

**IN THE SUBORDINATE COURT OF THE FIRST CLASS
HOLDEN AT LUSAKA FOR THE LUSAKA DISTRICT
AT LUSAKA**

(Criminal Jurisdiction)

IN THE MATTER BETWEEN:

THE PEOPLE

V

EDWARD CHILOMBO CHISANGA



JUDGMENT

REFERENCE

STATUTES

1. The Penal Code, Chapter 87 of the Laws of Zambia.

In this case, the accused stands charged with 2 counts. On count 1 - obtaining goods by false pretences contrary to Section 309 of the Penal Code. The particulars of the offence allege that the accused during the month of January 2015 at Lusaka in the Lusaka District of the Lusaka Province of Zambia did obtain building materials from Scirocco Enterprise valued at K74 424.00 by falsely pretending that he had money to pay when in fact not.

On count 2, the accused stands charged with issuing a cheque on an insufficient funded account contrary to Section 33 (1) of Act No 1 of 2007 of the Payment and

Financial Systems Act. The particulars of the offence allege that the accused on 22nd September 2015 at Lusaka in the Lusaka District of the Lusaka Province of Zambia with intent to defraud willfully and dishonestly did issue Eco Bank of Zambia Cheque No. 330 in the sum of K72 424.00. to Scirocco Enterprise on an insufficient funded account. The accused pleaded guilty on both counts.

I warn myself at the outset that the onus is upon the prosecution to prove their case beyond all reasonable doubt and that there is no onus on the accused to prove his innocence. The accused is entitled to give and call evidence or to remain silent and if he elects to remain silent, this does not affect the burden on the prosecutions. If after considering all of the evidence in this case, there is any doubt in my mind as to the guilt of the accused then the benefit of that doubt must be given to the accused.

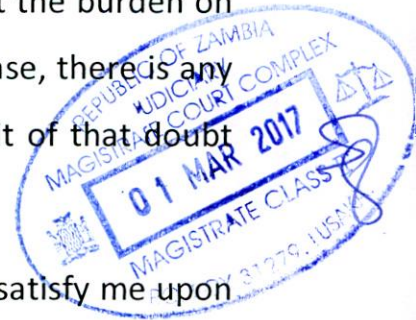
In order to prove the guilt of the accused, the prosecutions must satisfy me upon each and every ingredient of the offence charged.

On count 1, they must prove that:

1. The accused obtained building materials from the complainant.
2. The goods are valued at K72 424.00
3. Such obtaining was through false pretences.

On count 2, they must prove that:

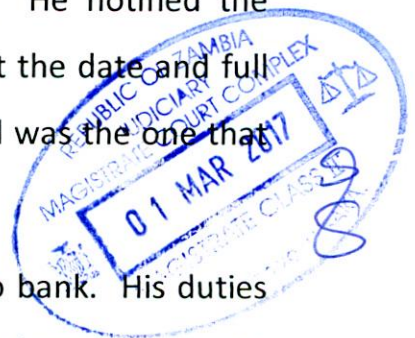
1. The accused issued cheque No. 330 in the sum of K74 424.00 to the complainant.
2. The accused intended to defraud the complainant.
3. The accused had insufficient funds in the account.



I will now consider the evidence in this case. The prosecutions called 5 witnesses. **PW1** was **Yongee Panchar**. He is a show sales manager. His duties include selling and receiving goods. In January 2015, the accused approached him and indicated that he needed 980 boxes of tiles, ceiling materials and sinks. The total value was K181,036.00. The accused paid the amount in instalments leaving a balance of K72, 404.00. The accused gave him a signed Eco bank Cheque No 330 as guarantee for payment and promised to pay within one month. The director pressured him to get the payment. He then deposited the cheque but the following day, he was informed that it had bounced. The matter was reported to the police station. He has only recovered K10 000.00.

When cross examined by the accused, he stated that he could not remember the number of cheques the accused issued. He was aware that the manager said he would proceed with the cheque because time had elapsed. He notified the accused before depositing it and even sent him a copy. He put the date and full amount on the cheque because time had elapsed. The accused was the one that breached the trust because he took over a year to pay.

PW2 was **Felicity Opara**. He is the compliance manager at Eco bank. His duties are to advise the bank on issues of compliance, regulations and customers. On 25th September 2015, the bank received a cheque issued by Diamond Constructions. The owners of the company are the accused, E. Chilombo and another person. The cheque was to pay the complainant. The account had a zero balance at that time. The cheque was in the sum of above K72 000.00 and was not paid. He produced exhibits P1, P2, P3 and P4 which are cheque, bank



statement, warrant and mandate file respectively. The signature on the cheque was for the accused.

He was not cross examined.

PW3 was **Allah Azam**. He is the salesman at the complainant. on 13th March 2015, he loaded 980 boxes of floor tiles for the accused. He issued a delivery note marked P5.

He was not cross examined.

PW4 was **Nazim Mohammed**. He is the sales manager at the complainant's company. On 22nd September 2015, he started pursuing the accused for payment of the goods he got. The accused gave him exhibit P1 in the sum of K72 424.00. He filled in the cheque. The complainant has since paid K40 000.00 with a balance of K32 424.00.

When cross examined, he stated that he was aware that the accused issued a number of cheques that cleared. The accused did not communicate with his boss Ahmed. The only way they could get their money was to act on the cheque.

PW5 was **Kennedy Mpezeni**. He investigated the matter.

He was not cross examined by the accused.

The accused testified and did not call any witnesses. **DW1** was **Edward Chisanga Chilombo**. He is one of the directors of Diamond Constructions. He bought 1000 boxes of tiles and materials for the ceiling from the complainant. He was given a condition that he issues the complainant a cheque. He issued 4 chequess. The agreement was that he would inform them each time he had money in the account. Payments were made leaving a balance of K72 424.00. PW1 and PW3



called him that their boss was putting pressure on them. He tried to call the boss but he did not respond. He sent a text message informing him that there was no money in the account. He responded that the debt had taken long and that he should be wary of the consequences of bouncing a cheque. He was summoned by oriental police station between October and November 2015. He has thus paid K40,000.00. He did not get the goods on false pretences because he has been committed to the payments.

When cross examined by the prosecutions, he admitted that the goods were delivered. K72,424.00 was the balance remaining. It is true that he issued a cheque and signed on it. There was no money in the account at the time the cheque was issued. He did not issue the cheque with dishonesty as the others had already cleared. He used to communicate with the complainant each time he had money and also the amount to fill in.

I have taken due and careful consideration of the evidence at hand. The following facts are not in dispute. The accused obtained some goods on credit from the complainant. the accused issued some cheques to the complainant. the accused made payment towards the amount owed and remained with a total of K72,424.00. the workers to the complainant did remind the accused about the balance that had remained as they were under pressure from their boss. The complainant deposited the cheque in the sum of K72,424.00. the cheque bounced because there was no money in the account. The matter was reported to Oriental police station.

Having stated the facts, I now apply the law to the facts. What evidence is there that it was the accused that obtained goods from the complainant. Fortunately,



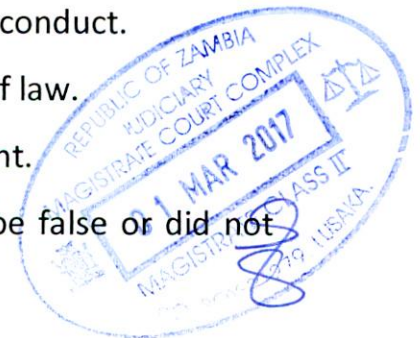
in this case, the accused does not dispute having obtained the goods from the complainant.

The bone of contention is whether he obtained the goods by false pretences. The term 'false pretences' is adequately defined in Section 308 of the Penal Code. It provides that:

"any representations made by words, writing or conduct, of a matter of fact or of law, either past or present, including a representation as to the present intentions of the person making the representation or of any other person, which representation is false in fact and which the person making it knows to be false or does not believe to be true, is a false pretences".

The definition shows that there are several elements of false pretences which must be proved. The following must be established:

1. There must be representation made by words, writing or conduct.
2. The representation made must be of a matter of fact or of law.
3. The matter of fact or of law, must be either past or present.
4. That the person making the representation knew it to be false or did not believe it to be true.
5. There was an intent to defraud.
6. The change of ownership of the thing was actually induced by false pretence.



What evidence is there that the accused made a representation to the complainant that acted on his mind to hand over the property to the accused. The evidence at hand is silent on the representation made by the accused. The evidence of PW1 reveals that the accused merely got goods worth K181,036.00 of which he paid in instalments leaving a balance of K72,424.00. There was a

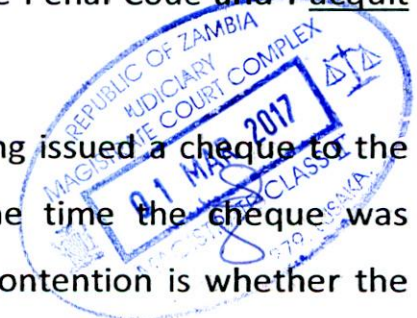
dereliction of duty as the prosecutions ought to have adduced evidence to show the representation made by the accused at the time of getting the goods. I have also noted the disparities in the evidence of the prosecutions witnesses through PW1 who said the accused obtained goods worth K181,036.00 while PW3 and PW4 stated K72,424.00. I have also noted the exhibit P5 but this is merely a delivery note and has no value of the goods purported to amount to K72,424.00. The prosecutions have therefore failed not only to prove that the goods obtained amounted to K72,424.00 but also that the accused made a representation at the time of obtaining the goods.

I am not satisfied that the prosecution has proved their case beyond all reasonable doubt. I find the accused not guilty as charged on count 1 of obtaining goods by false pretences contrary to Section 309 of the Penal Code and I acquit him of the offence.

As regards count 2, the accused does not dispute having issued a cheque to the complainant. The accused also admitted that at the time the cheque was deposited the account had no money. The bone of contention is whether the accused issued the cheque with intent to defraud and dishonestly.

Section 245 of the Penal Code provides that:

"an intent to defraud is presumed to exist if it appears that at the time when the false document was made, there was in existence a specific person ascertained or unascertained capable of being defrauded and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact, nor by the fact that he had thought he had a right to the thing he obtained by a false document."



The accused in his evidence indicated that he did not issue the cheque with dishonesty because he had issued other cheques that had cleared. However, it is worth nothing the evidence of PW1 who indicated that when the balance of the money was K72,424.00 to be paid, the accused issued a cheque and promised to pay within one month. He communicated with the accused over the payment as he was under pressure from his boss. This evidence was confirmed by PW4 and the accused. Although the accused indicated that the other cheques he issued had cleared, PW1 indicated that the accused had breached the trust with them and hence the cheques being deposited. It is only reasonable that at the time the accused issued the cheque his actions were dishonest. He further had an intention to defraud as according to Section 245 of the Penal Code, the presumption is not rebuttable. I therefore have no doubt that the accused willfully and dishonestly issued the cheque.

I am satisfied that the prosecution has proved their case beyond all reasonable doubt on count 2 and I find the accused guilty as charged of issuing a cheque on an insufficiently funded account contrary to Section 33(1) of the Payments and Financial Systems Act and I convict him accordingly.

Delivered in open court this day of 2016

J.S. CHIYAYIKA

MAGISTRATE CLASS I

