ZIMBABWE BANKING CORPORATION LIMITED
and
SYFRETS MERCHANT BANK
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 11 November 2014 & 18 May 2016

Criminal Appeal

F Mahere, for the appellants
E Makoto, for the respondents

HUNGWE J: The two appellants are related financial institutions carrying on business in terms of the laws of Zimbabwe. They were charged with six counts of the crime of contravening s 5 (1) (a) (ii) (b) of the Exchange Control Regulations Statutory Instrument 109 of 1996 as read with s 35 (1) (b) of the Exchange Control Act Exchange Rate Management Order 2000 S.I. 225B of 2000 (Adherence to International Cross Rates) "a foreign currency authorised dealer shall deal at the International cross rates prevailing on the day of the transaction on all foreign currency transactions." Put simply the two institutions were charged with the offence of failing to apply the prevailing international cross rates as they were obliged to do as authorised foreign currency dealers. Instead, so goes the allegation, the two institutions dealt with foreign currency applying black market rates. After a protracted trial, the two institutions were convicted and sentenced to a fine. They now appeal only against their respective convictions.

The first ground of appeal is that the court a quo misdirected itself by coming to the conclusion that the evidence tendered proved that the appellant sold to Treger Industries foreign currency at rates above international cross rates.

The second ground of appeal was that the court a quo misdirected itself by determining that the three witnesses who testified on behalf of the state had no motive to lie.

The third ground of appeal as was the fourth and fifth was that the court *a quo* misdirected itself by relying on Treger Industry's internal documents which did not prove what needed to be proved by the state in order to secure a safe conviction.

The fourth ground of appeal alleged that the court *a quo* misdirected itself by relying on Treger Industries' internal documents which did not prove any payment to the first appellant nor that the appellants made any payments to Treger or any third party on behalf of Treger.

The fifth ground of appeal was that the documents relied upon show that the source of the foreign currency was one Logan and not the appellants.

The sixth ground of appeal was that the court misdirected itself in placing an onus on the appellants to prove that Logan was not its employee when there was no evidence that he was an employee of the appellants.

The seventh ground of appeal is that the court *a quo* misdirected itself by relying on documents which had inconsistent information to convict the first appellant.

The eighth ground of appeal was that in any event the documents do not show the amounts of money which was paid to the first appellant by the Treger Industries.

The rest of the remaining grounds of appeal related to specific points grounds upon which a misdirection is alleged ranging from how the question of onus regarding proof of whether a person was an agent of the one party or the other; the probative value of documents which contained inconsistent information; whether there was proof that in fact payment was made to the bank by Treger Industries; the weight to be attached to internal documents relied upon by the state and what probative value was carried by a payment voucher.

The appellants took one main point in this appeal. It is this. The state did not lead evidence of the international cross rates of exchange applicable at the time of the alleged offences. As such the charges are fatally defective and cannot sustain a conviction. The question to ask is whether the international cross rate of exchange was an essential element of the offence charged. It is necessary to examine what offence was charged in the first place. The charge read:

> "Contravening s 5(1) (a) (ii) of the Exchange Control Act, (Cap 22:05) as read with s 35 (1) (b) of the Exchange Control Regulations in Statutory Instrument 109 of 1996 as read with s 5 of the Exchange Control Act (Exchange Rate Management) Order 2000 in Statutory Instrument 225B of 2000 (Adherence to International Cross Rates)
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> > 'A foreign currency dealer shall deal at the International Cross Rates prevailing on the day of the transaction on all foreign currency transactions.'"

The State Outline made the following averments:

> "3. On the dates mentioned in column A of the Schedule, the bank sold amounts of foreign currency mentioned in column B to Treger Holdings at rates

mentioned in column C instead of the International Cross Rates mentioned in column D and the bank was paid Zimbabwean dollars mentioned in column E of the schedule.

4. The foreign currency was transferred into Treger Industries sister companies, namely Ger and Co (Switzerland), Ger and Co (UK) and Monarch Marketing (South Africa)

5. The banks by so doing acted in contravention of s 5 (1) (a) (ii) of the Exchange Control Act, *(Cap 22:05)* as read with s 35 (1) (b) of the Exchange Control Regulations Statutory Instrument 109 of 1996 as read with s 5 of the Exchange Control Act (Exchange Rate Management) Order 2000 S.I 225B of 2000 which seeks authorised dealers to adhere to the international cross rates."

The facts of this case shows that the appellants were engaged in foreign trade as a manufacturer and exporter. The financial transactions included paying for foreign purchases using foreign currency. A Zimbabwean currency would need to be converted to the currency of the country from which that purchase is to be made. An exchange rate would be applied to convert Zimbabwe currency to the currency of the country in which the payment is to be made. In the present case, there are three currencies involved, the Zimbabwean currency, the South African Rand and the United States Dollar. In order to effect payment into an account held by its sister companies in the United Kingdom, Switzerland and South Africa, it follows that Treger Industries would have to secure foreign currency. The State alleges that the appellants sold foreign currency to Treger Industries at "black market rates" in column C instead of the "official rate" in column D. Transfers into the sister companies, namely, Ger and Co (Switzerland) and Ger and Co (UK) as well as Monarch marketing (South Africa) required that Treger Industries secure foreign currency. The allegation is that the appellants, on six occasions, sold to Treger Industries foreign currency. It is the exchange rate used in these transactions which forms the basis of the charges against the appellants.

An exchange rate has two components, the domestic currency and a foreign currency, and can be quoted either directly or indirectly. In a direct quotation, the price of a unit of foreign currency is expressed in terms of the domestic currency. In an indirect quotation, the price of a unit of domestic currency is expressed in terms of the foreign currency. An exchange rate that does not have the domestic currency as one of the two currency components is known as a cross currency, or cross rate. The schedule used appears, with respect, to reflect the rate of exchange between either the South African Rand or the US Dollar only. It seems on the charge as framed, the State was required to also express the cross rate between the currencies in issue. In other words the State was obliged to state in the charge, the prevailing cross rate which ought to have been applied in the various transactions. On the facts of this case, the State alleges that Tregers paid into three sister companies resident in different jurisdictions. As such, theoretically, three foreign currencies would have been involved, i.e. the Swiss Franc, the British Pound and the South African Rand. The charge however reflects that the South African Rand and the United States Dollar were used in the transactions. The reference to US Dollar in the schedule introduces the cross currency which, according to the charge, ought to have been applied in the transactions involving the parties. Yet there is no suggestion either in the charge or elsewhere on the state papers, of what the actual applicable cross currency exchange rate on a specified date or the date of a given transaction was. In the circumstances of the present case, the charge refers to a failure by the appellants to adhere to the prevailing cross rate on each of the six occasions when it "sold" foreign currency to Treger Industries. Because the payment was to be made in either Swiss Francs, British Pounds or South African Rand, it stands to reason that the use of a cross rate was unavoidable in each instance when the appellants "sold" the foreign currency.

The cross rate of exchange is the rate between two currencies, both of which are not the official currencies of the country in which the exchange rate quote is given in. In this case, the reference to the US Dollar implies that the US Dollar was the cross currency in all the transactions which involved Treger Industries, its sister companies domiciled in the three countries as well as the appellants who facilitated the transactions. As such it was incumbent on the State to prove that the cross rate on a given day was such an amount of US Dollars to that other currency in into which the local currency was being converted. In other words that cross rates could only be expressed in US Dollars not in local currency because the parties were seeking to settle accounts not in US Dollars but in the currencies of Switzerland, United Kingdom and South Africa. That this was the case follows from the Outline of the State Case. For adherence to the international cross rate to be evident, it had to be calculated in a specific manner which took into account that the settlement of accounts was to be made in some other currency than the United States Dollars. In other words, the cross rate which the charge referred to would of necessity be the exchange rate between non-dollar currencies which can only be established through the US Dollar. Put differently, a cross rate is the rate of exchange between two currencies not involving the US Dollar. Thus the cross rate is the exchange rate between two currencies that are not the official currencies of the country that the exchange was quoted in. For example, A Zimbabwean investor could get the cross rate of the Swiss Franc to the Rand, or the British Pound to the Rand and so on. It is that rate to which s 5 of the Exchange Control (Exchange Rate Management) Order 2000 refers to. It could not be referring to the Zimbabwe Dollar rate referred to in column D. To read the Statutory Instrument in that manner would render it meaningless and would not make any economic sense since it is the currency pairing which is in issue in the present case.

In its judgment, the court *a quo* held that the appellant ought to have excepted to the charge before pleading to it rather than allow a plea to be recorded before raising the issue of the cross rates in the application for discharge. In the court's reasoning, it was wrong for the defence to proceed with a trial where it knew that the charges were based on wrong exchange rates. The reasoning of the court completely missed the point. The opinion expressed by the learned magistrate apply to objections to an indictment for any formal defect which is apparent on the face of the indictment. See s 170 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. However, the basis of the present attack on the conviction is entirely different and is not on the basis of an apparently defective charge or indictment but on the basis that the State was obliged to prove what the prevailing cross rate was on the date of each transaction as required by the averment in the indictment or charge. The indictment was properly framed and contained the necessary averments sufficient to inform the accused of the nature of the offence charged. It detailed the manner in which the failure to adhere to the Order constituted an offence and the occasions on which the alleged breaches of the law were said to have occurred. As such, the charge was not exceptiable. The State was obliged to lead the evidence to substantiate the allegations of failure to adhere to cross rates prevailing at the time of the various transactions. A charge or indictment would be exceptiable if it did not comply with the relevant provisions of the Act or the statute in terms which the offence is founded; or does not set out an essential element of the offence; or does not disclose an offence; or does not contain sufficient particulars of any matter alleged in the charge; or if the accused is not correctly described in the charge.

Presently, there was no evidence, except the bald allegation, that the official exchange rate was in fact the cross rate for the currencies involved in the transactions. In other words, it was necessary for evidence to be led to prove that in fact the official rate of exchange in column D was equivalent to the cross rate for the particular currency sold on that day. There would have been a catch, however in that a cross rate would not have involved the US Dollar. Thus, how was the State going to overcome the specific hurdle would have required the leading of evidence to show that in fact technically these are one and the same thing. The State does not appear to have appreciated the difference between the official exchange rate and the use of the word "international cross rate" in the Exchange Rate Management Order of 2000 which is the subject of the charge faced by the appellants. The State, in the charge set out to prove that the appellants did not adhere to the use or application of International Cross Rates when they executed transactions involving Treger Industries. Thus, in my view, one of the elements which the State had to prove was the applicable cross rate on each transaction. There is no such proof. In my view, the absence of such an essential ingredient of the charge rendered the conviction unsafe in respect of all counts. I am unable to agree with the reasoning by the magistrate that the appellant's failure to except to the charge deprived the appellants of their right to raise the point later in the trial. Nor can the appellants be deprived of such right on appeal. An accused's right to be properly informed of the case which the State intends proving against him is so strictly observed that particulars which are meaningless or even confusing instead of being explanatory in nature may result in the acquittal of the accused on appeal, due to the prejudice which they may entail for the accused. Particulars which the State provides either in the charge or indictment or in the summary of its case become part of the case for the State which the State has to prove: *R* v *Wilken* 1945 EDL 246 @ 253. Except where the State expressly abandons a particular, it is bound by the particulars: *S* v *Nathaniel* 1987 (2) SA 225 @ 235D (SWA).

Ultimately, it is my view that the point raised by the appellants was well taken both in their application for discharge at the close of the case for the State and at the end of the trial. Unfortunately, the point was missed by the trial court resulting in an unnecessary trial.

Having reached this conclusion, I do not find it necessary for me to consider the rest of the grounds of appeal set out above as the first ground is decisive of the appeal. Having found for the appellants on this point, it follows that the appeal must succeed and the conviction must be quashed.

In the result I make the following order:

The appeal be and is hereby allowed. The conviction is set aside and the sentence quashed.

BERE J authorises me to say that he agrees with this judgment.

Gill, Godlontons & Gerrans, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners