REPORTABLE (29)

FORTUNE MURISI
v
THE STATE

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GWAUNZA JA & HLATSHWAYO JA
HARARE, JUNE 6, 2014 & MARCH 7, 2019

L Uriri, for the appellant

M Mugabe, for the respondent

HLATSHWAYO JA: On 3 April 2006 the appellant was found guilty of one count of contravening s 3(1)(a)(ii) of the Prevention of Corruption Act [*Chapter 9:16*] (hereinafter referred to as 'the Act') by the Magistrates Court. On 9 February 2013, the High Court confirmed the conviction and found that there was no appeal against sentence before it. The appellant now appeals to this Court against both conviction and sentence.

The following facts were established before the trial court. The appellant was a magistrate at Chinhoyi Provincial Magistrates Court, Mashonaland West. It was alleged that on a date unknown to the prosecutor but between 20 and 30 December 2005, at Chinhoyi Magistrates Court, the appellant was approached by one Sarah Rice, a plaintiff in a matter that was before the Civil Court under Case Number CC 86/05 and her relative Agnes Ziyenge. It was alleged that the appellant corruptly solicited and accepted a gift in the sum of ZW$500 000.00 for the fast tracking of Sarah Rice's case. Furthermore, it was alleged that on

29 December 2005 the appellant corruptly accepted a gift in the sum of ZW$800 000.00 from one Stephen Rupiya who was acting on behalf of Sarah Rice.

The appellant was arraigned before the Magistrates Court on the basis of these allegations and was charged with two counts of contravening s 3(1)(a)(ii) of the Act. After a contested trial, the appellant was convicted on the first count of soliciting and accepting a gift in the sum of $ 500 000.00 for the purpose of fast tracking Sarah Rice's case. He was sentenced to thirty-six (36) months imprisonment with labour of which twelve months were wholly suspended on condition that he did not commit, within that period, any offence contravening s 3 of the Act and for which he is sentenced to imprisonment without the option of a fine.

Dissatisfied with the finding of the Magistrates Court, the appellant noted an appeal against both conviction and sentence in the court *a quo*. The court *a quo* dismissed the appeal against the conviction but however found that there was no appeal against sentence before it. The appellant then noted this appeal on the following grounds:

AS REGARDS CONVICTION

1. The court *a quo* erred in law in finding that the appellant had properly been convicted by the court of the provincial magistrate at Chinhoyi in that:
   1.1 The reverse onus provisions in the Prevention of Corruption Act, ("the Act") could not, as a matter of law, come into play, and the appellant could not have been placed on his defence, unless certain jurisdictional facts as required by section of the Act (*sic*) had been met, *id est*, that the appellant had within the course and scope of his duties as a public officer done something which objectively viewed showed favour or disfavour to another.
   1.2 The court *a quo* erred in not finding that as a matter of law, all the requisite jurisdictional facts have to be satisfied before an accused can be placed on his defence and before a conviction can ensue.
   1.3 For the stronger reason, the court *a quo* ought to have found, as a matter of law, that a conviction in terms of the Act cannot ensue if:
      1.3.1 the person allegedly giving the gift or inducement did not consider himself to be corrupting the appellant; and
      1.3.2 the appellant did not consider himself corrupted

1.3.3 the appellant did not, on an objective basis, show favour or disfavour to another.

1.4 The court *a quo* erred in law in not finding that the court of the provincial magistrate, in convicting the applicant (*sic*), had not properly applied the cautionary rule in respect of potentially accomplice evidence and had therefore satisfactorily excluded the risks sought to be cured by the cautionary rule.

1.5 The court *a quo* erred in not giving adequate consideration to the fact that the objective test in section 4 of the Act is the legal test of the reasonable man, and, consequently, the question would be whether the disinterested proverbial reasonable man would consider that on the facts the appellant had wrongfully received an inducement so as to show favour or disfavour to another.

1.6 The court *a quo* erred in not finding that the court *a quo* ought to have, as a matter of law, returned the benefit of the doubt if the inference of guilt was not the only reasonable inference.

AS REGARDS SENTENCE

2. The court *a quo* erred in law in not considering events that had taken place since the appellant's conviction, which events militated against the upholding of the custodial sentence set out in paragraph of *(sic)* the appellant's Heads of Argument *a quo*, and such further relevant considerations as could be ascertained from the court's records including the fact that at the time of the hearing of the appeal the appellant had served a portion of the custodial term.

3. The court *a quo* erred in law in not finding that the sentence imposed by the magistrate was out of sync with the established statutory sentencing regime and case law in similar matters.

4. The court *a quo* erred in law in not finding that the court of the provincial magistrate was obliged by law to consider other forms of punishment.

ISSUES FOR DETERMINATION

Mr *Mugabe* for the respondent has, in his heads of argument pointed out, and correctly so in my view, that the appellant in his grounds of appeal against conviction does not allege that, let alone show how, the court below misdirected itself in upholding the magistrate's decision convicting him. Instead of attacking the reasoning and the decision of the High Court, the appellant simply reproduced the same arguments he advanced when he appealed in the court *a quo*. So, strictly speaking, the appellant has not properly challenged the conviction. However, this Court would still be duty bound to consider the propriety of the conviction before

assessing the appropriateness of the sentence. Accordingly, the issues for determination can the summarized thus:

1. Whether the essential elements of the crime were satisfied justifying a reverse onus on the appellant.
2. Whether the cautionary rule had been properly applied with regard to 'potentially accomplice evidence'.
3. Whether the sentence imposed should stand in the circumstances.

These will be discussed *seriatim* below:

Whether the essential elements of the crime where satisfied justifying a reverse onus on the appellant.

The appellant was convicted for the contravention of s 3(1)(a)(ii) of the Act, which reads as follows:

> "3. **Corrupt Practices**
> (1) If-
> (a) any agent corruptly solicits or accepts or obtains, or agrees to accept or attempts to obtain, from any person a gift or consideration for himself or any other person, as an inducement or reward-
> (ii) for showing or not showing, or for having shown or not shown, favour or disfavour to any person or thing in relation to his principal affairs or business.
> he shall be guilty of an offence"

Section 15 (2)(a) of the Act creates a presumption or rather a reverse onus in relation to the prosecution of the above offence. It reads as follows:

> "If it is proved in any prosecution for an offence in terms of section three or four that-:
> (a) Any agent has solicited, accepted, obtained, agreed to accept, or attempted to obtain any gift or consideration for himself or for any other person, it shall be presumed, unless the contrary is proven, that the agent did so in contravention of section three;"

It was contended by counsel for the appellant that the reverse onus provisions in the Act could not, as a matter of law, come into play and the appellant could not have been placed on his defence unless certain 'jurisdictional facts' as required by the Act had been met. It was averred that the jurisdictional facts which must be met before the appellant could be put on his defence are that he, within the course and scope of his duties as a public officer, did something which objectively viewed showed favour or disfavour to another.

It was further submitted that a conviction in terms of the Act cannot ensue if the person allegedly giving the gift or inducement did not consider that she was corrupting the appellant, the appellant did not consider himself to be corrupted and did not show favour or disfavour to another.

The Court was referred to the case of *S v Chogugudza* 1996 (1) ZLR 28 (S) as authority for the proposition that it must be proven that the appellant, within the course and scope of his duties as a public officer did something which objectively considered showed favour or disfavour to another. This Court in the *Chogugudza* case (*supra)* held as follows at p30E-F:

> "... before the State could rely on the presumption in section 15(2)(3) of the Prevention of Corruption Act, it would have to show (a) that the accused was a public officer; (b) that in the course of his employment or in breach of his duty (c) he did something which, objectively considered, showed favour or disfavour to another."

It is important that the above passage be read within the proper context of that case. The court a *quo* correctly noted that the above passage was stated in the context of s 4 of the Act that deals with offences committed by public officials in the course of their employment. The appellant was charged under s 3 of the Act, which relates to corrupt practices. Before importing the requirements stated in the *Chogugudza* case (*supra*) it is therefore imperative to

establish the clear and literal meaning of s 3 as read with s 15(2) of the Act which creates a reverse onus on the appellant where certain facts are proven. Statutory interpretation is aimed at giving life to the intention of the legislature with the starting point being establishing the ordinary and grammatical meaning of the provision before resorting to aids of interpretation.

The Constitutional Court has had occasion to deal with the construction of legislative provisions in the case of *Chihava & Ors v Principal Magistrate & Anor* 2015 (2) ZLR 31 (CC) where the following is stated at 35F-36E,

> "The starting point in relation to the interpretation of statutes generally would be what is termed 'the golden rule' of statutory interpretation. This rule is authoritatively stated thus in the case of *Coopers and Lybrand & Others v Bryant* 1995 (3) SA 761 (A) at 7:
>
> > 'According to the 'golden rule' of interpretation, the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument. In his book '*Principles of Legal Interpretation - Statutes, Contracts and Wills*' 1st Ed. At page 57, E A Kellaway echoes this statement as follows:
> >
> > > 'The dominating Roman-Dutch law principle is that an interpretation which creates an absurdity is not acceptable (that is '*interpretatioquae paritabsurdum, non est admittenda*)'" (my underlining)

The ordinary and grammatical meaning of s 15(2) is that where a case is prosecuted in terms of s 3 of the Act and it is proven that an agent has corruptly solicited, accepted or agreed to accept any gift or consideration for himself, it shall be presumed unless the contrary is proven, that the agent did so in contravention of s 3. Therefore, once the above is proven it will be presumed that the person corruptly solicited or accepted the gift for purposes of showing favour to another person in relation to his principal affairs or business.

The provision which creates a reverse onus on the appellant is clear and unambiguous as to what should be established before the appellant may be put on his defence and discharge the onus, on a balance of probabilities, of course, that he did not accept the gift or consideration for purposes of showing favour to any person. The established facts before the

trial court and the court *a quo* were that the appellant solicited money for 'lunch' which money was subsequently paid by Sarah Rice through one Simon Kasukuwere whom the appellant had sent. Simon was given ZW$500 000.00 which he passed on to the appellant.

It was proved, in the trial court that the appellant solicited consideration for himself in the form of money. The presumption in s 15 (2) of the Act was triggered once the above was established hence there was an onus on the appellant to prove on a preponderance of probabilities that the money he solicited and accepted was not for showing favour to Sarah Rice in relation to his principal duties. I find no merit in the appellant's assertion that a conviction in terms of the Act cannot ensue if the person giving the gift or inducement did not consider that she was corrupting the appellant or where the appellant did not consider himself to be corrupted. It is precisely the purpose of the provision to remove the discourse from pure subjectivism to the realm of objectivity and balance of probabilities. The appellant failed to discharge the onus and it is on this basis that the decision *a quo* cannot be faulted in upholding the conviction.

Whether the cautionary rule had been properly applied with regard to 'potentially accomplice evidence'

The appellant in his grounds of appeal contends that the court *a quo* erred in law in not finding that the court of the provincial magistrate, in convicting the appellant had not properly applied the cautionary rule in respect of potentially accomplice evidence and had therefore satisfactorily excluded the risks sought to be cured by the cautionary rule.

The reason for the existence of the cautionary rule with regard to an accomplice witness was clearly spelt out by Gowora JA in *Ncube v The State* SC 33/2016 at p7-8 of the cyclostyled judgment as follows:

> "The reason for the existence of the cautionary rule regarding the evidence of accomplice witnesses in criminal trials is trite. An accomplice is a self-confessed criminal and various considerations may lead him to falsely implicate an accused person, such as a desire to shield a culprit, or the hope of clemency where he has not already been sentenced. Additionally by reason of his inside knowledge he has a deceptive facility for a convincing description of the facts, his only fiction being the substitution of the accused for the real culprit."

It can be seen from the above that it is imperative that a trial court treats the evidence of an accomplice witness with great circumspection as such a witness has ample reason to falsely incriminate an accused. This does not mean that such evidence is not admissible. It merely means that a court of law ought to warn itself of the inherent dangers associated with the reliance on such evidence.

Section 270 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides as follows with regard to accomplice evidence:

> **"270 Conviction on single evidence of accomplice, provided the offence is proved *aliunde***
> Any court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment, summons or charge under trial on the single evidence of any accomplice:
> Provided that the offence has, by competent evidence other than the single and unconfirmed evidence of the accomplice, been proved to the satisfaction of such court to have been actually committed."

It is clear from the record that the provincial magistrate was alive to this requirement and the principle that the evidence of a potentially accomplice witness should be treated with caution unless it is corroborated by evidence. The evidence of Sarah and Agnes

was corroborated by the evidence that was before the trial court particularly evidence of one Simon Kasukuwere who was sent by the appellant to collect the consideration in the sum of $500 000.00. In assessing the evidence of Mr Kasukuwere, the provincial magistrate made a finding as to his credibility noting that he had no reason to frame the appellant 'who was his senior in the Ministry'.

The requirements in regard to accomplice evidence are aptly summarized in *S v Mubaiwa* 1980 ZLR 477 at p 481A-C as follows:

(i) in exercising the caution which was necessary before acting upon the evidence of an accomplice, the court had to deal separately with the case of each appellant;

(ii) quite apart from the requirements of s 292 of the Criminal Procedure and Evidence Act [*Chapter 28*](now repealed), a trial court had to warn itself of the danger of acting on the evidence of an accomplice;

(iii) the best way to be satisfied that an accomplice was reliable was to find corroboration implicating the accused;

(iv) the risk of accepting accomplice evidence would be reduced if the accused person was found to be a liar, or did not give evidence to contradict that of the accomplice;

(v) but in the absence of the features in (iv) the court could convict if, being aware of the danger, it was satisfied that it could rely on the evidence of the accomplice, because of the merit of the accomplice, as against the accused as a witness was beyond question;

(vi) in the case of (v) if corroboration was necessary it had to be corroboration implicating the accused person and not merely the corroboration which met the requirement of s 292, i.e. corroboration in material aspects. (See *R v Lembikani & Anor* 1964 R. & N. 7.)

It has been shown above that the potentially accomplice witness evidence before the trial court was corroborated. Furthermore, the trial court made a finding that the appellant was not a credible witness in his own case. It is trite that an appellate court is ordinarily loath to disturb findings of a trial court that depend on credibility. (See *Gumbura v The State*

SC 78/14). The provincial magistrate found that the appellant was not truthful and that he did not give evidence to contradict that of the accomplice. The following was stated in this regard:

> "It is not easy to disbelieve the State witnesses when one compares their evidence with that of a single witness,that is the accused. One is persuaded to believe that accused failed to call even a single witness because his assertions were not true and that accused failed to find anyone to support him. The court feels that it is risky to accept accused's evidence which is full of bald assertions but without any corroboration."

The provincial magistrate cannot therefore be faulted for convicting the appellant on the said evidence. The court fully satisfied itself as to the cogency of the evidence as required by the Criminal Procedure and Evidence Act and the above cited authorities. It is on this basis that I find no merit in the appellant's contention that the court *a quo* erred in not finding that the provincial magistrate had not properly applied the cautionary rule in respect of 'potentially accomplice evidence'.

Whether the sentence imposed should stand in the circumstances

A perusal of the decision *a quo* shows that after dismissing the appeal against conviction, the court *a quo* proceeded to find that there was no appeal against sentence before it.

The appellant submits that the court *a quo* grossly misdirected itself in finding that the appellant had not appealed against sentence when the appeal and heads of argument in the court *a quo* had attacked both conviction and sentence. Counsel for the respondent conceded this fact and moved that the question of sentence be revisited by this Court.

By erroneously finding that there was no appeal against sentence before it, the court *a quo* failed to consider all the relevant issues raised by the appellant in its grounds of appeal.

The position is well settled that a court must not make a determination on only one of the issues raised by the parties and say nothing about other equally important issues raised, "unless the issue so determined can put the whole matter to rest" – *Longman Zimbabwe (Pvt) Limited v Midzi* & *Ors* 2008 (1) ZLR 198, 203 D (S) & *Gwaradzimba v C J Petron and Company (Proprietary) Limited* 2016 (1) ZLR 28 (S) at page 32A-B.

In the *Gwaradzimba* case *supra*, GARWE JA made the following remarks at page 32B-C of the cyclostyled judgment:

> "The position is also settled that where there is a dispute on some question of law or fact, there must be a judicial decision or determination on the issue in dispute. Indeed the failure to resolve the dispute or give reasons for a determination is a misdirection, one that vitiates the order given at the end of the trial – Charles Kazingizi v Revesai Dzinoruma HH 106/2006; Muchapondwa v Madake & Ors 2006 (1) ZLR 196 D-G, 201 A (H); GMB v Muchero 2008 (1) ZLR 216, 221 C-D (S).

The failure by the court *a quo* to deal with the issue of conviction that was duly before it for determination is a gross misdirection which justifies this Court interfering with the finding of the court *a quo* in this regard, i.e., setting aside the finding that there was no appeal against sentence before the same court. Thus, it becomes the task of this Court to now determine the question whether the magistrate's court misdirected itself in sentencing the appellant to thirty six months imprisonment and suspending twelve months on condition of future good behaviour.

This Court is in as good a position as the court *a quo* to make this determination. Furthermore, given the delays so far experienced in the conclusion of this matter, the interest of justice require that this Court so determine the matter rather than remit it to the High Court.

Both counsel were of the view that this Court should determine both the issue of conviction and sentence, instead of deciding one and remitting the other issue to the High Court. There is sufficient and weighty legal authority and precedence in support of adopting this approach. In *Siluli v The State* SC 106/04, this Court held:

> "… before arriving at a conclusion the court is enjoined to carefully balance the mitigating features and aggravating features. This the court did not do in the present case. The trial court's misdirection leaves this Court with two options. Either to remit the matter for sentencing de novo or, for this Court to pass sentence itself. The latter is the more common practice; *see Mharadzo*'s case, *supra*. The Court, in this case, will follow the more common practice and assess the sentence itself."

In *Delta Beverages (Private) Limited V Murandu* SC 38/15 it was held:

> "While ordinarily the remedy would have been for this court to remit the matter to the court *a quo* for the hearing of evidence on the factors requisite for a proper assessment of the damages in question, I take the view that this is not a proper case for such action. **Firstly, this dispute has dragged on for some 15 years and remitting the matter would only lengthen the delay and frustrate efforts to bring finality to this litigation**. Secondly, but for the respondent's age and health status, this court has before it the requisite evidence and is in as good a position as any other court to reasonably assess the damages in question."

See also *Olivine Industries (Private) Limited v Shonhiwa & Ors* SC 18/15 where it was held:

> "That being the case and in the interests of bringing finality to this litigation, I am of the opinion that no real purpose would be served by remitting the matter to the Labour Court for it to consider the same merits. This Court has before it all the evidence relevant for a final determination of the matter."

In *Halwick Investments t/a Whelson Transport v Nyamwanza* SC 48/09 the court was of the view that it could "properly determine the issue without the need to remit the matter to the court *a quo*" while in *Duly Holdings v Chanaiwa* SC 17/07 the following was said:

> *"*Although I have considered remitting the matter to the *court a quo* for the appropriate determination as indicated, I am also cognizant of the need to bring finality to the case.

Accordingly, since all the evidence that would enable this court to determine the matter on the merits has been placed before us, I shall proceed to do so."

In *Taruvinga v Cimas Medical Laboratories* SC 19/05 the court stated:

"The appellant was charged with three other offences, also arising from the same conduct. Although the Labour Court did not deem it necessary to consider these other offences, it is in the interests of justice, and finality in litigation, that they be considered by this Court on the basis of the evidence before it."

Thus, in making the decision whether to remit the matter to the court *a quo* for sentencing or to pass sentence itself the court considers the following, among other factors:

(a) Ordinarily, the appellate court would remit the matter to the lower court so that it does not become the court of first and last instance on sentence imposed. That would be the "common practice" contrary to what is stated in the passage from *Siluli v The State* (*supra*). See *Delta Beverages (Pvt) Ltd v Murandu* (*supra*) where remittal is referred to as the "ordinary remedy."
(b) The need to bring finality to matter taking into account, *inter alia*, the length of the delay already experienced in the conclusion of the case in particular and the interests of justice, generally.
(c) The availability to the appellant court of the material necessary finalizing the matter, often expressed as the appellant court 'being in as good a position as the court below in assessing sentence', or 'no real purpose being served by a remittal.'

I am satisfied that in this case all the above factors are fully satisfied and that this Court may proceed to assess the appropriate sentence.

In deciding on the appropriate sentence in this case, guidance must be derived from s 3(2) of the Act, which provides thus:

"**3 Corrupt practices**

(2) Any person who is guilty of an offence in terms of subsection (1) shall be liable to -

(a) a fine not exceeding three times the value of the gift or consideration concerned or level fourteen ,whichever is the greater; or

(b) imprisonment for a period not exceeding twenty years; or to both such fine and such imprisonment."

In sentencing the appellant to a custodial sentence of thirty six months the trial court reasoned as follows;-

> "Finally, there is no doubt that corrupt practices resorted to by judicial officers who play a crucial role in the administration of justice is particularly viewed seriously. Judicial officers are placed in positions of authority. It is their duty to ensure that persons who come before them are dealt with properly and in accordance with the law. There is also no doubt that as officers of the courts, the abundant obligation is to uphold the law and by their conduct set an example of impeccable honesty and integrity. A failure to do so will lead to the erosion of confidence in the minds of the public." And concluded: "This court has looked at all other forms of sentence, but is of the firm view that a custodial sentence will act as a personal as well as general deterrence."

While the magistrate's court, in the exercise of its discretion, concluded that a custodial sentence was appropriate in the circumstances, it did so without considering any other forms of punishment despite a passing reference to having done so, or a consideration of a combination of custodial and non-custodial sentence, i.e., a short, sharp term of imprisonment and a hefty fine as permissible in the Act. It further failed to properly assess the requisite length of such sentence, an exercise which would have entailed a careful balancing of mitigating and aggravating features as well as a fair comparison with sentences in similar decided cases. Finally, it failed to consider the events that had taken place since the conviction of the appellant. These errors, individually and in combination, amount to misdirection entitling this Court to interfere with the sentence imposed.

As regards the length of sentence, it was pointed out that the period of 36 months imprisonment was more than twice the sentence imposed in the case of *Chogugudza*(*supra*)where the moral blameworthiness of the accused, a public prosecutor, was greater: fifteen months imprisonment with eight months conditionally suspended for corruptly consenting to the admission to bail of foreign accused persons. The magistrate's court should have been guided by the approach set out in *S v Wood* 1973(2) RLR 11 (AD) in order to arrive at the proper length of sentence:

> "The question of the appropriate sentence in the case of the first offender almost always presents a judicial officer with problems of particular difficulty. My experience on the Bench convinces me that, in general, there is a tendency in this country to impose prison sentences on first offenders which are too heavy …
> In imposing a prison sentence on a first offender sight should never be lost of the fact that, for the greater part, the form of punishment itself, much more than the length of the sentence, is likely to reform him and act as a deterrent to others. This is particularly true where the offender belongs to a class, the members of which, whatever their race, feel deeply the shame and stigma of a prison sentence. The publicity of his trial, his exposure as a criminal, the far-reaching and often devastating effect of imprisonment on his social, family and economic life are, in the case of the first offender, aspects of punishment which should never be over-looked or under-estimated. It is these consequences attendant on serious criminal conduct which more than the length of the prison sentence are likely to deter other persons and to reform the first offender and, if they do not, it is unlikely the length of the prison sentence will, in the majority of cases, have a significant effect on bringing about the desired results."

Therefore, the length of the custodial sentence should have been considerably less than the 36 months imposed by the magistrate's court.

The powers of this Court in hearing appeals as outlined by s 12(4)(a) of the Supreme Court Act [*Chapter 7:13*] (hereinafter referred to as the 'Supreme Court Act') are as follows:

> "**12 Determination of appeals in ordinary cases**
> (4) On an appeal against sentence the Supreme Court shall, if it thinks that a different sentence should be passed—
> (*a*) quash the sentence passed at the trial and pass such other sentence warranted in law in substitution therefore, whether more or less severe, as it thinks ought to be passed,

having regard to all the circumstances, including events which have occurred after the date of sentence:
Provided that in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial" (My emphasis)

The above powers are generally facilitative and enabling – allowing the appellate court to quash and substitute the sentences of lower courts in the exercise of the appellate role, but are also substantive and grant original jurisdiction in exceptional circumstances to consider events occurring post sentencing. In this regard, I am required by virtue of s 12(4) of the Supreme Court Act to have regard to all the relevant circumstances and events that occurred after the date of sentence in considering the appropriate punishment on appeal.

This matter has been hanging over the appellant's head since 2005 and as correctly observed by the respondent such a long waiting period to have the matter finalised does have an effect on the appellant. When this matter was heard on appeal, almost ten years had elapsed since sentence was passed. This inordinate period of waiting and being uncertain and anxious was a form of mental and emotional punishment for the appellant. Moreover, the appellant had served a portion of the custodial term at the time of hearing the appeal. He has since moved on in his life and established a successful law practice. The delay in the disposition of this matter, which is in no way attributable to the appellant, is such that an effective prison term at this stage will not be in accordance with real and substantive justice. Mr *Mugabe*, for the respondent, submitted as much, suggesting that a wholly suspended sentence would be appropriate.

The appellate court in the case of *Kelvin Maitland Richards v The State* SC 14/04, interfered with the sentence of the trial court after having regard to the circumstances occurring after the sentence. In doing so it stated:

> "It has been almost six years since this incident took place. The appellant has had to live with the trauma of this event for all those years. He also spent some days being incarcerated just prior to Christmas. He is now twenty-three years old and now has the ability to pay a fine.
> The appellant waited for his trial to commence for almost two years. He was only a young boy at the time and the mental anguish he underwent must have been considerable. Since his conviction he has had to await his fate for almost a further four years. This too must have caused him a great deal of distress. I am satisfied that in an appropriate case a sentencing court should be mindful of the fact of the mental trauma an offender has been subjected to. In this case there appears to have been no sensible reason for the appellant to have been charged with the offence of murder. The delay in bringing the matter to trial almost two years after the event occurred is also not entirely excusable. The publicity of the trial, the appellant's exposure as a criminal and the often devastating effect on the life of a young boy is also not to be underestimated.
> Can there be any doubt that his conviction and the mental trauma which he must have suffered since the unfortunate incident took place will "inculcate caution in the citizenry" and have the necessary deterrent effect on others? I am satisfied that it will. In my view, the justice of this case would be met by the imposition of a fine."

In the totality of the circumstances of this case it is appropriate and in the interest of justice that the custodial sentence of thirty six months imposed by the magistrate's court be quashed and substituted with a reduced length of imprisonment which is wholly suspended partly on condition of future good behaviour and partly on condition that the appellant pays a fine more than treble the value of the gift as provided for by s 3 of the Act.

DISPOSITION

In the premises, the appellant has failed to establish why the conviction for soliciting or accepting a gift for the purposes of showing favour to another should be interfered with by this Court. As regard sentence, the court *a quo* grossly misdirected itself in finding that there was no appeal against sentence before it and the magistrate's court misdirected itself in assessing sentence.

In the result, it is ordered as follows:

1. The appeal partially succeeds with each party bearing its own costs;
2. The appeal against conviction is dismissed;

3. The decision of the court *a quo* regarding sentence is set aside and substituted with the following:

"The sentence of the Magistrates Court is quashed and substituted with the following:
"Accordingly, the accused is sentenced to twenty four months imprisonment; twelve months of which is suspended on condition that the accused does not within five years commit an offence involving the contravention of section 3 of the Prevention of Corruption Act, Chapter 9:16 for which he is sentenced to a term of imprisonment without the option of a fine and a further twelve months is wholly suspended on condition that he pays a level 14 fine.""

ZIYAMBI JA I agree

GWAUNZA JA I agree

Murisi and Associates, appellant's legal representatives

National Prosecuting Authority, respondent's legal representatives