

THOMAS CHINYAMAKOBVU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MOYO AND NDLOVU JJ
BULAWAYO 12 & 22 JUNE 2023

Criminal Appeal

L Mcijo, for the appellant
N. Katurura, for the respondent

NDLOVU J: This matter came before us on Appeal. After hearing counsel we reserved judgment. Herewith is the judgment.

BACKGROUND FACTS

The appellant appeared jointly charged with another who was later acquitted in the Magistrates Court. They were facing charges of Theft of Trust Property in Contravention of *Section 113 (2) (a)* of the *Criminal Law (Codification and Reform) Act, [Chapter 9:23] [the Act]*. Upon conviction he was sentenced to 24 months imprisonment of which 3 months imprisonment was suspended on condition of good behavior, a further 9 months imprisonment was suspended on condition he restituted the complaint and the balance of 12 months imprisonment were suspended on condition he performed 420 Hours of Community Service. The appeal is against conviction. The brief allegations were that at the material time of the commission of the alleged offence, the appellant was employed by the complainant company as a Sales Manager at its Bulawayo Depot. On 16 December 2020, the appellant instructed the now acquitted accused person, who was a driver employed at the same company together with the appellant, to go and deliver 300 cases of Pepsi Drink at Renkini Country Bus Terminus contrary to an earlier lawful and known instruction to deliver the same consignment to Plumtree

Bakery in Plumtree. This second instruction was verbal and was made in the presence of a third person who testified as much. The drinks were delivered to an undisclosed address and a person thereat signed the delivery note, without endorsing helpful details on the delivery note.

According to the State, the diversion of the consignment was unlawful and in violation of the trust agreement between the appellant and his employer, the complainant, and it resulted in a loss amounting to **ZWL\$183 600-00** because that unidentified recipient of the drinks did not pay for the drinks.

APPELLANT'S DEFENCE

At the commencement of his trial, the appellant told the trial court that after approving that the consignment be delivered at Plumtree Bakery his assumption was that it was to be and was delivered at Plumtree Bakery. The top management had teamed up with subordinates against him for him to lose his job. In cross-examining his then co-accused (the driver), the appellant denied that he re-routed the consignment from Plumtree to Renkini. He denied knowledge of the drinks being delivered to Renkini. Appellant's co-accused in cross-examination the appellant put it to him that in fact, it was the appellant's signature on the delivery note and that they had had a telephone conversation about the consignment in question. All the state witnesses told the trial court that when this issue was brought to the appellant's attention, he promised to sort it out, but never did.

GROUND'S OF APPEAL.

The following were the appellant's grounds of appeal.

1. *The court **a quo** misdirected itself on a point of law in relying on the evidence of an accomplice witness without exercising the required caution.*
2. *The court **a quo** erred on a point of law in relying on hearsay evidence.*
3. *The court **a quo** misdirected itself in convicting the appellant where there was no evidence to prove the essential elements of the offence of "theft of trust property" where the appellant never held the property in question in trust nor took the said property.*

VIVA VOCE ARGUMENT ON APPEAL

Counsel for the appellant thrust his argument on the following points to establish fault in the conviction.

1. *The appellant had the authority to re-route deliveries if there was, in his discretion, a need to do so.*
2. *The state did not prove any prejudice to the appellant's employer, so no theft was proven.*

JUDGMENT

Clearly, counsel was bringing a fresh Defence or Defence Outline on behalf of the appellant at the hearing of the appeal and long after filing the grounds of appeal. That approach is unprocedural. The State's allegations and evidence were clear that the stock lost was worth ZWL\$183 600-00 and nothing was recovered. There was no evidence to the contrary. That settled the element of permanent deprivation. It is trite that an appeal concerns and confines itself with and to the 4 corners of the record and the issues for resolution are as are indicated in the grounds of appeal as are filed of record. There is no need to cite authorities for that position of the law. Counsel for the appellant was now inviting the appeal court into the wilderness of guesswork and recalibration of one's case as the appeal went on. That is improper and is not allowed. The grounds of appeal raised by the appellant are in our view without merit considered against the clear evidence led by the State before the court *a quo*.

DISPOSITION

For the above reasons, we find that the trial court cannot be faulted for convicting the appellant on the evidence that was before it and imposing the sentence it imposed. The respondent proved the case against the appellant beyond reasonable doubt. The appeal fails and is dismissed in its entirety.

Ndlovu J.....

Moyo J..... I agree

Liberty Mcijo and Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners