MARK HERBERT KAUNDA v THE PEOPLE (1982) Z.R. 26 (S.C.)

SUPREME COURT
BRUCE-LYLE, AG. C.J., NGULUBE, D.C.J. AND MUWO, J.S.
6TH APRIL AND 28TH MAY, 1982
(S.C.Z. JUDGMENT NO.12 OF 1981)
APPEAL NO.110 OF 1981

Flynote
Criminal law and procedure - Charges - Particulars of offence - Defect in - Effect when only defective in description.

Headnote
The appellant and another were convicted of obtaining money by false pretences. He appealed against conviction and sentence. One of the issues which arose was the defect in the particulars of offence which should have charged him with obtaining of a cheque by false pretences and not money.

Held:
(i) Where the indictment is defective in mere description of the thing obtained and the substance of the charge remained the same, an amendment could cure the defect.
(ii) Where the error did not make the charge bad but simply defective and no embarrassment or prejudice was suffered by the accused on account of the error, the proviso to s.15 (1) of the Supreme Court Act may be applied.

Cases cited:
(1) R. v Smith and Others [1950] 2 All E.R. 679
(2) R. v Harden [1962] 1 All E.R. 286
(3) Nkole v The People (1977) Z.R. 351

For the appellant: M. W. Mwisiya , Mwisiya and Co.
For the respondent: L. S. Mwaba, State Advocate.
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Judgment
BRUCE-LYLE, AG. C.J.: delivered the judgment of the court.

The appellant and one other were convicted of obtaining money by false pretences. He now appeals against the conviction and sentence.

It was common cause at the trial that the appellant had a contract with the Posts and Telecommunications Corporation to clear the bush in the area along which telephone lines passed; that where the regional manager submitted a certificate that an area had been cleared the necessary

payment voucher and cheque were then prepared and payment effected in due course.

The officer-in-charge of Kalomo Telecommunications Division, the co-accused, prepared the necessary certificate that the appellant's firm Unicorn had cleared the bush along the trunk line and rural party line, and on the strength of this certificate the necessary payment voucher and cheque for K3,830.40 were prepared in favour of the appellant's firm Unicorn. The appellant collected and signed for the cheque and ultimately deposited it into the account of Unicorn with Standard Bank Ltd. Buteko Avenue Branch, Ndola. Upon investigations by the Posts and Telecommunications Corporation it was discovered that the bush indicated by the co-accused in the certificate as having been cleared by the appellant's firm, had not been in fact cleared. The investigations were carried out at all times with the appellant and co-accused and they agreed with the officers of the Posts and Telecommunications Corporation that the bush had not been cleared and that the certificate written by the co-accused in favour of the appellant's firm was in fact false.

When the appellant was warned and cautioned he did not volunteer a statement and stated that he would only do so in the presence of his counsel, but when he was charged he denied the offence. When the appellant was called upon to make defence in court, he elected to remain silent and mentioned that he would call two witnesses and gave their names to the court. At a subsequent stage the trial the appellant stated that his witnesses had been intimidated and therefore decide not to call them to give evidence and he closed his case.

The learned trial magistrate in his judgment believed the evidence of the prosecution witnesses and found as Act that the representation made by the appellant embodied in the certificate prepared by the co-accused on behalf of the appellant's firm that the bush had been cleared and on the strength of which a cheque for K3,830.40 was obtained, was false and that the appellant knew that the representation made by him through the co-accused was false and convicted the appellant.

Mr Mwisiya for the appellant, has argued that the appellant did not know the contents of the certificate written by Ponya the co-accused, as that certificate was enclosed in a sealed envelope and it was that condition when it was received by the appellant and it was still sealed when the appellant delivered the certificate, and so the appellant could not have known the contents and therefore could not be held responsible

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for the representation in the certificate that the whole area in the Kalomo north had been cleared; that the appellant thought the contents of the sealed envelope related to an application from his firm for an advance payment for the clearing of the area. We have examined closely the evidence on record and we regret to say that there is no evidence by any of the witnesses that the certificate delivered to PW2 by the appellant was a sealed envelope. There is also no cross-examination by the appellant of any of the prosecution witnesses to suggest that the certificate written by Ponya the co-accused, was put in sealed envelope before it was handed over to the appellant.

Mr Mwisiya further argued that there is a clause in the contract document that adjustments to moneys can be made as between the parties and which clause implied that there could be advanced payments for work to be done. We have examined the contract document which was exhibited at

the trial, and we are unable to find such a clause. There is, however, a clause 3 which could in all probability be the clause relied upon by Mr Mwisiya. The clause 3 reads:

> "3. Should this contract be prematurely terminated by either party, the termination shall be effected by:
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> (a) payment for that portion of the contract which has been completed satisfactorily as specified this contract;
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> (b) refund of all moneys in excess of the amount due for (a) above which may be held by either party or on behalf of either party, and,
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> (c) the payment of compensation or liquidating damages by whichever party requests the terminating of this contract, the compensation to be decided at the time of termination."

Sub-clause (b) *supra*, in our view, relates to refund of moneys in excess of payment made to the contractor for work already done or for short payments by the Posts and Telecommunications Corporation to the contractor for work already done; that this sub-clause related to work already done is specifically referred to in this particular sub-clause.

There was the further argument that all throughout the cross-examination of most of the prosecution witnesses, that the certificate by Ponya was request for an advance payment for work to be done. There is no doubt whatsoever that the appellant's cross-examination of the witnesses suggested this line of defence, but the bare facts before the trial court did not support that line of defence. There was a certificate from Ponya which stated in no uncertain terms that the area Kalomo north had been cleared; that there was the payment voucher in support of the cheque which payment voucher was signed by the appellant that the payment was for bush cleared on completion of the sixth stage covering Kalomo north. Mr Mwisiya has argued that in all probability the appellant did not read the contents of the payment voucher before he signed. The appellant having signed the payment voucher a rebuttable presumption was raised that the appellant read and understood what

was written on the voucher before he signed. There is no evidence on record in rebuttal of such presumption, and we are therefore unable to agree with Mr Mwisiya.

It is clear from the written contract document between the appellant's firm and the Posts and Telecommunications Corporation that the Corporation agreed to pay for work done and not to pay in advance for work to be done. The allegation by the appellant that he was under the impression that the payment was on advance for work to be done is not borne out by the evidence. There was no evidence by the appellant of single instance when he had been paid in advance for work to be done.

While we find the trial magistrate's conviction overwelmingly supported by the evidence that, by the false pretences of the appellant, he did in fact obtain something of value capable of being obtained, whether it be a cheque or money, we are concerned with the issue as to whether or not the particulars of offence should have been that the appellant obtained a cheque to the value of K3,830.40 or cash K3,830.40. It is well established on the authorities *R. v Smith* (1), and *R. v Harden* (2), that in cases as the present appeal, the indictment should charge the obtaining of a cheque by false pretences and not for the obtaining of money. Such particulars of offence, as in the

present appeal, have been held to be defective in mere description of the thing obtained, the substance of the charge remaining the same. We are obliged to find the particulars of the offence in the present appeal, defective in that the indictment should have been in respect of a cheque to the value of K3,830.40 as the thing obtained and not K3,830.40 in cash. We would reiterate the principle upheld *R .v Harden* (2), already referred to, that where the indictment is defective in mere description of the thing obtained the substance of the charge remained the same and an amendment could cure the defect. In the case of *Nkole v The People* (3), it was held by this court that where the error did not make the charge bad but simply defective and no embarrassment or prejudice to the accused has been occasioned by such error, the proviso to s. 15 (1) of the Supreme Court Act may be applied. In this appeal, we find that the error in charging the appellant with obtaining cash by false pretences instead of charging him with obtaining a cheque to the value of the amount on that cheque, has not occasioned the appellant any embarrassment, prejudice or miscarriage of justice, and we therefore find that this is a proper case in which to apply the proviso to s. 15 (1) of the Supreme Court Act. The appeal against conviction is therefore dismissed.

Appeal dismissed

KOSAMU AND ANOR v