HB 135-17
HCA 264-12
XREF HCA 114-14
XREF GWANDA 100-12

TEDIUS REVESAI
versus
THE STATE

HIGH COURT OF ZIMBABWE
BERE AND MATHONSI JJ
BULAWAYO 29 MAY 2017 AND 1 JUNE 2017

Criminal Appeal

R Ndou for the appellant
W Mabhaudhi for the respondent

MATHONSI J: The appellant was, on 6 June 2012 convicted by a provincial magistrate at Gwanda of criminal abuse of duty as a public officer in breach of s174 (1) and (b) of the Criminal Law [Codification and Reform] Act [Chapter 9:23] for having released a suspect, Meikles Nkala from custody, without compiling a docket on a theft charge after the suspect had been arrested for stealing four zinc sheets from Mkwidzi cattle pens. He was, upon conviction, sentenced to 24 months imprisonment of which 6 months imprisonment was suspended for 5 years on condition of future good behaviour.

The appellant was unhappy with that turn of events and has appealed to this court against both conviction and sentence. He took issue with the conviction because, in his view, the court *a quo* convicted him on the strength of the evidence of an accomplice witness who testified before the court without being warned of the risk of self-incrimination and indeed without the court itself adopting the cautionary rule on the dangers of relying on such evidence. The evidence in question was unreliable and in the end the state did not prove its case beyond reasonable doubt. Regarding sentence, the appellant took the view that it is so harsh and severe as to induce a sense of shock.

The state does not support the conviction. Mr *Mabaudhi* who appeared for the state submitted that the court *a quo* misdirected itself by convicting on the basis of accomplice evidence without even determining the credibility and reliability of the witness in question.

Furthermore the release of a suspect by a police officer does not necessarily amount to an abuse of duty in that a police officer has a discretion in those circumstances.

The appellant was a police constable in the Zimbabwe Republic Police of two years experience who, despite being a junior officer, had been thrust to the deep end by being put in charge of Mkwidze Police base, a satellite of Gwanda Police station. A suspect, Meikles Nkala, was arrested by a subordinate of the appellant one Genius Chauke, ably assisted by a neighbourhood watch committee member Themba Ncube, on suspicion of having stolen four zinc roofing sheets from a cattle pen belonging to the community.

When the suspect was handed over to the appellant, he interrogated him, during which interrogation the suspect stated that he had picked up the roofing sheets and generally denied having committed an offence. Following the questioning of the suspect the appellant formed the opinion that there was no evidence that an offence had been committed. He then released the suspect and advised him that following further investigations, he would call him back to the police station for further processes to be done.

Apparently that did not go down well with the local councilor who then lodged a complaint that the appellant had showed favour to Meikles Nkala by releasing him without taking him to court. As a result, the appellant was arrested and prosecuted aforesaid. At the trial, Meikles Nkala who had himself been prosecuted for the theft and secured for himself a wholly suspended sentence, surprisingly testified without being warned as an accomplice and the court accepted his evidence hook-line-and-sinker without even applying the cautionary rule in respect of suspect evidence. This was despite the fact that the witness suddenly changed his story from a complete denial of the offence to an acceptance that he had indeed stolen the roofing sheets. To cap it all, he mentioned, for the first time in court, that the appellant had solicited for and was paid by him a bribe of R900-00 for releasing him.

I agree with Mr *Mabaudhi* for the respondent that the mere release of suspect from police custody without being taken to court does not necessarily amount to an abuse of duty as a public officer. The suspect was handed over to the appellant as the officer in charge of the police base

and he was entitled to make that decision. That the decision may have been wrong does not amount to an offence.

In terms of s25 of the Criminal Procedure and Evidence Act [Chapter 9:07] it is a requirement that a person effecting an arrest of a suspect without a warrant must have a reasonable suspicion that a crime has been committed. If he or she does not have such a reasonable suspicion the arrest becomes unlawful and is what may properly amount to an abuse of duty. In fact the reasonable ground requirement has received constitutional recognition in s50 (3) of the Constitution which gives an arrested person a fundamental right to be informed of the reason why the detention should continue. If no reasons for continued detention exist the arrested person has a right to his or her immediate release.

Clearly in Zimbabwe we have the legal instruments defining the rights of suspects and also empowering law officers to act in a certain manner when handling criminal suspects. Those legal instruments, some of which I have just cited, give police officers the discretion to detain as well as to release and to even decline to take suspects to court, if they entertain a doubt that a criminal offence has been committed. The same applies to public prosecutors. A public prosecutor at a set down office to whom dockets are lodged by police officers after investigations, has a right to assess the evidence and decide whether there is a case to prosecute or not. If, in the opinion of the public prosecutor at set down, there is no evidence in the docket upon which a successful prosecution may be undertaken, it is within the discretion of the public prosecutor to decline to prosecute. A decision to decline to prosecute does not amount to abuse of office by the public prosecutor because he or she has the authority to make that decision.

I am saying all this because quite often in contemporary history public officers have been reduced to robots or automatons, machines without feelings or senses to make informed decisions on criminal prosecutions. A police officer will jump to handcuff a person and drag them to a police station where the person is promptly locked up in cells merely because a member of the public has filed a report against the unfortunate person. So you have a situation where a police officer does not bother to form an independent opinion about the matter or to

even begin to entertain a reasonable suspicion against the suspect but will merely detain the person because a civilian has said so.

Having detained the person, quite often no meaningful investigation is carried out beyond making a charge and recording a warned and cautioned statement from the suspect, taking the suspects fingerprints and then escorting him or her to court even where the arresting detail does not believe that an offence has been committed. Once in court, the public prosecutor reposed with the duty to assess the strength or otherwise of the case against the suspect abdicates that duty by simply rubber stamping and sending the suspect for initial remand. Undeserving cases are processed all the way to court and at times innocent people end up in custody while awaiting trial because the system is adulterated and those charged with the responsibility to vet cases do not bother to do so.

In my view it is that kind of laziness and at times timidness and reluctance to make correct decisions even when authority is bestowed on public officers, which is an abuse of duty, a case of omitting to act in a proper manner. The net effect of that is an insurmountable backlog of cases in the courts which should not be there at all. By the time courts of law find time to try those cases and discover they are no cases at all, they would have remained in the system as backlog for ages and innocent people would have been inconvenienced and their lives affected unnecessarily.

It is time to remind officers that they have a duty and indeed power to vet cases and release suspects where clearly they have no case to answer. The state should also take the blame for not encouraging police officers to make decisions and reducing them to a level where they are afraid of exercising discretion given to them by the law. A police officer should never arrest a person where he or she does not have a reasonable suspicion that an offence has been or is about to be committed. By the same token he or she should never arrest and detain a person in order to investigate whether an offence has been committed. It amounts to putting the cart ahead of the horse. It is turning the entire procedure upside down.

In the case of reasonable suspicion, what is required is that the person effecting an arrest must have information on the basis of which a reasonable person would hold a suspicion that the

person to be arrested has committed or was about to commit the criminal offence. See *S* v *Purcell-Gilpin* 1971 (1) RLR 241; *Attorney-General* v *Blumears* 1991 (1) ZLR 118 (S). It would be recalled that even where there is a reasonable suspicion, the police have a discretion not to arrest. If, in the circumstances the arrest is not justified, it will still be unlawful and the suspect may be entitled to sue for delictual damages. See *Muzonda* v *Minister of Home Affairs & Another* 1993 (1) ZLR 92 (S).

This is a case in which the court relied solely on the evidence of Meikles Nkala who had been released by the appellant because to him there was insufficient evidence that an offence had been committed. When the appellant questioned Nkala, he had given some kind of defence that he had picked up the roofing material. In fact at the trial there was evidence that the sheets may have been lying a distance away from the cattle pen. Of course whether Nkala picked up the sheets or not would have been immaterial because the offence of theft would still be committed even under those circumstances. But then that was not the issue for trial, the issue being whether the appellant abused his duty by releasing Nkala.

The appellant explained that he released the suspect because he was not convinced there was sufficient evidence to take him to court. The factor of reasonable suspicion is subjective to the officer in question. In order to secure his conviction the state ought to have established that subjectively he did not entertain the belief that he says did which is a tall order indeed.

The only other basis upon which the conviction could have been achieved was through the evidence of Meikles Nkala who claimed that the appellant solicited a bribe of R900-00 from him which he paid. But then Meikles Nkala was an accomplice who had secured for himself a wholly suspended sentenced of 75 days imprisonment for his role in the whole saga. When he testified he was not warned as an accomplice neither did the court apply the cautionary rule to ward off the dangers inherent in the testimony of such a witness. Above all his evidence was apparently so unreliable that it could not be a basis for a conviction.

This is a witness who only mentioned the bribe in his evidence in court having failed to do so in his written statement given to the police. See p42 of the record. Clearly the issue of

money may have surfaced while he was in the hands of CID officers who investigated the matter involving the appellant.

The appellant gave an explanation that as a junior officer given charge of a police post he still did not know that theft by finding was an offence. Hence he entertained the suspect's story that he had picked up the zinc sheets in question. The explanation given by the appellant was not disproved. Therefore the court was not entitled to convict him. See *R* v *Difford* 1937 AD 370 at 373.

The explanation given by the appellant could not be discarded merely on the basis of Nkala's evidence. Because of the danger of false incrimination which exists where accomplice evidence is involved, the court is required to approach this evidence with extreme caution. Before relying on such evidence the court must be satisfied that the danger inherent in relying on it has been totally eliminated. It was stated in *S* v *Ngara* 1987 (1) ZLR 91 (S) that the surest way to eliminate the risk of false incrimination of another by an accomplice it to look for corroborative evidence implicating the accused. In this case there was absolutely no corroboration of Nkala's bribery story. Therefore that evidence could not be relied upon to secure a conviction. The conviction cannot stand.

In the result, it is ordered that;

1. The conviction of the appellant is hereby set aside and the sentence quashed.

2. The verdict of the court a quo is substituted with the verdict that the appellant is hereby found not guilty and acquitted.

Bere J agrees…….

Mugiya & Macharaga Law Chambers, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners