

REPORTABLE (43)

ELPHAS NCUBE
v
THE STATE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, GOWORA JA & MUTEMA AJA
BULAWAYO, JULY 28, 2014 & NOVEMBER 28, 2016

N Mushangwe, for the appellant

K Ndlovu, for the respondent

GOWORA JA: On 14 October 2009 the appellant was found guilty of one count of fraud by the magistrate court. The matter was referred to the Attorney-General on the question of sentence. On 25 January 2010 the High Court confirmed his conviction and sentenced him to 7 years imprisonment, of which one year was suspended on condition of good behavior. He has already served the sentence in full. The appellant now appeals to this court against both conviction and sentence.

The following facts were established before the magistrate. The appellant is a businessman of some fifteen years standing. He is the owner of a company called Defiant Property Management, a private company duly registered as such under the laws of Zimbabwe.

The appellant, through his company, acts as a middleman in “getting people selling property together”. He is not a registered estate agent.

Sometime in January 2008 the appellant caused an advertisement to be flighted in the Chronicle newspaper in respect of an immovable property known as 4051 Nketa Drive Bulawayo. The complainant, one Doris Dewa, responded to the advert. After viewing the property in question the complainant made arrangements with the appellant to meet with the seller on 24 January 2008 at the appellant’s business premises.

The parties duly met as scheduled. Present at the premises of the appellant’s company was one Mpilo Nyathi (Nyathi) who identified herself as Magdalene Sibanda, the seller. An identity document and an original Deed of Transfer bearing the names of the said Sibanda were exhibited to the complainant. The complainant made an offer for the property and on 28 January 2008 the parties concluded an agreement of sale for the property. The seller was identified on the agreement of sale as Magdalene Sibanda. Upon signing of the agreement, the complainant paid the purchase price in full and the title deeds were surrendered to her.

The appellant advised the parties to engage lawyers for purposes of effecting transfer of the property to the complainant. Thereafter the complainant attempted on several occasions to contact Nyathi to have the property transferred into her name and without success. She then visited the property in question at which juncture she met the owner of the property, one Sibanda who denied any knowledge of the transaction. Upon realizing that she had been duped she made a report to the police leading to the arrest of the appellant and Nyathi on

allegations of fraud. Subsequently, the two were jointly charged in the magistrates court with one count of fraud as defined in s 136(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

At their initial arraignment before the magistrate, Nyathi pleaded guilty to the offence. The appellant denied the charge. The trials were separated and Nyathi was duly convicted on her plea of guilt. She was sentenced to a term of imprisonment for 36 months, with 6 months suspended on conditions of good behaviour.

After a trial in which Nyathi appeared as a witness on behalf of the prosecution the appellant was duly convicted on the charge of fraud. The magistrate considered that the offence merited a sentence beyond his jurisdictional limits and referred the matter to the Prosecutor General for his decision on the question of sentence in terms of s 54 (2) of the Magistrates Court Act [*Chapter 7:10*], which reads in relevant part:

“54 Stopping and conversion of trials

- (1) ... N/A
- (2) If upon the conviction of an accused person upon summary trial or trial on remittal by the Prosecutor-General, before sentence is passed, the magistrate is of the opinion that a sentence in excess of his jurisdiction is justified, he may adjourn the case and remand the person convicted and submit a report to the Prosecutor-General, together with a copy of the record of the proceedings in the case.”

Following upon a consideration of the prejudice involved in the offence the Attorney-General(now Prosecutor General) recommended that the matter be transferred to the High Court for sentence in accordance with the provisions of s 225(1)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

On 25 January 2010, the appellant appeared before a judge of the High Court in Bulawayo for sentence. His conviction on the charge of fraud was duly confirmed and he was sentenced to imprisonment for a period of seven years, of which one year was suspended on conditions of good behaviour. He has appealed with leave to this Court against both conviction and sentence.

In his grounds of appeal against conviction, the appellant raised the following issues for determination:

- that the learned magistrate failed to warn the accomplice witness in accordance with laid down principle.
- that the learned magistrate erred in returning a guilty verdict in the absence of evidence establishing the guilt of the appellant beyond a reasonable doubt.
- that the learned trial magistrate erred in rejecting the appellant's evidence without giving cogent reasons for so doing.

As regards sentence, the grounds raised were the following:

- that the effective sentence of six years imprisonment was so excessive as to induce a sense of shock.
- that the failure by the learned judge in the court *a quo* to suspend a portion of the sentence on condition that the appellant pays restitution to the complainant amounted to a misdirection justifying interference with the sentence as a whole.

It was contended by Mr *Mushangwe*, for the appellant, that the conviction must be set aside on the grounds that the failure by the trial magistrate to warn the accomplice witness was a misdirection which warranted interference by this court in the verdict rendered by the magistrate.

Before us, Mr *Ndlovu* who appeared on behalf of the State conceded that the learned trial magistrate failed to warn Nyathi in accordance with the provisions of s 267 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. However, despite this concession, it was the contention by Mr *Ndlovu* that the failure to warn the witness did not affect the cogency of the witness's evidence nor her credibility as a witness. It was further argued that the requirement for warning an accomplice witness merely serves to warn the witness that he or she was compelled to answer all questions put to such witness notwithstanding that some or all such questions may tend to incriminate the witness.

The court was referred to *R v Simakonda* 1965 R & N 465; and *S v Ngara* 1987 (1) ZLR 91 as authority for the proposition that a failure to warn an accomplice witness against giving false evidence on the commission of an offence is a misdirection.

Section 267 of the Criminal Procedure and Evidence Act reads:

“F. Evidence of accomplices

267 Accomplices as witnesses for prosecution

- (1) When the prosecutor at any trial informs the court that any person produced by him or her as a witness on behalf of the prosecution has, in his or her opinion, been an accomplice, either as principal or accessory, in the commission of the offence alleged in the charge, such person shall, notwithstanding anything to

the contrary in this Act, be compelled to be sworn or to make affirmation as a witness and to answer any question the reply to which would tend to incriminate him or her in respect of such offence.

[Subsection substituted by section 22 of Act 9 of 2006.]

- (2) If a person referred to in subsection (1) fully answers to the satisfaction of the court all such lawful questions as may be put to him, he shall, subject to subsection (3), be discharged from all liability to prosecution for the offence concerned and the court or magistrate, as the case may be, shall cause such discharge to be entered on the record of the proceedings.
- (3) A discharge in terms of subsection (2) shall be of no effect and the entry thereof on the record of the proceedings shall be deleted if, when called as a witness at the trial of any person upon a charge of having committed the offence concerned, the person concerned refuses to be sworn or to make affirmation as a witness or refuses or fails to answer fully to the satisfaction of the court all such lawful questions as may be put to him.

A reading of the section in question confirms that the warning is primarily aimed at an accomplice witness who is yet to be tried and charged. The procedure to be adopted is that the prosecutor is required to advise the magistrate that the witness is an accomplice who is yet to be charged. In turn, the magistrate is required to warn the witness that he is required to give evidence and to answer any questions truthfully notwithstanding that the questions might tend to incriminate him.

Although the trial magistrate states in the judgment that a warning in terms of s 267 of the Criminal Procedure and Evidence Act had been issued to the accomplice witness prior to her giving evidence, the record does not confirm the statement of the learned magistrate.

The evidence of Nyathi was critical to the State case as she was identified as the person who purported to act as Magdaline Sibanda the owner of the immovable property. Indeed

the learned magistrate convicted the appellant primarily on the basis of the evidence adduced by Nyathi on the involvement of the appellant in the whole scheme. Given the clear provisions of s 267, the failure on the part of the magistrate to warn the witness to tell the truth would not amount to a misdirection. The witness had already been convicted and sentenced. There was thus no fear that she could be compelled to answer any questions that could incriminate her. She could not be tried twice for the same offence.

However, that being said, the magistrate was obliged to treat the evidence of the accomplice with caution and the learned trial magistrate accepted that there was need to treat the evidence of Nyathi with caution. It is clear from the record that the magistrate was alive to this requirement and the principle that the evidence of an accomplice should be treated with caution unless it was corroborated by evidence *aliunde*.

The principle is set out in s 270 of the Criminal Procedure and Evidence Act in the following terms:

“270 Conviction on single evidence of accomplice, provided the offence is proved *aliunde*

Any court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment, summons or charge under trial on the single evidence of any accomplice:

Provided that the offence has, by competent evidence other than the single and unconfirmed evidence of the accomplice, been proved to the satisfaction of such court to have been actually committed.”

The reason for the existence of the cautionary rule regarding the evidence of accomplice witnesses in criminal trials is trite. An accomplice is a self-confessed criminal and

various considerations may lead him to falsely implicate an accused person, such as a desire to shield a culprit, or the hope of clemency where he has not already been sentenced. Additionally by reason of his inside knowledge he has a deceptive facility for a convincing description of the facts, his only fiction being the substitution of the accused for the real culprit.

The rule requires that the court should warn itself of the danger of convicting on the evidence of an accomplice. Having done so, by contrasting the evidence of the accomplice with that of the accused and viewing it against all the surrounding circumstances and the general probabilities of the case, the court must be satisfied beyond a reasonable doubt that the danger of false incrimination has been eliminated. It is not enough for the trial court to merely warn itself of the dangers of false incrimination and then to convict simply on its faith in the honesty of the accomplice witness, based on nothing more than his demeanor and the plausibility of his story.

The requirements in regard to accomplice evidence are aptly summarized in *S v Mubaiwa* 1980 ZLR 477 to be the following:¹

- (i) in exercising the caution which was necessary before acting upon the evidence of an accomplice, the court had to deal separately with the case of each appellant;
- (ii) quite apart from the requirements of s 292 of the Criminal Procedure and Evidence Act [Chapter 28](now repealed), a trial court had to warn itself of the danger of acting on the evidence of an accomplice;
- (iii) the best way to be satisfied that an accomplice was reliable was to find corroboration implicating the accused;

¹ At p 481A-C

- (iv) the risk of accepting accomplice evidence would be reduced if the accused person was found to be a liar, or did not give evidence to contradict that of the accomplice;
- (v) but in the absence of the features in (iv) the court could convict if, being aware of the danger, it was satisfied that it could rely on the evidence of the accomplice, because of the merit of the accomplice, as against the accused as a witness was beyond question;
- (vi) in the case of (v) if corroboration was necessary it had to be corroboration implicating the accused person and not merely the corroboration which met the requirement of s 292, i.e. corroboration in material aspects. (See *R v Lembikani & Anor* 1964 R. & N. 7.)

In his defence outline the appellant denied that he was acquainted with Nyathi prior to the commission of the alleged offence. He told the court that he saw her for the first time after she walked into his office claiming that she was Magdalene Sibanda. She had then requested his assistance in the sale of her immovable property. According to the appellant she had in her possession all the relevant documents. Believing that she was who she purported to be, the appellant accepted the mandate and advertised the property in the newspaper. The complainant responded to the advert and went to view it. She was accompanied by her father. She made an offer and an agreement of sale was prepared for signature by both parties. Upon signature the complainant paid the purchase price in full from which appellant was paid 5% as commission. Appellant then advised the parties to go to Lazarus & Sarif to have the property

transferred to the complainant's name. However before this could be done Nyathi disappeared and efforts on the part of the complainant proved difficult.

The complainant then caused their arrest and initially Nyathi denied knowing the complainant and it was only after both the appellant and the complainant had insisted that she admit her involvement that she admitted having signed the agreement as Sibanda. The appellant told the court that Nyathi had implicated him in the commission of the offence purely out of malice as he had no connection with her prior to the transaction in which his assistance had been sought for the sale of the property in question.

The appellant gave evidence on oath in his defence. The trial magistrate was persuaded to find that the witnesses for the State were credible and as a result found the appellant guilty of the offence with which he had been charged.

What emerges from the record is that the learned magistrate warned herself of the dangers of accepting the evidence of a single witness unless there exists sufficient evidence *aliunde* pointing to the guilt of the accused before convicting such accused person. The mere fact that there is evidence *aliunde* that the offence has been committed does not mean that the accomplice's evidence must not be approached with caution. The accomplice's evidence must be corroborated, but the corroborative evidence need not implicate the accused. It is sufficient that the accomplice's evidence be corroborated in a material respect. The principle was succinctly spelt out by QUENET J.P. in *R v Juwaki and Anor* 1965 (1) S.A. 791(S.R., A.D), at 794A-F as follows:

“I do not agree that in every case where imperfections exist in the evidence of an accomplice there must necessarily be corroboration of his evidence implicating the accused. As was pointed out by SCHREINER, J.A. in *R v Ncanana* 1948(40 S.A. 399 (A.D.)), that is the best but not the only way of reducing the danger of false incrimination, and see *R v Mpompotshe*, 1958 (4) S.A. 471 (A.D.). The legal position as stated by CLAYDEN C.J. in these terms:

‘The principles which apply were set out in *Rex v Ncanana*, 1948 (4) S.A. 399 (A.D.), and were confirmed more recently in *R v MPOMPOTSE*, 1958 (4) S.A. 471 (A.D.). I do not propose to set out in full what was said by SCHREINER J.A. in those two cases. He said that, quite apart from the section, a trial court had to warn itself of the danger of acting on the evidence of an accomplice. He said the best way to be satisfied that the accomplice was reliable was to find corroboration implicating the accused. But he also said that the risk in accepting accomplice evidence would be reduced if the accused person was found to be a liar, or did not give evidence to contradict that of the accomplice. And he said that in the absence of these features, the court could convict if, being aware of the danger, it was satisfied that it could rely on the evidence of the accomplice because the merit of the accomplice, as against the accused, as a witness was beyond question. In the later cases it was stressed that if corroboration was necessary it had to be corroboration implicating the accused person and not merely the corroboration which meets the requirements of the section, corroboration in material respects.’”

(See *Lembikani & Anor* 1964 R & N 7, delivered in the Federal Supreme Court on 11th February, 1964). Where there are imperfections in the evidence of an accomplice and there is no corroboration of his evidence implicating the accused, the question remains whether there are other features which reduce the danger of false incrimination and if there are, whether they reduce it to the point where there is no reasonable possibility that the accused has been falsely implicated. Indeed, that was the manner in which CLAYDEN, C.J. approached the question of the correctness of the second appellant’s conviction in *Lembikani*’s case. And may I say that in considering whether the danger of false incrimination has been satisfactorily removed, the need that the other features should be strong and significant must, in each case, be related to the quality and character of the accomplice’s evidence and the degree of its imperfections.

The special danger of false implication is not met by corroboration of the accomplice's evidence in material respects not implicating an accused. Nor is it met by proof *aliunde* that someone else committed the crime. The risk will be reduced if in the most satisfactory way if there is corroboration implicating the accused. It will also be reduced if the accused is shown to be a liar, does not give evidence to contradict or explain the evidence of the accomplice. The risk will be further reduced, even in the absence of the above features, if the court recognizes the inherent danger of convicting on the evidence of an accomplice, and appreciates that the acceptance of the accomplice's evidence and rejection of that of the accused person is only permissible where the merits of the former and the demerits of the latter as witnesses are beyond question. See *R v Ncanana* (3) 1948 (4) S.A. 399 (A.D), at pp 405-6.

However, although the learned trial magistrate warned herself of the dangers of convicting an accused on the sole evidence of an accomplice, she did not go further to find evidence on the record that corroborated the implication of the appellant by the accomplice witness. Also critical to this enquiry is the source of the documents that were used in the fraud. Whilst the witness stated that the appellant had the documents and exhibited them to her, the position of the appellant was that these documents were brought to him by Nyathi. He stated that she identified herself as Sibanda.

The evidence of the complainant was to the effect that the supposed seller produced a national identity card which had her picture and names. The identity document was given to the witness to confirm that the supposed seller was indeed Magdalene Sibanda. The title deeds were at the same time handed over to the appellant, presumably for his perusal. Clearly the national identity document was a critical feature in the transaction as it would satisfy the

purchaser as to the authenticity of the seller and the genuineness of the transaction. Despite this clear evidence from the complainant the court did not have regard to the improbability of the appellant having procured the document depicting Nyathi as Magdalene Sibanda. If her likeness was on the national identity document then her version that she had merely been called in to pretend to be Sibanda would not be credible. She had to explain how her likeness was depicted on the national identity document of some other person. She did not suggest that the appellant had asked her to furnish him with her photograph in order to perpetrate the fraud.

There is some conflict on the evidence as to whether the identity document was of metal or paper. What however is not in dispute was that the complainant was persuaded that the person whose face was depicted on the identity document was the accomplice witness Nyathi. If Sibanda's face had not been on the document the fraud would not have succeeded. It was only when the complainant went looking for the supposed seller for purposes of having transfer effected that the reality of the fraud struck her. The person who signed the agreement of sale and whose likeness was depicted in the identity document exhibited to her was not the same person who she found at the property which had been sold to her and identified herself as the registered owner. The unmistakable conclusion is that the witness participated in the fabrication of the document.

Clearly there were imperfections in the evidence of the accomplice witness. There is in fact no evidence corroborating her evidence in material respects. The other features that would tend to reduce the risk of false implication are absent and were not even adverted to by the magistrate. Critically one of the most important features is the impression created by the accused as a witness. The court *a quo* criticized the appellant in the following terms:

“It is correct to assume that when the accused was approached by the seller seeking his services as an agent the accused went as far as seeing the property for sale to satisfy himself that the property existed and then went on to place an advert in the newspaper describing the property so as to seek buyers. If indeed the owner of the property was not selling the property or was not the person who approached the accused person it should have been detected at this stage.

At no time in the judgment is the appellant accused of telling untruths or being a liar. The criticism is limited to the manner in which he dealt with his mandate as an agent. That he should have gone to view the house being offered for sale. The judgment also criticizes Magdalene Sibanda. It is suggested in the judgment that when the complainant went to view the property there was someone at the property and that the visit by the complainant ought to have alerted Sibanda of this imminent threat to her property. The magistrate also wondered how the title deeds and the identity document could have ended up where they did if Sibanda was not acquainted with Nyathi and the appellant.

What the court missed which was critical in my view, was how the accomplice obtained an identity document bearing the name of Magdalene Sibanda but bearing her likeness. Both the complainant and the appellant stated that Nyathi had a metal identity document with her likeness in the name of Magdalene Sibanda and they accepted that the identity document was genuine and authentic. The learned trial magistrate did not make any findings as to the credibility of the two on this material aspect of the evidence. This evidence points to the fact that the accomplice had obtained documents in Sibanda’s name and further that she was masquerading as Sibanda. After the fraud Nyathi disappeared from the scene and only emerged when the police got involved. As a result due to the imperfections should have found corroboration from the evidence of the complainant on the material aspect that the appellant connived with Nyathi to misrepresent to the complainant that Nyathi was Sibanda the owner of the immovable property

which was the subject matter of the fraud. The only evidence to that effect was from Nyathi and this was the critical issue for determination in the guilt of the appellant.

It is evident that in assessing the evidence of the accomplice witness the magistrate did not have regard to the requirements set out in Mubaiwa's case. In her analysis of the evidence adduced before the court, the learned magistrate appeared to shift the *onus* to the appellant to establish his innocence where the state had not established his guilt beyond a reasonable doubt.

The mere fact that the appellant advertised a property for sale on its own would not necessarily lead to a conclusion that he was guilty of fraud. It is beyond doubt that the magistrate considered the advertisement of the property by the appellant as the grounds for a finding of guilt on the part of the appellant. The evidence of the appellant was subjected to the kind of scrutiny that should have been applied to the evidence of Nyathi. Describing the appellant as a middleman, the court considered that it was imperative upon him to have verified the authenticity of the documents used in the fraud. The court should have asked itself what convinced the complainant that identity document revealed Nyathi as Sibanda. If the appellant was just a middle man, how did Nyathi's likeness appear on identity documents bearing Sibanda's personal details and likeness. The court also did not mention any evidence *aliunde*, which would confirm the appellant's role in the deception. The evidence of Sibanda actually put in doubt the complicity of the appellant in the commission of the offence.

The established facts were that Nyathi had the national identity documents for Sibanda and the original title deeds to the immovable property in her possession. The facts

established were that Nyathi posed as Sibanda and executed documents relating to the fictitious agreement of sale resulting in the complainant losing substantial sums of money. Even though Nyathi admitted taking part in the fraud, there was need for corroboration on the role that the appellant was alleged to have played in colluding with Nyathi to act as Sibanda and misrepresent to the complainant that she was the real owner of the property in question. This necessary piece of evidence was never before the court *a quo* and in its absence the court could not have come to the conclusion that the accomplice had properly implicated the appellant.

In my view the court *a quo* failed to give proper consideration to the cautionary rule relating to accomplice evidence and the only logical conclusion is that there was insufficient evidence upon which the appellant could have been convicted of fraud.

In view of the finding that the evidence of Nyathi could not be found to be credible in the absence of evidence *aliunde* corroborating her implication of the appellant, there is no need to examine the other grounds of appeal. Accordingly the conviction must be vacated.

I turn next to the question of sentence. In passing sentence the learned judge before whom the appellant for purposes of having sentence passed did not give reasons for the sentence meted out to the appellant. A failure to give reasons for sentence or an order is a gross irregularity and thus amounts to a misdirection. In *S v Makawa* 1991 (1) zlr 142 (S) EBRAHIM JA stated:²

“Although there are indications in this case that the magistrate may have considered the case, a large portion of those considerations remained stored in his mind instead of being committed to paper. In the circumstances, this amounts to an omission to consider and give reasons. There is a gross irregularity in the proceedings. See *R v Jokonya* 1964 RLR

² At 14D-E

236(G); *R v d’Enis* 1966 RLR 457(A); 1966 (4) SA 214(RA); and Practice Note 4 of 1966(Appellate Division) 1966 RLR 755.”

See also the remarks of GARWE JA in *Gwaradzimba v C.J. Petron & Company (Pty) Ltd* SC 12/16.

Accordingly, the sentence of the court *a quo* stands to be quashed not only by reason of the fact that the appellant has been acquitted of the charges but also on the basis of the misdirection.

In the premises, the appeal succeeds. The conviction is set aside and the sentence by the High Court is quashed.

CHIDYAUSIKU CJ: I agree

MUTEMA AJA: I agree (the late)

Mushangwe And Company, appellant’s legal practitioners

The National Prosecuting Authority, respondent’s legal practitioners