GOODWELL TASANGANA PARADZA
Versus
COMMISSIONER OF POLICE
And
DISPOL HARARE SOUTH

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 3 December 2003 and 7 January 2004

Opposed Application

Ms *Mabika,* for the plaintiff
No appearance for the respondents

BHUNU J: The applicant is employed as a Sergeant in the Zimbabwe Republic Police. He was charged with 6 counts of soliciting for a bribe but was convicted of 5 counts. He appealed to the 1st respondent without success.

He now seeks a reversal of his conviction and sentence and a retrial on the basis of procedural irregularities.

The facts giving rise to his complaint are that on the 23rd October 2001 he appeared before the trial officer Superintendent Mufadza charged with contravening section 34 of the Police Act [*Chapter* 11:10] as read with section 29(1)(d). It being alleged that he omitted or neglected to perform his duties properly.

The prosecuting officer Assistant Inspector Kurezva put the charge to the applicant. The trial officer intervened and objected to the charge arguing that it had lumped together a number of charges. That much is not in dispute. What is in dispute is the stage at which the presiding officer intervened. The respondents say it was before the applicant had pleaded to the charge whereas the applicant claims that it was after he had pleaded to the charge. I do not think that it is necessary to resolve that factual dispute at this stage. The real issue is whether or not the presiding officer exhibited some bias in the manner he handled the case.

Paragraph 2 of the pressing officer's reasons for judgment at page 48 of the record of proceedings is revealing. This is what he had to say:

> "2. Initially when you first appeared before me you were charged for contravening paragraph 34 of the Schedule to the Police Act. When the prosecutor read out the charge, it was clear that he had not done his job in that the wording of the charge sheet was revealing a different case altogether. When I checked the facts were revealing a specific offence under section 27. The charge had already been put but I had not recorded the plea. As I always do I told both your defence counsel and the prosecutor that there is need to prefer a specific charge as revealed by the facts. No evidence was led hence there was no prejudice to you. A trial court must always see that justice is done by not prejudicing the other party. I do not know why your defence counsel is raising the issue now. He should have raised the issue during trial and asked the court to place the protest on record." (my emphasis).

It is self evident that in his own words the trial officer considered that the prosecution had not done its job in a manner that would secure a conviction. He then decided to descent into the arena and directed operations on behalf of the prosecution. The net result was that 6 charges were substituted for the initial single charge.

It is unthinkable that had the applicant proffered a plea which was at variance with his defence outline the presiding officer would have assisted him in the manner he assisted the prosecution or at all.

The prosecuting officer in his supporting affidavit attempted to justify the assistance he got from the bench on the basis that this was his first case to prosecute he made mistakes due to inexperience.

Both the trial officer and the prosecution officer now say that the defence counsel agreed to the amendment of the charge a fact, which is denied by the defence counsel.

In his reasons for judgment as I have quoted above nowhere does the trial officer state that the defence counsel agreed to the amendment. In fact he states that he told both defence counsel and the prosecutor that there was need to amend the charge.

Even if I were to accept that counsel for the defence agreed to

amend the charge what then happened was not an amendment of the original charge but a substitution of the single original charge with six new charges under a different section.

Both the trial officer and the prosecuting officer agree that the original charge was put to the accused but deny that he pleaded to the charge in his reasons for judgment the trial officer does not say that the applicant did not plead to the charge. What he says is that he did not record the plea. He says, " the charge had been put but I had not recorded the plea."

In the final analysis I am satisfied that by descending into the arena and assisting the prosecution the trial officer exhibited some form of bias. By his conduct he ceased to be a neutral arbiter thereby vitiating the proceedings.

The probabilities are that the appellant had pleaded to the original charge but the trial officer did not record the plea preferring that the charge be amended as directed by him. This was in my view a serious misdirection because once the appellant had pleaded to the original charge he was entitled as of right to a verdict on that charge.

In the result it is ordered:

1. that the judgment of the first respondent dismissing the appellant's appeal against both conviction and sentence be and is hereby set aside.
2. that the first respondent is ordered to hear the appeal afresh and to consider the matter on the merits and more particularly that the applicant having pleaded to the initial charge he was entitled to a verdict on that charge.
3. that the respondents shall pay the costs of this application.

Warara and Associates, applicant's legal practitioners
Civil Division of the Attorney General's Office, the respondents' legal practitioners.