HB 138/16
HCA 394/14

EDMORE NYARUGWE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
BERE & TAKUVA JJ
BULAWAYO 15 FEBRUARY & 2 JUNE 2016

Criminal Appeal

Appellant in person
W. Mabhaudi for the respondent

TAKUVA J: This is an appeal against conviction and sentence. The appellant who was a self actor applied orally for leave to appear in person. Mr *Mabhaudi* indicated that in view of his attitude towards the propriety of the conviction, he was not opposed to the application. We then granted the requisite leave to prosecute the appeal in person. After hearing both parties, we quashed the conviction and set aside the sentence indicating that our reasons would follow. These are they.

The appellant appeared before a magistrate at Victoria Falls facing the following charges:-

> "Contravening section 174 (1) (a) of the Criminal Law (Codification and Reform) Act Chapter 9:23. In that on the 28th day of July 2014 and at Victoria Falls Border Post, the accused person Edmore Nyarugwe who is a police officer unlawfully did an act which is contrary to his duties as a police officer, that is to say accused accepted $300,00 from Tariro Mundozo in order to facilitate smuggling of various goods into Zimbabwe without paying duty at the border.
>
> Alternatively

> Contravening section 170 (1) (a) (i) of the Criminal Law (Codification and Reform) Act Chapter 9:23 Bribery. In that on the 28th of July 2014 and at Victoria Falls Border Post, the accused being a police officer unlawfully agreed to accept for himself $300,00 as an inducement for omitting to do any act in relation to his principal's affairs, that is to say accused accepted $300,00 from Tariro Mundozo in order to facilitate smuggling of various goods into Zimbabwe without paying duty at the border contrary to his duties as a police officer manning the border post."

Despite pleading not guilty appellant was convicted and sentenced to pay a fine of "US$400,00 or in default of payment 6 months imprisonment. In addition 3 months imprisonment suspended for 3 years on condition the accused does not within that period commit any offence involving criminal abuse of office as an element [and for which] upon conviction he is sentenced to imprisonment without the option of a fine."

The state alleged that on the day in question, appellant "came into contact" with Tariro John Mundozo, Augustine Chasaya and Ronald Chasaya who offered him a $300,00 bribe to facilitate their entrance into Zimbabwe with their truck containing goods without declaring its contents to ZIMRA officials at the border. Appellant is further alleged to have offered Rufaro Mvududu, a ZIMRA official US$100,00 to induce her to allow the truck safe passage into Zimbabwe without declaring its contents. The appellant was arrested after the three men in the truck revealed that they had bribed the appellant.

In his defence outline, the appellant denied accepting a bribe from anyone. He denied that he knew or met any of the three men in the truck on the day in question. Further, he denied offering Rufaro Mvududu (Rufaro) US$100,00 in order to allow the truck to pass through into Zimbabwe without being searched.

The state, in a bid to prove its case called three witnesses namely Rufaro, Ronald Chasaya (Ronald) and Gamuchirai Chirikure (Chirikure). Rufaro told the court *a quo* that while she was attending to the truck and its crew, appellant approached her and offered her US$100,00 which she did not see or take. The money was for allowing the truck safe passage. She then informed her supervisor about what appellant had done.

The second state witness was Ronald who denied that he or any of the truck's occupants had given the appellant any money. He said he did not know the appellant at all. The state which was not amused by the sudden u-turn in his evidence impeached him and ultimately had him declared a hostile witness. Ronald was then extensively cross-examined by the prosecutor but he stuck to his version. Finally, the state called Chirikure, a police officer whose evidence contradicted that of Rufaro. Her evidence exonerated the appellant in that she said appellant was manning another gate far away from where the truck in issue was parked and that in fact she and not Rufaro dealt with the suspect truck. She was surprised that the crew did not return to her with documents she had requested but instead approached Rufaro. At that stage she suspected that the crew was up to no good. She also said at that stage appellant never came near the truck.

The state closed its case without impeaching Chirikure. Appellant gave evidence and insisted that he never spoke to any of the three occupants of the tuck. He emphatically denied offering Rufaro a bribe. He confirmed that it was in fact Chirikure who was manning the "extrance gate" and that if what Rufaro alleged happened, had in fact happened Chirikure would have seen him at or near the truck. She did not.

The magistrate in her judgment in which she curiously found Rufaro to be a credible witness concluded thus:

> "In addition to that what (*sic*) she is saying is backed up by the witness statement of Ronald Chasaya. He may have deviated from them (*sic*) in court but his aggression or hostility towards the prosecution shows that he was bent on changing his statement. …
>
> What I find is that this statement corroborates what Rufaro said that accused approached her on behalf of them … He even mentioned the amount of $200,00 which Nyarugwe was offered by his brothers with a balance to be paid after the transaction was complete. Those are details which add to the possibility of the offence … I find the evidence of Rufaro with the witness statements in contrast to accused's assertions head (*sic*) to the conclusion that accused person did abuse his duty as a public officer and offered a bribe." (my emphasis)

Herein lies the fundamental and monumental error committed by the magistrate. Ronald was a hostile witness who was so declared and cross-examined by the prosecutor. The sole

purpose of cross-examining a hostile witness by a party calling him is to neutralize the adverse testimony of such witness. In *S* v *Mazhambe & Ors* 1997 (2) ZLR 597 (H) GILLESPIE J had this to say –

> "The purpose of proving a prior inconsistent statement is to neutralize the effect of the unexpectedly adverse testimony. The statement does not itself become evidence. The contents of the statement cannot be relied upon as evidence. If the witness who has already departed from the statement nevertheless on confrontation admits the truth of the statement and adheres to it, in the sense of repeating it in evidence then the court may act on that oral evidence, although not on the previous statement. The weight of any such evidence will of course usually be substantially affected by the equivocation of the witness. Conversely, the fact that a witness has and his credibility impeached by production of a previous inconsistent statement does not mean that his evidence, adverse to the party calling him, must necessarily be rejected. It remains evidence given in court and must be properly examined and a judicial determination reached as to whether or not to accept it. In particular, the explanation for the giving of the prior statement may be such that the credibility of the evidence actually given in court cannot be discounted. Similarly, where the court goes further and declares the witness hostile, the adverse evidence is effectively neutralized as evidence led by the party against itself. It is not, however, *ipso facto* to be disregarded. The evidence given by that witness, both under cross-examination by the party calling him and otherwise, may be considered and accepted or rejected in whole or in part depending upon the weight to be attached to it." (the underlining is mine)

In casu, no reliance should have been placed on Ronald's statement to the police. Further, his evidence in chief in court could only be considered if he had incriminated the appellant in some portions of his testimony. Put differently if Ronald had associated himself with portions that are not favourable to the appellant the court could have relied on those portions. There are none such portions.

In *R* v *Twetison* 1964 RLR 147, LEWIS J remarked;

> "There may well be cases where a previous inconsistent statement does not operate against the acceptance of the evidence of that witness. For example, a crown witness may give evidence on oath in chief implicating the accused and he may then be cross-examined by the accused to the effect that he had made a statement to the police sometime previously exonerating the accused. He may then say:

> "Yes, I admit having said that but I was acting through fear at the time I told that to the police. Now that I am in the court and I am under oath, I am telling the truth and what I have told the courts is the truth."

In such circumstances, in an appropriate case, it would be proper to accept the evidence of such witness as truthful and convict on it despite the previous inconsistent statement. In such a case, of course, there is no question of the crown impeaching the credit of its own witness, and the evidence implicating the accused is evidence on oath in court at the trial. But, as I pointed out, the reverse cannot apply, if the witness in his or her evidence on oath in court gives evidence unfavourable to the crown. The mere fact that she has made a previous statement favourable to the crown extra-judicially cannot be used to neutralize the unfavourable evidence."

In this case the court *a quo* could only rely on Rufaro's evidence. In terms of section 269 of the Criminal Procedure and Evidence Act Chapter 9:07 it shall be lawful for the court by which any person prosecuted for any offence is tried, to convict such person of any offence alleged against him in the indictment, summons or charge on the single evidence of any competent and credible witness. Rufaro's evidence in my view is unsatisfactory in material respects. She said she immediately reported the incident to her superior. What is surprising is why this matter was not reported to the police at the border by the so-called supervisor if indeed Rufaro had reported it. Secondly, according to Chirikure, Rufaro did not voluntarily divulge what happened to her. It is Chirikure who had to quiz Rufaro on her role in the discussion with the three men in the truck the previous day. Thirdly, at the close of the state case, the court had two versions of what possibly happened at the border. It was improper for the court to reject one version simply because Chirikure is a police officer who was keen to exonerate another police officer. If indeed appellant approached Rufaro at that gate why is it that only Rufaro saw him there?

In *S* v *Makanyanga* 1996 (2) ZLR 231, GILLESPIE J remarked that:

> "Proof beyond a reasonable doubt demands more than that a complainant should be believed and the accused disbelieved. It demands that a defence succeeds whenever it appears reasonably possible that it might be true. This insistence upon objectivity far transcends mere considerations of subjective persuasion which a judicial officer may entertain towards any evidence. The administration of justice would otherwise be the hostage of the plausible rogue whose insincere but convincing blandishments must prevail over the stammering protestations of the truth by the diffident, frightened or confused victim of false incrimination." (my emphasis)

From the evidence on record it cannot be said that there is no reasonable possibility that the appellant's defence might be true.

For these reasons we upheld the appeal and quashed the conviction and sentence.

Bere J …….. I agree

National Prosecuting Authority, respondent's legal practitioners