

THE STATE
versus
PAUL HARI

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 22 April 2021

Review Judgment

MUZOFJA J: The accused was arraigned on a charge of theft of an ATM card in contravention of s 113(1)(a) and (d) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Code). The facts show that the accused stole an ATM card. He later used it to purchase goods worth ZW\$153 180. Upon conviction he was sentenced to 12 months imprisonment of which 3 months imprisonment was suspended on the condition of goods behaviour. Another 3 months imprisonment was suspended on condition of restitution. Effective sentenced of 6 months imprisonment.

The regional magistrate raised issue with the trial magistrate on the appropriateness of the charge. There was no consensus. The record was referred on automatic review with a covering note letter by the regional magistrate. The issue raised is that, since the accused used the ATM card to purchase goods to the appropriate charge should be contravening ss 167 and 168 of the Criminal Code.

The essential elements of theft as defined in s 113 are taking property capable of being stolen, knowing that it belongs to another and with the intention to permanently deprive the owner of his or her ownership. The offence is complete when the elements are satisfied. *In casu* the charge of theft of the ATM card was appropriate. The accused's conduct satisfied the elements.

The use of the ATM card was completely separate and distinct conduct which certainly resonate with the essential elements in ss 167 and 168 of the Criminal Code. It would therefore be competent to charge the accused for under the said sections.

A reading of the trial court's reasoning in sentencing, the unauthorised use of the ATM card was taken as aggravation. I find no misdirection. Even if the accused could have been charged as such. The court considered what he did with the card.

The non-charging of the accused under ss 167 and 168 *per se* cannot interfere with the proceedings. I did not read the regional magistrate's concern to extend to the sentence nor was the conviction questioned. Apart from the choice of charges, which is in the domain of the prosecution I find no misdirection.

Accordingly, the proceedings are confirmed just to be in accordance with real and substantial.