



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No. 13/2013

In the matter between:

CHARLES MYEZA

Appellant

And

REX

Respondent

Neutral Citation: Charles Myeza v Rex (13/2013) [2016] SZSC 77
(30 June 2016)

Coram: **K.M. NXUMALO AJA, J.S. MAGAGULA AJA, and
M. LANGWENYA AJA**

Heard: 30 MAY 2016

Delivered: 30 JUNE 2016

Summary: Criminal Law – Incomplete record – Fraud – Forgery & Uttering – Whether intent to deceive and prejudice proved – Appellant correctly convicted of fraud, forgery and uttering – His appeal against conviction dismissed – Sentence confirmed.

JUDGMENT

M. LANGWENYA AJA

[1] The appellant appeared before the High Court facing fifty counts of fraud, forgery and uttering. He was convicted of all the counts and sentenced to five years' imprisonment. All the counts were taken together for sentence purposes. The appellant is alleged to have committed the offences on divers occasions between the years 2004 and 2005 when he was a police officer at Mbabane Police Headquarters.

[2] The nature of the counts against the appellant are that whilst in the employ of the Royal Swaziland Police (RSP), in the Finance department, he fraudulently processed several payments on behalf of PPC Electrical (Pty) Ltd for work done on behalf of RSP whereas the said PPC Electrical had either not carried out or partially carried out the alleged work. Consequent to the said misrepresentations the RSP and the Government of Swaziland suffered an actual loss and prejudice of E661 046.36 as a result of honouring the fraudulent claims. The appellant effected the fraudulent transactions through receiving invoices from PPC Electrical and endorsing same with the name of Vusi Silindza Sgt as the person who received the invoice. PW 2-Vusi Silindza gave evidence to the effect that he had not authorized the appellant to receive the invoices. The appellant was said to have also signed a document that purported to be a contract of engagement of PPC Electrical by the RSP in the name of PW 3-Absalom Mkhalihi.

[3] At the High Court, there were initially four accused. The appellant was the first accused, Phumzile Myeza, Musa Ngwenya and PPC Electrical (PTY) LTD were the second, third and fourth accused respectively. The second accused is a wife of the appellant. The appellant and the second accused were directors of the fourth accused at the time of the commission of some of the offences

charged. The appellant resigned his directorship in July 2005. The second and third accused were acquitted and discharged at the close of the case of the prosecution. The appellant and the fourth accused were convicted of all the counts. Only the first accused filed his appeal against conviction.

[4] Regarding the charges of fraud, the accused were alleged to have, whilst acting in furtherance of a common purpose, unlawfully and intentionally misrepresented, by preparing and submitting for payment, the invoices forming the basis of each particular charge and claiming that they represented a genuine claim for work performed including materials purchased and applied in each particular transaction, by the fourth accused, a company in which they all had an interest, when that was allegedly not the case.

[5] It was contended further that as a result of each such misrepresentation, the Swaziland Government suffered prejudice or financial loss in a total sum of E 661 046.36 when it honored the said invoices.

[6] In connection to the counts of forgery, it was alleged that in each such count, the appellant had unlawfully, falsely and with intent thereby to defraud and to the prejudice of the Royal Swaziland Police and the Treasury Department of the Swaziland Government forged an instrument in writing being the signature of either Vusi Sifundza and that of Absalom Mkhalihi on either the invoice or contract concerned in the particular charge. It should be noted that the charges of forgery related to the appellant having either received (and in some instances having signed some of) the invoices forming the subject matter of the charges by entering the name (and at times the signature) of Vusi Silindza as well as to the appellant having signed a document that purported to be a contract between the Royal Swaziland Police and the fourth accused as and in the name of Absalom Mkhalihi who was the authorized officer to do so without his consent or authority. The latter document was shown as having been used to support the payment vouchers of the alleged fraudulent invoices processed for payment by the appellant.

[7] In a nutshell the signature of Vusi Silindza was allegedly forged in order to misrepresent that the work claimed for in each invoice was performed. This was because of Mr Silindza's special function in the processing of payment of invoices for work done as he was allegedly the one to verify if such work had

indeed been done and at what cost. This, he would confirm through entering his name and even signing the relevant invoice before passing it over for payment to the accounts department where the appellant was based. [The forgery alleged to misrepresent that indeed the fourth accused had been given the tender for the work done.

[8] It is common cause that the record is not complete as the indictment reflects forty-eight counts when the evidence shows there were fifty counts and the judgment on sentence had to be reconstructed. It is also a fact that some of the evidence of both Crown and Defence witnesses is disjointed and incomplete. Mr Gumedze, Counsel for the appellant submitted that all attempts to reconstruct the record had been exhausted and that he was happy to proceed with the matter in the state the record is in. Mr Dlamini, Counsel for the Respondent concurred with Mr Gumedze's sentiments in this regard.

[9] In **S v Chabedi 2005 (1) SACR 415 (SCA) paragraphs 5 and 6** Brand JA said the following regarding the record on appeal:

[5] On appeal, the record of proceedings in the trial Court is of cardinal importance. After all, that record forms the whole basis of the rehearing by

the Court of Appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial...

[6] The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal.

[10] In light of both Counsels explanation and position on the matter, the Court was of the view that the adjudication of this appeal on the record as it stands should proceed as the appellant will not be prejudiced thereby.

[11] Dissatisfied with the conviction, the appellant appealed to the Supreme Court and argued *inter alia* that:-

a) The Court *a quo* erred both in law and in fact in finding and holding that the appellant's act of signing the contract of PPC Electrical (PTY) LTD for

and on behalf of the Royal Swaziland Police (RSP) using the words “A.V. Mkhalihi” constituted a criminal offence yet Mr A.V. Mkhalihi ratified the contracts by authorizing payment due;

- b) The Court *a quo* erred in both law and fact in refusing to appreciate that the appellant had initialed and signed other contracts where he had no pecuniary interest in a similar manner;
- c) The Court *a quo* erred in law and in fact in finding that the contract of PPC Electrical (PTY) LTD executed by the appellant on behalf of RSP was a fraud;
- d) The Court *a quo* erred in law and in fact in finding and holding that the appellant’s act of receiving invoices by writing “V. Silindza Sgt” constituted a criminal offence when the Warrant Officer and the Receiver ratified the act by authorizing payments; and that

e) The Court *a quo* erred in law and in fact in refusing to appreciate that the appellant had received other invoices in respect of other companies in which he had no financial interest.

[12] Mr Dlamini who appeared for the Respondents submitted that the appellant was properly convicted for the offences charged; that the appellant cannot be allowed to violate established procedure in his acceptance or receipt of invoices and use it as justification for his unlawful conduct. The Respondent submitted that the trial Court did not err in law and in fact in rejecting the explanation of the appellant in preference for the evidence tendered by the Crown.

[13] The material facts giving rise to the conviction of fraud, forgery and uttering have been articulately and accurately set out by the learned trial Judge Hlophe and I can do no better than to refer to his judgment in this regard. I do not propose to go into all the unsatisfactory features of the appellant's evidence referred to by the trial Court in its well-reasoned judgment. I need only highlight a few matters which go to show the untruthfulness of appellant's conduct.

[14] It is common cause that the appellant was employed by the Royal Swaziland Police (RSP) as an accountant in the Finance Department at the Police Headquarters, Mbabane. Amongst other duties, the appellant was responsible for processing payments to contractors who had performed work for the RSP. There is also the Research and Planning Department within the police service which is responsible for the maintenance of the infrastructure and building structures within the police service. The Head of the Research and Planning Department was PW 1 Senior Superintendent William Wayne Dlamini and he was assisted by Sergeant Vusi Silindza PW 2 and Majabula Mkhathjwa. The Finance Department consisted of the following officers; the appellant, PW 3-Absalom Mkhalihi, Cyprian Ginindza, and Dumsani Matsenjwa. Petros Ndlangamandla was the head of the Finance department and his deputy was PW 3.

[15] It is also not in dispute that the procedure for procuring maintenance work for police buildings and structures was that the affected police station would forward a request for maintenance work to the Research and Planning department, which department would send PW 2 to the requesting police station to assess the extent of the work to be carried out and compile a report. On compilation of the report, a contractor would be assigned the job. The

Research and Planning department would prepare a contract of engagement for the specific job awarded to a contractor which would be signed by a representative of the contractor and the head of deputy of the Finance Department on behalf of the RSP. The contractor would carry out the task and submit an invoice to the Research and Planning department within the RSP. PW2 would do an inspection of the work done and if satisfied with the work of the contractor, he would sign the invoice and endorse his name and transmit it to the Finance department in order for the payment to be processed.

[16] Once the Finance department received an invoice from the Research and Planning department it prepared a batch for the payment of the invoice and forward it to the Treasury department. The batch had an invoice, a contract and purchase order (contract of engagement) and a voucher payment or batch cover. The appellant was one of the officers who were responsible for preparing and compiling the batches. Once the batch was compiled, it is then transmitted to the head or deputy head of the finance department for signature. Only PW 3-Absalom Mkhalihi and Petros Ndlangamandla were authorized to sign the contract of engagement on behalf of the RSP.

[17] The appellant did not dispute that he received the said invoices and wrote on them the name “Vusi Silindza Sgt” and in other invoices he affixed what purported to be Vusi Silindza’s signature after he had written the name and rank of PW 2 in the following manner- “Vusi Silindza Sgt.”

[18] The appellant did not dispute that he signed the contract of engagement between PPC Electrical (Pty) Ltd and the RSP as and in the name of Absalom Mkhalihi. The contract between PPC Electrical (Pty) Ltd was an open ended contract that was valid for a period of a year. It is this contract that the appellant copied and signed in the name of Absalom Mkhalihi when he was not authorized to do so. The effect of the appellant receiving invoices and appending Vusi Silindza’s name on them created an impression that the said Vusi Silindza had actually received those invoices when he had not. This was fraud. A false impression was created that Vusi Silindza had inspected the work allegedly done in accordance with the stipulated procedure and satisfied himself that payment was due. Similarly, the signing by the appellant of the contract of engagement between PPC Electrical and the RSP using the name of Absalom Mkhalihi and submitting same with other documents for payment, created the impression that PPC Electrical had performed the work it had been assigned when, in other instances, it had not done so.

[19] Intent to defraud has two principal aspects: intention to deceive and intention to induce a person to alter or abstain from altering his or her legal position. The intention to defraud can be with direct intent or by *dolus eventualis* (See **J.R.L Milton South African Criminal Law and Procedure Vol II 3rd Ed, at 730**).

[20] The *locus classicus*, as was pointed out by Professor **Milton**, at 731, in regard to intent to deceive is **Derry v Peek (1889) 14 App Cas 337, at 374** in which Lord Herschell said that-

“...[F]raud is proved when it is shown that a false representation has been made (1) knowingly or (2) without belief in the truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in its worth.

[21] **Exparte Lebowa Development Corporation Ltd 1989 (3) SA 71 (T) at 101 E-I**, is also apposite. There Stegmann J said the following regarding fraud by *dolus eventualis*:

The essence of fraud involving dolus eventualis appears to be the deceit practiced by the representor in suggesting that to be true that which he knows may not be true. He knowingly exposes the representee to a risk (that the representation may be false) and deceitfully leaves the representee ignorant of his exposure to that risk.

[22] Any such case of fraud by *dolus eventualis* may, I think, be analysed further to disclose another fraud underlying and accompanying the first. When anyone makes a representation of fact whilst not knowing whether his representation is true or false, he thereby actually makes two distinct representations of fact. The first represents as fact that which he does not know to be either true or false. The second is a misrepresentation of fact relating to his own state of mind: it is a representation (usually implied) that he has an honest belief in the truth of the first representation. Such second representation is one that he knows to be false, it therefore establishes a case of fraud by *dolus eventualis* relating to the first representation.

[23] The trial Court found that there were fifteen fraudulent invoices issued by the PPC Electrical (Pty) Ltd for work that it had not done. The established

procedure for submitting the invoices in this regard was circumvented by the appellant who submitted same directly to the Finance Department where he inexplicably received them. On receipt of the fraudulent invoices, the appellant wrote *ex-facie* the name of Vusi Silindza- the officer responsible for receiving invoices in the Research and Planning department. The uncorrupted procedure was that the invoices were handed over to the Research and Planning department which would verify their accuracy with regard to the work done and the amounts claimed before they were submitted to the Finance department. The appellant's exculpatory version is that he had no intention to defraud the RSP and the government of Swaziland as he had executed other contracts and invoices in respect of other companies for which he had no financial interest in similar fashion. This argument in my view does not make the appellant's conduct any less reprehensible. The reality is that the appellant cannot properly seek to benefit from his past unlawful conduct. That the appellant now contends it was not a criminal offence to write the name of Vusi Silindza on invoices as this action was subsequently ratified by his superiors who authorized payment based on the invoices so signed is an even more tortuous argument.

[24] The fact that the Warrant holder and his Reliever signed the said vouchers to authorize the payment of invoices supported by the contract signed AV Mkhalihi, suggests that the officers concerned were careless not to have scrutinized the documents to see them for what they were-fraudulent as the appellant affixed Vusi Silindza's signature without his knowledge and consent. The appellant cannot rely on his abuse of trust that the Warrant Holder and his Reliever reposed with him to justify his wrongdoing. As it turns out, it was the duty of the appellant to honestly prepare, collect and submit correct and proper documentation to the Warrant Holder and his Reliever for signature. That he opted to dupe his superiors in the manner he did cannot be condoned (Refer to **Engelbrecht v The State 446/10**) [2011] **SCA 068**.

[25] The appellant's case is that the invoices were prepared on behalf of PPC Electrical and dropped at the Deep Inn located at the Finance Department at the Police Headquarters. The appellant's version, which was denied by PW 2 Vusi Silindza is that the latter had agreed that the appellant serves the invoices for work done at the Finance or Accounts' department of the Police Headquarters through being deposited at the Deep Inn. This was in violation of the established procedure outlined above, namely that the invoices had to

be submitted to the Research and Planning department for verification purposes before they were taken to the Finance department. This representation, it is common cause, was false. How and when would Vusi Silindza ascertain and confirm if the work was done if the invoices were not submitted to his department remains a mystery that the appellant did not explain. The fact that the appellant, a police officer of many years in the Finance department knew the procedure of submitting invoices but went ahead and circumvented it to the detriment of the complainant is telling.

[26] The above set of facts and evidence leave one with the inescapable conclusion that the appellant ensured that fraudulent and inflated invoices on behalf of PPC Electrical were processed in violation of set procedure to the detriment of the complainant. The trial Court was correct, in my view to hold that the appellant and PPC Electrical Pty Ltd played a vital role in ensuring that the common goal which was to siphon money from the coffers of the Treasury Department was achieved. The appellant ensured that was so by violating the established procedure and signing or receiving the invoices concerned either as Vusi Silindza when he well knew and was aware that the established procedure did not allow him to do so.

[27] Concerning the counts of forgery, it is common cause that the appellant did write the name of Vusi Silindza and sometimes his signature in some of the invoices when he was not entitled to do so in terms of established procedure. It was this conduct of the appellant that ensured that the payment of the (fraudulent) invoices was carried out. The conduct of the appellant in this regard was calculated to mislead the officers responsible for processing payment on the understanding that the said invoices had been subjected to all the verification processes when that was not the case.

[28] The trial Court was correct in finding that the appellant's conduct of receiving invoices and inserting on the documents the name of Vusi Silindza; and the act of appellant inserting the name of A.V. Mkhalihi on the contract as the person representing the police in the conclusion of the contract when that was not the case, constitute a fraudulent act.

[29] The appellant faced charges which transcended the existence of a contract between PPC Electrical (PTY) Ltd and the RSP. The Respondent conceded during the prosecution of this appeal that a genuine contract existed. As I understand it, the issue was not so much that a genuine contract did not exist

as much as it was that, on the contract, the appellant inserted names of his superiors to give the impression that the contract and the invoices had been approved by his superiors before payment was made.

[30] The trial Court's assessment of all the evidence, its adverse credibility findings relating to the appellant and its rejection of his evidence cannot be assailed nor can its favourable credibility findings concerning the Crown witnesses. The accounts of Crown witnesses were satisfactory and accord with the probabilities. They corroborated each other in material respects. A reading of what is available of the record leaves not the slightest doubt that all the Crown evidence was honest and accurate.

[31] In the result, the appeal of the appellant against conviction is dismissed and the sentence of five years imposed by the High Court is confirmed.

M. LANGWENYA AJA

I agree _____

K.M. NXUMALO AJA

I agree _____

J.S. MAGAGULA AJA

For the Appellant: Mr S. Gumede

For the Respondent: Mr T. Dlamini