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TAPIWA MUSVAZVI
versus
THE STATE

HIGH COURT OF ZIMBABWE
BERE AND MATHONSI JJ
BULAWAYO 13 MARCH 2017 AND 30 MARCH 2017

Criminal Appeal

R Ndlovu for the appellant
Ms N Ngwenya for the state

MATHONSI J: If there is any reason why struggling parastatals in this country will never extricate themselves from the financial malady, the incongruous state of financial decay they currently find themselves in, it is having senior management in the mould of the present appellant who have constituted themselves as middlemen trading with the same parastatals they are assigned to superintend for their own personal aggrandizement. It is the singular reason why they will forever remain in the quagmire they are in because these managers see absolutely nothing wrong with approving payments of large sums of money to themselves or their nominees and will defend themselves against criminal prosecution for such fraudulent activities with everything they have got. It is unbelievable.

The appellant was an assistant depot manager at the Grain Marketing Board (GMB) at the material time. Following investigations conducted by the Loss Control Department of GMB which unraveled some fraudulent activities at the parastatal, the appellant was charged along with five of his subordinates with two counts of fraud involving a total of \$16711-10. The allegations were that on 10 November 2010 at GMB Kelvin West Depot in Bulawayo himself and his five subordinates or one or all of them had misrepresented to GMB by making fictitious

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transactions purportedly made between GMB and one Abson Chinho thereby deceiving GMB into paying to Abson Chinho the sum of \$8119-10 in count one.

In count two it was alleged that on 26 November 2010 the six employees had used the same *modus operandi* to fleece GMB of the sum of \$8592-10 which was again paid to Abson Chinho. The latter was being paid the purchase price of a flat being No 1 Broadhurst R Mugabe Way, Bulawayo. Contesting the charges the employees were subjected to a lengthy trial commencing on 6 August 2012 at Western Commonage magistrates court, at the conclusion of which they were all convicted.

The appellant was sentenced to 4 years imprisonment in respect of each count. Of the total of 8 years imprisonment 2 years imprisonment was suspended for 5 years on condition of future good behaviour while a further 3 years imprisonment was suspended on condition of restitution. This left the appellant with an effective 3 years imprisonment. He was aggrieved and launched this appeal against both conviction and sentence.

The appeal grounds are lengthy but in essence the appellant attacks the conviction on the basis that the evidence led by the state did not prove that his conduct resulted in any loss being suffered by GMB. Although false information relating to alleged deliveries of maize to GMB was entered in the records resulting in payment being made to Abson Chinho, this was not fraudulent and did not result in prejudice to GMB.

Regarding sentence his gripe is that he should not have been treated differently from his co-accused who were sentenced to community service. As such the sentence of the court *a quo* should be quashed in favour of a sentence of 24 months imprisonment of which 12 months should be suspended on condition of future good behaviour while the remaining 12 months should be suspended on condition he completes 420 hours of community service at a government institution.

The appeal is strongly opposed by the state which is of the view that the conviction and sentence were proper and met the justice of the case. The appellant got his just deserts. The state led evidence to the effect that GMB's Loss Control officers, Joseph Virima and Munyaradzi Chitenga were assigned to investigate some suspicious deliveries and payments in December

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2011. It was during the course of those investigations that they uncovered two anomalous transactions wherein payments had been made to Abson Chinho on the instructions of the appellant who was the assistant depot manager at the Kelvin Depot in Bulawayo.

The records showed that on 10 November 2010 Abson Chinho a farmer, had delivered 29524 tonnes of maize in the form of 600 bags of 50kg while maize to the GMB Kelvin West Depot using truck number ABJ 6582 driven by one B. Ndlovu, ID No 24-528695k 54. It turned out that on that particular day the appellant was performing the duties of the Depot Manager as the incumbent was away. In that capacity he signed the grain receipt thereby approving the generation of a petty cash voucher for payment to be made to Abson Chinho's FBC Bank Limited account number 3025090540214 in the sum of \$8119-10. The payment was made on 24 November 2010.

Investigations by Joseph Virima, the Loss Control Officer, revealed that Abson Chinho was not a farmer. He was not involved in any grain business and never delivered any maize to GMB on that date or any other date for that matter. Quite to the contrary he is a fellow who rented his flat in Bulawayo to the appellant. They had, in January 2011, months after the two payments made to him, entered into an agreement of sale in terms of which Chinho sold his flat to the appellant as a sitting tenant. The payment was towards the purchase price of the flat, only that it was paid by GMB and not by the applicant.

It also turned out that the driver appearing in the GMB records as having performed the task of driving truck number ABJ 6582 into the depot carrying the 600 bags of maize, B. Ndlovu, did not exist anywhere on the surface of the earth. As if that was not enough, truck number ABJ 6582 was not the kind of truck as would carry that amount of maize and did not carry such quantity of maize on that date or any date for that matter. It is a tipper truck with a carrying capacity of 6,28 tonnes. The signature of driver Ndlovu appended on the weighbridge ticket was forged.

Clearly therefore the only correct information in respect of the transaction on 10 November 2010 is that Abson Chinho was paid a sum of \$8119,10 ostensibly for delivery of

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maize but in actual fact as purchase price for a flat he sold to the appellant. The only beneficiary was the appellant.

The state also proved that on 26 November 2010 further internal GMB documents were generated to the effect that Abson Chinho had again delivered 31,244 tonnes of maize to GMB Kelvin West Depot using truck number AAJ 8782 carrying 600 bags of white maize. The truck was driven by Blessing Manatse. The appellant's subordinates verified and confirmed the entries in respect of that transaction as well every step of the way. The appellant capped it all by signing the grain receipt as Depot Manager in the absence of the incumbent thereby giving payment instructions for Abson Chinho to be paid the sum of \$8592-10 paid by GMB into his FBC Bank Limited account number 3025090540214, as "Farmers Payment". That payment went to the credit of the appellant in settlement of a debt he owed Chinho towards the purchase price of a flat aforesaid.

Investigations revealed that no such vehicle ever delivered maize to GMB on that date or any date. Truck number AAJ 8782 belongs to Panel Link, a Chinese company in the business of buying scrap metal and is driven by Blessing Manatse who, on 26 November 2010 was in Botswana. The truck was parked all day and never went anywhere near the GMB Depot. It has a carrying capacity of only 18 tonnes and would not have carried 31244 tonnes of maize.

It is a truck that had been to GMB Depot before driven by Blessing Manatse but for the purpose of weighing scrap metal at the GMB weighbridge, a facility which GMB avails to the public at a fee. It is because of that that its particulars and those of its driver were captured in the GMB weighbridge data base and was easily manipulated to generate a transaction for delivery of maize which the truck never brought there. In the weighbridge ticket in question Manatse's signature was forged. He testified in court and confirmed all the evidence I have summarized above.

It means therefore that all the information captured in the records as having been used to generate payment of \$8592-10 was false. The only correct detail is that Abson Chinho was paid that money through his FBC Bank Limited account for the benefit of the appellant. That is the

evidence which confronted the appellant when he got the opportunity to defend himself, an undertaking in which he came second best.

The appellant confirmed all the evidence led on behalf of the state which I have set out above. In fact that part of the evidence was common cause. His defence was that he was at that time a middleman involved in buying maize from suppliers of GMB who wanted cash fast as opposed to waiting for payment from GMB which had delays of up to two weeks. He had been encouraged to do that business because Abson Chinho had offered him his flat and he wanted to raise money to pay the purchase price.

He then used his money generated from the sale of his tobacco from his A2 Farm in Hurungwe Mashonaland West Province, the tobacco selling season is certainly not in November, to pay a maize vendor who delivered the two loads of maize to GMB. It is the vendor who submitted the false particulars of truck numbers and drivers. He then instructed the vendor to supply to GMB personnel the name of Abson Chinho in order to force GMB to pay Chinho what would have been due to the vendor. For his part, he paid the vendor in cash but did not disclose how much was paid to the vendor.

Indeed he deliberately avoided mentioning the name of the vendor almost until the end of the trial. Even then, the exercise of obtaining the name of the vendor would have made a dentist extracting a tooth green with envy. The following is the dialogue between the public prosecutor and the appellant late during cross examination as appears at page 164 of the record:

“Q: Besides these two transactions are there any other transactions you did to someone?

A: Yes

Q: Why are these two transactions having wrong information?

A: The vendor who supplied the information knows why he supplied wrong information. He is the one who knows why the name of the driver and the truck number is wrong and everything else is correct.

Q: That is the person who fill (*sic*) the forms and bring (*sic*) them to you for payment?

A: Yes

Q: Why are you so secretive about these vendors when you are facing these charges that are so serious. Why don't you mention them?

A: When the investigations started I supplied the name of the vendor to the Investigating Officer, Munyaradzi Chitenga. This vendor is Tariro Tinago, Number 7 Warwick Court, Between First Street and Five Avenue Bulawayo. We looked for this person with Munyaradzi Chitenga and we were told that that person left. We told the In Charge Crime with Munyaradzi Chitenga.

Q: All I want is for you to say I contracted Mr so and so not only to say 'vendor'?

A: I told the Investigating Officer.

Q: So this person disappeared?

A: I tried to locate him but in vain.

Q: Mr Tinago was not a worker at Grain Marketing Board?

A: He was not

Q: Any reason why he picked the trucks which were in the Grain Marketing Board data base?

A: No

Q: He had the truck registration, No identity number of the driver and the driver's name?

A: I do not know how he got it."

Of course the appellant and the investigating officer, if at all they ever went looking of that vendor, would not have found him because there is no such address in Bulawayo. I take judicial notice of the fact that there is no street known as "First Street" but "First Avenue," neither is there a street called "Five Avenue" but "Fife Street." Assuming he meant "First Avenue" there is no way there would be a location between that street and "Five Avenue" because the two are separated by at least three avenues.

It is significant to note that the appellant only mentioned the name of Tinago for the first time at the end of his cross examination. He did not mention it in his defence outline and not in

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his evidence in chief. It had to be extracted from him right at the end of cross examination, when it was too late to investigate it. It is not without reason that he also mentioned Chitenga who did not testify in court and not Virima the chief state witness who investigated the matter and testified for the state.

It is also interesting that when the faceless vendor was finally mentioned, it is then that the appellant disclosed that he could not be located and had disappeared from the surface of the earth. Very convenient indeed but not helpful to the appellant's cause because the state proved that false documentation was generated in order to pay the appellant's debts under very false pretences. Therefore the state put him in a fix where he had a case to answer.

While it is trite that no onus rests on an accused person to prove his innocence, or to convince the court of the truthfulness of any explanation he gives, if the accused person elects to give an explanation in order for the court to acquit, there must be a reasonable possibility of the explanation being true. See *R v Difford* 1937 AD 370 at 373.

In order for the appellant's story to repel the strong and compelling evidence of the state which established the commission of fraud, there was need for a reasonable possibility that Tinago exists and did deliver the two loads of maize while submitting false information to GMB. In my view that possibility did not exist in light of the evidence I have considered above. That then left the state case intact.

The trial magistrate had all the eyes on the ball when he convicted the appellant and his co-accused. He reasoned as follows at pp 37-39 of the record:

"Now a re-visit to the evidence before this court establishes that vehicle registration ABJ 6582 is a tipper truck owned by a mining company under the municipality of Gweru. Its carrying capacity is only 6 tonnes. Entries by accused two, that this truck delivered 600 bags to Grain Marketing Board in Bulawayo is not true. It is misleading and false misrepresentation. Accused 3 endorsed this misrepresentation that this truck indeed delivered a load of 600 bags of maize to Grain Marketing Board, Bulawayo, despite clear evidence that this is a small truck the two maintain it had a load of 600 bags. The driver of the vehicle indicated as B. Ndlovu is nonexistent. ---. On the instructions of accused 1, Abson Chinho was indicated as the owner of the maize. As a result Abson Chinho was paid \$8119-10 for the load delivered by a small truck that has no capacity to carry such a load. This means he was paid for a load that was not delivered. The documents authored

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by accused 2 and 3 in this case contained false information. They did not tell the truth about this transaction hence a misrepresentation leading Grain Marketing Board paying Abson Chinho for the said maize. In that regard the guilt of accused 1, accused 2 and accused 3 has been glaringly established in respect of count number 1 ---.

Accused 4 indicated that on 26 November 2010 Blessing Manatse drove truck registration number AAJ 8782 carrying 600 bags of maize supplied by Abson Chinho, a farmer. Accused 5, the weighbridge clerk confirmed this delivery and authored the grain receipt and completed the weighbridge ticket. Evidence produced before this court established that on 26 November 2010 Blessing Manatse was outside Zimbabwe. He was in Botswana. His passport was produced to that effect. At that time his workplace lorry AAJ 8782 was parked at his work place as he is the only one who drives it. Clearly therefore accused 4 misrepresented facts in this regard. Accused 5 also misrepresented such facts in agreement with accused 4 because this truck was never at Grain Marketing Board on this day ---. As a result payment to Abson Chinho of \$8592-10 was made authored by accused 1. Of interest to note is the fact that these purported deliveries were made when the Depot Manager was away and accused 1 was acting in his place, authorizing such payments. Further to this such payments were made to Abson Chinho who had sold a flat that is residential property to accused 1. In other words as a result of these misrepresentations, Grain Marketing Board was caused to pay for a residential property bought by accused 1 from Abson Chinho. These non-deliveries were therefore created to cause Grain Marketing Board this prejudice.”

In my view the above assessment of the evidence and the findings cannot be faulted. Having harrowed through the evidence with the meticulous eye of an eagle, I am unable to find any misdirection in that conclusion of the court *a quo*.

In terms of s136 of the Criminal Law [Codification and Reform] Act [Chapter 9:23]:

“Any person who makes a misrepresentation—

- (a) intending to deceive another or realizing that there is a real risk or possibility of deceiving another person; and
- (b) intending to cause another person to act upon the misrepresentation to his or her prejudice, or realizing that there is a real risk or possibility that another person may act upon the misrepresentation to his or her prejudice;

shall be guilty of fraud if the misrepresentation causes actual prejudice or is potentially prejudicial to another person, and be laible to—

- (i) a fine not exceeding level fourteen or not exceeding twice the value of any property obtained by him or her as a result of the crime, whichever is the greater; or
- (ii) imprisonment for a period not exceeding thirty-five years; or both.”

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The evidence led on behalf of the state established all the elements of fraud as provided for in s136. The degree of proof required in a criminal case was attained. It should be recalled that the degree need not reach certainty, but must carry a high degree of probability. As stated in *S v Isalano* 1985 (1) ZLR 62 (S) at 64 F-H (quoting with approval the sentiments of LORD DENNING in *Miller v Minister of Pensions* [1947] 2 ALLER 372 (KB);

“Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible, but not, in the least probable,’ the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

I conclude therefore that the state case reached that degree of cogency. There is therefore no merit in the appeal against conviction which will be dismissed.

On sentence *Mr Ndlovu* for the appellant submitted that the court *a quo* misdirected itself by treating the appellant differently from his co-accused. He submitted further that the disparity between the sentences wherein the appellant was sentenced to a total of 8 years with an effective 3 years after suspension of the 5 years on conditions, when the six were convicted of the same offence while his co-accused were given community service was too much. I agree, but in doing so I am mindful first and foremost of the fact that the appellant is the only one who was convicted of two counts of fraud. His subordinates were each convicted of one count.

In arriving at the sentence the *a quo* navigated the following route at pp 59-60;

“Also in assessing the appropriate sentence the court has to take into account the degree or level of participation by each of the the accused. It is generally accepted and justified to impose a harsher sentence upon a person who played the dominant role in the commission of the crime and a lighter sentence upon a person who played a minor role. Where there is substantial disparity in the moral blameworthiness then that disparity should be considered in determining the appropriate sentences. Also where there is benefit or gain the amount of such benefit or gain by each individual should be considered accordingly in determining the appropriate sentence.”

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The reasoning of the court *a quo* in that regard is very sound and was informed by the fact that the appellant (accused 1 at the trial) was the leader of the event who engineered the fraud, used his subordinates as cannon fodder and then singularly benefited from the crime. Therefore to the extent that there was need to treat him differently from the others when considering sentence, the court *a quo* cannot be faulted.

It is however the magnitude of the sentence which points to some misdirection. The penal provision in s136 of the Act provides for the imposition of a fine or alternatively imprisonment. It has been stated repeatedly that where the statute provides for the imposition of a fine alternatively imprisonment the court must give serious consideration to the imposition of a fine and leave imprisonment for bad cases.

I am in agreement that this was one of those bad cases. The appellant fleeced a struggling state enterprise of large sums of money propelled only by greed. He bought an immovable property directly from money syphoned from his employer. He held a position of trust as a senior official but abused his position not only by stealing from the employer but recruiting subordinates to achieve his nefarious goal. Therefore imprisonment was unavoidable in the circumstances.

However he was a first offender who had lost his job having served GMB for 22 years. This is a person who had fallen from grace and although he benefited from the offence, there was need to temper justice with mercy. The two counts should have been treated as one for purposes of sentence and although he should have remained with a term of imprisonment a substantial portion should have been suspended in recognition of the fact that he is a first offender and in consideration of restitution.

In the result, it is ordered that;

- 1) The appeal against conviction is hereby dismissed.
- 2) The appeal against sentence is hereby upheld. The sentence of the court *a quo* is quashed and in its place is substituted the following sentence:

“Both counts are treated as one for purposes of sentence and the appellant is hereby sentenced to 5 years imprisonment of which 1 year imprisonment is suspended for 5

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years on condition he does not, during that period commit any offence involving dishonesty for which, upon conviction, he is sentenced to imprisonment without the option of a fine. Of the remaining 4 years 2 years imprisonment is suspended on condition he restitutes the complainant through the registrar of the High Court, the sum of \$16711-20 on or before 30 June 2017.

Effective sentence 2 years.”

Bere J agrees.....

R Ndlovu and Company, appellant’s legal practitioners
National Prosecuting Authority, state’s legal practitioners