ABDUL RAOOF DAWOOD
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUZENDA & SIZIBA JJ
MUTARE 23 October 2024 & 19 November 2024

CRIMINAL APPEAL

Advocate *GRJ Sithole*, for the appellant
Mr *M. Musarurwa*, for the respondent

SIZIBA J: After hearing submissions from both counsel on 23 October 2024, we allowed the appeal against conviction and having set aside the judgment of the court *a quo*, we substituted it with an order as follows:

> "The accused is found not guilty and acquitted."

We have been asked to provide reasons for the above order and they are the subject of this judgment.

The appellant was arraigned before the Magistrates Court sitting at Mutare facing a charge of theft or alternatively theft of trust property contrary to ss 113 (1)(a) or 113(2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] respectively. After a full trial, he was found guilty and convicted of the crime of theft of trust property contrary to s 113 (2) of the same Act and the sum of money confirmed to have been stolen was US$18 000. On 20 June 2024, he was sentenced to pay a fine of US$600 or the equivalent in local currency at the prevailing bank rate and in default of the fine he was to serve one hundred and twenty days imprisonment. In addition, the appellant was sentenced to six months imprisonment wholly suspended on condition of restitution of the sum of US$18 000 on or before 30 June 2024. Dissatisfied with the decision of the court *a quo*, the appellant then appealed to this court against both conviction and sentence.

THE EVIDENCE ADDUCED BEFORE THE COURT *A QUO*

In terms of the charge as captured in the Summary Jurisdiction, the period in which the appellant was said to have misappropriated funds at Waverly Blankets (Pvt) Ltd where he was employed as a Branch Manager extended from September 2021 to July 2022. He was in charge of the complainant's branch in Mutare. The total amount which was allegedly stolen or misappropriated or converted to his own use was US$73 768.00.

In terms of the outline of the state case, it was alleged that the appellant received from Nyasha Nyakudya and Paul Chomusina daily cash sales for banking in terms of column 'B' of the schedule that was attached to the state outline. It was alleged that he banked the amounts in column 'C' and failed to account for the amounts in column 'D' of the same schedule which amounted to US$16 073.00. It was further alleged that the appellant acknowledged to complainant's security officer one Raymond Huni that he had misappropriated a sum of US$13 000.00 of which he allegedly paid US$3000 to his University to clear his debt and was conned a sum of US$10 000 when he tried to purchase Rands. Furthermore, it was alleged that the appellant gave fifty-eight bales of double blankets to his friends which were valued US$16 900. The misappropriated funds allegedly prompted an audit whereby a shortfall of US$54 254 was established. The appellant allegedly negotiated through his uncle and made a payment of US$33 000 on 20 September 2022 and also signed a guarantee to pay the balance from the US$54 254 within fourteen days. He also allegedly guaranteed to pay the additional balance after a full audit. The total amount misappropriated through under banking, sales manipulation and unaccounted stock after a full audit was alleged to be US$73 768 of which US$33 000 was recovered.

Mohammed Arif Bhadhella was an uncle to the appellant. He testified that he accompanied the appellant's mother who had driven from Mutare at 0200 hours to go and pay US$33 000 to the complainant's Harare office as a pre–condition to the appellant's release from police detention. Raymond Huni was the complainant's security officer whose evidence was basically to the effect that he was alerted of the appellant's conduct and carried out an investigation. He also maintained that the appellant admitted having misappropriated the funds and promised to pay the money back with the assistance of his relatives. Maram Reddy Srinivasaruddy was the complainant's auditor who claimed to have carried out an audit. Under

cross examination by the defense, she admitted that she was not competent and qualified to carry out an audit since she was not a registered auditor in Zimbabwe. Nyasha Nyakudya was a shop Assistant. He testified that the appellant had called him to his office and told him that he was missing US$18 000 and that they should try to replace or recover it from their sales. This was allegedly on a Saturday preceding the Monday in which the appellant was arrested. He testified that Irvine Munondo was the till operator. He admitted under cross examination that he had not mentioned the US$18 000.00 in his statement to the police. The testimony of Paul Chomusina who was a security guard also resembled that of the previous witness concerning the issue of the US$18 000. Aron Marc Darryn Vico also confirmed that the appellant was released from police detention on condition of payment of the US$33 000 to the complainant.

The appellant told the court *a quo* that the complainant's security officer forced him to acknowledge having misappropriated the US$13 000. He denied the allegations leveled against him by the state. He specifically denied having misappropriated any funds. He denied having misappropriated a sum of US$18 000. The state witnesses were subjected to intense cross examination by appellant's legal counsel and the audit report was totally discredited. The appellant's alleged admissions were shown to have been under extreme oppression by both the police and the complainant's security officer.

FINDINGS BY THE COURT *A QUO*

The court *a quo* made a finding that the appellant was the Branch Manager for the complainant's branch in Mutare during the period from September 2021 to July 2022. The trial magistrate appreciated that the allegations by the state were that the alleged misappropriation of funds by the appellant occurred in three ways being under banking, sales manipulation and unaccounted stock. The court *a quo* further made a finding that the issues of under banking, sales manipulation and unaccounted stock had not been well articulated or well ventilated during the state case. The trial magistrate also made a finding of fact that in some instances, the payments were made directly to the suppliers without the need to bank the cash. It was also found that there was overbanking in the tune of US$21 407 which both the state and the defense could not explain. The trial court lamented that if a proper audit had been carried out, it would have assisted in ascertaining the real meaning of the amounts allegedly underbanked and overbanked. As for the allegation of sales manipulation, the trial court found that the sales were not audited and that the cashier who had been responsible for the United States dollar till could

not testify as his contract of employment had been terminated. On the issue of the fifty- eight bales of blankets, the trial magistrate found that the stock take report was not submitted as part of evidence. Then after all these findings which logically pointed to an expected and deserved happy ending for the appellant, the court *a quo* then took a different turn and concluded its judgment by holding that the appellant had failed to account for US$18 000 which he received and which was kept in his custody.

GROUNDS OF APPEAL AGAINST CONVICTION

The appellant's appeal against conviction was premised on three grounds which are as follows:

1. The court *a quo* erred and grossly misdirected itself both at fact and law when it convicted the appellant for theft of US$18 000 when there is no indication that the complainant had asked him to account for it and he failed to.
2. Alternatively, the court *a quo* erred and misdirected itself when it convicted the appellant for theft of US$18 000 from the complainant on the basis that he failed to account for the money in question.
3. Further, the court *a quo* erred in law and grossly misdirected itself when it ignored the appellant's evidence that the money was probably stolen from him.

SUBMISSIONS BY COUNSEL

At the hearing of this matter, Mr *Musarurwa* was at pains in trying to convince us that the appellant was properly convicted of theft of US$18 000 when that sum of money had not been mentioned both in the charge sheet and state outline. His submission was that the said sum of money was revealed by the appellant by his own admission and hence he was properly convicted. Advocate *Sithole*'s position was clear in that there was no legal or factual basis for the conviction of the appellant.

THE LAW AND ITS APPLICATION TO THIS CASE

The basis of an appellate court's interference with a lower court's findings of facts is limited to those instances where the lower court would have been irrational or grossly unreasonable in its findings of facts or assessment of evidence in a manner that can be shown to

vitiate its decision. In *Mupande and Others* v *The State SC 58-22* at pp 6 to 7 of the cyclostyled judgment, the Supreme Court articulated the law as follows:

> *"It is trite that an appellate court is loath to interfere with the findings of fact made by the trial court unless the findings are grossly unreasonable. This position was articulated by this Court in Hama v National Railways of Zimbabwe 1996 (1) ZLR 664 (S), wherein it held that:*
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> > *'The general rule of the law, as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion.'*
>
> *It is not enough to merely aver that another court would have arrived at a different conclusion on the same set of facts. One must go beyond that to prove that the court in making its decision had taken leave of its senses and therefore the finding is irrational."*

The court *a quo*'s finding that the appellant stole the US$18 000 from the complainant is irrational. Having properly concluded that the three ways in which the state alleged that the appellant had misappropriated the funds were under banking, sales manipulation and unaccounted stock and also having concluded that none of those ways of misappropriation of funds were proved, it was illogical and irrational to then conclude that the appellant had misappropriated any money from the complainant. Most importantly, the US$18 000 did not originate from the allegations that the appellant was facing. It was not part of the alleged globular figure of US$73 768. Even if the learned magistrate would have made a finding that the appellant had revealed that he had missed US$18 000, such finding would not have justified the conclusion that he had stolen such money from the proven facts since all the forms of misappropriation were not proven to have occurred. The court *a quo*'s finding on this aspect is so much divorced from the rest of the judgment and so much illogical that this court can safely say that the trial court had taken leave of its senses. On this basis alone, the conviction of the appellant was improper.

Over and above this, it is quite unfair and improper to convict an accused person basing on an allegation or fact that he or she was not warned about in the charge or state outline if such fact or allegation is so material that it forms the sole basis for the conviction. Section 274 of the Criminal Law (Codification and Reform) Act [*Chapter 9*:*23*] which allows a conviction or verdict on an offence other than that charged does not help the situation at hand. It provides as follows:

> **"*274 Conviction for crime other than that charged***
> *Where a person is charged with a crime the essential elements of which include the essential elements of some other crime, he or she may be found guilty of such other crime, if such are the facts proved and if it is not proved that he or she committed the crime charged."*

The first reason why this section does not apply to this case is that the appellant was not convicted of a different offence other than that which he was charged with. He was convicted of the same offence that he was charged with. The second reason why the section cannot apply is that there were no facts or essential elements of any other charge or offence that were proved against him in this case.

The illogicality of the court *a quo*'s finding regarding the US$18 000 even spilled over to the sentence in that having concluded that the appellant stole US$18 000 and also that he paid back US$33 000, the court still ordered him to restitute US$18 000. We will not bother ourselves with the impropriety of the sentence since the conviction itself is flawed. Surely no amount of logical judicial reasoning could have led to the conviction of the appellant for any offence at law from the evidence that was presented before the trial court as well as the court *a quo*'s own findings that the alleged three ways in which the money could have been misappropriated were all not proven. It is for these reasons that we upheld the appeal against conviction without hesitation.

Muzenda J agrees _____

Maunga Maanda and Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners