

Judgment No. S.C. 213/98
Crim. Appeal No. 194/97

ACKIM MITA DIBAE v THE STATE

SUPREME COURT OF ZIMBABWE
McNALLY JA, EBRAHIM JA & MUCHECHETERE JA
HARARE, OCTOBER 13, 1998

H Zhou, for the appellant

P F Zvinavashe, for the respondent

EBRAHIM JA: The appellant was employed as a quartermaster at the Zimbabwe Defence Forces 4 Brigade Headquarters in Masvingo. He was court-martialled. He faced a charge of theft (twenty-four counts); alternatively he was charged with the negligent performance of his duty which resulted in a deficiency in supplies in contravention of para 19(4) of the First Schedule of the Defence Act [*Chapter 11:02*].

He was also charged with fraud. The allegation was that he misrepresented to a firm trading under the name Pay 'N' Take that the credit facility he applied for with them was for the Zimbabwe Defence Forces and that he had authority from his employer to make the application. He was convicted of theft in respect of Counts One to Eight, Eleven, Twelve, Sixteen, Nineteen and Twenty, and was found guilty of negligent performance of his duties in respect of Counts Nine, Ten, Thirteen, Fourteen, Fifteen, Seventeen, Twenty-one, Twenty-two, Twenty-three and Twenty-four. He was also convicted of fraud.

In respect of the first batch of charges faced by the appellant, the allegations were:-

- “1. During the period extending from 20 February 1993 to 2 March 1995 the accused was employed in the Zimbabwe National Army as a Quartermaster at HQ 4 Bde.
2. As Quartermaster HQ 4 Bde, the accused’s duties involved, amongst other things, raising indents to various units within the ZDF for the issue of stock from the QM stores.
3. Some time between 20 February 1993 and 2 March 1995 the accused raised indents for clothing, DRE and other expendables purporting that these items were required by various units within the Zimbabwe Defence Forces. (See schedule ‘A’ annexed hereto being a list of the indents ‘issue vouchers’ raised by the accused and the items that went missing).
4. Upon delivery of the stores issued by the accused on diverse occasions during the period aforementioned, various junior store-men discovered that there were some discrepancies between the issue vouchers and the goods delivered.
5. On being questioned to account for these shortfalls, the accused could not or failed to do so.
6. Accused had no right to steal State property; or alternatively
7. Accused had no right to negligently perform his duty so as to result in a deficiency of \$87 205.50.”

In respect of the fraud charge the prosecution’s case was that:-

- “1. Sometime in April 1995 the accused, whilst employed as Quartermaster HQ 4 Bde, approached Mr Timothy Nduku, a manager at Pay ‘N’ Take Wholesale, Masvingo.
2. The accused represented to Mr Nduku that he intended to open up a facility to make purchase by cheque with Pay ‘N’ Take for the use of HQ 4 Bde Quartermaster stores canteen.
3. Mr Nduku then gave the accused a form (Application for facility to make purchase by cheque).
4. The accused duly filled in the application form in his capacity as Quartermaster HQ 4 Bde.

5. Thereafter, the accused was granted permission to purchase goods valued at \$10 000.00 by cheque. Accused proceeded to purchase goods worth \$9 835.11 using the said facility.
6. The accused used the goods worth \$9 835.11 for his private use. When he applied for the facility, the accused knew full well that the facility was not for the use of HQ 4 Bde Quartermaster stores but for his own use.
7. The accused had no right to fraudulently acquire goods from Pay 'N' Take; or alternatively
8. Accused had no right to steal State property.”

At the conclusion of his trial the appellant was sentenced to:-

- “1. To be cashiered.
2. Stoppages of pay in the sum of (\$49 010.90) forty-nine thousand and ten dollars and ninety cents, being the amount of prejudice to the State.
3. Six years' imprisonment with labour of which two years' imprisonment with labour is suspended on condition the accused repays the sum of nine thousand eight hundred and thirty-five dollars and eleven cents (\$9 835.11) to Pay 'N' Take Wholesalers Masvingo by the date 31 December 1996.”

The appellant appealed to this Court both against conviction and sentence. At the conclusion of the hearing we dismissed the appeal in its entirety and indicated that our reasons would follow. These are they.

In relation to Counts One to Twenty-four, save for Count Eighteen on which the appellant was acquitted, the evidence of Rabson Musango (“Musango”), the senior internal auditor, was crucial to the prosecution’s case. He was part of an internal audit team which carried out an audit at the Quartermaster’s Stores at 4 Brigade Headquarters where the appellant was the quartermaster. It emerged during the audit that whilst goods were being collected by the appellant and

Corporal Parangurayi from the Ordnance and Supply Depots in Harare and Bulawayo they did not reach the Quartermaster's Stores in Masvingo. Musango was able to glean this information by noting that the requisition forms were meant to be prepared in "sets of four", and in particular copy four was not filed at the Quartermaster's Stores as should have been the case had the goods been received. This indicated that they never reached their alleged destination. It was also discovered that no entries were being made in the ledger that goods secured from the Supply Depot had been received at the Quartermaster's Stores, which indicated that the goods had not been received at the Quartermaster's Stores.

The offences committed by the appellant fall into three groups in terms of the *modus operandi* followed by him. In respect of Counts Nine, Ten, Thirteen, Fourteen, Fifteen, Seventeen, Twenty-one, Twenty-two, Twenty-three and Twenty-four, the evidence was that Corporal Mwangurayi, who is now deceased, authorised the indent of goods and then proceeded to the Bulawayo and Harare Depots and collected the goods. The evidence showed that these goods were never entered in the ledger at the Quartermaster's Stores; neither were the fourth copies filed to show that the goods were received by the Quartermaster's Stores. This was discovered by the auditors when they carried out an audit.

In respect of Counts One to Three, the evidence was that the fourth copy of the requisitions were filed with Quartermaster's Stores but the store-men, to cover themselves, endorsed on the rear of these documents that the goods had not in fact been received at the Quartermaster's Stores. The appellant was the quartermaster: It was his duty to inspect these papers. It is inconceivable that he

would not have challenged the store-men had the goods been received and placed into stock at the Quartermaster's Stores unless, of course, it was he who was taking the goods for himself.

Finally, in respect of the goods relating to Counts Four to Eight, Eleven, Twelve, Sixteen, Nineteen and Twenty, the method to collect goods from the Depots was the same as the first group of offences referred to earlier in this judgment. The evidence showed that these goods never reached the Quartermaster's Stores; no entries were made in the ledger. The number four copy of the requisitions were not filed and there is no record of these having been filed. The appellant in his defence produced a "small ledger" in which he said was recorded the receipt of the goods collected from the Depots. The difficulty with this defence was that the "small ledger" was no longer in use at the Quartermaster's Stores and it was apparent from an examination of the ledger that it had been hurriedly written up, a clear attempt to fabricate evidence in support of this defence.

Lastly, as regards the fraud count, the appellant misrepresented to Pay 'N' Take that he was opening an account for Quartermaster's Stores canteen. Pay 'N' Take thought they were dealing with Headquarters 4 Brigade Quartermaster's Stores canteen and not with the appellant as an individual.

The prosecutor called as its main witness a Mr Nduku from Pay 'N' Take. It was his evidence that the appellant approached him and negotiated for a credit facility for Headquarters 4 Brigade Quartermaster's Stores canteen; that Pay 'N' Take only offered credit facilities to companies or recognised traders and not to

individuals; that the appellant filled in an application form for credit, in which he indicated that he represented Headquarters 4 Brigade Quartermaster's Stores and that his position in that organisation was that of quartermaster. He further gave the physical address of the company as Headquarters 4 Brigade, Masvingo and the postal address as Box 750, Masvingo, the postal address for Headquarters 4 Brigade; that when the appellant took delivery of the goods they were loaded into a military truck. Payment was never made and when he tried to press for payment, the appellant wrote two letters promising payment (the letters were produced as exhibits and one of them bears the Headquarters 4 Brigade Quartermaster's official unit date-stamp which may only be used on official Army correspondence); and that when the debt remained outstanding he approached 4 Brigade Headquarters authorities. Mr Nduku learnt that no authority had been granted to the appellant to open any account with Pay 'N' Take and that the goods in question had not been received at 4 Brigade. It was only then that Pay 'N' Take realised that it had been deceived by the appellant and that all along the goods were for the appellant's own use. This is only when summons was issued against the appellant in a bid to recover the money owed. A report was subsequently made. Mr Nduku also told the court that his company had done business with others messes and canteens at Headquarters 4 Brigade and that each time they paid for the goods in cash and not by requisition. It is common "service" knowledge that messes and canteens purchase goods for cash and not by requisition. They cannot use requisitions because they are strictly speaking not State Departments.

Mr Nduku's evidence was corroborated to some extent by the evidence of Mrs Muradzikwa - a defence witness. Her evidence was that she was introduced to the appellant by a mutual friend. The appellant approached her and indicated he

wanted a credit facility with Pay 'N' Take. She then advised him that the company only offered credit facilities to companies or recognised traders. Whereupon the appellant claimed to run a kiosk in Mucheke and that whatever goods he bought would be delivered to that address. She further advised him on how to fill in the form although she did not see him do it. The significance of her evidence is that she confirms that Pay 'N' Take did not offer credit facilities to individuals. Secondly, she says she advised him on how to fill in the form. On being questioned she later said that if one looks at the application form one remains with the impression that the credit facility was for Headquarters 4 Brigade Quartermaster's Stores canteen and that the goods were in fact delivered there.

All in all, the evidence shows that the appellant misrepresented to Mr Nduku that he was opening an account on behalf of Headquarters 4 Brigade Quartermaster's Stores when in fact he had no such authority. When he obtained the goods they were for his personal use. Pay 'N' Take remained looking to Headquarters 4 Brigade Quartermaster's Stores canteen for payment and, to date, the debt has not been paid.

It is on the basis of this evidence that the appellant was convicted of the counts outlined above. The audit carried out by the chief internal auditor established the blatant irregularities of the appellant's conduct and there is no sensible basis upon which to interfere with the findings of the Court Martial.

Since we did not interfere with the conviction we had no power to substitute the sentence imposed by a Court Martial. See *S v Steele* 1972 (1) RLR 377 and *S v Mutohodza* S-98-89.

It is for these reasons that we dismissed the appeal in its entirety.

McNALLY JA: I agree.

MUCHECHETERE JA: I agree.

Musunga & Associates, appellant's legal practitioners

Directorate of Prosecutions, respondent's legal practitioners