HH 556-17
HC CA 1120-15
XREF CRB 1099-12
XREF AGB 892-13

TAWANDA SIBANDA
versus
THE STATE

IN THE HIGH COURT OF ZIMBABWE
BERE AND MANGOTA JJ
HARARE, 6 NOVEMBER 2014, 20 MAY 2015 AND 30 AUGUST 2017

Mr *I Mureriwa*, for the appellant
Mr *E Mavuto*, for the respondent

BERE J: After hearing argument in this matter we upheld the appeal and gave an *ex tempore* judgment. We have been asked to give our reasons. Here they are.

The appellant appeared at Harare, regional magistrate's court facing 10 counts to which he pleaded not guilty.

Count 2 was withdrawn after plea entitling the appellant to a verdict of not guilty and acquittal. At the end of the trial the appellant was also found not guilty and acquitted in respect of count 9.

The appellant was then convicted in respect of counts1, 3, 4, 5, 6, 7, 8, and 10. For count 1 the appellant was sentenced to 12 months imprisonment which was wholly suspended for 5 years on condition the appellant did not within that period commit any offence involving concealing a transaction relating to the principal's affairs and for which upon conviction he will be sentenced to imprisonment without the option of a fine.

Counts 3, 4, 5, 6, 7, 8, and 10 having been treated as one for purposes of sentence the appellant was sentenced to 5 years imprisonment of which 12 months imprisonment were suspended for 5 years on condition appellant did not within that period commit any offence of which upon conviction he will be sentenced to a term of imprisonment without the option of a fine. A further 3 years were suspended on condition the appellant effected restitution to the complainant leaving the appellant with an effective 12 months imprisonment.

Aggrieved by both the conviction and sentence by the court *a quo* the appellant filed an appeal against both in this court in terms of section 34 (1) of the High Court Act which states as follows:

> "The High Court shall have jurisdiction to hear and determine an appeal in any criminal case from the judgment of any court or tribunal from which, in terms of any enactment, an appeal lies in the High Court."[1]

When this appeal was argued the appeal against conviction and sentence in respect of count one was abandoned meaning the conviction and sentence for count one remained as per the court *a quo's* determination.

I shall in this appeal therefore concentrate on the grounds of appeal for counts 3, 4, 5, 6, 7, 8 and 10.

Count 3-6

For counts 3 to 6 the court *a quo* was said to have erred in fact and at law by convicting the appellant when no adequate evidence was led by the state to prove beyond a reasonable doubt all the essential elements of the offences in question.

The court *a quo* was also said to have erred in convicting the appellant of theft of the amounts in question when the same amounts were conceded by one of the key witnesses Mugadza through exhibit 13 that Mortex owed Curechem Overseas Private Limited (the complainant) the amount in question which finding the court *a quo* confirmed in its judgment.

The court *a quo* also came under attack for having treated C M Sibanda, N C Mpofu and Happiness Nesvinga as independent witnesses who had witnessed the appellant being handed over some money in question relating to each and every count.

Furthermore, the court was said to have erred in fact and at law when it failed to appreciate that if the appellant had unlawfully taken the money meant for Curechem Overseas Private Limited, Mugadza would not have written a letter confirming owing the same company (the complainant) the same amount of money as well as creating a creditor's reconciliation

[1] . Chapter 7:06

where he was confirming receiving the whole consignment including those allegedly sold by the appellant to third parties and even confirming having made part payments for those assignment on the Moretex Creditor's reconciliation.

The learned magistrate also came under heavy criticism and was alleged to have erred in fact and at law for disregarding the appellant's probable explanation concerning the acknowledgement of debt marked exhibit 13 preferring to rely on evidence from Upenyu Chikono and Stanford Mugadza both of whom he conceded were not credible witnesses as well as the testimonies of Happiness Nesvingo and C. M Sibanda, witnesses the court found to have had "dirty hands" meaning even their testimonies were tainted as it was only meant to put themselves in good light and appellant in bad light.

The court *a quo* was said to have erred in failing to appreciate that there was a special relationship between Stanford Mugadza's Moretex and Curechem Overseas Private Limited linked to the abuse of mining rebate where Mortex was one of the importers of the chemicals and as such since Curechem Overseas Private Limited failed to show that it was in fact the one importing the chemicals and not the registered agents like Mortex it meant that the appellant's defence was probable when he said Yevai Goto and Stanford Mugadza had lied by saying that Mugadza's Mortex had not been the importers of chemicals in question and had never been involved in the importation of Sodium Cyanide.

Counts 7-10

The court *a quo* was said to have erred and misdirected itself when it convicted the appellant for theft from the complainant, Curechem, yet there was no adequate evidence which showed that Eyetech had received the products for the money allegedly given to appellant by Respect Moyo as there was neither proof of delivery note (P.O.D) nor was there any alleged consignment shown on the Moretex Creditor's reconciliation. The court *a quo* was said to have erred in convicting the appellant on those counts when it conceded in its judgment that Stanford Mugadza and other state witnesses failed to answer satisfactorily why the alleged products Eyetech

Investments (Pvt) Limited was allegedly paying for were not appearing on the reconciliation of Moretex if Stanford Mugadza had collected the products using Moretex Trading as they alleged.

The learned magistrate was said to have erred in fact and at law in failing to appreciate that in the absence of handwriting expert's evidence, it had not been proven beyond any reasonable doubt that appellant was the one who had signed exhibits 9, 10 and 11 given that the evidence of Mugadza and Respect Moyo was found by the court not to have been credible.

I propose to deal with the grounds of appeal against sentence only after certifying the conviction.

When the state was served with the appellant's heads of argument Mr *Mavuto* for the state conceded that the convictions in respect of counts 7, 8, and 10 had been erroneously made and was therefore not supporting the convictions. The state counsel, in his filed heads of arguments sought to support the convictions on counts 1, 3, 4, 5, and 6. The conviction and sentence in count 1 was never challenged by the appellant when the matter was argued and, in fact the appeal against it was abandoned at the time of argument meaning the conviction and sentence stands.

There were further interesting development in the appeal itself. After Mr *Mureriwa*, for the appellant had presented his arguments and adequately dealt with all the questions thrown at him by the appeal court during submissions, when given the opportunity to present his own arguments, Mr Mavuto for the respondent graciously stood up and advised the court that having carefully followed the submissions by Mr *Mureriwa* as well as his responses to questions by the court he could not oppose the appeal. State counsel urged the court to uphold the appellant's appeal in respect of those remaining counts.

I now wish to deal with the appeal itself in the light of the position taken by both counsels starting with the convictions in counts 3 to 6.

It was incumbent upon the state to prove all the elements of the offences in question beyond reasonable doubt. It is the accepted approach that the onus to do so is thrust upon the state. All the appellant needed to do was to give an explanation that was reasonably true or

probable. See *R* v *Difford*[2] and *R* v *M*[3]. It is trite that if there is any reasonable doubt after the presentation of the state case and the accused's case, such a doubt must be read to benefit the accused and not the state.

It does seem to me that one of the monumental errors that characterized this trial was when the leaned magistrate adopted the role of an expert in handwriting and then without the aid of a qualified expert concluded that as a result of his own observations the appellant had signed the disputed documents and proceeded to convict the appellant. It was procedurally wrong for the court to adopt such a lackadaisical approach on such a crucial and decisive issue. I can do no better than refer to the remarks made by the court in the case of *Stewarts and Lloyds of SA* v *Croydon Engineering and Mining Supplies (Pvt) Ltd* where it was stated;

> "---- it was undesirable from every point of view that the court should look through certain sophisticated instruments and rely upon its own observations when, from its limited knowledge of the subject, it did not know whether its observations were reliable or not and whether an inference could reliably be drawn from them or not."[4]

It was insufficient in this case for the court to merely compare signatures on the requisition forms and those on the POD for counts 3 to 6 and the signature on the employment contract of the appellant and then conclude that the signatures resembled each other and were therefor those of the appellant and then proceed to convict the appellant in respect of counts 3 to 6. The evidence was clearly inadequate and failed to reach the expected threshold in criminal matters. The concession made by Mr *Mavuto* though at the last hour was therefore well made.

I now move to deal with convictions on counts 7, 8, and 10. The record of proceedings shows that the court *a quo* relied to a large extent on the evidence of Mugadza who was a suspect witness, and as such who had to be warned by the court in terms of section 267 of the Criminal Procedure and Evidence Act.[5] It was clear that Mugadza was an accomplice witness. The other witness called in respect of these counts was Chikomo who was Mugadza's subordinate. There

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[2] . 1937 AD 372 at p. 373
[3]. 1946 AD 1023 at p. 1027
[4] . 1979 (1) SA 1018 (W)
[5]. Chapter 9:07

can be no doubt that both these witnesses' evidence needed to be treated with extreme caution and if need be corroborated by some other independent evidence. There was no such corroboration.

The record of proceedings shows that the court had difficulties believing Mugadza's testimony. In fact the court found the bulk of his evidence not credible at all. To be precise, the court found it as a fact that Mugadza wrote an acknowledgment of debt (exhibit 13) and at the same time alleged to have given the same money he acknowledged to be owing to the appellant. This is the money on account of its alleged receipt by appellant led to convictions in respect of count 7, 8, and 10. It is quite clear in my view and as alleged by the appellant that Mugadza used Mortex (Pvt) Ltd masquerading as owner to purchase chemicals from the complainant hence the acknowledgement of liability signed by Mugadza. That Mugadza's hands were dirty is confirmed by the fact that at one time he was arrested for this case.

It does seem to me that the acknowledgement of debt signed by Mugadza is exactly what it purported to stand for, an acknowledgment by Mugadza that his company Mortex Trading was indeed owing the acknowledged amount of US$157 470-00 to the complainant and the proposals stated therein for settlement. It is highly unlikely that this money could have been given to the appellant as put forward by Mugadza and of course denied by the appellant.

It does not make sense to me that the court *a quo* would have easily bought in the self-serving explanation by Mugadza which was to the effect that the money was actually paid and that the acknowledgment of debt (exhibit 13) was a ruse.

It is in the light of this rugged testimony that the State found itself unable to support these convictions. And again in my view that was a well-informed position.

It may very well be that the appellant's company Eyetech Investments (Pvt) Limited owes certain sums of money to the appellant. If it is so, then it must be appreciated that Eyetech and the appellant in the absence of a proper application to lift the cooperate veil, the appellant and Eyetech remain at Law as separate legal entities. One must not be confused for the other. If this is accepted (as it should be), then the process to recover such debts cannot result in the criminal prosecution of the appellant. That is a purely civil remedy.

Before concluding this judgment I wish to comment in passing on one development that caught my attention and of course disturbed me as I was preparing for this appeal. Right in the middle of the trial the prosecution made an application to call the evidence of an officer who had not been part of the list of witnesses given to the defence. The applicant was opposed by the defence but this application was gratuitously granted by the presiding magistrate and his ruling was brief and is captured on page 161 of the record of proceedings as follows:

> "Ruling
> The Investigating Officer is a person normally expected to testify his calling will not be something from the blues and however the defence will be allowed to amend its defence outline since failure to do that will lead to prejudice. The state is ordered to revise its pool of witnesses and serve the defence to avoid other inconveniences."

I am disturbed by this approach in these proceedings. Unless there are compelling reasons, the prosecution must not be given an opportunity to beef up its ailing case as the trial unfolds. Not only that but for the magistrate to have suggested as he did in this case that the state was now "ordered to revise its pool of witnesses---" amounts in my view, to aiding the state at the expense of an accused person. It puts a dent on the expected impartiality of the trier of facts. It should be avoided.

It was for these reasons that we upheld the appellant's appeals and pronounced him not guilty and acquitted in respect of counts 3, 4, 5, 6, 7, 8 and 10. The appellant remains guilty of count 1 (one) whose appeal was abandoned at the hearing of the appeal.

Mangota J agrees…….

Messrs Scalen and Holderness, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners