

SAMUEL MUNYARADZI CHAGUTA

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND NDOU JJ
BULAWAYO 14 JUNE 2010 AND 29 JULY 2010

Mr. N. Munjanja for appellant
Mr. W. Mabaudi for respondent

Criminal Appeal

CHEDA J: This is an appeal against conviction.

On the 14th June 2010 we upheld this appeal after hearing submissions by both counsel and promised to avail reasons later, these are our reasons.

Appellant was charged with contravening section 34 of the Schedule to the Police Act [Chapter 11:10] as read with section 29(2)(b)(ii) of the aforesaid act. Allegations against him are that on the 16th July 2006 while on duty at Bulawayo central police station he received a report of fraud. The accused in question who had been arrested was found in possession of Z\$125 000 000-00. Appellant ordered the detention of the accused but, it is alleged that he failed to order that money should be recorded as an exhibit. As a result of his failure to issue the said order, the money was handed over to accused's relatives. The accused was being held for having defrauded the complainant in the sum of P3000.

According to the evidence led there is no indication that appellant instructed his subordinates to release the money to the suspect. This is clearly stated by Tendai Liberty Dhlakama whose testimony in court is that appellant told him that it was not proper for the

recovered money to be booked as an exhibit, but, should be booked as prisoner's property since it had not been proved that the suspect was the actual perpetrator of the fraud.

Appellant is accused of either neglecting or omitting his duty by failing to order the booking of the money found in the suspect's possession as an exhibit. Evidence presented before the court *a quo* is that he directed that it be booked as prisoner's property. His reason for doing so, is that he was of the opinion that there was no *nexus* between the stolen P3000 and the \$125 000 000-00 found on the accused's possession.

Negligence is failing to act like a reasonable man. In civil cases for one to be liable, plaintiff should prove on a balance of probabilities that indeed the accused party was indeed culpable. In casu appellant's negligence or omission is of a criminal nature which requires proof beyond reasonable doubt.

The issue is whether accused's failure to order that the recovered money be booked as an exhibit passes for criminal negligence. To determine this question it is important to examine the circumstances and practice of police operations.

It is clear that it is accepted practice that a duty Inspector can decide not only to detain a suspect but also to either book property found in the accused's possession either as an exhibit or prisoner's property. If for example a suspect is found in possession of a knife immediately after a victim has been stabbed, there will be every reason for the knife to be recovered and booked as an exhibit. Such weapon cannot reasonably be booked as a prisoner's property as it is directly linked to the crime.

The position obtaining in casu is that the money stolen was Botswana currency yet the suspect was found in possession of local currency. I find that there was no *nexus* whatsoever,

save to speculate that the suspect could have converted it to local currency. Unfortunately, that is, but, all one can say. In my opinion one can not be said to be negligent if he acted in accordance with a practice accepted as proper in circumstances and where he properly used his discretion. The fact that someone else or his employer, for that matter could have acted differently is not enough reason to hold him negligent. It appears that a duty Inspector can use his discretion in deciding which property should be recorded as either exhibit or prisoner's property.

As this accused is facing criminal negligence, it is necessary to examine whether he took any precaution required of his duty in the circumstances. When being advised of the recovered money, he did not order that it be returned to the suspect but directed that it be booked as prisoner's property. That action to me totally eliminates both negligence and omission. It is common practice for a suspect's property to be booked either as prisoner's property or exhibit. The accused had not been charged as investigations were still in progress. These courts are reluctant to interfere with an administrative discretion unless it can be proved that it had not been judiciously exercised which is not the case in *casu*.

In my view in order for one to be convicted of this type of negligence, the state must prove either of the following:

- (1) that what he did was something that another person in his position could not have done in the circumstances, or
- (2) to show that it was a practice which was so obviously clear that it would be folly for anyone to have neglected or omitted to do.

This principle was clearly laid down in the most persuasive case of *Morton v William Dixo, Ltd. Lord Dunedin (Lord President)* (1909 S.C. 809) referred to in *Barkway v South Wales Transport* (1950) 1 ALLER 392.

The other dimension in this matter is the involvement of Sergeant Mapfumo who is related to victims of the then accused on whom \$125 000 000-00 was found. One of the victims is Sergeant Mapfumo's brother-in-law. Sergeant Mapfumo was included in the search party, arrest and subsequent hand-over of this woman to the Bulawayo central police station. His involvement, in my view, noble as it was, may have blown out of proportion this perceived procedural irregularity in the handling of this matter by appellant. I feel compelled to believe that the good sergeant might have seen it fit to take the matter personally as it now involved a relative. He, however, can not be blamed as it is only natural to react that way. However, the taking of the matter personally turns to effectively cloud one's professional judgment which seems to be the case here.

I entertain the greatest doubt that appellant acted in a negligent manner or omitted his duty in the circumstances.

The conviction was not proper and accordingly the appeal succeeds.

Cheda J.....

Ndou J.....agrees

Messrs Munjanja and Associates, appellant's legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners