for refusal of remand in respect of the accused persons when one of them was his relative. Such conduct was meant to show favour to the relative. Thirdly, that the appellant presided and granted an application for the removal of the three accused persons from remand contrary to Practice Direction 6 which precluded hearing of such cases during the Covid 19 pandemic period.

The appellant denied the charge. He denied approaching Mavenge about the bail application. To him, these were contrived allegations by Mavenge who suspected that the appellant had an illicit love affair with his wife in his absence. These allegations were raised after Mavenge's malicious misconduct charges he had preferred against the appellant failed. He had no relationship with any of the accused persons. As for Practice Direction 6, he said he was unaware of it. It was not brought to his attention at the time he heard the matter. He simply presided over the matter since it was placed before him by the State.

Proceedings before the court *a quo*

The evidence before the court a quo was led predominantly from court officials. During the Covid 19 period particularly in June 2021 Courts in the Province worked on reduced work load. They were supposed to deal with urgent matters, bail applications and warrants for further detentions. This was a directive from the Chief Magistrate's office. In due course Practice Direction 6 of 2021 was issued curtailing work in all courts. The information was relayed through the Provincial Magistrate in charge of Mashonaland West Province, Ruth Moyo who cascaded the information to the Resident Magistrates in the Province through their WhatsApp group. Contrary to that directive the appellant presided over an application for refusal of remand in respect of the accused persons. He presided over the matter yet one of the accused persons was related to him.

Mavenge was the key witness, he told the court that the appellant approached him to consider granting bail to the accused persons. They met at his offices on a Sunday. He disclosed this information to Ruth his immediate supervisor. He denied falsely implicating the appellant.

After the state closed its case the appellant presented his defence and insisted that he did not commit the offence.

After hearing the parties the court convicted the appellant and sentenced him as already stated. In its analysis of the evidence, it found that most court officials at Karoi Magistrates Court were aware of the Chief Magistrate's directives including the prosecution but the appellant professed ignorance. It reasoned that, even if the appellant was unaware of the Practice Direction, he was aware of the court operating conditions but decided to act contrary to them. The application for refusal for further remand did not fall in the category of cases that could be dealt with during that period. By dealing with the matter the appellant showed favour to the accused persons.

In respect of the attempt to influence the granting of bail, the court found Mavenge credible and accepted his evidence in its totality. It reasoned that he had no reason to falsely implicate the appellant.

Dissatisfied by the decision, the appellant appealed against both conviction and sentence.

The grounds of appeal

Five grounds of appeal against conviction were set out on the notice of appeal. They raise the following issues for determination,

1. Whether the court a quo misdirected itself in finding Mavenge's evidence credible.
2. Whether the court a quo misdirected itself in finding that the appellant presided over the application for refusal of remand in the absence of evidence that he was related to any of the accused persons.
3. Whether the court misdirected itself in finding that the appellant acted contrary to Practice Direction 6 when there was no evidence that the Practice Direction was brought to his attention.

4. Whether the court a quo shifted the onus of proof to the appellant to prove his defence.
5. In the alternative, whether Practice Direction 6 precluded the hearing of an application for refusal of remand. If it did, whether the appellant's conduct was an innocent misinterpretation of the Practice Direction.

In respect of sentence, the four grounds of appeal impugn the sentence in that it was too excessive regard being had to similar cases. The court must have suspended the custodial sentence on condition of performance` of community service.

Submissions before this court

The issues raised by the appellant's legal practitioner in both the written and oral submissions recognise that an appeal court is slow to interfere with a trial court's findings on credibility unless the findings are not supported by the evidence or are completely wrong. In in this case, it was argued the findings by the court a quo were not supported by the evidence.

On Mavenge's credibility a number of shortcomings in the state case were highlighted which rendered his evidence not worth of belief. For instance that there was no evidence to confirm the meeting between the appellant and Mavenge. Despite the fact that this evidence was readily available the State opted not to place it before the court. Contrary to the law of evidence the court a quo shifted the onus of proof to the appellant to prove his defence by calling the community service officer who allegedly accompanied the appellant to meet Mavenge on the fateful day. In addition, that there was no immediate report, the delayed report was an afterthought by Mavenge.

On the second ground of appeal, the point made was that, the State having relied on the alleged relationship between the appellant and one of the accused persons it failed to prove such a relationship. In fact, the State failed to even identify the appellant's alleged relative. The State simply relied on Mr Mavenge's evidence which was not credible.

In respect of the Practice direction, it was argued that there was no evidence to show that it was brought to his attention. There was evidence that the Practice Direction was sent to Mr Mavenge but nothing was led to show that he passed on the information to the appellant. According to the appellant, the communication from the Chief Magistrate was irrelevant in this case since the charge did not rely on such communication.

The court must have accepted the appellant's defence which was reasonable in the circumstances.

In the alternative it was submitted that the appellant presided over the application out of a sheer misinterpretation of the Practice Direction. His conduct was not criminal but an error.

The appeal was strenuously opposed. In its opposition the State highlighted that what needed to be proved was just but one of the three conducts set out on the charge. The court a quo did not misdirect itself in finding that Mavenge was credible, he made a report of his interference at the earliest possible time. What his superiors did with the report had nothing to do with him.

That the court a quo found Mavenge credible cannot be interfered with by this court it being a finding of fact unless the findings were not supported by facts. The circumstances of the case especially how the appellant dealt with the accused persons shows that he was compromised. He was aware of the Chief Magistrate's directive but went on to deal with the matter. There was no need to prove any relationship between the appellant and any of the accused persons. The perception created to Mavenge was sufficient. As a result, the appellant's conduct in dealing with the accused persons showed that he had an interest in the matter.

In respect of sentence, it was submitted that the sentence imposed was in fact on the lenient side considering that the appellant was a Magistrate. His conduct tarnished the justice delivery system..

The Law

The starting point is obviously s174 (1) of the Criminal Code that creates the offence. From the wording of the section the essential elements relate to the following,

1. The office, the accused must be a public official,
2. The timing, the conduct or omission must be done during the course of duty and is contrary to his or her ordinary duties,
3. The intention, must act intentionally in the act of commission or omission,
4. Purpose, to show favour or disfavour to another.

To prove its case the State need only prove beyond a reasonable doubt the first three elements. The proof thereof triggers the presumption that the conduct was meant to show favour or disfavour to another. The State need not prove that[1].

The onus then shifts to the accused to rebut the presumption. This presumption operates as a matter of law. It is a natural consequence of proof by the State.

The State must prove that the public officer did some conduct which they knew is contrary to their duty or omit to do anything which they knew it is their duty to do. The intention becomes central in proving such a charge. The conduct constituting abuse must be deliberate, calculated or purposeful.

Factual and Legal Analysis

That the appellant, who was a Magistrate at the time of the alleged commission of the offence was a public official was not an issue before the court *a quo*. It need not be an issue before this court. He was a public official as defined by law[2].

Similarly, that the impugned conduct was done in the exercise of his duty is no issue. The appellant presided over the matter and made a ruling which was part of his duties as a judicial officer. At the time of the alleged interference he was still a Magistrate. What this court must exercise its mind primarily on is whether the act of commission was committed and whether it was committed intentionally as per the grounds of appeal.

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[1] Masimike v The State SC 104/22
[2] S169 of the Criminal Code

The first issue for consideration is whether the State proved that the appellant interfered with Mavenge's discretion. There is no doubt that as a judicial officer the appellant would have compromised Mavenge's judicial function by simply indicating that one of the accused persons was related to him and bail must be considered.

Proof of this allegation rests on the circumstances surrounding the commission of the offence and Mavenge's credibility. Issues of credibility are in the domain of the trial court. Indeed, the appeal court is slow to interfere with a trial court's findings on credibility for the obvious reason that the trial court has the benefit to assess the manner and demeanour of a witness[3].An appeal court can only interfere where the finding of fact is not supported by facts.

This was a case of a single witness. The court a quo was alive to that fact. In assessing Mavenge's evidence the court a quo relied on the relevant cases on how to assess the evidence of a single witness. This is because there was no corroboration. In such cases the evidence must therefore be of high regard to be accepted although not necessarily perfect. In other words, the quality of the evidence must make up for the lack of quantity. Thus, the court was required to consider the merits and the demerits of the evidence contextually and come to a decision.

It is competent for a court to convict on the evidence of a single competent and credible witness[4].The issue of credibility therefore must be the decisive factor. Assessment of a witness' credibility is not a scientific process but an art which really draws from both the judicial officer's experience and established considerations.

The credibility of witnesses, especially in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. In Faryna *v. Chorny*[5], the court concluded that 'the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions'. Where applicable the witness' evidence must be tested against other contemporaneous evidence that does not depend on human recollection like documentary evidence. The court must also consider if there are any internal material inconsistencies in the witness' evidence, their mental capacity, any motive to embellish the evidence or exaggerate it, the age, level of sophistication and intelligence.

In this case, there were serious evidentiary deficiencies due to the manner in which the case was handled and investigated. There was room to corroborate Mavenge's evidence but the State chose not to. The State could have called Chikwati the community service officer who allegedly accompanied the appellant to Mavenge's office. There was also room to produce contemporaneous evidence from Mavenge's or the appellant's cellphone through the service providers.

In the interest of justice, it is only fair that the State produces all the evidence that can be reasonably obtained for a court to make an appropriate decision. In our view, even if corroboration is not necessary since the law allows a conviction on the evidence of a single

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[3] Beckford v Beckford 2009 (1) ZLR 271 (SC)
[4] Criminal Procedure and Evidence Act
[5] [1951] 2 B.C.J. No. 152

witness, where evidence to corroborate can be found and the State fails to provide such an adverse inference must be drawn against the State.

In this case it was foolhardy and ill-advised of the State to proceed in the absence of evidence from Chikwati and evidence from the telecommunication service provider. To make matters worse the court a quo placed the onus on the appellant to call Chikwati. This amounted to shifting the onus on the appellant to prove his defence. This was a misdirection.

The standard of proof saddled on the State is quite high, it must be proof beyond a reasonable doubt. Indeed, it must not be proof beyond a shadow of doubt but it must be proof that a reasonable person having considered the facts can conclude that the accused committed the offence

Having said so, Mavenge's evidence must pass the test. The court a quo reasoned that Mavenge gave his evidence well. That he reported the matter immediately after the appellant approached him contrary to the appellant's assertion that the issue was raised after he presided over the application.

The court a quo failed to take into account the circumstances surrounding the making of the report to Ruth Moyo by Mavenge. Mavenge did not make the report *mero motu*. When he was allegedly approached on the Sunday, he did nothing about the issue. On the Monday morning he did nothing about the issue. He only raised the issued on the Monday afternoon when Ruth Moyo called him inquiring about some shenanigans surrounding the bail application. The allegation was that money was being raised to pay the Magistrate and the Prosecutor dealing with the case. Mavenge was the Magistrate dealing with the case.

When Ruth inquired about the matter the suspicion was that Mavenge was about to be compromised. It is under these circumstances that in response Mavenge intimated about the appellant. The court *a quo* did not address its mind on the implication of the circumstances surrounding the disclosure. Mavenge was not a simple ordinary person. He was a senior Magistrate and was well aware that the appellant had committed an offence. However he chose to keep quiet about it. His explanation was that he did not want to ruffle feathers since the appellant was a workmate. He did not tell the court why he changed his mind and let the cat out after the inquiry by Ruth Moyo.

Secondly the court a quo failed to analyse the issue on the delayed report. Indeed, there is no requirement for an immediate report as in sexual offences but it is reasonable to conclude that where an offence is committed, the complainant if aggrieved would report. In this case whether it was Mavenge's duty or the Chief Magistrate duty it is apparent that the three layers of persons well acquainted to the law did not take immediate action. These are law officers.

The alleged interference took place on the 14th of May 2021. The appellant presided over the matter in July 2021. So the interference became an issue in July 2021.They chose to keep quiet until members of the Zimbabwe Anti-Corruption Commission approached Ms Makwande. Infact when Makwande was approached, it had nothing to do with the approach to Mavenge. It was about the appellant's presiding over the application. A doubt arises whether there was interference at all. If it did happen why was it not an issue in May but became an

issue in July? In our view it was a matter of now linking the dots about appellant's conduct leading to the conclusion that he had some vested interest in the accused persons' case.

Mavenge was the appellant's immediate supervisor. Appellant alleged and set out facts that indicate that there was bad blood between them. First, he said Mavenge suspected that he had an illicit affair with his wife. Mavenge denied this. What we found striking is that, an anonymous letter was written to Mavenge. It was not direct but had some insinuation of an affair. Usually, these matters of the heart are best kept private and have nothing to do with work. In this case Mavenge took the letter to his supervisor. It was suggested although denied that by referring the issue to the Provincial Magistrate there may be a suspicion that Mavenge believed the appellant was the paramour. As a result Mavenge had issues with the appellant.

Secondly the appellant raised issue about a botched disciplinary hearing initiated by Mavenge. This could have been an innocent internal procedure but it may also point to the strained relationship between the two or could have been a basis for a strained relationship.

Had the court a quo considered all the factors as highlighted, in our view a doubt in the credibility of Mavenge arises. It cannot be true that they enjoyed a cordial relationship at the backdrop of what the appellant alleged.

We find that the court a quo did not fully analyse Mavenge's evidence so that the quality of the evidence makes up for the lack of quantity. The court simply said he gave his evidence well .This is the demeanour. Obviously Mavenge could score high on this as a seasoned court person. The court a quo should have looked out for the other salient features of the case and considered them. It failed to do so.

Accordingly we find that the State failed to prove beyond a reasonable doubt that Mavenge was interfered with.

Our finding on the issue of interference naturally impacts on the issue that the appellant presided over the application where one of the accused persons was his relative. If there was no evidence that Mavenge was interfered with, it means no issue about a relative of the appellant. There was not even a basis for a perception that one of the accused persons was related to the appellant. The ground of appeal therefore succeeds.

The Practice Direction

Ruth Moyo the then Provincial Magistrate in charge of Mashonaland West Province received the Practice Direction on the 21st of July 2021. She sent it to Mavenge. Mavenge was expected to cascade the Practice Direction to the appellant. Mavenge was non-committal on how and when he communicated with the appellant about the Practice Direction. He did not send the message to the appellant on the day he received it. He said he sent it after sometime. No dates were given.

The appellant presided over the application for refusal of remand on the 22nd of July just a day after the Practice Direction was received. He granted the application the following

day the 23rd. The sequence of events strictly speaking show that at the time the appellant granted the application the Practice Direction had not been brought to his attention.

However, the matter does not end there. According to the evidence the contents of the Practice Direction were just as the Chief Magistrate's Office had directed. That the appellant was aware of. It was not even disputed.

The issue that arises is whether the State case could rely on the Chief Magistrate's directives. That is not possible. The charge preferred against the appellant was specific that the appellant acted contrary to the Practice Direction. Bianca Makwande sought to indicate that the Practice Direction was widely circulated implying that the appellant must have known about it. The issue remains that there was no evidence that he was aware of it.

To come to a conclusion that the appellant is guilty there must be proof that he acted intentionally. The intention must be towards the Practice Direction. The totality of the evidence show that the Chief Magistrate's directives were known but the State opted to rely on the Practice Direction which came later. So the appellant must have acted with full knowledge of Practice Direction. The state cannot seek to rely on that which it did not allege in the charge. The state did not rely on the Chief Magistrate's directives.

The offence of criminal abuse of office requires intention, it is foul hardly to surmise that the appellant had intention to act contrary to the Practice Direction because he was aware of the Chief Magistrate's directives. In *Mushata v The State*[6] the court dismissed an appeal against conviction where the appellant an Acting Director of Works at Chitungwiza Municipality approved a site plan in favour of for the construction of a people's market. The approval was unlawful because it was done without the knowledge or approval of council. The act of commission by the appellant in that case was with full knowledge that council was supposed to approve the construction first.

We find that the State failed to prove its averment on this issue. Indeed the appellant presided over the matter but he had no intention to do so contrary to the Practice Direction.

Having made the above findings it becomes unnecessary to address the last ground of appeal taken in the alternative. The reason being that the other grounds of appeal succeed. However we comment in passing on the issue of raising an alternative ground of appeal. We wondered if the approach does not come to aprobating and reprobating. The appellant cannot allege that he was unaware of the Practice Direction yet in another breath allege that this was a misinterpretation of the Practice Direction. This may actually point to some lack of truthfulness in the appellant's case. It can also imply that the appellant is just throwing everything to the court. These are criminal matters it's either the conduct was committed or it was not. Mutually exclusive grounds of appeal have no place in our criminal jurisdiction. Otherwise it is taking the court for granted. This is a court of law which sits to deal with live matters, litigants must take such proceedings seriously. It is not a place to test some philosophies.

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[6] HH220/23

Disposition

It is our considered view that the State failed to prove beyond a reasonable doubt any of the alleged infractions by the appellant. Mavenge was not a credible witness. The delay in advising the Provincial Magistrate about the interference and the likelihood of bad relations with the appellant dented his testimony. His evidence begged for corroboration. The State failed to adduce contemporaneous evidence which was readily available to corroborate his evidence. In respect of the Practice Direction, the appellant's conduct was not done in violation of the Practice Direction. In any event such misconducts should be subject to a review if the State was aggrieved.

Accordingly the following order is made,

1. The appeal against conviction and sentence be and is hereby allowed.
2. The conviction and sentence imposed by the court a quo is set aside and substituted by the following,

'Not guilty and acquitted'

Murisi and Associates, appellant's legal practitioners

National Prosecuting Authority, the respondent's legal practitioners.