DAMBUDZO MERJURY ZIFAMBA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 14 May 2014 and 16 August 2017

Criminal Appeal

P. Kwenda, for the appellant
S. Fero, for the respondent

BERE J: On 12 June 2012 the appellant appeared at Rotten Row Magistrate Court, Harare facing two counts of fraud as defined by s 136 of the Criminal Law (Codification and Reform) Act[1]. Upon conviction the appellant was sentenced to 15 months imprisonment of which 7 months were suspended for 5 years on condition of future good conduct. The remaining 8 months were suspended on condition the appellant does community service as specified.

The appellant did not accept both her conviction and sentence hence this appeal.

The grounds of appeal against conviction and sentence were given as follows:

1. The court *a quo* erred in convicting the appellant on the basis of conjecture.
2. The court *a quo* erred in failing to correctly apply the legal principles relating to circumstantial evidence, and,
3. the court *a quo* erred in making a finding that the appellant had paid restitution to the complainant.

When served with the notice of appeal the State conceded the appeal and filed a notice in terms of s 35 of the High Court Act [*Chapter 7:06*].

Section 35 referred to above is framed as follows:

"35 Concession of appeal by Attorney General

[1] Chapter 9:23

> When an appeal in a criminal case, other than an appeal against sentence only, has been noted to the High Court, the Attorney-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 reasons stated by him support the conviction, whereupon a judge of the High Court in chamber may allow the appeal and quash the conviction without hearing argument from the parties or their legal representatives and without appearing before him."

The invoking of this section presupposes that the Attorney-General's representative is obliged to give reasons in support of the stance taken. Despite this the appeal court is not obliged to religiously accept the position adopted on behalf of the Attorney-General's office, because quite often the appeal court may hold a different view, in which case the appeal would have to be argued in the usual manner followed by a determination of the matter.

This may also be the position in those borderline cases where the court would not have been able to take a definitive position on the matter on mere perusal of the notice conceding the appeal. In such a scenario the court may insist on hearing argument in open court as opposed to dealing with the matter in chambers.

Referring the matter to be dealt with in chambers only comes about when the appeal court is in total agreement with the position adopted by either the Attorney-General or his/her duly appointed representative.

The instant appeal is one such case where as the appeal court we felt the position taken by Mrs *Fero* of the Attorney-General's Office (now National Prosecuting Authority) could not be questioned as it was well informed. Our position as the appeal court was informed by the following considerations.

Firstly, it will be noted that the gravamen of the offence as captured in the two counts is that the appellant and her co-accused misrepresented to the complainant that one Sitemere Mevos had received medical attention at Parirenyatwa Hospital and had paid cash for the treatment so received, when they knew that the said Sitemere Mevos had not received medical attention at Parirnyatwa Hospital. It was then said that the misrepresentation made had led to Cimas being prejudiced of a total sum of $2 561-76.

Section 18 of the Criminal Law (Codification and Reform) Act[2] enjoins the State to prove each and every essential element of the offence beyond a reasonable doubt before an accused person can be properly convicted.

[2] (supra)

The record of proceedings in the court *a quo* shows that the appellant's defence was fairly simple. She denied the charge and stated that she had neither completed nor signed any claim forms. She also denied any involvement in the matter whatsoever.

The evidence led by the State was not of any help in the light of the appellant's defence. It remained unexplained at the conclusion of the trial how the appellant was able to commit the offence when she had already left employment the offence having been allegedly committed in November 2010 and June 2011, as per the indictment.

There was no evidence placed before the court which showed that the appellant filled in the claim forms or personally processed them for purposes of refund. There was no evidence placed before the court to show that the appellant connived with her co-accused to commit the offence in question. In fact, both the appellant and her co-accused person denied knowing each other prior to their being called to the police station to answer to the charges. The porous state case got even more complicated when the key State witness Sitemere Mevos failed to give evidence linking the appellant to the case leading to her impeachment. The impeachment was fatal to the State case.

At the conclusion of it all one cannot help coming to the inevitable conclusion that the appellant's conviction was based on pure conjecture and nothing more.

The conviction and sentence are accordingly set aside with the result that the appeal succeeds.

HUNGWE J: agrees …….

Kwenda and Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners