ROBERT CHUDU
versus
THE STATE

HIGH COURT OF ZIMBABWE
BERE AND MATHONSI JJ
BULAWAYO 10 JULY 2017 AND 13 JULY 2017

Criminal Appeal

N Mlala for the appellant
Ms S Ndlovu for the respondent

MATHONSI J: The appellant was employed by Delta Beverages (Pvt) Ltd at its Victoria Falls depot as a cashier. He was charged with 60 counts of fraud in contravention of s136 (a) (b) of the Criminal Law [Codification and Reform] Act [Chapter 9:23] at the magistrates court in the resort town. The allegations were that on 60 occasions he had created false reversal transactions purporting that all or part of goods that had been purchased by customers of the complainant had been returned when they had not been. He would then convert the money to his own use.

Despite his protestation of innocence, the appellant was convicted following a protracted trial. He was then sentenced on 30 November 2015 to 40 months imprisonment 22 of which were suspended on condition he restituted the complainant the sum of $26583-47 by 30 September 2016. Displeased with that turn of events the appellant launched an appeal to this court against both conviction and sentence. As regards conviction he listed a total of seven grounds which essentially boil down to one, namely that the state failed to prove its case against him beyond a reasonable doubt in that there was insufficient evidence that he had committed the offences charged.

Regarding sentence, the appellant was unhappy that the court *a quo* took the view that he was motivated by greed; it failed to make a factual finding on the motive behind the commission of the offence; it failed to take into account salient mitigatory factors which he did not specify and erred in ruling that fraud is a serious offence. Looking at those grounds of appeal against sentence, it is significant that the appellant does not complain about the sentence being excessive

or harsh as to induce a sense of shock. He does not suggest that the court *a quo* exceeded its sentencing discretion. More importantly the appellant does not even suggest that he was a good candidate for community service. In that regard it is difficult to understand how the appellant hopes to overturn the sentence on such appeal grounds.

The facts as appear in the state outline were that during the period extending from 5 April 2014 to 7 February 2015 and on specified dates, the appellant had received cash from sales of the complainant's products while discharging his duties as a cashier. He had created, in respect of each transaction, an official initial invoice for the amounts he received. On 60 occasions he created a false reversal transaction of part or the whole amount of the transaction purporting that all or part of the purchased goods had been returned to the complainant when none of the goods were returned. On some instances, he would create a new fake invoice covering part of the actual amount received and then steal the remainder. On other instances, he would not even create such fake invoice but would simply steal the whole amount received after reversing the transaction. That way he stole a total of $26 583-47 none of which was recovered.

Most of the evidence led in this case was common cause. Even the system under which the appellant operated as the sole cashier at the depot was common cause. When a customer came to purchase drinks, the customer would first go to the stock controller with empty bottles or crates and place an order. The stock controller would raise a crate control invoice indicating the number of empties brought in by the customer at the back of which he or she would endorse a code for the customer's order. The customer would then proceed with that document to the cashier, who at the material time was the appellant. The appellant would write two invoices showing the amount to be paid by the customer who would then immediately pay the appellant that amount. The appellant would print the invoice, sign it and hand it over to the customer.

Armed with the invoice the customer would return to the stock controller to be given the order on the invoice. The customer would proceed with the purchased product to the gate manned by a security guard who would then check the items against the invoice issued to the customer and also enter the purchased goods in a book and the date of purchase. That would complete the exercise allowing the customer to depart with the purchased goods. As I have said the step by step process was common cause.

It was also common cause that on divers occasions between 5 April 2014 and 7 February 2015 the appellant would, a while after the transactions with customers were made as per the process outlined above, reverse the same transaction invoices. On certain instances he would replace the reversed invoice with an invoice of a lessor amount. On other instances he would not substitute the reversed invoice at all. This happened on 60 occasions and hence the 60 counts of fraud preferred against the appellant. The only contentious issue was whether in reversing the invoices, the customer would have returned the goods that they would have earlier purchased. The appellant's defence was that he reversed a total of 60 invoices amounting to $26583-47 because the customers returned the goods because they had no cash to purchase the goods. As far as he is concerned there was no prejudice suffered by the complainant. If it had taken stock it would have realized that all the time those goods were sitting in the warehouse.

In this appeal, the appellant has sought to discredit the state case on the basis that there was no stock take to prove the prejudice. In addition, the security guards who manned the gate and therefore witnessed the goods being returned were not called to testify. For those reasons the state failed to prove its case against him beyond a reasonable doubt. The doubt exists in the fact that loss of stock was not established. He must therefore benefit from that doubt. Unfortunately life cannot be that easy and the appellant cannot get away that easily.

While it is true that in a criminal prosecution the state bears the burden to prove its case beyond a reasonable doubt before an accused person can be convicted, it does not mean that an accused person's guilt must be proved beyond any shadow of doubt. In fact such a threshold can never be achieved because there will always be a lingering doubt in respect of any phenomenon. As stated by LORD DENNING in *Miller* v *Minister of Pensions* [1947] 2 ALLER 372 (KB) (quoted with approval in *S* v *Isalano* 1985 (1) ZLR 62 (S) at 64 F-H;

> "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."

It occurs to me that the case for the prosecution was indeed proved beyond a reasonable doubt. The argument relating to stock take and the calling of the security guards represents the

fulminations of a person clutching at straws desperate to find something to say. I say so because there was absolutely no need for a stock count because the documents produced proved the prejudice. The court *a quo* was shown the original invoices, 60 in total, which the appellant had issued to customers. One can only issue an invoice because a customer has come in to pay for the listed goods. Those invoices were shown to have been processed to completion from the cashier to the stock controller who issued stock and then to the security guard at the gate to cross check and allow the customer to depart with the goods. The evidence led was enough to show that the goods were paid for and taken out. One may then ask, why would a customer who has come all the way to Delta Beverages for the purpose of purchasing products, who has indeed purchased and taken away the products then come back to Delta Beverages later with the purchased goods and return all of them or some of them? It just does not make sense.

There was evidence placed before the court, which was not disputed, that after transacting with customers the appellant later reversed the transactions and either replaced them with fake invoices of lessor amounts or did not replace them at all. The prejudice to the complainant was therefore obvious. To then say that having placed that evidence before the court, the state should have gone ahead and produced the results of a stock count or the evidence of security guards who allegedly presided over the return of the goods is to shout at the sun in the remote hope that it would drop from the sky. It was unnecessary. In any event there was evidence that the affected customers had been contacted by the witnesses and they confirmed they did not return the goods. To then say that evidence should be ignored because it was hear say, is again to raise the bar unduly high. What was said by the customers may indeed have been hearsay but that does not detract from the fact that the assistant audit manager David Chamunorwa made it clear that the procedure for making reversals was not followed. The appellant was required by the system to notify his supervisor of any reversals but he did not. In the course of investigations Chamunorwa had checked the documents kept by the security guards and says he ascertained that the goods had been recorded as going out and not recorded as having been returned. According to him there was no record of any returns. In my view the need to bring in the affected customers and the security guards pales against the background of the reliable evidence of the auditor who made the verifications.

It is accepted that an accused person bears no onus to prove his innocence and that he does not have to convince the court of the truthfulness of any explanation that he gives. If, however the accused person elects to give an explanation even if that explanation is improbable the court can only convict if satisfied, not only that the explanation is improbable but that beyond any reasonable doubt it is false. See *R* v *Difford* 1937 A. D 370 at 373; *S* v *Pisirayi* HB 121-16. Put differently in order for the court to acquit on the basis of an explanation given by an accused person, there must be a reasonable possibility of the explanation being true. It is that lofty threshold which the appellant's explanation in this case does not reach.

For at start, a reversal of an invoice done at the instance of a customer would require the involvement of the appellant's supervisor. The supervisor in question, Nobuhle Gabella explained that she was not involved in the reversals. The appellant sought to argue that the sold stock was returned by the customers, a process that would involve the security guards and the stock controller. Although they were not called to testify, during his investigations Chamunorwa had checked the records and satisfied himself that no returns were made. In any event, as I have said earlier, it would not make sense for the customers who had paid for and carried away drinks, to return all or the bulk of them a few hours later because they did not have money. The fact that the transactions were completed and goods taken means that the customers had the money and could afford to purchase them. Therefore the explanation given by the appellant that the invoices were reversed because of returns is demonstrably false. The records spoke for themselves that the appellant sold the goods and received money but later reversed the transaction without any corresponding return of goods.

Regarding the value of the prejudice in the total sum of $26583, 47 this was also proved through the production of the records showing each of the initial invoices and the subsequent reversals of same. That was done repeatedly on 60 occasions starting with the transaction of $565-41 made on 10 October 2015 on invoice number 1201724970 for Battalion Army Chalets in count one. It was reversed by the appellant and replaced with a new fake invoice number 120726331 for $59-78 thereby inflicting prejudice in the sum of $505-63. That continued going back right up to 5 April 2014 in count 60 where the initial invoice number 1200321338 for Zambezi Boat Club in the sum of $155, 28 was later reversed by invoice number 1200323731 and not replaced at all. The 60 counts all add up to a total of $26583-47 for which the appellant

was charged and convicted. In my view there was no misdirection in the conviction of the appellant.

Regarding sentence I have said that although the appellant was sentenced to an effective 18 months imprisonment which entitled him to consideration of the suitability of community service as an option, the appellant has not taken issue with the sentence on those grounds. Instead he has argued both extraneously and vaguely about the reasons for sentence, that the court *a quo* felt he was motivated by greed and failed to make a factual finding on the motive behind the commission of the offence. Mr *Mlala* who appeared for the appellant did not advance any arguments regarding sentence not even in his heads of argument. It is not the province of this court to perform that exercise for the appellant.

In the result, the appeal against both conviction and sentence is hereby dismissed.

Bere J agrees……

Mashindi and Associates C/o Marondedze, Mukuku, Ndove and Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners