CHRISTOPHER MANGISI
versus
THE STATE

HIGH COURT OF ZIMBABWE
BERE AND MATHONSI JJ
BULAWAYO 18 JANUARY AND 4 FEBRUARY 2016

Criminal Appeal

Appellant in default
Ms N. Ngwenya for the respondent

MATHONSI J: The appellant's legal practitioner did not attend court even though the notice of set down of the appeal was served upon the law firm of *Mcijo, Dube and Partners* on 18 December 2015. Although counsel for the state applied for a dismissal of the appeal by reason of default, we could not accede to that application as we were of the view that there was a possibility that the appellant's non-appearance may have been actuated by the concession made by the prosecution. There is a strong possibility that the appellant's counsel may have assumed that the matter would be disposed of in chambers and that the set down would fall off.

It is as a result of that possible confusion that we directed that the matter be referred to me in chambers, so that it may be disposed of therein instead of dismissing the appeal by default. In fact nothing would have been achieved by proceeding that way when the state was not supporting the conviction. The state has conceded the appeal against conviction in respect of the two counts of fraud and theft.

For that reason the matter should not have proceeded in the manner proposed by the state counsel given that the way it has. It should have been disposed of in terms of section 35 of the High Court Act [Chapter 7:06] which provides:

> "Where an appeal in a criminal case, other than an appeal against sentence only, has been noted to the High Court, the Attorney General (read the Prosecutor General) may, at any time before the hearing of the appeal, give notice to the registrar of the High Court that he does not, for the reasons stated by him, support the conviction, whereupon a judge of the High Court in chambers

> may allow the appeal and quash the conviction without hearing argument from the parties or the legal representatives and without their appearing before him."

In her heads of argument *Ms Ngwenya* for the respondent submitted, after demonstrating how she was drawing such a conclusion, that:

> "Ultimately and regarding the convictions in the two counts it is conceded that there are gaps in the state's case which gaps could have been plunged (sic) by leading evidence from indicated witnesses, among a plethora of them (who) could have been called to prove the state's case. The net effect of the gaps is that triable issues remain unventilated, making [---] unresolved and essential elements of the offences charged not proved beyond a reasonable doubt though there was a *prima facie* case against the appellant. At the end of the day it is conceded and submitted that the state's case is in shaky ground and that the convictions are not supported as they are seemingly unsafe."

Having come to that conclusion the state should have proceeded in terms of section 35 of the High Court Act and simply given notice to the registrar of this court that it does not support the conviction. Where such notice is given on an appeal the registrar should place the appeal before a judge, in chambers, who, if satisfied, should allow the appeal against conviction and quash the sentence. That way space would be created for other deserving and contested appeals to be set down on the roll for determination. In future the state should be guided accordingly in order to avoid unnecessarily clogging the appeals roll with matters that should not be set down at all.

The appellant was charged in the first count with fraud, it being alleged that on 27 November 2007 at Dasso Building, Fife Street and 4th Avenue Bulawayo he unlawfully and with intent to defraud misrepresented to Million Newa Ndlovu that as a registered estate agent, he was selling stand 7559/10 Tshabalala Township Bulawayo on behalf of Sophie Mpofu the owner of it and obtained ZWD 22 million from Ndlovu.

In the second count, he was charged with theft of ZWD 250 000-00 belonging to Enisha Magaya the allegations being that on 28 February 2001 he had taken possession of that money being proceeds of the sale of house number 6527 Gwabalanda Township Bulawayo and instead of handing the money over to the owner, he converted it to his own use.

In respect of count one, that of fraud, the state led evidence from three witnesses. Borniface Kaseke, Sophie Mpofu and Fanuel Phiri – none of whom were able to shed light as to whether the appellant made any misrepresentation and to who. In short, the alleged victim,

Million Newa Ndlovu who allegedly bought the house, was not called to testify, leaving a gap in the evidence. Sophie Mpofu is the owner of the house and all she said was that she did not instruct anyone to sell her house. Both Kaseke and Phiri did not incriminate the appellant with Phiri saying all that he knew was that his grandfather's house was sold by unknown people.

On the second count of theft only Elisha Magaya, the owner of house number 6527 Gwabalanda Bulawayo gave evidence. All that he said was that the house was sold firstly by the appellant and he then tried to cancel that agreement before selling the house himself for the second time. There was nothing in his evidence to suggest that the appellant converted the money to his own use. In fact the appellant gave an explanation as to what happened to the purchase price, namely that the buyer took it to his own lawyers where he sought to enforce the agreement. There was no evidence to rebut that assertion.

The point was made by SANDURA JA in *S* v *Kuiper* 2000 (1) ZLR 113 (S) 118 B-D in considering what the court has regards to in examining the explanation given by an accused person;

> "However, quite apart from the effect of the further evidence adduced on appeal, I do not think that the magistrate was justified in rejecting the appellant's version. The test to be applied before the court rejects the explanation given by an accused person was set out by GREENBERG J in *R* v *Difford* 1937 AD 370. At 373 the learned judge said:
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> > '---no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation is improbable the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal---.'
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> Similarly in *R* v *M* 1946 AD 1023, DAVIS AJA said the following at 1027:
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> > 'And, I repeat, the court does not have to believe the defence story; still less has it to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true."

The court *a quo* misdirected itself in assessing the evidence in that it does not appear to have bothered to consider whether the state, which bore the onus of proving the guilt of the appellant in respect of both counts beyond a reasonable doubt, had proved such guilt. Quite to the contrary, the magistrate shifted the onus of proof to the appellant for him to prove his innocence. At page 15-16 of the record he reasoned as follows:

> "Although accused pleaded not guilty to both counts in this case, and although this has been a lengthy trial, a perusal of the record actually reflects that this is a fairly simple straight forward case in which the accused has failed to come up with a reasonable defence, in that, money was paid and receipts were issued by accused's company ---. As I have already pointed out, this is a fairly straight forward case in which the accused has failed to come up with a reasonable defence to both counts; hence accused's defence cannot stand. I accordingly find the accused guilty as charged."

In my view, this is a very muddled thought process which is very dangerous indeed. The appellant did not have to prove anything. It is the state which had to prove his guilt by leading credible evidence tending to establish all the essential elements of the offences. It is because the magistrate misdirected his thought process that he did not bother to assess the evidence led on behalf of the state to see if a crime was committed. To him the moment the appellant stood in the dock charged with the offences, he was guilty. The onus was upon him to "come up with a reasonable defence" failing which he was guilty as charged.

In that regard the concession made by the state is properly made. The conviction in respect of both counts cannot stand. With it the attendant sentence must also go.

In the result, it is order that;

1. The conviction of the appellant on one count of fraud and one count of theft is hereby set aside.
2. The sentences are hereby quashed.
3. In its place is substituted the verdict that the appellant is hereby found not guilty in respect of both counts and is accordingly acquitted.

National Prosecuting Authority, respondent's legal practitioners

Bere J agrees…….