

THE STATE
versus
ESTHER MUCHICHWA
and
RUTH MUCHICHWA
and
TOBESA MATONGO

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 15 MARCH 2018

Criminal Review

MOYO J: This matter was referred to me from the scrutinizing Regional magistrate. The accused persons were arrested and charged with contravening section 4 (1) of the Exchange Control Regulations S.I 109/96 as read with section 5 of the Exchange Control Act [Chapter 22:05]. The allegations against them were that they were found buying and selling foreign currency, holding bundles of money in the following denominations:

8 by \$6 bond notes,

1 x \$1 bond coin,

2 x 25c bond coins,

10 x \$5 bond notes,

2 x 10 Pula notes,

9 x \$5 bond notes,

7 x \$2 bond notes, and

2 x 200 Pula notes.

The state case was that police officers on patrol saw first and second accused persons seated on chairs touting for customers saying lets change money.

During that time second accused held cash in her hand. Third accused then came and parked her Honda stream motor vehicle, registration number ADU 9836 in front of the police officers. She proceeded to where first and second accused were and spoke to them. The three

of them then proceeded to where third accused had parked her motor vehicle and they started counting money. Police officers then pounced and first accused then changed her direction whilst holding cash which she handed over to her son who then fled from the scene. The three accused persons were then searched by the police officers and first accused was found in possession of \$59-00 in bound notes and 400 pula. Second accused was found with \$44-00 in bound notes and the third accused was found in possession of \$72 in bound notes and 20 pula.

All the three accused persons denied the allegations against them. First accused said that she was not touting for customers but that third accused had come to refund her, her money on a failed blanket purchase agreement.

The second accused person told the court that the police arrived as she was receiving her change from the third accused person which change was as a result of a blanket sale agreement.

The third accused person stated that she had gone to 5th Avenue to handover to first and second accused persons their monies resulting from a blanket sale agreement. That as she counted this money, police officers pounced and arrested her and her co-accused. The learned magistrate correctly found that at the end of the trial there was no evidence which established that at the time the police officers arrested the three accused persons, the three of them were dealing in foreign currency. The learned magistrate correctly found again that the fact that the accused persons were seen by Constable Tamai counting or handing over money to each other, does not establish that the accused persons dealt in foreign currency. The magistrate correctly accepted third accused's version of events and correctly acquitted her.

However, the learned magistrate then erred in proceeding to assess the state case as against the first and second accused only, that is, that they were heard touting for customers. The learned magistrate then fell into the error of choosing the state version as against the two accused persons' version. He says the reason for this was that there appeared to be no malice on the part of the police officers. Surely that is not the yardstick for proof by the state of a case against the accused persons, beyond a reasonable doubt. Justice demands that an accused's version succeeds where it is reasonably possible that it is true. The court already believed the version that they did not exchange money but had their business transaction of sale of blankets that they were conducting. That defence is reasonably possibly true. The learned magistrate had no right

to discard it for no apparent reason for the simple reason that they are accused persons. Refer to the case of *S v Makanyanga* 1996 (2) ZLR 231. It is not correct to infer guilt in the circumstances of this case. The accused persons did not deal in any currency as alleged by the state and therefore they were entitled to their acquittal.

It is for these reasons that the verdict of the court a quo in relation to the two accused persons, accused one and two, is set aside and a verdict of not guilty substituted.

I accordingly make the following order

- 1) The conviction and sentence of accused one and two be and are hereby set aside.
- 2) The order for forfeiture of the cash found in the possession of the accused persons be and is hereby set aside.
- 3) The learned magistrate is ordered to recall the accused persons and advise them of this order and also ensure that they, are refunded the forfeited sums.

Takuva J agrees.....