

THE STATE
versus
MICHAEL CHANGUNDA

HIGH COURT OF ZIMBABWE
FOROMA AND KWENDA JJ
HARARE, 27 September 2022

Review Judgement

FOROMA J: When this matter came up before me on automatic review I raised certain issues with the trial magistrate the response to which confirmed that the trial had not been handled in a manner that afforded real and substantial justice to the accused. I illustrate below the miscarriage of justice that occurred.

Accused was charged with 4 counts under the Medicines and Allied Substances Control Act [*Chapter 15:03*] as follows:

Count One

Contravening s 55(3)(a) and (b) of the Medicines and Allied Substances Control Act [*Chapter 15:03*]. Dispense medicine without a licence, on an unlicensed premise in that on the 27th day of August 2020 and at Zvevatsunga Spar Juru, Michael Changunda unlawfully dispensed (sic) by selling various medicines listed on Annexure A on an unlicensed premise whilst he is not a holder of licence in terms of this Act.

Count Two

In that on the 27 day of August 2020 and at Takudzwa General Dealer Juru Michael Changunda unlawfully dispense (sic) by offering for sale various medicines listed on Annexure B on an unlicensed premise whilst he is not a holder of a licence in terms of this Act.

Count Three

Contravening s 29(1)(a) of the Medicines and Allied Substances Control Act [*Chapter 15:03*].

“Selling unregistered specified medicines”

In that on the 27th day of August 2020 and at Zvevatsunga Spar Supemarket Juru Michael Changunda unlawfully offer (sic) for sale specified medicines listed on Annexure A knowing that the medicine was not registered in terms of this Act.

Count Four

In that on the 27th day of August 2020 and at Takudzwa General Dealer Juru Michael Changunda unlawfully offer (sic) for sale specified medicines listed on Annexure B knowing that the medicine was not registered in terms of this Act.

The record reflects that accused pleaded guilty to the four counts and was found guilty of all 4 counts as charged and as pleaded.

It is apparent from the record that the accused was guilty of two counts but as a result of improper splitting of charges he ended up being convicted of 4 counts. The outlines of the state case in respect of the four counts preferred indicate that the accused is the owner of Zvevatsunga Spar Supermarket Juru. It would appear that accused was also operating a general dealer shop trading as Takudzwa General Dealer at Juru. In respect of count one accused was asked by one Sly Mutyavariri to produce:

- (i) a licence for selling medicine which he failed to do and;
- (ii) a licence which showed that the premises he was operating on was licenced to sell medicines and he failed to do so.

In respect of count two, the accused was asked by Sly Mutyavaviri from the Medicines Control Authority of Zimbabwe (MCAZ), accompanied by ZRP officers from Juru, to produce a licence for selling medicines listed on Annexure B at Takudzwa General Dealer and he failed to do so and he was also asked to produce a licence which showed that the premise he was operating on Takudzwa General Dealer was licenced to sell medicine and he failed to do so. Mr Sly Mutyavarire also checked the Register kept by MCAZ in terms of s 54 of the Medicines and Allied Substances Control Act [*Chapter 15:03*] and found that accused's name did not appear in the register.

In respect of count four accused could not produce a licence in his name to show that he was authorized to sell medicine listed on Annexure B at Takudzwa General Dealer.

The medicines listed on both Annexure A and B were then confiscated. It is apparent that all the medicine listed on Annexure A found at Zvevatsunga Spar Supermarket originated from

India and was not registered in terms of the Medicines and Allied Substances Control Act and accused had no licence to trade in any of that medicine including the unregistered medicine at Takudzwa General Dealer.

Clearly therefore two offences were committed namely trading in medicines without a licence and trading in medicines on premises not licenced for trading in medicines. A proper appreciation of the first offence makes trading in medicines on unlicenced premises redundant. The accused cannot be charged with unlawful trade in unlicenced goods (medicine) on unlicenced premises as he could not lawfully trade in registered medicines or substances on unlicenced premises either. A proper interpretation of the legislation will show that three offences are created in the trading in medicines and these are:

- (i) a person may not conduct such trade/business unless he or she is licenced to trade in medicines and;
- (ii) a person may not deal or trade in medicines, whether locally produced or imported, unless same is registered and;
- (iii) a person may not deal or trade in medicines from which are not licenced for that purpose.

Clearly therefore accused was found guilty of contravening s 55(a) and (b) which are a separate offences each yet he was not charged with same. In the circumstances accused was improperly charged with trading in unregistered medicine on unlicenced premises as trading in unregistered medicines or substances on licenced premises a separate offence.

This is a convoluted charge in that two offences are rolled into one. Section 55 (i) (a) of the Medicines and Allied Substance Control Act [*Chapter 15:03*] reads as follows:

- “55 (i)(a) No person shall practise as or carry on the business of a pharmacist on any premises unless the premises are licenced in terms of this Part for such practice or business and;
- (b) the premises are under the continuous personal supervision of a person who is licenced in terms of this Part for those premises.”

Clearly licencing of premises at which sale medicines takes place unless observed constitutes a separate offence from trading on licenced premises in sale of medicines without supervision by a person who is licenced.

Accused ought to have been charged with 2 counts of trading on unlicenced premises in contravention of s 55(1)(a) for trading at Zvevatsunga Spar and at Takudzwa General Dealer and

two counts of operating without supervision by a licenced person in contravention of s 55(i)(b) for trading (i) at Zvevatsunga Spar and (ii) at Takudzwa General Dealer.

Accused ought also to have been charged with 2 counts of contravening s 29(i)(a) that is selling unregistered medicines (i) at Zvevatsunga Spar and (ii) at Takudzwa General Dealer.

In the circumstances the charges that accused was convicted of are unproved convictions.

In the event the Prosecutor General exercises his right to re-charge the accused, the trial should be for contravention of the correct sections of the Act and any resultant sentence should not be more severe than the ones set aside.

In the result the convictions are quashed and the sentences set aside.

FOROMA J:.....

KWENDA J: Agrees