HB 166/16
HCA 385/14

ADMIRE CHIKWAYI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA & MAKONESE JJ
BULAWAYO 30 JULY 2015 & 21 JULY 2016

Criminal Appeal

MAKONESE J: The appellant in this matter was a public prosecutor at the relevant time. On the 18th December 2014 he was convicted by a magistrate sitting at Western Commonage Magistrates' Court at Bulawayo on a charge of contravening section 174 (1) of the Criminal Law (Codification and Reform) Act Chapter 9:23, that is, criminal abuse of duty as a public officer and sentenced to 24 months imprisonment of which 6 months were suspended for five (5) years on the usual conditions.

The appellant was dissatisfied with the outcome of the trial and noted an appeal against both conviction and sentence. His grounds of appeal are as follows:-

1. The trial court erred and misdirected itself in concluding that the state had proved its case beyond a reasonable doubt.
2. The learned magistrate erred and misdirected himself by convicting the appellant when the state failed to disprove the appellant's defence.
3. The learned magistrate erred and misdirected himself by ignoring the entry that the appellant had entered in the docket indicating that he was recusing himself from dealing with the matter.
4. The trial court erred and misdirected himself by rejecting and concluding that the appellant's defence outline was inconsistent with the evidence in chief.
5. The sentence imposed was so severe as to induce a sense of shock.

In his response to the notice of appeal, the trial magistrate had this to say:

> "This is an appeal that was lodged just for the sake of it. There was overwhelming evidence that the appellant not only solicited for $300, but also received it, albeit unknown to him that he was being trapped! I cannot understand how the appellant says his defence remand unchallenged. The good thing is that our courts are courts of record, and so the evidence is there for the Appeal Court to see.
>
> As for the sentence, if the sentence imposed can be held to induce a sense of shock in the circumstances, then that phrase "sense of shock" has lost its meaning. In fact I foresee a situation where the appeal court will hold the sentence I imposed to be overly lenient."

On 3 March 2015, the appellant filed an amended notice of appeal wherein he effectively sought to expunge his initial grounds of appeal by substituting it with fresh grounds of appeal. In the amended notice of appeal, the thrust of the grounds of appeal is as follows:

1. The conviction of the appellant on the basis of a trap orchestrated by the state through the police constitutes a violation of the appellant's constitutional right to lawful, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair administrative conduct enshrined in section 68 (1) of the Constitution of Zimbabwe.
2. The conviction of the appellant on the basis of evidence obtained by means of a trap orchestrated by the state through the police constitutes a violation of the appellant's constitutional right as enshrined in section 70 (3) of the Constitution of Zimbabwe.
3. The court *a quo* erred in convicting the appellant when the state had failed to discharge the onus on it to prove all the essential elements of the offence of criminal abuse of duty as a public officer beyond reasonable doubt as required in section 18 (1) of the Code.
4. The court *a quo* ought to have considered the imposition of community service as required by law.

The appellant's counsel filed quite detailed and extensive heads of argument. The issues raised by the appellant are as follows:

1. Whether the practice of trapping by the police in the administration of criminal justice is constitutional.
2. Whether the admission of evidence obtained through trapping by the police is constitutional.

3. Whether there were inconsistencies between the appellant's defence outline and his oral evidence in court.
4. Whether the imposition of a custodial sentence without first considering the alternative of community service without first considering the alternative of community service was proper.
5. Whether the imposition of a custodial when the Code prescribes the alternative sentence of a fine was proper.

Factual Background

The allegations against the appellant are summerised in the state outline. The facts are largely common cause. The appellant was at the material time, a Regional Public Prosecutor based at Tredgold Building, Bulawayo. On the 17th November 2014 appellant solicited for a bribe of US$300 from one Nicholas Masuku (the complainant). The bribe was for the purposes of ensuring that the complainant's fraud case pending at Tredgold could be set down for trial. CID details were tipped of the impending handing over of the US$300,00 to the appellant. A trap was arranged and the money that was being handed over to the appellant had its serial numbers marked. Upon the handing over of the money to the appellant, CID details swooped upon the appellant who had placed the money under his mobile phone on his office desk. The appellant explained to the arresting details that the money was a refund for the purchase of a stand. It is common cause that the complainant had reported a case of fraud against one Alfonse Achinulo. It is also common cause that on or about 13 November 2014, the appellant summoned the complainant to his office at Tredgold for a discussion. It is necessary for the purpose of this appeal to quote from the record the complainant's evidence during the trial on this aspect. At page 32 of the record, the complainant states as follows:

"On 13 November 2014, I was at Esigodini on business. My PA phoned me. She is Thembeka Dube. She said I was required at court by the accused. I asked my PA to book the accused for 2:30 pm. However, things did not happen as I had planned, and so I only got to accused's office at Tredgold at 3:30pm. Accused asked my PA to wait outside, so that we remained being two in accused's office. Accused said he had discussed my case with his superior. I was the complainant in that case, and the accused in the case was Alfonse Achinulo. The case was a fraud case that I had reported against Alfonso Achinulo… …

He said the superior was coming from Gokwe and that he (the superior) wanted to go back to Gokwe that Friday. Accused said that therefore the superior needed something. I asked what that something was and he said it was money. I asked how much money was required, and accused said my case appeared to be a serious one. I said it was well and I was going to look into that. Accused said his boss wanted to leave by 10:00 am the following day."

On the 17th November 2014, after discussing the matter with one Superintendent Ncube, complainant phoned the appellant enquiring on how much exactly was required to facilitate the set down of his case. The appellant informed the complainant that an amount of US$300 was needed. The money was subsequently handed to the appellant leading to the arrest of the appellant.

It is on these facts, that the appellant now argues that his conviction was on the basis of a trap orchestrated by the state through the police. The appellant contends that the conviction based on evidence obtained by means of a trap violates his constitutional rights as enshrined under section 70(3) of the Constitution.

I will now proceed to deal with each of the grounds of appeal as amplified in the appellant's heads of argument. Before I do so, however, I must dispose of one important factual issue.

A proper reading of the record of proceedings in the court a quo reflects that the appellant solicited the bribe to enable him to facilitate set down of a matter. Appellant initiated the entire process that led to his arrest. At first he did not mention the amount of money that he said was required by his superior. When asked to give a figure appellant stated that US$300 was needed. The money was then handed to the appellant who received it. The police effected the arrest and

recovered the money from the appellant. This is not a "trap" in the strict sense of the word. The appellant was already committing a crime when he solicited for a bribe. His conduct was in contravention of section 174 (1) of the Criminal Law Codification and Reform Act. The section provides as follows:

> "(1) if a public officer in the exercise of his or her functions as such, intentionally –
> (a) does anything that is contrary or inconsistent with his or her duty as a public officer; or
> (b) omits to do anything which t is her duty as a public officer to do; for the purpose of showing favour or disfavor to any person, he or she shall be guilty of criminal abuse of duty as a public office and liable to a fine not exceeding level thirteen or imprisonment for a period not exceeding fifteen years or both."

The appellant had clearly set into motion a process where he was to receive a bribe of US$300 on the pretext that his superior had demanded it. The payment of the bribe was to facilitate the set down of a trial date. The complainant alerted the police for the purpose of effecting an arrest. Even assuming that the appellant had not received the bribe money, his conduct of soliciting for a bribe was in contravention of section 174 (1) of the Criminal Law Codification and Reform Act.

It has been argued by the appellant that the police orchestrated a trap. Gardner & Lansdom, *South African Criminal Law & Procedure* Vol 1, 6th Edition page 659, define a "trap" as:

> "*a person who, with a view of securing a conviction of another, proposes certain criminal conduct to him, and ostensibly takes part therein. In other words, he created the occasion for someone else to commit the offence."*

In *Musuna* v *The State*, HB 112-07, BERE J dealt with a similar situation where the facts are strikingly similar to the present matter. The accused a police officer had solicited for a bribe from a Congolese national, who reported the matter to the police, and a trap was set. The learned judge distinguished the types of police traps and held that evidence from a trap could only be unlawful or inadmissible if the trap was intended for the express purpose of inducing an accused to commit a crime he would ordinarily not have committed.

See also the case of *S* v *Azov* 1974 (1) SA 808 (T) at page 809 where the judge observed the following:

> *"This court is not concerned with the approach on traps, whether it is a procedure that is to be lauded or disapproved of. The fact is that is not unlawful to have set the trap; not do I accept the proposition that traps must necessarily be treated in the manner that has been suggested in the appellant's heads of argument. It seems to me that traps are really of three kinds. There is the trap which most of us dislike so much where a traffic inspector puts a cord across the road and when you go over it too fast he traps you. There the traffic inspector has done nothing really to entice you to exceed the speed limit; he is merely set about trapping you … There is no reason why a trap of that kind should be treated with the disapproval which is suggested in general about traps.*
>
> *Secondly, we have the sort of trap that we have where the accused person is not enticed into doing something wrong. She is suspected of selling liquor and she has liquor in her possession. All the trap does is to go and buy it from her. He did not place the liquor in her possession and he did not induce or entice her to keep liquor illegally; all he did was to trap her into selling it. This is the second type of trapping. Then the third type of trap that you have in gold and diamond trapping cases where you bring the gold or diamonds to the person and invite him to buy it. That sort of trap is very dangerous and open to abuse, and the courts have on numerous occasions expressed their disapproval of it, more particularly because the traps used in such case are often persons of low repute, not necessarily police officers. The distinction must be drawn and borne in mind.*
>
> *In the present this woman was not enticed or induced to start trading in liquor; she was suspected – presumably on reasonable grounds – of trading in liquor and all that was done was to go and by some beer from her – to trap her in that fashion. The police used three policeman to trap her and whilst all evidence produced before a court of law must be treated with caution and care must be exercised in evaluating it, there is no particular reason why these three policemen should be treated as if they were villain or doing something unlawful."*

On the facts of the present case, the police obtained information that the appellant had demanded a bribe, which in itself is unlawful. The police then moved in to arrest the appellant after he had received the money. He gave a false reason for being in possession of the money. He alleged soon after his arrest that the money was a refund for the purchase of a stand. That was his initial defence. This is not an insignificant issue because in this appeal the appellant is arguing that he was trapped and that the setting up of the trap violated his constitutional rights. In his lengthy defence outline the appellant denied that he ever solicited or received any money

from the complainant under any circumstances. This seems to give credence to the position that the raising of the constitutionality of the trap came as an afterthought.

I now turn to consider whether there is merit in the argument that the conduct of the police was inconstant with section 68 (1) of the Constitution. The relevant section provides that:

> "(1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair."

Further section 70 (3) of the Constitution provides as follows:

> "(3) In any criminal trial, evidence that has been obtained in a manner that violates any provision of this Chapter must be excluded if the admission of the evidence would render the trial unfair one would otherwise be determined to the administration of justice or the public interest."

I have no doubt in my mind that the constitutional issues raised by the appellant were merely raised as a red herring. A basic tenant of constitutional law is that not all rights are absolute, but their restriction has to be proportionate to the means that it seeks to achieve. The detection of crime, more particularly corrupt practices, must be achieved not by luring suspects into committing offences, but setting up of lawful traps that only serve to prove that a crime has indeed been committed. I am of the view that the constitutional issues raised are of no moment and that they are being raised merely to obfuscate the issues. There is no evidence on record that the police orchestrated the trap or initiated it.

As regards sentence, there is no misdirection on the part of the magistrate regarding his approach to sentence. The appellant was a public prosecutor in the Regional Court. He solicited for a bribe from a complainant who had approached the court to seek justice. An officer of the court who engages in criminal conduct puts the entire justice system into disrepute. Sentencing the appellant to any sentence other than a term of imprisonment would, in my view, have been wholly inappropriate.

In the result, the appeal against conviction and sentence is dismissed.

Kamocha J …… I agree