IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.160/2017**
HOLDEN AT LUSAKA
(CRIMINAL JURISDICTION)

BETWEEN:

THE PEOPLE **APPELLANT**

AND

PEANOS LUZENDI **RESPONDENT**

CORAM: Muyovwe, Hamaundu and Chinyama, JJS
On 2nd October, 2018 and 23rd October, 2018

For the State : Mr B. Chiwala, Anti-Corruption Commission

For the Respondent: Ms E. I. Banda, Senior Legal Aid Counsel

JUDGMENT

Hamaundu, JS, delivered the Judgment of the court.

Cases referred to:

1. **Machipisa Kombe v The People (2009) ZR 282**
2. **Zulu & 2 others v The People (1978) ZR 227**
3. **Christopher Nonde Lushinga v The People (2011) 2 ZR 301**
4. **Wilson Mwenya v The People (1990-1992) ZR 24**
5. **Nsofu v The People (1973) ZR 287.**
6. **Alubisho v The People (1976) ZR 11**
7. **Mika v The People (1970) ZR (reprint) 80**
8. **Kosamu & Another v The People (1982) ZR 29**

Legislation referred to:

1. **The Supreme Court of Zambia Act, Chapter 25 of the Laws of Zambia**
2. **The Criminal Procedure Code, Chapter 88 of the Laws of Zambia**

In this matter the Director of Public Prosecutions appeals against the judgment by the High Court which quashed the respondent's conviction by the subordinate court of one count of corrupt practices.

The respondent was charged in the subordinate court of the first class at Chipata with one count of corrupt practices, contrary to **Section 19(1)** of the **Anti-Corruption Act, No. 3 of 2012**. The charge was founded on the allegation that between the 1st December, 2012 and 17th April, 2013 the respondent, being a public officer holding the position of senior investigations officer at the Drug Enforcement Commission, solicited a sum of K30,000 from James Mvula, the principal of Chipata College of Education and Malizani Tembo, the vice principal of the same college; and that, pursuant to that solicitation, the respondent actually received a sum of K5,000.

The evidence which the prosecution adduced before the magistrate was thus: Following complaints lodged with the Drug Enforcement Commission that the principal of Chipata College of Education and his vice had received allowances for work which they had not done, investigations were instituted into those complaints. The respondent was designated as head of the team that was tasked to carry out the investigations. In the course of the investigations the respondent started demanding from the two suspects payment of the sum of K30,000 so that the investigations could be dropped. Aggrieved by the turn of events, the two suspects reported to the Anti-Corruption Commission, who decided to use bait money.

The officers from the Anti-Corruption Commission prepared a sum of K5,000, whose serial numbers were recorded. The money was given to the principal, who was to hand it over to the respondent while the officers were to wait in hiding. On 17th April, 2013, the respondent went to collect the money at the principal's office whereupon he was confronted by the officers. The money was not found on the respondent's person. It was however found in a visitor's book which lay on a desk which was adjacent to the visitor's chair on

which the respondent was seated. The respondent attempted to run away but was immediately caught and taken to the offices of the Anti-Corruption Commission where he was charged for the subject offence.

It was established that, on the day that the respondent was apprehended at the principal's offices, he was not on duty; having been given some days off for being unwell.

In his defence, the respondent confirmed that he had led the investigation against the two officers. He said that he had closed the investigation after interviewing them. His explanation for his presence at the principal's office on the material day was that he had merely gone there to look for a place at the college for his younger brother. He denied ever receiving the sum of K5,000.

The magistrate found the following as facts:

(i) that the respondent had indeed been officially investigating the principal and vice-principal of the college regarding the complaints

(ii) that the respondent had been communicating with the two officials

(iii) that the respondent had been to the college on several occasions

(iv) that on the last occasion the respondent went to the college when he was officially on sick leave

(v) that the money which was in the principal's office was the bait money which had been given to the principal after he had lodged a complaint against the respondent

(vi) that the bait money was found in a book that was right in front of the respondent; and

(vii) that the respondent ran away when he was confronted by the officers from the Anti-Corruption Commission

The magistrate then decided to treat the testimonies of the principal and his vice with caution. However, the magistrate was of the view that the following were odd coincidences;

(i) That the respondent was found at the college after the complaint had been made to the Anti-Corruption Commission

(ii) That the respondent was found at the college purportedly performing his duties when he was on sick leave

(iii) That the money which was found in the visitor's book right in front of where the respondent had sat was the same bait money whose serial numbers had been recorded

(iv) That there was no indication that either the principal or the vice had called the respondent to go to the college on that day; and

(v) That, upon being accosted by officers from the Anti-Corruption Commission, the respondent had attempted to run away.

On the strength of those odd coincidences, the magistrate believed the testimonies of the principal and the vice. Consequently,

the magistrate convicted the respondent on those testimonies and sentenced him to 12 months imprisonment with hard labour, suspended for 12 months.

The respondent appealed to the High Court against the conviction. The High Court quashed that conviction and set the respondent free on the following grounds:

(i) **That the evidence of solicitation, an essential ingredient in proving the offence, was only in the peculiar knowledge of the principal and the vice, who, themselves, were witnesses with an interest to serve.**

(ii) **That although the above circumstances were clearly visible there was nothing in the magistrate's judgment to suggest that he had applied his mind to the danger of relying on the evidence of the principal and the vice, other than just stating that he had treated their testimony with caution.**

(iii) **That the magistrate did not demonstrate any special and compelling grounds that may have persuaded him to convict the respondent**

(iv) **That since the evidence that was presented before the subordinate court was purely circumstantial, an inference of guilt, in the circumstances of this case, was not the only one that could have been drawn; and**

(v) **That the magistrate merely convicted the respondent on suspicions which the magistrate deduced from the respondent's behaviour: this clearly showed that the magistrate did not apply the standard of proof required in criminal law.**

The Director of Public Prosecutions was aggrieved by this decision: hence this appeal.

The appeal was argued on the following solitary ground:

That the court below erred in law when it found that the evidence of the Principal and the Vice had not been corroborated.

On behalf of the appellant, Mr Chiwala argued that the trial magistrate did not choose to believe the testimony of the principal and his vice merely because of its plausibility but that the magistrate actually gave reasons for believing the two witnesses. Counsel argued that those reasons, themselves, were odd coincidences which amounted to corroboration. In the course of counsel's arguments, we were referred to our decision in **Machipisa Kombe v The People**[1] where we held, inter alia, that odd coincidences constitute evidence of something more, which amounts to corroboration. We were particularly referred to the respondent's attempt to run away. Citing the cases of **Zulu & 2 others v The People**[2] and **Christopher Nonde Lushinga v The People**[3] where we held that such conduct provides corroboration in that it is evidence of a guilty conscience, counsel argued that the respondent's attempt to run away was a strong odd coincidence which was inconsistent with innocence.

Learned counsel disagreed with the High Court's holding that, because the money was not found on the person of the respondent, an inference of guilty was not the only one that could be drawn. Counsel argued that the definition of possession is not only restricted to personal possession, but that there can be constructive possession as well. Counsel submitted that the High Court should have regarded;

(i) the surrounding circumstances;
(ii) the opportunity to receive the bribe; and
(iii) the locality,
as corroboration of the testimony of the two witnesses.

Finally, counsel argued that although the trial magistrate did not recite the usual warning of the danger of convicting on uncorroborated evidence of suspect witnesses, the fact that the magistrate gave reasons for believing the testimony of the principal and his vice was sufficient. We were urged to allow the appeal and restore the conviction by the trial magistrate.

In the arguments advanced on behalf of the respondent, the question as to where exactly the bait money was found took centre stage. Ms Banda, learned counsel for the respondent, argued that it

did not seem plausible that if, indeed, the respondent had solicited and received the money, he would be able to put that money in the book; or get rid of it, before the Anti-Corruption Commission Officers entered the room, when he was not aware that the said officers had been waiting in hiding. Learned counsel dismissed the appellant's argument about constructive possession with the counter-argument that it defied reason to imply that because the respondent was the visitor and the money was found in the visitor's book then he had received it. Counsel argued further that it was also wrong to imply that the respondent received the money merely because the money was found near where he sat. It was also counsel's argument that, in any event, the money was in the possession of the principal because it was found in his office and in a book of which he had possession.

Applying our decision in **Machipisa Kombe v The People**[1], counsel argued that there was nothing odd about the respondent going to a public college to inquire about a place for his relative, especially that he was on his way home; having been given some days off for being unwell.

Counsel finally argued that a key ingredient of the offence charged was solicitation. She submitted that, in this case, other than the biased evidence of the principal and his vice, there was no other evidence which implicated the respondent in a material particular. For this submission we were referred to the case of **Wilson Mwenya v The People**[4]. We were then urged to dismiss the appeal.

There is a fallacy in the arguments which the respondent advanced in the High Court; and has continued to advance before this court. The fallacy lies in the fact that the respondent seems to put corroborative evidence on the same level as circumstantial evidence. This was very apparent when the respondent prosecuted his appeal in the High Court. And, because the respondent was very persuasive with his fallacious approach, the High Court fell into the same error. In **Machipisa Kombe v The People**[1], which has been cited before us, we did define the status and purpose of corroboration. However, our decision in the **Kombe** case came from what we said in **Nsofu v The People**[5]. It is in that case that we explained in detail the status and purpose of corroboration; and the approach to be adopted. We quote hereunder a passage from our

judgment in that case at pages 290 and 291 of the law report in which that case appears:

> **"Mr Zamchiya submits that there are three items of evidence which afford corroboration of the evidence of the three girls that it was the appellant who committed the offences"**

We then went on to set out the pieces of evidence that Mr Zamchiya pointed out to us and continued as follows:

> **"Mr Zamchiya submits that these three items of evidence all showed that the appellant had the opportunity to commit the offence. Miss Mwachande meets this argument by saying that although the appellant certainly had such opportunity the evidence was insufficient to establish that no one else equally had such opportunity and therefore this evidence is insufficient to afford corroboration that it was the appellant who committed the offence.**
>
> **Miss Mwachande's argument seems to assume that unless the evidence which is relied upon as corroboration is sufficient in itself to prove the fact in issue it cannot be corroboration. This approach misconceives the character of corroborative evidence. If it were necessary for such evidence to be conclusive in itself then the question of corroboration would not arise; it would then be possible to convict without relying on the evidence of the prosecutrix. Corroboration must not be equated with independent proof; it is not evidence which needs to be conclusive in itself. Corroboration is independent evidence which <u>tends</u>** *(underlining for emphasis)* **to confirm that the prosecutrix is telling the truth when she says that the offence**

was committed and that it was the accused who committed it. As Lord Diplock put it in D.P.P v Esther at page 1073g:

> *'what is looked for under the Common Law rule is confirmation from some other source that the suspect witness is telling the truth in some part of his story which goes to show that the accused committed the offence with which he is charged'*

The matter is placed in proper perspective if the wording of the cautionary rule is borne in mind, namely that it is dangerous to convict on the evidence of a prosecutrix in such cases. The necessity for corroboration does not alter the fact that the evidence on which the conviction is based is that of the prosecutrix; the corroborative evidence serves (merely) to satisfy the court that it is safe to rely on that of the prosecutrix" (we have supplied the word ***"merely"*** for clarity)

If we go by our guidance in the **Nsofu** case, it should be said that in this case the evidence that was in issue, and on which a conviction was sought, was that of the principal and his vice. The evidence of odd coincidences; such as the finding of the bait money in the visitor's book which was next to where the respondent had sat and the appellant's attempt to run away; were only pieces of corroborative evidence whose purpose was merely to satisfy the trial court that the two witnesses were telling the truth. So, unlike circumstantial evidence which is only acceptable if it permits only an

inference of guilty, these odd coincidences need not have been conclusive of themselves. It was sufficient if they satisfied the court that it was safe to rely on the testimony of the principal and his vice. Once there was that satisfaction, the evidence that became operative for the purpose of conviction was the testimony of the principal and his vice. It can be seen that the testimony of these two witnesses was direct; and not circumstantial. The testimony explained how the respondent solicited, in person, money from the two witnesses. The testimony went on to explain how the bait money was handed to him by the principal. In other words, the two witnesses were classified as eye-witnesses. Therefore, the issue of inferences did not even arise.

In this case we are satisfied that there were odd coincidences which would satisfy a court that the danger that the principal and his vice were falsely implicating the respondent had been excluded; and that it was safe to rely on their testimony. Two of those coincidences were relied upon by the trial magistrate; namely, the finding of the bait money next to where the respondent had sat and the attempt by him to run away. There was also a third odd coincidence which the trial magistrate failed to bring out in the manner in which it should have been brought out. That odd

coincidence was this: According to the respondent's own version of what transpired, on the material day he was given some days off on account of being unwell. On his way home, he abruptly decided to pay the principal a visit so that he could ask for a place at the college for his younger brother. It cannot be disputed that to set up a test using bait money is not something which can be accomplished abruptly: It requires planning. It was therefore a strange coincidence that, although the respondent had just made an abrupt and unannounced decision to visit the principal, he found a well laid ambush waiting for him.

So, when all the odd coincidences were added together, they, indeed, tended to confirm what the principal and his vice had said. The trial magistrate was therefore on firm ground when he relied on that testimony; upon being satisfied, by the odd coincidences, that the danger of false implication had been excluded. We are of-course aware that the trial magistrate did not recite the classic warning of the danger of convicting on the uncorroborated testimony of suspect witnesses. However, from the approach that the magistrate took, we are satisfied that the magistrate was alive to that danger; and that he

took the correct steps to ensure that the said danger had been excluded.

We therefore find merit in the appeal. By the power conferred on us by **Section 15(1)** and **(3) of the Supreme Court of Zambia Act, Chapter 25 of the Laws of Zambia**, we set aside the judgment of the High Court. Instead, we restore the conviction of the respondent by the subordinate court.

Under the provisions of **subsection (4)** of the same section, we are further empowered, on any appeal, whether against conviction or sentence, to interfere with any sentence that has been imposed. It is in this regard that our attention now shifts to the sentence that was imposed by the trial court. We must point out that we have set out in several cases the principles that should govern an appellate court when interfering with the sentence. We shall refer to only one of those cases. In **Alubisho v The People**[6] we summarized the approach through the following three questions:

> **"(1) Is the sentence wrong in principle?**
>
> **(2) Is it manifestly excessive or so totally inadequate that it induces a sense of shock?**
>
> **(3) Are there any exceptional circumstances which would render it an injustice if the sentence were not reduced?**

Only if one or other of these questions can be answered in the affirmative should the appellate court interfere"

This is a case of corruption by a senior officer employed by an institution that deals with law enforcement. The officer's duties also involved law enforcement. It is common cause that the Country has for some time now been on a campaign to end corruption. Our society disapproves of corruption. It is the court's duty to reflect that disapproval through the sentences that are passed.

We note that the offence charged carried a maximum sentence of 14 years. We also note that, the subordinate court having been presided by a magistrate class 1, the maximum sentencing power that was available to the court under **Section 7** of the **Criminal Procedure Code, Chapter 88** of the **Laws of Zambia** was 5 years. Given the on-going campaign against corruption and the dim view which our society has of it, our view is that this case merited a stiffer penalty than the power which was available to the trial court; and, if the magistrate had guided himself properly as regards the sentence, he would have realized this, so that he should have applied the provisions of **section 217** of the **Criminal Procedure Code** and committed the respondent to the High Court for sentence. We,

therefore, find the sentence of 12 months imprisonment, suspended for 12 months, to be so totally inadequate that it induces a sense of shock. As a result, we have decided to interfere with it.

The predecessor to this court, the Court of Appeal, held in **Mika v The People**[7], that in interfering with the sentence of a trial court, an appellate court should not give a sentence which is beyond the jurisdiction of the trial court. We have maintained that principle in subsequent cases; one such case being **Kosamu & Another v The People**[8]. In this case, much as we hold the view that the circumstances of this case demanded a stiffer penalty, we are confined to the jurisdiction that the trial court had; that is a maximum of 5 years imprisonment. We, therefore, set aside the suspended sentence that was imposed by the trial magistrate. In substitution therefor, we impose a sentence of 5 years imprisonment with hard labour, with effect from the date hereof.

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E. N. C. Muyovwe
SUPREME COURT JUDGE

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E. M. Hamaundu
SUPREME COURT JUDGE

.....
J. Chinyama
SUPREME COURT JUDGE