HH 283-16
HC 292/13

DALVIN DEAN GREEN
versus
THE STATE

IN THE HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE 21 JANAURY 2014 & 18 May 2016

Criminal Appeal

S. Hofisi for the appellant
Mrs S. Fero for the respondent

BERE J: The appellant in this case was charged of contravening section 36 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (fraud). In the alternative he was charged of contravening section 113 (2) (d) of the Criminal Law Codification and Reform Act [Chapter 9:23] – theft of trust property.

After a protracted trial the appellant was acquitted on the main count and convicted on the alternative count and subsequently sentenced as follows:

> "36 months imprisonment of which 6 months is suspended for 5 years on condition accused does not during that period commit any offence involving dishonesty for which he or she is sentenced to imprisonment without the option of a fine. Of the remaining 30 months, 26 months is suspended on condition accused makes restitution to the complainant in the sum of $34 200 through the clerk of court Harare and before 14 January 2013. The remaining 4 months is suspended on condition that the accused performs 140 hours of community service at Parirenyatwa Hospital."

Dissatisfied by both the conviction and sentence the appellant lodged this appeal and the ground of appeal is basically that the appellant was convicted against the weight of evidence tendered. The argument was that even the conviction on the alternative count was not sustainable by the evidence tendered before the court *a quo*.

I am satisfied after perusing the record of proceedings that the evidence relied upon in convicting the appellant was clearly open to some serious doubt and that the appellant ought not to have been convicted. The view I hold is informed by the following observations.

There was overwhelming evidence that the complainant and the appellant embarked on the business venture jointly or that as testified by the appellant and supported by the financial director, operations director and the buyer the appellant himself was the principal to the transaction.

The proceedings show that there was an abortive attempt by the prosecutor to impeach one Rodgers Nakhozwe after it was perceived that he was not giving evidence favourable to the state case. Apparently this witness's testimony was consistent with the evidence of the other witnesses who were treated as accomplice witnesses and whose evidence was preceded by the appropriate warnings.

To borrow from BHUNU J in *S* v *Katsiru*[1]

> "Despite the thoroughly discredited evidence from the two police officers, the prosecutor did not see it fit to impeach either of the two police witnesses. The net result was that the State relied on two contradictory statements, leaving the trial court to pick and choose which evidence it preferred and the court proceeded to do just that. That in our view constituted a gross irregularity, because the onus was on the State to prove its case beyond a reasonable doubt, and not as the court."

In its assessment of the evidence at the conclusion of the trial the court *a quo* chose to religiously accept the story told by the complainant at the expense of the version given by the appellant which was corroborated by the other impeached state witnesses. No cogent reasons were given by the court *a quo* as to why it rejected the accused's version as supported.

In my view there are two reasonable possibilities in this case. It is either the two went into a joint venture to conduct this transaction or that the appellant was the owner of the deal as

1. 2007 (1) ZLR 304 (H) at 371A – B

confirmed by the order which was given to him by Moonlight and that he sought the assistance of the complainant in financing the transaction.

If either of these positions is accepted as the court *a quo* ought to have accepted, this them becomes a classic case where the complainant, ill advisebly decided to enlist the services of the police to deal with purely civil dispute. This becomes eminently so if one accepts that at the time the appellant was arrested he had started paying out to the complainant what he believed was due to him.

It is also of significance that even at the time this trial was concluded, the complainant himself had not ascertained what was due to him as he kept on saying he and the appellant were supposed to sit down and work out what was due to each other.

Under such circumstances one then wonders how the element of permanent deprivation was satisfied or how restitution was arrived at. Whichever way one looks at the evidence tendered I am satisfied the accused was convicted against the weight of evidence.

The appeal must be allowed and conviction and sentence are set aside and substituted by the following. It is ordered that:-

The trial court's verdict be and is hereby replaced by the verdict that the accused s found not guilty and acquitted.

Hungwe J …….. I agree

V. Nyemba & Associates, appellant's legal practitioners
Prosecutor General's Office, respondent's legal practitioners