

ALEXIO NYAKUDYA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 18 February 2016 & 25 April 2018

Section 35 of the High Court Act [Chapter 7:06]

HUNGWE J: The Prosecutor-General filed a notice in terms of s 35 of the High Court Act, [*Chapter 7:06*], indicating that he did not support the conviction of the appellant in the present appeal. Consequently, we removed the matter from the roll so that we consider and determine it in chambers.

The appellant was initially jointly charged with one Jeffrey Kudakwashe Hwenhira “Hwenhira” for fraud as defined in s 136 of the Criminal Law and Codification and Reform Act [*Chapter 9:23*] (2 counts). The State Outline alleged that the said “Hwenhira” an employee of the complainant company First Transfer Secretaries, connived with the present appellant to steal share certificates. They then connived to transfer the same shares into the appellant’s name. It will be seen from the precis that it was the Hwenhira who had access to the share certificate who is alleged to have abused his access in order to remove them for the purposes of executing the nefarious scheme leading to the charges. After a lengthy, in a rambling judgment the court *a quo* acquitted the principal offender. The appellant, who was the second accused, was convicted. The appellant’s conviction is not founded on any proven facts. In the main, the judgment concentrated in showing why the first accused, Hwenhira was not guilty. It fails to indicate, in its analysis, how it found the appellant guilty.

There are too many unsatisfactory features that remain unexplained in the judgment. The absence of a causal connection between the disappearance of the certificates from wherever they were kept and the appellant render the conviction unsafe. As demonstrated in the reasons given by the Prosecutor-General, where the charge was premised on connivance, once the other co-perpetrator was acquitted, then it follows that the conviction of the other accomplice would become problematic. This is precisely what transpired here. There is no basis for the conviction of the appellant by the court *a quo*. A reading of the judgment shows that the learned magistrate missed too many essential elements upon which a conviction for theft in the circumstances of this case would have been grounded. For example, if the other

accomplice was not involved in the removal of the certificates, how then was it possible for the appellant, an outsider at First Transfer Secretaries, to access the share certificates?

The question of the identity of one Pathisani Sithole whose identity documents were said to have been used by the present appellant remained unresolved. That too added another dimension from which the guilt of the appellant became suspiciously questionable. Once doubt was cast on the identity of the person who posed as Pathisani Sithole, the appellant could not have been properly convicted. It is for these reasons that we are in agreement with the Prosecutor-General that the conviction of the appellant was unsafe.

Consequently, the conviction is quashed and the sentence set aside.

My brother BERE J authorises me to state that he agrees with this judgment.

Mutombeni, Mukwasha, Muzawazi & Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners