

ADELIGHT MACHEKANYANGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MANGOTA and TAGU JJ
HARARE, 12 & 19 November 2014

Criminal Appeal

Advocate *T. Magwaliba*, for appellant
R Chikosha, for respondent

TAGU J: The appellant who was jointly charged with her supervisor, was convicted after a protracted trial on 6 counts of theft of trust property as defined in s 113 (2) (d) of the Criminal Law (Codification and Reform) Act [*Cap 9.23*]. The appellant was sentenced to 24 months imprisonment of which 12 months imprisonment was suspended for 5 years on usual conditions of good behaviour. The remaining 12 months were suspended on condition she restituted the complainant, Zimbabwe Electricity Transmission Distribution Company (ZETDC), in the sum of \$ 8 112.00 through the Clerk of Court, Marondera by 28 February 2014.

Dissatisfied with the conviction and sentence, the appellant appealed to this honourable court. During the hearing of the appeal she did not pursue her appeal against sentence, save to say that the time she was given to pay restitution was unduly short when the relevant factors are considered. She persisted with the appeal against conviction.

The basis of her appeal was that, firstly, the appellant was denied right to legal representation. Secondly, that it was not proved beyond reasonable doubt that the appellant connived with one LUKE MUGUMANYA (her co-accused in the court *a quo*) to commit the theft. Thirdly, that she was not the sole custodian of the money since other cashiers had access to the cash box.

Mr *Chikosha* for the respondent supported both the conviction and sentence.

During the hearing of the appeal the fact that the appellant was not afforded legal representation was not emphasised by Advocate *Magwaliba* for the appellant. In any case the record shows that the matter was postponed for three consecutive trial dates to afford appellant the opportunity to seek a legal representative. Mr *Machokoto* who was to represent the appellant failed to turn up on the day of trial without explanation. Mr *Mazani* who then appeared on the day of the trial also recused himself when the court indicated its intention to proceed with the trial. In our view the trial court cannot be faulted on that basis.

On the other two grounds the evidence on record clearly shows that the appellant was a cashier. The appellant received money in respect of the six counts. The appellant took the money to LUKE MUGUMANYA who counted and compiled a cash deposit slip. The appellant took the money and the deposit slip and put it in the cash box. The appellant took the cash box and put it in the strong room. The appellant kept the keys to the cash box. LUKE MUGUMANYA locked the strong room and kept the keys to the strong room. The following day LUKE MUGUMANYA would unlock the strong room. The appellant would take the cash box and hand over the cash to bank tellers for banking purposes. According to appellant's evidence she does not know who did the banking. She claimed that a number of cashiers had access to the cash box and the keys to the cash box.

However, during cross examination by the State she was asked why she did not say that other cashiers had access to the cashbox keys. Her response was "I had a lot of things which were going on in my mind". Clearly the appellant did not raise that issue before, nor during cross examination of the sole witness for the State one MATHIAS FUNDAI. To me what she said was an after- thought.

To prove that the appellant indeed stole the money in question, she made a confession during her mitigation which she advanced through her defence counsel. Advocate *Magwaliba* tried to attribute the utterances made during mitigation to the lawyer who was representing the appellant. I do not agree that the lawyer said what he said out of his own mind without being told by the appellant. It would not make sense to say some things that the appellant said through her lawyer came from the appellant and others came from the lawyer's own mind. The following is what the appellant said through her lawyer-

"Accused during the offence she was staying with her elderly parents who were both sick for a long time. As we speak the accused lost her father at the end of December 2013. Now left with a mother whom she is looking after. At her age it would seek abnormal (*sic*) that at her age she is taken the responsibility also as a single parent. Part

of the proceeds some went towards to the hospital bills. One does not need to use criminal means to survive. Offence was committed out of need than greed the court will not turn a blind eye on that. The court should note the harsh economic conditions which has forced people to engage to illegal activities as a way of survival. As a woman she finds herself to that situation....”(The underlining is mine).

The above quotation, plus the evidence in the record clearly shows that the appellant committed the offence. There is no misdirection or gross irregularity committed by the court *a quo* which could vitiate its findings. The appellant’s guilty was proved beyond a reasonable doubt.

Coming to the issue of the sentence the appellant is lucky to escape an effective custodial sentence. There was a clear breach of trust reposed on the appellant by her employer. The sentence imposed by the court *a quo* is in line with decided cases hence there is no need to interfere with it.

As a result, and for the above reasons, it is ordered that-

The appeal is dismissed in its entirety.

MANGOTA J agrees.....

Maganga & Co, appellant’s legal practitioners
Prosecutor-General’s Office’s respondent’ legal practitioners