HB 185/18
HCA 112/15
X REF GWERU 579/15

**JESCA CHISEVA**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & MABHIKWA JJ
BULAWAYO 16 JULY 2018

**Criminal Appeal**

**MAKONESE J:** The appellant an attested member of the Zimbabwe Republic Police was arraigned before a Gweru magistrate facing allegations of attempting to defeat the course of justice in contravention of section 189 of the Criminal Law (Codification and Reform) Act (chapter 9:23) as read with section 184 of the Criminal Code. The state alleged that the appellant unlawfully and intentionally attempted to defeat or obstruct criminal proceedings against one Trust Phiri who was facing allegations of rape, by undergoing a psychiatric examination and to fake mental illness so as not to stand trial. The appellant was convicted and sentenced to 18 months imprisonment, of which 9 months was suspended on the usual conditions of future good conduct, the remaining 9 months was suspended on condition appellant performed 315 hours community service at St Paul's Primary School in Gweru.

The appellant noted an appeal with this court against both conviction and sentence. She contends that the court *a quo* misdirected itself in convicting the appellant notwithstanding that the state had failed to prove its case beyond reasonable doubt. The appellant further argued that the state witnesses falsely testified against the appellant and that the state failed to rebut the appellant's defence. On sentence, the appellant contended that the sentence was manifestly excessive and induced a sense of shock. The appellant avers that the court ought to have considered the imposition of a fine.

**The factual background**

On the 3rd of May 2014 Trust Phiri was arrested on a charge of rape and was taken to court for initial remand. During the course of the investigation of the rape allegations, the appellant arranged for a psychiatric examination of the complainant one Lena Shayamawo who was certified to be mentally unstable. Sometime in the same year and after Trust Phiri had been placed on remand pending trial the accused suggested to Trust Phiri and his parents that there was a need for payment of an amount of US$75 for the psychiatric examination of the accused. It was suggested to Trust Phiri and his parents that in order for Trust Phiri to be declared mentally insane, he was to pretend to be mentally unstable and his mother was to affirm is insanity by giving false testimony. The appellant indicated to Trust Phiri that if he was found to be insane he would be entitled to a special verdict. The rape allegations would then fall away and the accused (Trust Phiri) would be found not guilty and acquitted. The matter came to light when Trust Phiri's relatives approached the District Headquarters at Gweru to verify whether the appellant's suggestions and conduct was lawful. The appellant was subsequently arrested on allegations of attempting to defeat the course of justice. In her defence appellant vehemently refuted the allegations and any improper conduct on her part. She stated in her defence that she was being falsely accused because she had done her job effectively and professionally leading to the conviction of Trust Phiri. The learned magistrate in the court *a quo* disbelieved the appellant's version and concluded that the state had indeed proved its case beyond reasonable doubt.

**Whether the state proved its case beyond reasonable doubt**

The following facts were proved and established by the court *a quo*:

(a) that the appellant was given the sum of US$20 to facilitate the complainant in the rape case to be mentally examined by Trust Phiri or his relatives.

(b) that the appellant later demanded the sum of US$75 in order that Trust Phiri would be mentally examined, and that he ought to pretend to be of unsound mind so that a special verdict could be returned.
(c) That an uncle to the appellant pleaded with Trust Phiri to withdraw the allegations of attempting to defeat the course of justice.

The record shows that when Trust Phiri failed to raise the sum of US$75 they proceeded to the Police District Headquarters at Gweru and made enquiries on whether the appellant's conduct was lawful. As soon as the appellant realised that her plan was not going to succeed, she was then dissuaded from carrying out her plan of obstructing justice. The appellant did not factor through her plans not out of her own volition but because the matter had been brought to the attention of her superiors at the District Headquarters. At that stage and on the proved facts the elements of attempting to obstruct the course of justice had been satisfied. To suggest that an accused in a criminal matter, facing serious allegations must fake mental illness in order to secure a special verdict is clearly an attempt to obstruct justice. The learned magistrate's findings on the facts cannot be assailed.

**The law**

The offence of attempting to obstruct justice are simply established when it is shown that the accused person intentionally and consciously does an act that is calculated to defeat the ends of justice. Once the accused person sets in motion a series of actions designed to defeat the course of justice, even if he ultimately does not succeed he will be found guilty of the attempt to defeat the course of justice.

The appellant contends that the state had the onus to prove its case beyond reasonable doubt. The celebrated case of *R* v *Difford* 1937 AD 327 is cited in support of the appellant's argument. The words of the learned judge on the matter are in the following terms:

> "*... no onus rests on the accused to convince the court of the truth of any explanation e gives. If he gives an explanation, even if that explanation be impossible, the court is only entitled to convict unless it is satisfied not only that the explanation is improbable, but beyond reasonable doubt false. If there is any reasonable possibility of his explanation being true, ten he is entitled to his acquittal."*

The appellant's defence in this matter was proved to be false. The appellant was a very poor witness. In her defence case she raised several issued that were never mentioned in her defence outline. She was building up a defence case as the case progressed. A clear example is that the issue of Trust Phiri's grandmother visiting her church was never part of her defence case. The trial magistrate was correct in her refusal to accept the appellant's defence as being palpably false.

**Conclusion**

In terms of section 189(2) of the Criminal Code, a person shall not be guilty of attempting to commit a crime, if before the commencement of the execution of the intended crime he or she changes his or her mind and voluntarily desists from proceeding further with the crime. In this matter, the actual plan to defeat or obstruct justice failed because Mable Mabgwe approached Gweru Urban Police District Headquarters to seek advice in respect of what appellant had proposed regarding the suggestion for Trust Phiri to fake mental illness. The appellant did not voluntarily desist from the plan she had set in motion to defeat the course of justice. The offence of defeating or obstructing the course of justice is satisfied when a person causes judicial proceedings to be defeated or obstructed intending to defeat or obstruct the proceedings, realising that there is real risk or possibility that the proceedings may be defeated or obstructed. The appellant being a police officer had the necessary mental intention to subvert the course of justice by unlawful means.

I am satisfied that the conviction is proper and cannot be assailed. As regards sentence, it is trite that issues of sentence are the domain of the trial court. The appeal court is slow to interfere with the sentence of a lower court unless it is manifestly excessive as to induce a sense of shock. See *S* v *Nhumara* SC-40-88. The sentence, in my view was in fact lenient given the

seriousness of the offence. Attempting to defeat the course of justice goes to the chore of the criminal justice system. The appellant's conduct was well calculated to defeat the ends of justice for financial gain. Such offences are naturally difficult to detect and they defeat the prosecution of serious offences. In my view custodial sentences are called for and justifiable unless there are weighty mitigating features.

In the result, and for the aforegoing reasons the appeal against both conviction and sentence are dismissed.

Mabhikwa J ……. I agree