

PEPUKAI CHIKONO

VERSUS

THE STATE

APPELLATE DIVISION OF THE HIGH COURT OF ZIMBABWE
KAMOCHA & MAKONESE JJ
BULAWAYO 13 MAY & 19 DECEMBER 2013

Mr L. Mcijo, for the appellant

Miss N. Ngwenya, for the respondent

Criminal appeal

KAMOCHA J: The appellant in this matter noted an appeal against both conviction and sentence of the court *a quo*. After listening to legal practitioners representing both parties we dismissed the appeal in its entirety and indicated that our full reasons would follow. These are they.

Appellant pleaded not guilty to a charge of theft where it was alleged that on 9 December 2010 along 3rd Street Kwekwe, he took \$113 cash the property of *Willard Sibanda* knowing that *Willard Sibanda* was entitled to own, possess or control the property or realising that there was a real risk or possibility that *Willard Sibanda* was so entitled to own, possess or control the property and intending to deprive him permanently of his ownership, possession or control.

In summary the state outline was this. On 9 December 2010 at 0800 hrs when the complainant was in the Central Business District in Kwekwe he was approached by the accused who offered him a job. The complainant accepted the offer of a job. There after the accused gave the complainant an envelope and asked the complainant to put all his money into that envelope. The complainant put his money amounting to \$113-00 into the envelope.

The accused then referred the complainant to another person in the market place where he was going to commence working. Before the complainant left, the accused had changed the envelopes. He then handed the complainant a wrong envelope containing a piece of flour paper.

The complainant proceeded to the market place to start his job but found no person answering the description given by the accused.

He returned to where he had left the accused but the accused was no longer there. He was nowhere to be seen in the vicinity.

While still disappointed because he could not get the promised job, he opened the envelope into which the accused pretended had his money. He was shocked to discover that he had been conned of his money. He was a victim of an "Envelope Switch".

Complainant went to report the matter to the police leading to arrest of the accused. Out of the \$113 stolen \$73-00 was recovered.

The accused's defence outline was that on the day in question he never came any where near the area indicated by the complainant. He said he had come from Gokwe on the day in question to process his brother's death certificate. He came from Kadoma and went to the civil court where he intended to register the estate of his late brother.

Strangely, a certain police officer stopped him and asked him how much money he had. He was then arrested on the allegations that complainant had been conned of some money. The police officer went on to say he believed it was accused who had done so. He concluded that that was a clear case of mistaken identity.

The evidence adduced from the complainant was that he had arrived in Kwekwe between 9 am and 10 am from Zhombe. When he was near a flea market he met the appellant who engaged him in a conversation. A certain youngster arrived at the scene. The appellant asked the complainant and the youngster to go and assist him in loading his goods. He led them towards Globe and Phoenix. They got to a certain place where he told them to wait while he went away for a while and returned. On his return he told them that they were not supposed to take anything with them. He gave the complainant one of the envelopes which he had and told him to put his money in there. The complainant had \$113-00 which he put in the envelope. The man took the envelope from the complainant and sealed it and gave it back to him.

Thereafter the man sent him to go and look for a motor vehicle similar to the one complainant had seen with him (con man). The complainant set out for a wild goose chase. Of course, there was no such motor vehicle. He gave up the search for a non-existent motor vehicle and decided to go back to where he had left the con man and the youngster but they were nowhere to be seen.

He then decided to go and do the business that he had gone to Kwekwe for. He had gone all the way from Zhombe to Kwekwe to buy a mobile phone, a pair of shoes and some clothes. When he opened the envelope into which he had put his money but sealed by the trickstar he discovered that it was stuffed with pieces of flour paper. His money had been stolen by the trickstar.

Complainant said he had spent-some time with the man who stole his money but he thought it was less than 20 minutes. The tricks were being executed in broad day light. The complainant observed the person clearly by what he was wearing and the bag he was carrying.

The complainant went to the police to report the matter but the police were of no assistance at that stage. He left the police camp but as he was walking in town just behind the court building he fortuitously saw the trickstar still in the same attire and carrying the same bag. Complainant looked for a police officer and pointed the conman to him. The police man then arrested him.

The con man was the appellant. The complainant ruled out the possibility of mistaken identity. The appellant conned him and disappeared but he fortuitously met him again after 1 hour 30 minutes still in the same attire and carrying the same bag – in broad daylight. The complainant spent sometime with the appellant before he was conned. Appellant and complainant were close to each other as the appellant was making false promises to hire him. They walked together towards Globe and Phoenix. The appellant at some stage left the complainant for a while and returned. It was only after his return that appellant stole complainant's money.

The identification was so positive that it did not require any corroboration as chances of the witness being mistaken were non-existent in this particular matter. The trial court cannot be faulted for making that finding. Similarly the court cannot be faulted for rejecting the appellant's story. The conviction was accordingly sound and is hereby upheld.

The appellant was sentenced to 12 months imprisonment of which 4 months imprisonment was suspended on the usual condition of future good behaviour.

The appellant did mention in his notice of appeal that the appeal was against both conviction and sentence but gave no grounds of appeal against sentences. The only grounds of appeal raised related to conviction. Consequently the magistrate's response to the notice of appeal related to conviction only.

The appellant raised the issue of community service in his heads of argument. This was improper because the trial court had no opportunity to respond to that.

The magistrate's view was that due to prevalence of cases of con-artists in Kwekwe a deterrent sentence was called for. No other form of punishment other than imprisonment was appropriate in this case. The magistrate gave the reason for holding that imprisonment was the only suitable form of punishment *in casu*. The magistrate considered other forms of punishment and held that they were inappropriate in the circumstances.

This case was carefully planned. Complainant was promised some job albeit for a short time. The appellant chose his victim very carefully. The complainant was a rural dweller who was naive. The appellant pounced on him and took his \$113 which was a lot of money to a communal home dweller. The sentence was far from being excessive for someone who does this kind of thing. There is nothing wrong with it and it is hereby upheld. In the result the appeal is dismissed in its entirety.

Makonese J I agree

Hore & Partners, appellant's legal practitioners
Attorney-General's office, respondent's legal practitioners