

FRADRECK UTSIWEGOTA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 25 October 2021 & 1 August 2022

Criminal Appeal

W T Mufuka, for the appellant
E Makoto, for the respondent

ZHOU J: This is an appeal against conviction and sentence. The appellant was convicted after a trial, of one count of theft of trust property as defined in s 113 (2) (d) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to 10 years imprisonment of which 3 years imprisonment was suspended for 5 years on condition that during that period he does not commit any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine. The effective period of imprisonment was 7 years.

At the trial the appellant was facing four counts. He was acquitted on three of them but was convicted on count three. The charge in count three was that on a date unknown to the Prosecutor but during the period extending from July 2013 to June 2019, and at Decade Mining (Private) Limited, Shamva, the appellant held trust property, namely, 2 x 3 stamp mills, one 5 stamp mill, one 120KVA generator, two ABJ concentrators, one Toyota Hilux single cab motor vehicle, one Mazda 3 motor vehicle, one Foton (7 tonne) truck, eight electric motors, one amalgam barrel, three compressors, five water pumps, one motor bike, one dumper trailer and approximately 20 000 tons of gold dump tailings, which property belonged to Decade Mining (Private) Limited represented by Ramason Bupendra, and in breach of the terms under which the property was held, the appellant intentionally converted the property or part thereof to his own use.

The court found as proved the following facts: that the said Ramason Bupendra, a national of Singapore, came to Zimbabwe as an investor. He, together with the appellant and another

person who was later barred from participating in the management of the company were the directors of Decade Mining (Private) Limited. In 2013 Ramason Bupendra left the country for Singapore and left the appellant in charge of the assets of the company and also responsible for the management of the company. The company was operating then. Upon returning to Zimbabwe he found that the assets of the company listed hereinabove could not be accounted for by the appellant and the company was no longer operating. Equipment was either completely missing or had some parts missing. The appellant had unlawfully disposed of the property of the company and converted the proceeds thereof.

The appellant, in his defence outline, admitted to the following facts: that he and Ramason Bupendra formed the company, Decade Mining (Private) Limited which was in the business of mining and milling gold. When Ramason Bupendra left for Singapore in 2013 he had a meeting with the appellant during which it was agreed that the appellant would be in charge of the day to day management of the company during the absence of Bupendra. Bupendra returned to Zimbabwe in 2018.

Appellant further stated and contended that he was the majority shareholder of the company. This is not material to the case as it does not constitute a defence to the charge of theft of trust property. Appellant further stated that “no evidence or suggestion of theft is apparent from this charge”, an assertion which is clearly incorrect because the charge sheet alleges explicitly that he converted the property of the company to his own use in breach of the terms under which he was entrusted to hold the property. Evidence cannot be contained in the charge sheet or outline of the state case. In the defence outline the appellant further stated that he had not had the opportunity to account for the property as there was no board meeting that had been held since 2013. This, again is not a defence, as the appellant had the opportunity to account for the property in his defence outline and in his evidence before the court *a quo*. Other than pleading not guilty to the charge, the defence outline is not an unequivocal denial of the detailed factual allegations contained in the state outline as it does not speak to how the property listed therein was appropriated.

Evidence was led on behalf of the prosecution from the following witnesses: Ramason Bupendra, Patrick Jingiso a manager, Misheck Chaputa a boiler maker and later a plant foreman, and Augustine Mudzingwa the investigating officer. The learned Magistrate also conducted an

inspection *in loco* at the premises of the company and observed that what remained of the equipment were “non-functioning ramshackles’. After considering all the evidence, the Court *a quo* concluded that the guilt of the appellant in relation to the count of theft of trust property had been proved beyond reasonable doubt.

In relation to the conviction, the appellant raised six grounds of appeal. The sixth ground of appeal can be easily disposed of as noted earlier on. In this ground the appellant asserts that he was the majority shareholder and in that capacity had the right to make decisions including disposing of the assets of the company. This is clearly a misapprehension, because the company has a separate legal personality from that of the shareholders, see *Salomon v Salomon & Co Ltd* [1897] AC 22(HL). Property of the company belongs to it and not to the shareholder.

The first ground of appeal is that the court *a quo* erred by proceeding on the basis of a criminal complaint made by Ramason Bupendra who was not the owner of the property stolen and did not have the requisite authority to represent Decade Mining (Private) Limited, the company whose property was stolen. Mr *Mufuka* for the appellant advanced no argument in support of this ground of appeal. He advised that he had no instructions not to persist with it and would leave it to the court to determine. In the outline of the state case the complainant in respect of count three (**Record 43**) is referred to as Decade Mining Private Limited. There is a clear mix-up in the same outline where there is reference to the complainant leaving the country for Singapore and returning (a clear reference to Ramason Bupendra), but this does not invalidate the charge. Bupendra is a director of the company, and in that capacity has an interest to make a complaint on its behalf, much the same way that a parent can make a complaint of rape in which the victim is his daughter whether she is a minor or a major, in which case the daughter remains the complainant. The principles in civil proceedings relating to *locus standi* have no application in criminal proceedings because a crime is a wrong against the public, and the interested party is the State and not the complainant or the person who has drawn attention to the commission of the offence. There is therefore no “representation” of the company in this case because it is not a party to the proceedings. The parties are the State and the accused. Therefore, the issue of the authority to represent Decade Mining Private Limited does not arise in criminal proceedings. The company is the complainant merely in the sense of being the victim of the crime. The ground of appeal is therefore without merit.

In the second ground of appeal the appellant alleges that the respondent did not prove the essential elements of the offence. In particular, in the notice of appeal it is alleged that there was a failure to prove that the appellant held the property of the company “in trust”, that the specific terms of the trust were not proved, and that the appellant breached the terms of the trust or converted the property to his own use. A director is in a position of trust in relation to the company of which he is a director arising out of the fiduciary relationship. The director’s fiduciary duties owed to a company are imposed by the common law, see *Hahlo’s South African Company Law Through the Cases: A Source Book* (6th ed.) p. 278. In the circumstances of the instant case, on his own admission the appellant was left in charge of the company, which implied a duty of care in relation to the property of the company. He confirms this in his defence outline and in his evidence (**Record 153**), albeit in evidence he says he was only in charge of fixed assets such as the dumps and stamp mills. Instead of taking care of the company, he personally appropriated the property of the company as found by the court *a quo*. The dumps and mills were also removed by him.

The evidence of Patrick Jingiso is clear regarding the removal of the company property from the company premises by the appellant. At **Record 82**, this witness was asked about the seven ton truck and the D4D motor vehicle and he stated that he saw these being removed from the company premises by the appellant. He also confirmed that appellant removed the generator from the company premises. Appellant telephoned this witness and told him that a motor vehicle was coming to collect the generator. Appellant in the company of one Steven (**Record 83**) also took away the tractor under the guise that it was going for repairs although this is not part of the property said to have been stolen in the charge sheet. Appellant, according to this witness, also took five water pumps and a Mazda motor vehicle from the company premises, stating that these belonged to him, **Record 84**. As for the Mazda motor vehicle, the appellant himself drove it away. The witness also gave evidence that the appellant removed the gold dump from the company premises. Appellant, according to this witness, also removed the stamp mills and concentrators, **Record 85**. During the inspection *in loco* Patrick Jingiso showed the court *a quo* the places where the removed property used to be located. He also explained in detail some of the parts which had been removed from the cannibalized property that had remained at the premises of the company. Appellant in his evidence (**Record 154-155**) admitted to selling a 3 stamp mill for a sum of \$ 4000

which he received. There is nothing that he produced to show that the money was deposited into the account of the company. During his evidence-in-chief the allegations pertaining to theft of the Toyota and Mazda motor vehicles were drawn to his attention, **Record 156**. He gave no meaningful response apart from making a general statement that the company had used some of his cars and that proof of the existence of these motor vehicles had not been given to the court. But when the witnesses for the state testified he never challenged the fact that these motor vehicles were in existence and were removed from the company premises. Significantly, he had no comment to make in respect of the values of these motor vehicles. He also sought to question the fact that there had been a 7 ton Foton truck in his evidence in chief (**Record 157**) but had never challenged evidence of its presence when the state witness testified on it.

The Court *a quo* made the critical observation in its judgment that in his defence outline the appellant had never disputed the existence of the property which forms the basis of the charges against him but merely argued that his conduct in dealing with this property was not criminal. The court also noted that his attempt as the case progressed to question the existence of some of the property proved his dishonesty and lack of credibility. His failure to account for the missing property was thus correctly found to have proved that he converted them to his own use.

Ground number 3 in the notice of appeal is not really a ground challenging the conviction but merely the accuracy of the list of the stolen property. It asserts that the court *a quo* erred in concluding that appellant had disposed of or converted to his own use “ALL the property listed . . .” which means that he accepts the proof in relation to some of the listed property. The full extent of the stolen property is a question of detail. That detail is relevant only to the question of sentence but not to conviction.

The fourth ground of appeal alleges that the court *a quo* erred in failing to consider that the appellant did not violate s 183 (1) (b) of the Companies Act [*Chapter 24:03*]. Although the judgment of the court *a quo* makes no explicit reference to the section, the conclusions reached show that the appellant did dispose of a substantial portion of the assets of the company without a board resolution authorizing him to do so. Part of the property removed from the mine included motor vehicles. The Court *a quo* correctly rejected the appellant’s feigning of ignorance of the existence of such property in the face of the evidence of the witnesses that he took the property. The fact that he did not account for the property shows that he disposed of it. The ground of appeal

is a fishing expedition on an issue that was not explicitly dealt with but the clear evidence adduced shows violation of the provisions of s 183 of the Companies Act.

The fifth ground of appeal is that the court having convicted the appellant based on circumstantial evidence erred by failing to accept that the proceeds from the sale of the 3 Stamp Mill were applied towards the acquisition of a round mill. In the first instance, the conviction was not based on circumstantial evidence. It was based on the direct evidence of the witnesses who perceived the appellant's involvement in the disposal of the property. The appellant did not provide any proof that the proceeds realized from the disposal of the mill were appropriated towards the acquisition of the round mill. There was therefore no evidence upon which the court *a quo* could reach the conclusion which is being urged by the appellant.

In respect of the sentence the appellant has relied on three specific aspects which he contends ought to justify the setting aside of the sentence imposed and the remittal of the matter for the passing of another sentence. The first contention is that the sentence was based on a value of USD500 000.00 which he alleges was not proved by evidence. The reasons for the sentence show that there was no reference to the value of the property at all in the sentence. Instead, the court considered the nature and amount of property involved. The very fact that the court did not order compensation shows that the court did not consider the value to have been established with mathematical exactitude. In any event, the appellant has not suggested an alternative figure as representing the reasonable value of the property to which the offence relates. For the same reason that this was not a case in which the value was readily ascertainable, ground number eight in which the appellant complains about the failure to order compensation is not supportable. The court could not order compensation in these circumstances where the property involved was used property the value of which would have required experts to testify on. The proceedings were not a claim for damages but a trial for theft of property. The exact value of the property is not an element of the offence.

The last ground of appeal against sentence is that the court *a quo* erred by failing to consider that the appellant had a majority shareholding in the company that owned the property. The court *a quo* concluded, and it has not been challenged, that the fifty-one percent shareholding allocated to the appellant was merely for the purposes of compliance with the indigenization laws, otherwise the appellant was a mere front. In any event, the appellant's shareholding does not entitle him to

take the property of the company and convert it to his own use. This is particularly so where there are other shareholders or there is another shareholder, as was the case in this instance. As pointed out earlier on, company property belongs to the company itself. There can therefore be no mitigation arising out of the appellant's extent of shareholding in the company.

In all the circumstances the appeal is without merit.

In the result, the appeal is dismissed in its entirety.

ZHOU J:.....

CHIKOWERO J: Agrees.....

Thompson Stevenson & Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners