MUSHEMI MUSHEMI v THE PEOPLE (1982) Z.R. 71 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., MUWO, J.S. AND BWEUPE, AG. J.S.
18TH MAY AND 13TH JULY, 1982
(S.C.Z. JUDGMENT NO.18 OF 1982)
APPLICATION NO. 24 OF 1982

Flynote
Evidence - Documents - Evidence not allowed in court - Glossing over - Effect of.
Evidence - Witnesses - Credibility of - How assessed - Conflicting evidence. Need to show why court believed one witness in preference to another.

Headnote
The applicant was convicted on two counts of producing a document false in a material particular contrary to s. 6 of the Exchange Control Act: the falsity alleged being the representation that he would be a member of the presidential delegation to the Far East and further a representation that the members of the Central Committee and other officials would require a group imprest. In deciding the case, the learned magistrate refused to admit certain defence evidence and in a judgment glossing over the evidence he discounted the testimony of several prosecution and defence witnesses reducing the issue to one of credibility of the applicant. On an application for leave to appeal.

Held:
(i) A conviction which is based on finding of fact which is in direct conflict with the overwhelming balance of the evidence, that evidence having been glossed over, cannot be upheld.
(ii) The credibility of a witness cannot be assessed in isolation from the rest of the witnesses whose evidence is in substantial conflict with that of the witness. The judgment of the trial court faced with such conflicting evidence should show on the face of it why a witness who has been seriously contradicted by others is believed in preference to those others.

Case cited:
(1) Kasumu v The People (1978) Z.R. 252.

For the applicant: M .W. Mwisiya, Mwisiya and Co.
For the respondent: T. Kunaseelan State Advocate.

Judgment
NGULUBE, D.C.J.: delivered the judgment of the court.

When this matter came up for hearing we allowed the application which we treated as the hearing

of the appeal which we allowed, and quashed the conviction and the orders made following such conviction. We indicated then that we would give our reasons later, which we now do.

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The applicant, an Under Secretary for political affairs at Freedom House, was convicted on two counts of producing a document false in a material particular contrary to s. 6 of the Exchange Control Act; the falsity alleged being the representation that he would be a member of the Presidential delegation to the Far East, and further a representation that the members of the Central Committee and other officials from Freedom House accompanying His Excellency would require a group imprest.

The evidence had established and indeed there was no dispute that the applicant had authored two letters which were produced on his behalf to the Bank of Zambia; the first on 15th August, 1980, and the second on 18th August, 1980, in which he had requested foreign exchange approval for himself and for a group imprest in connection with the Presidential trip. Approval was granted and the applicant duly obtained travellers' cheques from his bankers using his own funds.

The prosecution had set out to establish that the applicant had authored the letters in question with full knowledge of the falsity of the representation made. This they did by calling witnesses to say that the applicant was never informed that he would be on the Presidential delegation; that he could not have been informed by word of mouth as all such notifications are in writing; that there was no record at Freedom House to show that the applicant was recorded anywhere as being on the delegation; that there was no such thing as a group imprest; that an officer could not in any case use his own funds on an official trip; and that the applicant had used a cheque for a car loan given by Freedom House to one of their staff in order to deceive the bankers into believing that the travellers' cheques were required by the Party. It must have come as a complete surprise to the prosecution therefore when, quite apart from the defence witnesses, their own witnesses established that notifications by word of mouth were a regular occurrence; that there were entries on some files indicating that the applicant had provisionally been listed as a member of the delegation; that there are group imprests; that officers and officials sometimes used their own funds on official trips and later obtained reimbursement; and that the cheque for a car loan had been issued in the normal course to an employee who had wanted to purchase the applicant's car and had even taken delivery of it only to abort the transaction when her husband objected.

The applicant's position in all this, was that he had been told verbally, initially by PW15 and later by PW19, that he would be a member of the Presidential delegation; that he had seen documents on certain files at Freedom House indicating that he was on the delegation, and that on the basis of that information and knowledge he went ahead to write the first letter in order to obtain travellers' cheques for himself. He had written the second letter after a meeting of the Central Committee on 18th August, 1980, when fears were expressed that delegation leaders and their officials might run short of cash, which to obviate he had taken the initiative to obtain a group impress using his own funds on

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the distinct understanding that he would obtain from the Party full reimbursement.

In a judgment which glossed over the evidence the learned trial magistrate discounted as irrelevant the testimony of seventeen prosecution witnesses and five defence witnesses, and the issue was reduced to one of credibility between the applicant on the one hand and PWs 15 and 19 on the other hand. While the applicant had maintained that these two prosecution witnesses had given him verbal intimations that he would be one of the officials accompanying His Excellency, and that his impending trip on that tour was supported by documents in some files at Freedom House, the two witnesses denied this. They were believed; the applicant was disbelieved and the learned trial magistrate found as a fact that no one had told the applicant that he would be on that President delegation, and that accordingly he had knowledge of the falsity of the representations in the two letters and was guilty of the offences charged.

On behalf of the applicant, Mr. Mwisiya submitted that having regard to all the evidence, including that given by the witnesses whose evidence was ignored, the finding that the applicant was never considered for and was not on the Presidential delegation was erroneous in law and in fact. He referred us to the evidence of PW12 who had stated under cross-examination that he had allowed a Mr Kambikambi to withdraw the applicant's name from the delegation after it had been listed prior to approval of the list by the Central Committee, and to the evidence of PW15 who had stated, again under cross-examination, that there had been drawn up a list of probable persons to go and the applicant was on that list, but that they had not written to them yet for them to start acting, and finally the evidence of PW16 who had stated that, as early as 11th August, 1980, he had received a letter from the Protocol Section informing the witness that the applicant was to go out on that delegation. We agree with the submission that, having regard to such evidence, which was for some reason ignored, a finding that the applicant was never at any stage on the delegation was one made on a new of the evidence which could not reasonably be entertained. That evidence coupled with the fact that the applicant was aware of documents supporting his belief that he would be on the delegation clearly ruled out any possibility that the applicant had acted with knowledge of the alleged falsity. At this stage we must comment on the stand taken by both the prosecution and the learned trial magistrate when the defence applied to have certain material documents in the possession of Freedom House produced for use in the trial. We are surprised that the prosecution objected to the production of documents which the defence had indicated were material to show that the applicant was on the delegation, and we are equally surprised that the trial court upheld the objection and required counsel for the accused to cite authorities in support f an application for the production of such relevant documentary evidence. We repeat what this court said in *Kasumu v The People* (1) at p. 259

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> "It is no part of the prosecution's function to place technical obstacles in the way of the introduction of relevant evidence; it is the function of the court to arrive at the truth and it is the function of the prosecution to assist the court to do so."

In the event the refusal to allow the documents to be introduced must have prejudiced the applicant since the decision rested on a finding that he had knowledge of the falsity of his representation bared on a finding of credibility which could not have taken into account the documents aforesaid.

The two prosecution witnesses relied upon could not in fact be said to have established the guilt of the applicant. PW15, (Masaninga) as already noted, did admit that the applicant's name appeared on the provisional list and that he had discussed such list with the applicant. His main contention was that the applicant had not been written to in order for him to start acting on the matter. This evidence was at variance with that of the witnesses who were ignored by the learned trial magistrate, and in any event supported the applicant's contention that he had a basis to believe that he would be on the delegation. Indeed, PW15 had alleged that only the names of three members of the Central Committee were on a list and yet even he had made every preparation to travel on that delegation only to learn at the last minute that his name had been omitted from the final list. As we see it both PW15 and the applicant must have had good reason to believe that they were to be on that delegation, and that in making immediate arrangements for the tour they had both acted in good faith though obviously prematurely. With regard to the witness PW19 (Hon. Kamanga) who could not even recall the Central Committee meeting of 18th August, 1980, his assertion that all notifications had to be in writing could not stand having regard to the evidence of the witnesses whose testimony was ignored, notably the defence witnesses, all of whom were responsible officials from Freedom House. The learned State Advocate, Mr Kunaseelan, quite properly concealed that having regard to the evidence which was not considered, the evidence of PWs 15 and 19 could not possibly be regarded as credible, let alone conclusive. In the event it is unnecessary for us to consider in any further detail such evidence, save to stress that the credibility of a witness cannot be assessed in isolation from the rest of the witnesses whose evidence is in substantial conflict with that of the witness. The judgment of any trial court faced with conflicting evidence should show on the face of it the reasons why a witness who has been seriously contradicted by others is believed in preference to those others.

Mr Mwisiya had advanced a number of other arguments including one based on mistake of fact and another on the drawing of inferences based on circumstantial evidence, all of which were valid and to which Mr Kunaseelan, who does not support the conviction, conceded. In the view that we take it is unnecessary to deal with those additional arguments. The conviction was based on a finding of fact which was in direct conflict with the overwhelming

balance of evidence was not considered, the court below having fallen into the error of glossing, and had it been so considered the absence of guilty knowledge on the part of the applicant could not, in our view, possibly have been in doubt.

It was for the foregoing reasons that we allowed the application which was treated as the hearing of the appeal which we allowed, and quashed the conviction and all the orders made following upon it.

Application granted, appeal allowed

JOSEPH MWEENE v