STEPHEN NDLOVU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA & NDLOVU JJ
BULAWAYO 3 July 2023 & 21 September 2023

Criminal appeal

L. Nkomo, for the appellant
K.M. Guveya, for the respondent

DUBE-BANDA J:

[1] This is an appeal against conviction and sentence. The appellant appeared before the Regional Magistrates Court sitting in the Western Division, he was charged with the crime of criminal abuse of duty as a public officer as defined in s 174 of the Criminal Law (Codification and Reform) Act, [Chapter 9:23]. It being alleged that on 7 September 2021 and at Bulawayo Magistrates Court, Tredgold Building, Bulawayo he during the exercise of duties as a Magistrate being a Public Officer unlawfully and intentionally granted two different verdicts in a court application, that is to say he passed a ruling dismissing an application for the release of the motor vehicle held as an exhibit and later on signed a draft order granting the application for the release of the same motor vehicle in respect of the same application thereby showing a favour to Noah Wambe or a disfavour to the delivery of justice an act contrary to his duties as a public officer realizing that there was a real risk or possibility that justice delivery will be so compromised.

[2] The appellant pleaded not guilty, and after a contested trial he was convicted and sentenced to three years imprisonment of which one year was suspended for five years on the usual conditions of good conduct. Aggrieved by both conviction and sentence he noted an appeal to this court.

Background facts

[3] At the time the appellant was charged with this offence he was a judicial officer holding the position of a Provincial Magistrate. He was stationed at Bulawayo Magistrates' Court. It was common cause at the trial that the appellant presided over an application filed by one Noah Wambe (Wambe) seeking the release of a motor vehicle that was held by the police as an exhibit. On 25 August 2021 the appellant signed a draft order (Exhibit 2) granting the order for the release of the motor vehicle, and on 7 September 2021 he handed down a written ruling (Exhibit 1) dismissing the application. On 7 September 2021 Wambe and his legal practitioner uplifted the order signed on 25 August and attempted to execute it at Mzilikazi Police Station, where the seized motor vehicle was kept. After service of the order, it was then discovered that there was another order i.e., exhibit 2 refusing the release of the vehicle. This discovery led to an investigation which resulted in the arrest, trial, conviction and sentence of the appellant.

The findings of the trial court

[4] The trial court accepted that on 25 August 2021 the appellant signed a draft order whose effect was to release the vehicle from the police. It found that the draft order remained in the record and the record remained in the office of the appellant until 7 September 2021. And that on 7 September he again produced a written ruling dismissing the application for the release of the vehicle. The court concluded that the act of producing two conflicting decisions in the same case was tantamount to abuse of office as defined in s 174 of the Criminal Code. Therefore, it concluded that the State proved the *actus rea* in terms of s 174 of the Criminal Code.

[5] The trial court then asked itself the question whether the appellant intended to abuse or act inconsistent with his duties for the purposes of showing favor or disfavor. It found that the appellant signed the draft order and purposefully kept it in the record, even after dismissing the application for the release of the vehicle. He then advised Wambe that the draft order had been signed and ready for collection. Wambe collected the order and attempted to execute it at the police station. Although the trial court did not directly relate to s 174 (2) of the Criminal Code, a reading of the judgment shows that it concluded that the totality of the evidence shows that

the appellant intended to show favor to Wambe or disfavor to the administration of justice. The appellant was then convicted and sentenced as stated above.

Grounds of appeal

[6] Aggrieved by the decision of the trial court, the appellant appealed to this court on the following grounds:

Ad conviction

i. The court *a quo erred* in law by convicting the appellant when the State had failed to discharge the onus, as required by s 18(1) of the Criminal Law (Codification and Reform) Act, to prove beyond a reasonable doubt two of the essential elements of the offence charged, namely the requisite intention and the showing of favour to Noah Wambe as alleged in the State outline.

ii. The court *a quo erred* in law by convicting the appellant when the appellant's defence of error in signing the draft order on the 25th August 2021 before the State had filed its response to the application placed before him, was not found to be improbable and false beyond a reasonable doubt.

iii. The court *a quo erred* in law by convicting the appellant when at the end of the trial there was a serious discrepancy between the material allegations in the State Outline and the totality of the evidence adduced, and the discrepancy was never explained nor the State Outline emended, thereby entitling the appellant to the benefit of the doubt and to an acquittal.

Ad sentence

iv. Without prejudice to the appeal against conviction, the court a quo in the exercise of its discretion grossly misdirected itself on the law applicable to sentencing of first offenders by concluding that is it not proper to impose a non-custodial sentence on appellant, and no reasonable court faced with the same circumstances could have arrived at the same conclusion.

(7) I will proceed to summarize the submissions by counsel, starting with the submissions by the appellant's counsel.

Appellant's submissions

(8) Mr *Nkomo* Counsel for the appellant submitted that in terms of the law, the burden rests on the State to prove the guilt of the accused beyond reasonable doubt and that if the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version and acquit the accused. Counsel submitted further that the State failed to discharge the *onus*, as required by s 18(1) of the Criminal Code, to prove beyond a reasonable doubt two of the essential elements of the offence charged, i.e., the requisite intention and the showing of favour to Wambe as alleged in the charge sheet and the summary of the State case.

[9] Counsel submitted further that the State alleged in the charge sheet and the summary of the Sate State case that on 7 September 2021 the appellant dismissed the court application filed by Wambe, and later on the same day signed a draft order granting the same application thereby showing favour to Wambe. Counsel argued that these allegations constituted the *actus rea* upon which the charge was anchored.

[10] Counsel argued that the court *a quo* fell into error in evaluating the totality of the evidence adduced and in determining whether the State had discharged the *onus* to prove each essential element of the offence to sustain the conviction of the appellant. Counsel argued further that the State failed to adduce evidence to prove beyond a reasonable doubt that the appellant in signing the draft order at the time he signed it, he acted with the requisite intention to show favour to Wambe or disfavour to the administration of justice.

[11] It was argued that the uncontroverted evidence shows that the appellant signed the draft order on 25 August 2021, the day Wambe filed his application. However, the allegations in the charge sheet and the summary of the State case are that the appellant signed the draft order on 7 September 2021, after making the ruling dismissing the application. Counsel argued further that given the erroneous sequence of events alleged by the State in the charge and the summary of the State case, no evidence was adduced to prove that the signing of the draft order at the time it was signed, the appellant had requisite intention to show a favour to Wambe or a disfavour to the administration of justice.

[12] Counsel submitted that the draft order that the appellant signed on 25 August 2021 was not forwarded to the Clerk of Court for issuance as a typed court order. Instead after realising that he had erroneously signed the draft order he withheld it in the record waiting for a response of the State to the application, and after receiving it, he made a written ruling dismissing Wambe's application. The appellant then alerted the State and Wambe's legal practitioner to collect the written ruling from the Clerk of Court on 7 September 2021.

[13] Counsel highlighted that the totality of the evidence adduced by the State, when considered objectively, only proved that the draft order was erroneously signed on 25 August 2021, and found its way into the hands of Wambe and his legal practitioner on 7 September 2021 solely because of Magumise the court recorder who wrongly issued the draft order. It was argued that the appellant was not the proximate cause of the release to Wambe of the erroneously signed draft order.

[14] Mr *Nkomo* argued further that the court *a quo* did not make a specific finding that the appellant's version was improbable and false beyond a reasonable doubt. Instead, the trial court found that his version of error in signing the draft order was probable true. Counsel submitted that absent a finding that the appellant's version of events was improbable and false beyond a reasonable doubt, the conviction is wrong on a question of law and ought to be vacated.

[15] Counsel highlighted that at the end of the trial the evidence adduced through the State witnesses did not prove beyond a reasonable doubt the material facts alleged in the State's version as set out in the charge and the summary of the State case. It was argued that the evidence adduced by the State differed from the material allegations in the charge in that the evidence showed that the draft order was signed by the appellant in error on 25 August 2021, and not 7 September 2021 as alleged. Counsel argued that the serious material discrepancies were never explained by the State.

[16] Counsel submitted that on account of fact and law, it cannot be said that the prosecution proved the State case beyond reasonable doubt. Therefore, the appeal ought to be upheld and

conviction set aside. The appeal against sentence was not persisted with, and was abandoned. No further reference shall be made to the appeal against sentence.

Respondent's submissions

[17] Mr *Kuveya* Counsel for the respondent submitted that the trial court carefully considered all the facts presented before it, rejected the appellant's version and found it to be false beyond reasonable doubt, finding that the only reasonable conclusion which could be drawn from the facts was that the appellant committed the crime of abuse of duty as a public officer by showing favour to Wambe. Counsel submitted further that in a case of violation of s 174 of the Criminal Code the *onus* to establish the unlawful conduct of the offence is on the State. However, there is an *onus* on the accused person to show on a balance of probabilities that he did not have the intention of favouring or prejudicing any person impacted by his act or omission. Counsel submitted that the State must establish that the accused is a public officer; who in the course of his or her duties or functions by commission or omission breached his or her duties. Counsel argued that the State proved the *actus rea* by showing that the appellant issued two conflicting orders in the same matter, which act was contrary to his duties. By proving the *actus rea* the presumption in s 174 (2) was then engaged. Counsel submitted that the presumption is not rebutted merely by raising a reasonable doubt, it stands until it is destroyed by evidence.

[18] It was highlighted that the trial court correctly found that the appellant deliberately signed the draft order, purposefully left it in the record, even after dismissing the application. And that it was the trial court's finding that by issuing two conflicting orders, the appellant had shown favour to Wambe. Counsel argued that the trial court dismissed the appellant's defence of an error.

[19] In response to the submission that the charge and the summary of the State case are at variance with the evidence on record, Mr. *Guveya* argued that on 7 September 2021 Magumise signed and stamped the draft order, and on the same day the appellant proceeded to write a ruling dismissing the application. Therefore, it was contended that no variance exits between the State allegations and the State evidence. Counsel submitted that the trial court applied its

mind to all the relevant facts presented to it and that it did not *err* in convicting the appellant, and the appeal has no merit and ought to be dismissed.

The application of the law to the facts

[20] The sole issue that arises from the three grounds of appeal is whether the trial court *erred* in convicting the appellant.

[21] The appellant was charged for contravening s 174 of the Criminal Code, the relevant provisions provide that:

> "174 Criminal abuse of duty as public officer (1) If a public officer, in the exercise of his or her functions as such, intentionally-
> (a) does anything that is contrary to or inconsistent with his or her duty as a public officer; or
> (b) omits to do anything which it is his or her duty as a public officer to do;
> for the purpose of showing favour or disfavour to any person, he or she shall be guilty of criminal abuse of duty as a public officer and liable to a fine not exceeding level thirteen or imprisonment for period not exceeding fifteen years or both.
> (2) If it is proved, in any prosecution for criminal abuse of duty as a public officer, that a public officer, in breach of his or her 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 or she did or omitted to do the thing for the purpose of showing favour or disfavour, as the case may be, to that person."

[22] The Supreme Court *per* KUDYA AJA (as he then was) in *Musimike v The State* SC 57/20 said that:

> "What constitutes proof beyond a reasonable doubt was pronounced by DUMBUTSHENA CJ in S v Isolano 1985 (1) ZLR 62 (S) at 64G-65A thus:
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> > 'In my view the degree of proof required in a criminal case has been fulfilled. In Miller v Minister of Pensions [1947] 2 All ER 372 (KB), LORD DENNING described that degree of proof at 373H as follows:
> > '…… and for that purpose, the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted

> fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

The approach to be adopted where, as in this case, a reverse *onus* is prescribed by statute was enunciated by this Court in a kindred offence of contravening s 4 (a) as read with s 15 (2) (e) (iii) of the repealed Prevention of Corruption Act [Chapter 9:16] in S v Chogugudza 1996 (2) ZLR 28 (S) at 42D, as follows:

> "The actus reus of the offence of contravening s 4(a) of the Prevention of Corruption Act having been proved by the State, it was for the appellant to displace the presumption by satisfying the trial court that his purpose of showing favour was legitimate - that in doing what he did, he had acted with an innocent state of mind. It was not for him to establish that his evidence on this aspect was necessarily true - only that on a preponderance of probabilities it was true. See S v Ndlovu 1983 (4) SA 507 (ZS) at 510D-G; Miller v Minister of Pensions [1947] 2 All ER 372 (KBD) at 374A-B."

The Court had earlier on emphasized at 34E that:

> "The plain language of s 15(2) (e) mandates that the presumption will stand unless proof to the contrary is adduced by the public officer, who is the accused. It is a presumption rebuttable at his instance. It imposes a legal burden upon him which must be discharged on a balance of probabilities. It is not discharged merely by raising a reasonable doubt."

[23] In *Musimike v The State* (*supra*) the court went further and said that the *onus* to establish beyond a reasonable doubt the *actus reus* of the offence, which is prescribed in the opening words and in paras (a) and (b) of s 174 (1) lies on the State. See *S v Kuruneri* HH 59/2007; *S v Broughton's Jewellers (Pvt) Ltd* 1971(2) RLR 276(A) at 279 E-G, 1971(4) SA 394 (RA) at 396 E-F; S v Marwane 1982(3) SA 717(A) at 755 H-756 C. The presumptive proof casts a legal *onus* on the accused person to show on a balance of probabilities that he did not have the intention of favouring or prejudicing any person impacted by his act or omission. Thus, the *actus reus* which must be established by the State is that the accused person is a public officer; who in the course of his or her duties or functions by commission or omission breached his or her duties or functions.

[24] The overall *onus* is on the prosecution to show beyond a reasonable doubt that the accused committed the crime charged. This means that on one hand if the prosecution proves the *actus rea* and the accused fails to rebut the presumption that he had the requisite intention, a case for a conviction would have been proved beyond a reasonable doubt. On the other hand, if the accused rebuts the presumption created by s 174 (2) of the Criminal Code, the prosecution would have failed to prove the State case beyond a reasonable doubt.

[25] It is against the backdrop of the law and these legal principles that this appeal shall be determined.

[26] In this case the prosecution proved the *actus rea* i.e., that the appellant was a public officer; who in the course of his duties by commission breached his duties or functions by issuing two conflicting orders in the same matter. On one hand he signed the draft order granting the application, and on the other hand also issued a written ruling dismissing the same application. The argument by Mr *Nkomo* that the signed draft order was not an order of court is misplaced and inconsequential. Once the appellant as a magistrate appended his signature on the draft order, it immediately seized to be a draft and became an order of court. The contention that the signed draft was supposed to be sent for typing, brought to the appellant for proof reading and signing to be a court order is incorrect. These processes are merely clerical and administrative. A draft order becomes an order of court the moment a judicial officer signs it. Therefore, the *actus rea* of the offence was proved beyond a reasonable doubt.

[27] Therefore, the contention that the court *a quo erred* in law by convicting the appellant when the State had failed to discharge the *onus*, as required by s 18(1) of the Criminal Code i.e., to prove beyond a reasonable doubt two of the essential elements of the offence charged, namely the requisite intention and the showing of favour to Wambe as alleged in the State outline has no merit. I say so because in this case the appellant was charged in terms of s 174 of the Criminal Code, and once the prosecution proved the *actus rea* it was presumed, unless the contrary was proved by the appellant, that he issued the two conflicting orders in the same case for the purpose of showing a favour to Wambe or disfavour to the administration of justice. In this case the *actus rea* was proved, it was for the appellant to show on a balance of probabilities that he had no intention of showing a favour to Wambe or disfavour to the

administration of justice. Therefore, by operation of law it was not for the prosecution to show that he had the requisite intention of showing favour to Wambe or disfavour the administration of justice. It was for the appellant to negative the intention created by the presumption.

[28] It was for the appellant to show that by issuing two conflicting orders in the same matter he had no intention of showing favour to Wambe or disfavour to the administration of justice. The standard of proof is on a balance of probabilities, this means that the evidence relied on by the party shows that it is more probable than not that the situation happened as the evidence suggests. See *Miller v Minister of Pensions* [1974] 2 AII ER 372, 374. In *Musimike v The State* (*supra*) the court said:

> "Now, "intentionally" is a synonym of "wilfully", which in the context of the English provision equivalent to our s 174 (1) was defined by LORD BUNGHAM in *R v G* [2003] UK HL 50 to mean "deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not".
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> The nature and scope of the intention cast on the accused person has best been described in two foreign cases cited by TSANGA J in *S v Taranhike & Ors* 2018 (1) ZLR 399(H) at 405G-406B. The first is the English case of *R v Dytham* [1979] 2 QB 722, in which the Court stated that:
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> > "The neglect must be wilful and not merely inadvertent and it must be culpable in the sense that it is without reasonable excuse or justification, the misconduct must be calculated to injure the public interest so as to call for condemnation and punishment.
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> The second is the Australian case of Northern Territory Australia v Mengel (1995) CLR 307, which held that:
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> > "It is the absence of an honest attempt to perform the functions of the public office that constitutes abuse of office. Misfeasance in public office consists of a purported exercise of some power or authority by a pubic officer otherwise than in an honest attempt to perform functions of his or her office whereby loss is caused to the plaintiff. Malice, knowledge and reckless indifference are the states of mind that stamp on a purported but invalid exercise of the power the

character of abuse or misfeasance in public office. If the impugned conduct then causes injury, the cause of action is complete."

[29] In determining whether the appellant had discharged the duty on him to negative the presumption created by s 174(2) of the Criminal Code, I consider first the contention that the trial court *erred* in law by convicting the appellant when at the end of the trial there was a serious discrepancy between the material allegations in the summary of the State case and the totality of the evidence adduced, and that the discrepancy was never explained nor the State Outline amended, thereby entitling the appellant to the benefit of the doubt and to an acquittal. This contention requires closer scrutiny.

[30] Gowora JA (as she then was) in *Wairosi v The State* SC 20/15 said:

> "The difference between the state outline and the complainant's or witness's evidence during the trial cannot be held against the complainant or the witness, as they do not take part in the preparation of the State's outline. The difference must however be satisfactorily explained as it will be fatal to the State's case if it remains unexplained when the State closes its case. In *S v Nicolle* 1991 (1) ZLR 211 at 214B-G KORSAH JA commenting on the functions of the State's and defence outlines, and the effect of the complainant's departure from the State's outline said:
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> > 'Commenting on the importance of the part played by the respective outlines of cases in a criminal trial SQUIRES J said in *S v Seda* 1980 ZLR 109 (G) at 110H – 111A:
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> > > 'They perform a similar function to the pleadings in a civil trial, and serve not only to identify what may be in issue between the State and the accused, but to advise each of the substance of the matters that are in issue, with the obvious advantages this affords of avoiding delay in completing the trial. In addition, it must always be appreciated that just as any significant and unexplained departure by the accused in his evidence from the outline of the defence which he makes, may be a matter for comment or even adverse conclusions, so does such a consequence affect what is said by the State witnesses.'
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> > While citing the above dictum of SQUIRES J with approval, I hasten to point out that whereas the outline of defence is prepared, from what the accused person, tells counsel, and is tendered in evidence with his approval, the outline of State case is not prepared on the instructions of the complainant and is certainly not approved by the complainant before it is tendered in evidence and does not constitute part of the complainant's testimony. I would suggest that the reason for drawing an adverse conclusion when the outline of State case is seriously at variance with the evidence of the prosecution witnesses is that because of the conflict between the two a doubt is raised as to whether the State

> witnesses are being truthful. Such a conflict may easily be explained by the production of the complainant's statement to the police. But if this is not done, so long as that conflict is unresolved at the end of the hearing, the benefit of the doubt must be accorded to the accused; for it would not be possible to say that the State has proved the case which it undertook from the onset to prove, and has therefore proved its case beyond a reasonable doubt.'"

In *Ephias Chigova v State* 1992 (2) ZLR 206 at 213 C to F KORSAH JA again commenting on discrepancies between the complainant's evidence and the State's outline said:

> "While I agree that the State is bound to prove the ingredients of the offence it alleges, a précis of a case by the State is not to be given equal weight with the outline of defence on behalf of the accused. The reason for this is simple. The complainant has no control over what a policeman may find relevant enough to include in a précis. The précis is not her word and deed. She is not to be taken as having made categorical statements on matters which, though relevant, are not essential to establish the offence alleged. The complainant's credibility is not to be assessed on apparent conflicts between her *viva voce* testimony and a summary of the case prepared by someone else.
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> The "defence outline", however, is prepared at the behest of the accused and usually read over by, or to, him and then signed by him or on his behalf. A complainant cannot be discredited because of discrepancies between a summary of the State case and her testimony, in the same way as an accused who, having made categorical statements in his "defence outline", testifies to something other than that which may tend to underscore the veracity or otherwise of the accused. To discredit a complainant because of discrepancies between the State outline and her testimony, the divergence between the two, must be so gross as to be utterly irreconcilable, or her testimony patently false."

[31] Case law shows that if the evidence is at variance with the summary of the State case, this would not necessarily mean that the evidence of the State witnesses must be rejected. It simple means that the weight to be attached to the evidence must be carefully be considered. See: *Wairosi v The State* SC 20/15. However, a significant and unexplained departure by the State from the summary of the State case may attract adverse conclusions. It may have consequences, depending on the facts of the case. See *S* v *Nicolle* 1991 (1) ZLR 211 @ 214 B-G; *S* v *Seda* 1980 ZLR 109 (G) at 110H - 111A; *Ephias Chigova* v *State* 1992 (2) ZLR 206 @ 213 C.

[32] In this case the charge sets out that on 7 September 2021 during the exercise of his duties as a public officer the appellant unlawfully and intentionally granted two different verdicts in a court application, that is to say he passed a ruling dismissing an application for the release of the motor vehicle held as an exhibit and later on signed a draft order granting the application

for the release of the same motor vehicle in respect of the same application thereby showing a favour to the Wambe or a disfavour to the delivery of justice.

[33] According to the summary of the State case on 25 August 2021, Wambe filed an application for the release of a motor vehicle held at Mzilikazi Police Station as an exhibit, and the application was opposed in writing by the prosecutor. The ruling was set to be handed down on 7 September 2021. On the 7 September 2021, and after being asked about the ruling the appellant advised the parties to come to his chambers. Wambe's legal practitioner and the prosecutor proceeded to the appellant's chambers where the defence was told to check the ruling in the record at 11 a.m. At 11 a.m. Wambe proceeded to the Clerk of Court and enquired about the ruling. He was attended to by Magumise who after getting the record pulled out a draft order which was attached to the application, stamped it and handed it over to the Wambe. The draft order was ordering the police to release the vehicle to Wambe within 48 hours of receipt thereof.

[34] Witness Magumise a senior court recorder testified that on 7 September 2021 he was approached by a Wambe's legal practitioner one Mandire enquiring about the whereabouts of the appellant. Mandire instructed Magumise to enquire from the appellant whether the draft order was ready. The witness testified that he later met the appellant and informed him about the inquiries made by Mandire, i.e., whether the draft order was ready. According to Magumise the appellant said "I will bring it later", referring to the draft order. The witness later received a report from a workmate and as a result of that report he opened the record and found the draft order. He then recalled that it was the draft order that was referred to by Mandire. And Mandire had said his client Wambe would come to collect the draft order. After consulting with his senior at the office, he signed the draft order, and at approximately between 3 p.m. and 4 p.m. Wambe came to the office and enquired about the draft order. The witness gave him the draft order. The witness identified exhibit 2 as the order that he handed over to Wambe. On 7 September the witness did not see the written ruling dismissing the application. He testified that he could not dispute that the ruling dismissing the application was in the record, because he did not go through the whole record, he merely looked for the draft order.

[35] It is rather concerning that Magumise was allowed to adduce inadmissible hearsay evidence. In terms of s 253 of the Criminal Procedure and Evidence Act [Chapter 9:07] hearsay

evidence is inadmissible, unless it is admissible in terms of the exception which is not relevant in this case. Hearsay evidence is defined to mean evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence. See *Principles of Evidence* PJ Schwikkard and S E Van Der Merwe (2nd ed) 253. The evidence of an unnamed young lady who is alleged to have informed Magumise that the appellant left the record at the clerk of court's office and said there was a draft order inside the record was inadmissible evidence. The State Counsel should not have adduced such evidence, and defence counsel should have objected to the admissibility of such evidence, and ultimately the court should not have permitted such evidence to be placed before it. The fact that an accused is legally represented does not bar the court to ensure that only admissible evidence is placed before it. For it is the court that ultimately must ensure that the accused gets a fair trial.

[36] The discrepancy between the summary of the State case and the evidence of Magumise is this: according the summary Wambe enquired about the ruling, however Magumise gave him a draft order. According to Magumise Wambe enquired about a draft order. This discrepancy is significant because of the following reasons; according to the summary Wambe's application was opposed by the prosecutor and the ruling was to be handed down on 7 September. On 7 September the appellant after being asked about the ruling asked Mandire and the prosecutor to come to his chambers and Mandire was informed to check the ruling at 11 a.m. Again, the prosecutor testified that he was informed that the ruling was going to be handed down on 7 September. On 7 September he phoned the appellant who informed him that Wambe's application was dismissed. He confirmed with the court record that indeed the application was dismissed.

[37] Furthermore, the appellant testified that he advised the parties to collect the ruling in the record. He told them that the ruling would be ready on 7 September 2021 from 11:15 a.m. onwards. On this significant issue the evidence of Magumise stands alone against the summary of the State case, the evidence of the prosecutor and the evidence of the appellant. Most importantly the discrepancy was not explained. The divergence between the summary of the State case and the evidence of Magumise is so gross as to be utterly irreconcilable. Therefore, the factual finding by the trial court that the appellant advised Wambe that the draft order was

signed is shown by the record to be wrong. This court can only interfere with the trial court's factual findings if they are vitiated by material misdirection or shown by the record to be wrong. See *R v Dhlumayo & Another* 1948 (2) SA 677 (A) at 705-706; *S v Naidoo* 2003 (1) SA 347 (SCA) para 26; *Mupande v The State* SC 58/22; *Musimike v The State* SC 57/20; *RBZ v Granger & Anor* SC 44/15 @ 5-6. In this instance the finding is wrong. I take the view that the variance between the summary of the State case and the evidence of Magumise had created a reasonable doubt in respect of what Wambe enquired about at the office of the clerk of court, which could only be resolved in the appellant's favour.

[38] In the defence outline the appellant said that he erroneously signed the draft order which was attached to the application. He testified that the application for the release of the vehicle was placed before him on 25 August 2021 and signed the draft order in error, and made a decision to keep the record while awaiting the prosecutor to file a response to the application. The prosecutor filed a notice of opposition and thereafter he informed the parties that the ruling will be ready on 7 September 2021, it had to be picked up from the office of the Clerk of Court from 11:15 a.m. onwards. The prosecutor testified that he filed an opposition to Wambe's application, and he was informed that the ruling would be handed down on 7 September. This evidence by the prosecutor corroborates the appellant's version.

[39] Again I take the view that the appellant's conduct starting from 25 August to 7 September is consistent with his version. He issued the order releasing the vehicle on 25 August, he did not send the record to the office of the clerk of court, and he kept it in his chambers until 7 September. If he had harboured some ulterior motive, he would have released the order of 25 August for execution well before 7 September, i.e., he would have sent the file to the clerk of court soon after granting it. He did not. It was only after he completed the written ruling of 7 September that he sent the record to the office of the clerk of court. This gives credence to the version that soon after signing the order of 25 August he realised that he had made an error. I juxtapose his version and his conduct with the evidence of the prosecutor that he informed the parties that the ruling will be ready on 7 September and the ruling he was referring to can only be the order dismissing the application. In fact, when the prosecutor phoned, the appellant actually informed him that the application was dismissed.

[40] A court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably true in substance the court must decide the matter on the acceptance of that version. See *S v Kuiper* 2000 (1) ZLR 113 (S) at 118B-D; *R v Difford* 1937 AD 370 and *R v M* 1946 AD 1023; *R v M* 1946 AD 1023 at 1027; *S v Jaffer* 1988 (2) SACR 84 (C) at 89D. In fact, I perceive no rational basis for rejecting the appellant's version. The finding by the trial court that the appellant's actions of 25 August 2021 and 7 September 2021 were inconsistent with his duties as a public officer are not borne out by the record, and is wrong. In fact, the trial court's factual findings are vitiated by material misdirection or shown by the record to be wrong.

[41] The provincial magistrate Mr Sangster testified and disputed that the draft order was signed in error. His evidence was that the appellant must have read the draft order, endorsed the details in the draft order and thereafter signed it, and such cannot be attributed to an error. This amounts to a misunderstanding of the appellant's version, his version is that he signed the draft order, and thereafter realised that he needed a response from the prosecutor before he determines the matter. Therein lies the error referred to by the appellant. The error was not in the signing, but in signing before the prosecutor filed his response to the application. He then kept the record awaiting a response from the prosecutor. After the prosecutor filed his response, he then informed the parties to collect the ruling on 7 September. Therefore, the evidence of Mr Sangster does not show that the draft order was not signed in error.

[42] The question that has to be answered is whether the appellant had the intention to favour Wambe or a disfavour to the delivery of justice? The appellant's version shows that it is more probable than not that he signed the order releasing the motor vehicle in error. I am of the view that the appellant showed that in issuing two conflicting orders in one matter he had acted with an innocent state of mind. The appellant's version negated the finding that by issuing two conflicting orders in the same matter he was actuated with the intention to favour Wambe and disfavour the administration of justice. In the final analysis the State did not prove its case beyond a reasonable doubt. He ought to have been acquitted. The conviction will therefore be set aside.

Accordingly, the following order will issue:

1. The appeal be and is hereby allowed.

2. The judgment of the court *a quo* is set aside and substituted with the following:

"The accused is found not guilty and acquitted."

Dube-Banda J……..

Ndlovu J……I agree

T.J. Mabhikwa & Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioner