

**THE STATE**

**VERSUS**

**ADRIAN MUCHAZIVEPI**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 15 JANUARY 2015

Criminal Review

**MAKONESE J:** This matter was referred to the National Prosecuting Authority in terms of section 54 (2) of the Magistrates' Court Act [Chapter 7:10], with a request of either increased jurisdiction or referral to the High Court for sentence as provided for by section 225 (b) of the Criminal Procedure and Evidence Act [Chapter 9:07]. Upon going through the record the Prosecutor General's office withheld its support for the conviction of the accused for fraud through the use of Section 274 of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

The background to this matter is that on the 13<sup>th</sup> August 2014, a Provincial Magistrate based at Bulawayo addressed a memorandum to the Registrar in the following terms:

“May you place the above record with urgency before any judge of the High Court with the following comments:

Accused appeared before me on a charge of theft, however during the course of the trial I realized that the evidence was pointing to fraud and I invoked section 274 of the Codification and Reform Act (sic) [Chapter 9:23] and convicted the accused of fraud. I then referred the record to the Prosecuting Authority (sic) in terms of section 54(2) of the Magistrates Court Act [Chapter 7:10] where it was declined to proceed in terms of the section.

I therefore write seeking for guidance and I have also attached the Prosecuting Authority's view in respect of my referral.”

On receiving the record I observed that the matter involved interesting aspects of law and therefore invited the National Prosecuting Authority and the legal practitioner for the accused person to submit written submissions.

I am indebted to both State and defence counsel who took time to explore the authorities on the matter to assist the court in arriving at an appropriate decision. It is abundantly clear that the learned magistrate was in a legal quandary which could only be untangled by a proper application of the law. The learned magistrate was in an invidious position.

#### The facts

The accused person appeared before the magistrate facing a charge of theft as defined in section 113 (2) of the Criminal Law (Codification 9:23). The brief allegations are that accused sold Dandy products to customers on a credit basis during the time of his employment at Dandy Zimbabwe in Bulawayo and converted a total sum of US\$44336-42 to his own use. The accused had raised fictitious invoices purporting that the company was owed money by various customers in order to cover up the offence. The offence was discovered by a Private Investigator who was hired to look into the activities of the accused. At the relevant time the accused was employed by Dandy Zimbabwe as a Sales Representative.

The accused who was legally represented at the trial denied the allegations throughout. The state led evidence from five witnesses. The accused gave evidence and at the end of the trial he was found guilty. The accused was however found guilty of fraud and not guilty of theft. The learned magistrate sought to rely on the provisions of section 274 of the Criminal law (Codification and Reform) Act. The learned magistrate then referred the matter to the Prosecutor General applying for increased jurisdiction on the sentence she intended to impose. The National Prosecuting Authority did not support the application for increased jurisdiction on a point of law and hence the referral of the matter to this court.

#### Analysis of the law

Section 274 of the Criminal Law (Codification and Reform) Act provides as follows:-

“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.”

It is noted that the above section is similar to the Republic of South Africa section 270 of the Criminal Procedure Act No. 51 of 1977 which states:-

“If the evidence on a charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved.”

I agree with the state’s reasoning that the two sections were put in place by the legislature to provide for situations whereby the accused committed an offence which is not a competent verdict or charged in the alternative but whose essential elements are encompassed in the offence charged. The accused may be found guilty of the proven offence whose essential elements are found in the offence for which the accused had been charged.

The position is well canvassed in a number of South African decisions and is well established in the following decisions:-

*S v Anias* 1995 (2) SALR 735 (A); *S v Mei* 1982 (1) SA 299 (0); *S v Kuvare* 1992 (2) SALR 180 (NM); *S v Mavundla* 1980 (2) SA 187 (7); and *S v Nyamza and Another* 2000 (1) SALR 626.

In *casu*, the accused was charged with theft but was convicted of fraud. Not all the essential elements of fraud are found in the theft charge. In particular, the element of misrepresentation is not found in the charge of theft. The learned magistrate clearly erred and misdirected herself when she sought to rely on the provisions of Section 274 of the Criminal Law (Codification and Reform) Act in finding the accused guilty of fraud. She could not do so in terms of the law.

It is instructive to note that Section 113 (4) of the Criminal Law (Codification and Reform) Act is peremptory in its application when it provides that:-

“For the avoidance of doubt it is declared that where a person, by means of a misrepresentation as defined in section one hundred and thirty five, takes any property capable of being stolen, intending to deprive another person of the ownership, possession or control of the property, the competent charge is fraud and not theft.”

It is clear that in accordance with the above provision there can be no doubt the learned magistrate could not lawfully resort to the use of section 274 of the Criminal Law (Codification and Reform) Act in finding the accused guilty of the offence of fraud instead of theft as she sought to do.

Disposal of the matter

In the circumstances of the matter, the learned magistrate should have referred the matter to the Prosecutor General in terms of section 54 (1) of the Magistrates Court Act so that the Prosecutor General would have resorted to the provisions of section 225 (a) (iii) of the Criminal Procedure and Evidence Act. The current status of the trial is that it has not run its full course as envisaged under section 54(1) of the Magistrate Court Act. The learned magistrate had not pronounced her sentence and therefore this court is still at large, in a review matter to either confirm, vary or set aside the conviction. The issue of *autre fois convict* does not in any event arise because this court is not confirming the conviction which occurred as a result of a misapplication of the law. In terms of section 29 (2) (i) of the High Court Act, [Chapter 7:06], I am satisfied that the proceedings in the court *a quo* are not in accordance with real and substantial justice and that the conviction cannot stand.

I am alive to the fact that the accused is entitled to a speedy trial. In the same breath the accused is entitled to a fair trial which accords with all the notions of justice and fairness.

In the result, I make the following order:-

1. The conviction is hereby quashed and set aside.
2. The matter is hereby referred to the Regional Court for a trial *de novo*, on the appropriate charge.

Makonese J.....

Takuva, J agrees.....

