MAKANZWEI JECHECHE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIWESHE JP & HUNGWE J
HARARE, 15 September 2015 & 7 October 2015

Concession in terms of section 35 of the High Court Act, [*Chapter 7:06*]

A Rubaya, for the appellant
E Mavuto, for the respondent

HUNGWE J: The appellant was the District Administrator for Chegutu District at the time of his conviction for criminal abuse of office as defined in s 174 (1) (a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. He was sentenced to 18 months imprisonment of which six months were suspended on the usual conditions of good behaviour.

The facts in this case are largely common cause. The dispute revolved around whether the appellant had solicited for a bribe from a trap as the State claimed. The appellant denied that he had indeed solicited for such a bribe. He alleges that the trap money was planted in an elaborate ploy to dislodge him from his politically influential position of District Administrator at the height of internal contradictions within the ruling political party ZANU (PF). As such he persisted with his protestations of innocence and appealed to this court against both conviction and sentence.

This, matter in my view, demonstrates the classical reasons why the evidence of traps needs to be approached with caution as well as the dangers inherent in police trap cases. The first point to note is that all witnesses including the police details qualify as trap witnesses. As such their evidence must be treated with caution. They have all the reason to ensure that the trap succeeds and would go to any extent to ensure this at the expense of the truth. This may result in failing to resist the temptation to embellish evidence. The evidence of a police trap should be treated with caution because such persons "may have a motive in giving evidence which may outweigh their regard to the truth. (*S* v *Chesane* 1975 (3) SA 172 (T) (@173G)

Gardner & Lansdown *South Africa Criminal Law and Procedure* vol 1 6th ed defined a "trap" as:

> "a person who, with a view to 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 *S* v *Ohlenschlager* 1992 (1) SACR 695 the court held that for the purpose of the cautionary rule, the ordinary meaning of 'trap' should be accepted and that there was no good reason for the narrow definition set out by Gardner & Lansdown. There was no good reason for example, for excluding a person from this definition merely because he did not propose the criminal conduct where he, after someone else proposed it, participated in the planning and execution of the proposed criminal offence with a view to convicting the offender.

A useful summary of the position is to be found in *S* v *Petkar* 1988 (3) SA571(A), where Smalberger JA said at 576:

> "Much has been said about the use of traps and the many undesirable features of the system. I do not propose to review the authorities on the point, and what has been stated in them. It will suffice for the purposes of the present matter to refer to extracts from two authorities. In *R* v *Clever; R* v *Iso* 1967 (4) SA 256 (RA) at 257H Quenet JP stated:
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> > 'In the case of persons who have previously been convicted, trapping has the undesirable feature that it puts temptation in the way of those least able to resist. In any case, such persons might not have offended but for the fact that a trap was used.'

He later added (@ p258E):

> "In cases where there is general recognition of the propriety of employing the system the greatest care should be taken to see that the trap is a fair one. Verbal persuasion should not be used."

I am in full agreement with the above sentiments. It is apparent to me that there were too many danger apparent in the tactics employed in the trap put into motion in the present matter. Whilst anyone must feel free to report to anyone in authority whom he feels is capable of dealing with the matter according to law, it has not escaped this court's attention that the complainant and trap left Kadoma and decided to report to a senior political figure in the form of one Didymus Mutasa who was then Minister of State Security. One wonders why the complainant felt it was only this man who could handle the apparent solicitation for a bribe from the appellant. Complainant could have made known his disgust at the appellant's alleged demands to the local police station in Chegutu before embarking on his journey to Harare.

Then there is the matter of the several inconsistencies pointed out by the appellant which go to the root of the trap witnesses' credibility. If, as the appellant claims, the State

witnesses are not agreed as to the presence of one Munemo inside the appellant's offices at the time the rest of the trap team trooped into the office after the envelope with the trap money had been placed into the drawer, is it not also likely that there would have been a point in time the appellant left briefly and the envelope was then planted? In any event it seems to me that this trap was haphazardly arranged such that one could not say with certainty that the appellant was aware that there was money place inside his desk. It would have been better had the trap enticed the suspect out of his office to a secluded place where he would have inevitably been found with money on his person rather than the situation here where the "trap" money was at no time physically on his person. When the appellant recites the political ploy to remove him from his office by this means, it is difficult to dismiss his defence as not reasonably possibly true.

Once the court considers this as a possibly true explanation of this rushed shoddy police job, one is reminded of the words of FLEMMING J in *S* v *Desai* 1997 (1) SA 845 (W) at p848 where he remarked:

> "The trap gave evidence. The informer did not. This left the field wide open for the appellant to testify about what the informer had allegedly done. That it is often for various reasons undesirable or impossible for the police to produce an informer as a witness, is a state of affairs which, as the 'defence' raised in this case shows, create an unattractive prospect for an accused who is trapped, to be acquitted not because the facts do not prove guilt, but because the accused was 'enticed and lured.' Courts should be aware of the risk. Courts have a duty to society in general not to share in the spirit of unduly promoting everything which can possibly assist towards acquittal, irrespective of the established truth. Unless the court devotes itself adequately to the ascertainment of the truth and to acting in accordance therewith, society can be expected to make its own assessment of guilt and to compensate with its own reactions for such and for indecisiveness or spinelessness of the court. That consideration must be born in mind when deciding to what extent the allegations of the appellant against the informer can or should be recognised as a 'defence'. Similarly so when asking whether the draftsman of the Constitution would have been so irresponsible as to strike a balance which demand that even those who are known to have committed an illegal deed should nevertheless be acquitted. (The said consideration also requires proper scrutiny of the uncontradicted evidence about 'enticement'.)"

In the instant case the complainant is a trap as were all the other witnesses. However, that notwithstanding I am unable to dismiss the appellant's claim of planted evidence as not being reasonably possibly true. I make this remark in light of the fact that it was within police powers to set up the trap better, if indeed they believed the appellant was in this nasty habit of demanding a bribe for executing his official duties. They would have possibly sent fairly senior officers to plan and execute the trap. They could have been able to find the trap money on his person rather than inside a drawer where the possibility of it having been planted could not be ruled out.

In light of the above and as in tradition, where there is doubt whether there has been proof beyond doubt, that doubt must be resolved in favour of the liberty of the accused. In the result the appellant ought to have been acquitted by the court *a quo* as the evidence did not cure these lingering doubts. The concession made by the State in respect of the appeal against conviction is, in my view, well made.

Consequently I make the following order:

The appeal against conviction succeeds. The conviction is quashed and the sentence set aside.

The verdict in the court *a quo* is altered to read "Not Guilty and acquitted."

CHIWESHE JP agrees……..

Rubaya & Chatambudza, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners