TAPUWA EVANS CHIDEMO
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA, KWENDA JJ
HARARE, 19 September 2019, 17 June 2020 & 1 September 2021

Criminal Appeal

E. Makoto, for the Chidemo
T. Mpofu, for the respondent

CHATUKUTA J: The appellant (hereinafter referred to as Chidemo) was charged with nine counts of contravening s 136 of the Criminal Law Codification and Reform Act [*Chapter 9:23*]. He was convicted on 12 December 2017, after contest, of two counts and acquitted of the remaining seven counts. He was sentenced to 6 years imprisonment of which 1 year was suspended on condition of future good behaviour. A further 2 years were suspended on condition he restituted the Zimbabwe Revenue Authority (ZIMRA) in the sum of USD450 538.61. On 29 December 2017 he noted an appeal against conviction under case number CA 820/2017. On 28 January 2019, the Prosecutor General filed an application for leave to counter-appeal against the decision of the court *a quo* to acquit Chidemo of the seven counts. We struck the application off the roll on 17 June 2020 and gave ex-tempore reasons for my decision. We proceeded on the same date to hear argument on the appeal by Chidemo. This judgment sets out the written reasons for the striking off of the application and the decision on the appeal by Chidemo.

Background

It is common cause that Chidemo was employed by the Zimbabwe Revenue Authority (Zimra) as an Accounting Officer. One of his responsibilities was the disbursement of Value Addition Tax (Vat) and other tax refunds to taxpayers. The tax refunds were processed using the PAYNET computer system.

The State case before the court *a quo* was as follows: Chidemo was the sole user of the PAYNET computer system. He was able to make changes in the system such as bank account

details of clients and create or delete transactions recorded in the system. Using his access to the PAYNET system, he transferred money due to various clients as tax refunds into bank accounts of individuals who and companies which were not entitled to the refunds. The money would be withdrawn from the accounts and handed over to him for his personal use.

With respect to the first count, it was alleged that Chidemo approached one Alfred Makaya requesting a corporate account to deposit his money which he alleged was from his clients. He was given a Kingdom Bank account for Release Consultancy Enterprises used by Clyde Makaya, Alfred Makaya's brother. Between 9 June 2011 and 11 February 2012, using the PAYNET system, he posted various batches of money amounting to USD90 11.90 from ZIMRA's CBZ account into the Release Consultancy Enterprises Kingdom bank account. Clyde Makaya withdrew the money from the account, handed it to his brother, Alfred who in turn handed over the money to Chidemo. The amount was due to ZIMRA's clients as refunds. The offence was discovered when ZIMRA carried out an audit. In the second count, Chidemo was alleged to have diverted a total of USD45 882.60 due to various ZIMRA clients which he deposited into his wife's bank account. The matter came to light when one of the clients made a follow up for his refund. In the third count, Chidemo approached one Bruce Masora for a bank account. Bruce Masora approached Ernest Matarutse who provided bank accounts with CBZ Bank and Barclays Bank. Chidemo then deposited a total of USD150 368.11 into the two accounts. In the fourth count, he used a Standard Chartered bank account in the name of Lotton Investments. He transferred refunds due to the Cuban Embassy in the sum of USD26 765.90 into the account. In the fifth count, Chidemo formed his own company, Armeline Enterprise, opened a bank account with Standard Chartered Bank in the name of the company. He deposited into that account a total of USD414 656.01. In respect of the sixth count, he used a Stanbic bank account for a company called Digi Link. The account was furnished by one Rugare Ruodo through Alfred Makaya. He deposited into that account a total of USD69 211.84. Rugare Ruodo withdrew the money hand it over to Alfred Makaya who in turn gave it to Chidemo. In the eighth count, Chidemo used a CABS bank account for Bradjoy Investments. The company had been formed by Alfred Makaya. He posted into that account a total of USD116 116.77. In the ninth count, he used Bruce Masora's personal account with Standard Bank and transferred a total of USD1 419.24.

It was alleged that in total, ZIMRA was prejudiced in the sum of USD1 239 083.93 none of which was recovered.

The state called witnesses from PAYNET, ZIMRA and an auditor from KPMG. The witnesses testified that Chidemo was responsible for the VAT refunds payments. He is the one who processed all the queried transactions. They linked him to the transactions by a user profile T. Chide (which they alleged was his user ID and password).

The State also called the representatives of the companies whose bank accounts were the recipients of the money fraudulently transferred from the Zimra bank account (except for one Bruce Masora who had passed away as at the time of the trial). The witnesses testified that they would withdraw the money from the companies' bank accounts and hand over the money to Chidemo.

Chidemo pleaded not guilty. His defence was that he was not the sole user of the PYNET system. His user name and ID was T. E. Chidemo and not T. Chide. Further, he was not the one who interfered with the system and transferred the refunds into his wife's account. He denied any knowledge of the company, Armeline Enterprise and transferring refunds into the bank account of that company.

The trial magistrate identified in his judgement 5 issues for determination. The following were the questions:

> "i) whether there is enough evidence that accused person transferred monies from Zimra account into the accounts mentioned in each of the separate counts of fraud which accuse person stand(s) charged with at the moment;
>
> ii) whether the money which was siphoned from Zimra's bank account finally found its way to the accused persons;
>
> iii) who was responsible for electronically transferring money from Zimra's account into various legitimate Zimra's Vat refund clients. In other words who was responsible for effecting the actual Vat refunds be it RTGs or electronic transfers;
>
> iv) who was responsible for electronically transferring money from Zimra's account into various legitimate Zimra's Vat refund clients. In other words who was responsible for effecting the actual Vat refunds be it RTGs or electronic transfers; and
>
> iv) whether the accused person was the sole user of PAYNET system at Zimra."

Having identified the above issues, the trial magistrate made the following findings: The State had failed to prove that Chidemo's user profile was T. Chide. The computer from which the payment instructions to Zimra's bank were generated and posted from was not identified and linked to Chidemo. The failure by the State to produce an audit log relied on by the auditor to prepare his report was fatal to the State case. The audit log would have reflected the person who authorised and/or authenticated the payments into the bank accounts of the illegitimate

clients. It was odd that the auditor did not attach such a vital document to his report and the State did not consider it necessary to produce the log during trial. The State failed to prove that Chidemo was the sole user of the PAYNET System and that he processed all the VAT refunds single-handedly.

It is on the above basis that the court acquitted Chidemo with respect to counts 1, 3, 4, 6, 7, 8, 9 and 10.

Turning to counts 2 and 5, the trial magistrate convicted Chidemo on the basis of circumstantial evidence. He made the following findings. As found in counts 1, 3, 4, 6, 7, 8, 9 and 10, there was no direct evidence linking Chidemo to the offences. However, there were peculiar circumstances with respect to the two counts that warranted convicting Chidemo.

Application for leave to counter-appeal

The Prosecutor General filed the application for leave to counter- appeal in terms of s 61 of the Magistrates Court Act [*Chapter 7:10*]. He contended that the court a quo erred in acquitting Chidemo in the seven counts when the *modus operandi* used in the commission of all the nine counts was the same. Chidemo transferred funds into his wife's account in count 2 and in count 5 into an account of a company in which he was the major shareholder and a director. The process used in the transfer of funds in respect of the two counts was the same as in the other seven counts. It was contended that the State therefore had prospects of success on appeal.

Preliminary point raised by Chidemo

Mr *Mpofu* raised a preliminary point that the application was out of time on account of the inordinate and unexplained delay in bringing the application. It was contended that whilst there was no time prescribed within which the Prosecutor General was required to file an application for leave within a reasonable time. A period of 13 months was not a reasonable time. Further, the founding affidavit did not advance any explanation for the delay in filing the application. An application stands or falls on the founding affidavit and the application must therefore fail. The explanation proffered by the Prosecutor General for the delay was belatedly advanced in heads of argument and was patently false as the Prosecutor General had access to the record of proceedings when Chidemo filed an application for bail pending appeal in April 2018. It was further submitted that there is need for finality in litigation hence the requirement that such an application should be brought within a reasonable time.

In response, Mr *Makoto* submitted that the time within which the application was filed was reasonable. The application had not been filed earlier than 28 January 2019 because of challenges in obtaining the record of proceedings. When the record was availed, the record was so voluminous it required the assistance of officials from Zimra to go through it. This caused further delays.

Section 61 of the Magistrates Court Act [*Chapter 7:10*] which reads:

> "**61 Prosecutor General may appeal to High Court on a point of law or against acquittal.**
>
> If the Prosecutor General is dissatisfied with the judgment of a Court in a criminal matter- –
>
> (a) upon a point of law; or
> (b) because it has acquitted or quashed the conviction of any person who was the accused in the case on a view of the facts which could not reasonably be entertained;
>
> he may, with the leave of a judge of the High Court appeal to the High Court against that judgment."

The section does not prescribe the time within which leave should be sought. However, there is a plethora of case authority that leave should be sought within a reasonable time. Where the Prosecutor General fails to bring the application within a reasonable time, he must seek condonation. (See *The Prosecutor General of Zimbabwe* v *Beatrice Tele Mtetwa & Anor* HH 82-16; *Attorney General* v *Lafleur & Anor* 1998 (1) ZLR 520 (H); *Attorney General* v *Bvuma & Anor* 1998 (2) ZLR 96 (S)). The authorities also state that what constitutes a reasonable time is dependent on the circumstances of each case.

After a spirited fight, Mr *Makoto* submitted that the Prosecutor General wanted to consider filing an application for condonation for late filing of the application. This in my view was a concession that that the application was not brought within a reasonable time. As rightly submitted by Mr *Mpofu*, a delay of 13 months could not be considered as a reasonable time for the following reasons:-

1. What constitutes a reasonable time is a matter of fact. The facts are contained in the founding affidavit. The explanation for the 13 months delay was not averred to in the founding affidavit. It instead was contained in the applicant's heads of argument after the issue had been raised by the court.
2. Judgment was handed down by the court *a quo* on 12 December, 2017 and full reasons for the acquittal were availed to the parties on the very day. This application was only filed on 28 January 2019. The deponent to the founding affidavit is the trial prosecutor

who would have been expected to be familiar with the evidence adduced during trial and would have been able to relate to the reasons for judgment given by the trial magistrate. She did not state why she did not consider it prudent to have advised the Prosecutor General on the need to file the application for leave soon after the handing down of the judgment.

3. It is common cause that Chidemo filed an application for bail pending appeal under case number B 495/18 on 9 April 2018 and all the volumes of the record of proceedings were part of the application. The application was served on the Prosecutor General on 10 April 2018. A Mr. T Mapfuwa from the Prosecutor General's Office filed a response to the application on 12 April 2018 opposing the application. It is clear from the response that he had access to the record as he referred to parts of the record of proceedings. In para 7 of the bail response, Mr. Mapfuwa referred to exhibits 14 (a) and 16 which are part of the record. In para 8 he referred to the reasoning by the trial magistrate. In para 10 he referred to evidence of one Shadreck Pfende to the effect that Chidemo absconded from his workplace after the allegations surfaced and that such conduct was consistent with a guilty mind. All these references are evidence that the Prosecutor General had access to the record of proceedings as early as April 2018, 4 months after the court *a quo*'s judgment. This is contrary to the submissions by Mr. *Makoto* that there were delays in getting the record of proceedings.
4. The application for leave was filed 9 months after the judgment in the application for bail. It is however apparent that the notice of the application is dated 29 May 2018. The founding affidavit was deposed to by Ngombengombe and commissioned on 28 August 2018. The affidavit has 13 paragraphs. There is reference to the record of proceedings in six of the paragraphs. As rightly submitted by Mr. *Mpofu*, the submissions by Mr. Makoto that there were delays in obtaining the record of proceedings are therefore patently false.

As rightly submitted by Mr *Mpofu*, the underlying factor in the requirement that leave be sought within a reasonable time is the need for finality in litigation. As of the date of the filing of the appeal by Chidemo, the only proceedings pending were proceedings intended to bring about one conclusion, the acquittal of the first respondent of the remaining two counts. For a period of 13 months up to the filing of the application for leave, Chidemo believed that proceedings regarding the seven counts for which he was acquitted had been completed. The

undesirability of lack of finality of such proceedings is aptly captured in *The Prosecutor General of Zimbabwe* v *Beatrice Tele Mtetwa & Anor* (*supra*). MAWADZE J was confronted with a similar application by the Prosecutor for leave by the Prosecutor General, 5 months after acquittal of the respondents in that case. He remarked on p9 as follows:

> "I wish to clearly point out that such a delay should always be juxtaposed with the rights of an accused person who would have been acquitted by a competent court. Such an accused person would have gone home to celebrate with family and friends only to be told and advised some odd 5 months later that the celebration is premature and that the battle has just began. The inference one can therefore draw is that such conduct ceases to be prosecution but persecution as such delay is not only unreasonable and prejudicial to an accused person but flies in the face of the provisions of s 69 of the Constitution."

Under the circumstances of this case, the delay of 13 months in filing the application is inordinately unreasonable. The Prosecutor General fabricated an explanation to justify the delay. The application for leave to counter-appeal is therefore out of time. I therefore upheld the point *in limine* taken by Chidemo. The Prosecutor General ought to have filed an application for condonation. There being no application before the court for condonation for late noting of an application for leave to appeal, we struck off the roll the application for leave.

Appeal by Chidemo

As alluded to earlier, Chidemo was convicted of two counts, counts 2 and 5. The appeal is against the conviction only in respect of those two counts. The basis of appeal is summarised as follows, that the court *a quo* misdirected itself in convicting him where it was not established that:

a) he was the sole user having access to the PAYNET system;
b) he had access or control over his wife's account and that of Armeline Investments (Pvt) Ltd and therefore did not transfer funds from Zimra's account into the two accounts and or withdraw the funds from the two accounts;
c) he opened the bank account for Armeline (Pvt) Ltd; and
d) he was linked to the address known as 352 Chishawasha, PO Box Mabvuku appearing on the forged Form CR 14 for Armeline (Pvt) Ltd and the forms used in the opening of a bank account for Tsitsi Kanyasa.

The following is the background to the two counts. With respect to the count 2, Chidemo was initially charged together with his wife, one Tsitsi Kanyasa. The State alleged that Chidemo deposited into Tsitsi Kanyasa's CABS account number 9027953337 a total of USD45

882.60 due to various Zimra clients. The funds were withdrawn from the account. The matter came to light when one of the clients made a follow up for his refund.

In the fifth count, it was alleged that Chidemo formed his own company, Armeline Enterprise. He opened a bank account on 12 May 2011 with Standard Chartered Bank in the name of the company. He deposited into that account a total sum of USD414 656.01. The matter came to light when Zimra conducted an audit of its books. The State produced a copy of the Form CR 14 for the company submitted upon the opening of the bank account. Chidemo and one Richard Matopodze were recorded as the directors of Armeline Enterprise. The person who filed the form with the Registrar was recorded as Tapiwa Evans Chidemo. The State produced another copy of a Form CR 14 for the company. The form was certified by the Registrar of Companies. However, Chidemo and one Irene Chidemo were recorded as directors. The form was filed by Rubima secretarial Services. Chidemo's national identification number, 63-988398 F80, appearing on both forms was the same as the one appearing on the Standard Bank application form. Chidemo's address was recorded as 352 Chishawasha PO Box Mabvuku, Harare on both CR 14 forms.

An official from the Registrar's office, Martha Chakanyuka, testified that Armeline Enterprise was properly registered as a company. The certified copy though filed with the Registrar, had inconsistences which rendered it a forgery and had not been properly filed. The copy submitted to Standard Bank was also forged. It was not filed with the Registrar. No receipt number was endorsed on it to prove that requisite payment upon the filing of the Form CR 14 was made to the Registrar's office.

The State also produced an application form for a deposit and share account number 9027953337 with CABS made by Tsitsi Kanyasa (Chidemo's wife) on 17 December 1997. That is the same account into which the refunds from Zimra were transferred to. The address given by Tsitsi on the form was number 352 Chishawasha, P.O. Box Mabvuku. The address on the application form was the same address for Chidemo appearing on the two copies of the CR 14 forms.

Chidemo pleaded not guilty. His defence was that he was not the sole user of the PAYNET system. His user name and ID was T. E. Chidemo and not T. Chide. Further, he was not the one who interfered with the system and transferring the refunds into his wife's account. He alleged that his wife's bank card had been cloned. An unknown person accessed funds transferred into his wife's account. He testified that his wife had not been using her CABS

account for a long time and did not understand how the Zimra funds ended in her account. He denied any knowledge of the company, Armeline Enterprise, and transferring money into the bank account of that company. He testified that someone had fraudulently opened a bank account using a forged Form CR 14 for the company Armeline Enterprises (Pvt) Ltd bearing his name and national identification number. He denied knowledge of the address (352 Chishawasha, P.O Box Mabvuku) appearing on the Form CR 14.

The trial magistrate found the defence to count 2 not to be reasonably true for the following reason in the main. Cloning of banks cards is usually done when the cards are being used during transactions. It was inconceivable that the Tsitsi Kanyasa's bank card would have been cloned when according Chidemo's own evidence Tsitsi's account had been inactive and the card had not been used in a long time. It was too much of a coincidence that the person who cloned the card would have known that Tsitsi Kanyasa's husband was Chidemo who worked at Zimra and then transferred or caused the transfer of refunds from Zimra bank account into Tsitsi's account.

The trial magistrate also found with respect to count 5 that that it was too big a coincidence that a person unknown to Chidemo would use Chidemo's name and personal particulars in a Form CR 14. The person would also give Chidemo an address identical to one which was used by his wife in an application made with CABS in 1997.

The trial magistrate concluded that the only reasonable inference that would be drawn from the coincidences was that Chidemo involved in the transfer of funds into his wife's account. He also was involved in the fraudulent transfer of funds into Armeline Enterprises (Pvt) Ltd's Standard Bank Account.

The court a quo therefore relied on circumstantial evidence in convicting Chidemo. The two tier test on circumstantial evidence applied by the court a quo is set out in *R v Blom* 1939 AD 188. The first rule is that the inference sought to be drawn must be consistent with all the proved facts. The second rule is that the proved facts should be such that they exclude any other reasonable inference from them save the one sought to be drawn.

The coincidences identified by the court a quo were indeed incredible. It was inconceivable that the unknown person who "cloned" Tsitsi's bank card knew that she was married to Chidemo where the two do not use the same surname. He/she knew that Chidemo worked at Zimra and was responsible for processing refunds. He/she also had Tsitsi's CABS bank account number into which to transfer the tax refunds. It was also inconceivable that the

persons who filed the Form CR 14 for Armeline Enterprise would give Chidemo the same address as the one used by Tsitsi 14 years earlier in opening an account with CABS. The same people would also know that Chidemo worked at Zimra and in what capacity.

The inferences drawn by the court *a quo* were consistent with the proven facts. The reasoning of the court cannot therefore be faulted despite its findings on the other seven counts. It was inconsequential whether or not Chidemo was the sole user of the PAYNET computer system or that there was no proof as to what his user profile for the system was. The circumstantial evidence gave rise to a reasonable conclusion that Chidemo was involved in opening the bank account with Standard Bank and that he transferred or was involved in the transfer of the vat refunds into that account and withdrew money from that account for his own benefit. The finding that he used his wife's CABS account and accessed the funds from the account was consistent with the evidence before the court a quo. Under the circumstances, the defence proffered by Chidemo to the two counts was not reasonably probable.

We find that the appeal against conviction lacks merit. Chidemo did not note an appeal against sentence.

It is accordingly ordered that:

1. The appeal be and is hereby dismissed.
2. The conviction be and is hereby upheld.

KWENDA J agrees.....

Rubaya and Chatambudza, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners