GODFREY MACHIWANA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA and MUZENDA JJ
MUTARE, 30 September and 12 November 2020

Criminal Appeal

C.N. Mukwena, for the Appellant
J. Chingwinyiso, for the Respondent

MWAYERA J: The appellant was convicted and sentenced by the Magistrates Court at Mutasa. He was convicted for contravention of s 29 of the Petroleum Act [*Chapter 13:22*] as read with Petroleum (Liquid Gas) Regulations [*Chapter 13:23*] operating a liquid petroleum gas retail business without a licence. The appellant was convicted after a protracted trial and sentenced to pay a fine of RTGS$ 8 500-00 or in default of payment 6 months imprisonment. Dissatisfied with the conviction the appellant lodged the present appeal with this court.

The appellant raised two grounds of appeal as follows:

"1. The court *a quo* grossly misdirected itself both on facts and the law by convicting the appellant in his individual capacity despite that there was evidence that it was a company that was operating the business.
2. The court *a quo* grossly misdirected itself in terms of law by convicting the appellant for selling liquid petroleum gas without a retail licence despite that there was no evidence that the appellant was selling the gas in question."

The brief facts forming the allegations as discerned from the record are as follows. The accused (now appellant) was operating a petroleum gas filling business at Bvunzawabaya Complex in Hauna from 2017. On 29 July 2018 at around 0001 hours, a fire broke out at the building from which the accused was operating. This prompted officials from Zimbabwe Energy Regulatory Authority to attend the scene. The accused was then requested to produce a valid petroleum gas operation licence but he had none and could not produce.

Amendment of charge on Appeal

At the commencement of the appeal the respondent counsel Mr *Chingwinyiso* correctly sought to amend the charge on appeal and Mr *Chibaya* for the appellant consented to the amendment. The charge as presented in the court *a quo* was clumsily presented. The trial court, the public prosecutor and the defence counsel paid a blind eye to the inelegance in the manner

the charge was drafted. The charge as presented in the court *a quo* cited the whole Energy Regulatory Authority Act [*Chapter 13:23*] instead of specific reference to the relevant section. The charge was amended by consent to read as follows:

> "Contravening section 29 (1) as read with section 29 (2) of the Petroleum Act [Chapter 13:22] in that on 10 August 2018, and at Hauna Growth Point, Honde Valley, Godfrey K. Machiwana not being a petroleum company licenced in terms of part vi of the said Act, procured or sold petroleum product, namely liquid petroleum gas."

The concession for amendment in our view was properly taken because it was clear from the defective or poorly drafted charge and the outline of State case what nature of offence the accused was facing. The amendment sought to couch the charge properly would not usher in a new charge neither would it be prejudicial to the accused as it did not change the essential components of the offence as presented in the inelegantly drafted charge.

In this case the amendment would not bring in a new complexion to the charge and the accused's position would not change for a worse off position but remain the same. As pronounced in *S v Simpambili* 1995 (2) ZLR 37 and *S v Dhuluahla* 1968 (1) SA 249 and also *S v Mazarura* HMA 36/20 an amendment of a charge is permissible on appeal in circumstances where there will be no prejudice to the accused and where there would be no need for change of defence. We thus by consent granted the amendment of the charge for proper and elegant drafting of the charge.

Turning to the two grounds of appeal:

1. **Whether or not the court *a quo* erred in convicting the appellant in his personal capacity despite there being evidence that a company Mach-One Refrigeration and Electricals (Pvt) Limited was the one operating business.**

   In this case the appellant was charged in his personal capacity and at no stage was the alleged company charged. In a scenario where the company is facing criminal charges then the director or employee of the company appearing for and on behalf of the company ought to be cited in a representative capacity. The provisions of s 385 (3) of The Criminal Procedure and Evidence Act [*Chapter 9:07*] are instructive:

   > "In any criminal proceedings against a corporate body, a director or employee of that corporate body shall be cited, as representative of that corporate body, as the offender, and thereupon the person so cited may, as such representative, be dealt with as if he were the person accused of having committed the offence in question."

In this case the company March-One Refrigeration and Electricals (Pvt) Limited was not charged but the accused on his personal capacity, the question of being charged in representative capacity therefore does not arise. (See *S v Wilson and Others* 2004 ZLR (1) 464).

The appellant was charged and convicted for operating a liquid petroleum gas retail business without a licence. The appellant in this case was the owner who was doing the manual work in the workshop facilitating the sale of gas. The sale was illegal in that he had no licence and was the sole actor without any employees. Charging and convicting the appellant in his personal capacity was above abode since it was supported by the prevailing circumstances on the ground. It is apparent from the evidence that the appellant was operating the retail workshop in a manner indicative of him as a sole dealer. There is nothing that precludes the State from instituting proceedings against the director of a company in his personal capacity in situations where the company just appears to be a mere name with the director benefiting. Section 385 (3) (v) of The Criminal Procedure and Evidence Act provides as follows:

> "the citation of a director or employee or a corporate body to represent that corporate body in any criminal proceedings instituted against it shall not exempt that director or employee from prosecution for that offence in his personal capacity more so if the crime is committed while furthering his own interests."

In this case the court was justified in disregarding the separate existence of the company and attach personal liability to the appellant who was operating manually on the ground and selling liquid petroleum gas without a licence. The first ground of appeal cannot stand in the circumtances.

2. **Whether or not the court *a quo* grossly misdirected itself in terms of law by convicting the appellant for selling liquid petroleum gas without a retail licence despite that there was no evidence that appellant was selling the gas in question.**

The appellant argued that the conviction was not safe as there was no evidence adduced to prove that indeed appellant was selling petroleum gas as a retail without a licence. The appellant's counsel argued that appellant had no onus to prove his guilty and that in the absence of evidence of purchaser from him he ought not to have been convicted. In response the State counsel argued that the State adduced evidence to prove the case on the onus required. Mr *Chingwinyiso* emphasised that the charge preferred makes it an offence to procure sell or produce petroleum product without the relevant licence. It was clear from the evidence of Israel Komichi that 5x48 kg of (LP) Liquid Petroleum gas cylinder was inside the room used for repairing refrigerators. The appellant himself confirmed he sold LP gas on *adhoc* basis. Appellant prevaricated on the quantity of gas and tanks he had and only buckled during gross examination when

asked about the gas tanks received from Mutare the day the premises caught fire (record p 52-54). The gas tanks were not empty.

The second State witness a security guard one Stephen Mawihwise confirmed receiving gas deliveries at night on behalf of the appellant and appellant did not dispute taking delivery in fact the appellant accepted bulk buying of gas. When the appellant's evidence is viewed with the totality of the evidence and that the security guard confirmed he used to see people coming to buy from the appellant there is clear evidence on which the court anchored the conviction of the appellant. In fact to buttress the evidence was the advertisement on the building. The appellant did not have a licence to store gas neither did he have a licence to procure and or sell the gas. The appellant was properly convicted on evidence adduced. The second ground of appeal cannot be sustained.

Disposition

The court *a quo* assessed the evidence of the State witnesses and accused person. Most aspects were common cause as the appellant could not dispute having gas tanks and taking deliveries of gas. The trial court had occasion to see and hear the witnesses and assess credibility. A perusal of the record of proceeding shows the build-up of evidence showing that the State proved beyond reasonable doubt that the appellant was dealing in procuring and selling liquid petroleum gas without a licence. He was competently charged in his individual capacity and properly convicted for contravening s 29 of as read with s 29 (2) of Petroleum Act [*Chapter 13:22*] in that he procured and sold liquid petroleum gas without a licence. The appeal has no merit.

Accordingly it is ordered that:

The appeal be and is hereby dismissed.

MUZENDA J agrees_____

Chibaya & Partners, Appellant's legal practitioners
National Prosecuting Authority, Respondent's legal practitioners