ANNA MUDYIWA
and
KENNEDY MUKUBVU
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MANGOTA JJ
HARARE, 3 June 2014 & 26 November 2014

Criminal Appeal

P Kwenda, for the appellants
I Muchini, for the respondent

HUNGWE J: The appellants were charged with theft of trust property (24 counts). They both pleaded not guilty. After a lengthy trial the first appellant was found guilty on all 24 counts. She was sentenced to 5 years imprisonment with labour of which 2 years is suspended on condition the accused makes restitution in the sum of US$68 201, 00 to Bharat Kidia by 28 February 2012. The second appellant was convicted of only two counts. He was sentenced to 18 months imprisonment of which 6 months imprisonment was suspended for 5 years on condition of good behaviour and a further 6 months imprisonment was suspended on condition the second appellant makes restitution in the sum of US$15 000, 00 to the complainant through the clerk of court by 31st December 2012.

They both appeal against conviction and sentence. The grounds of appeal against conviction by both appellants do not comply with the rules of court. The first appellant's grounds of appeal dated 15 November 2012 come nowhere near meeting the guidelines set out in the *Supreme Court (Magistrates Court) (Criminal Appeals) Rules, S.I. 504 of 1979*.

Rule 22(1) requires that the notice of appeal sets out "clearly and specifically" the grounds of appeal. In *Nguruve* v *The State* SC191-88 the Supreme Court indicated that the court expect legal practitioners to take the utmost care in the preparation of a notice of appeal. The ground must be precisely specified and particularised and must not be couched in vague and generalised terms. This court, for its part, has previously warned legal practitioners of the consequences of failure to comply with this important rule of court. An appropriately

clear and specific ground of appeal is important in that it directs both the appeal court as well as the trial court to the reason for the dissatisfaction. In his response to the notice the magistrate is able to answer specifically on the point and direct the parties to the portion of his/her judgment that deals with the aspect which has been raised. The respondent is also put on notice as to what it is he/she is expected to respond to in the appeal. This will inevitably save time in terms of preparation and delivery of the judgment answering the grievance raised in the appeal. We have, in this court and on times without number, complained of the shoddy and unprofessional standard of work with which we had to deal with. That has contributed to unnecessarily heavy workload for the judge who has to make out for himself what the ground of appeal really is. This is one such. I feel constrained to repeat that if the notice of appeal offends against R22 (1) of the said Rules, it will be struck out as invalid and the appeal will be discharged from the roll.

In *Ncube* v *State* 1990 (2) ZLR 303 (S) and in *Jack* v *State* 1990 (2) 166 (S**)** the Supreme Court stated that if the notice of appeal is vague and general, it is a nullity and cannot be amended by filing a more detailed notice later. See also *Madeyi* v *The State* HH 34-13. It is as if no notice has been given at all. The magistrate is within his rights to refuse to give his reasons for judgment on receipt of such notice.

I will demonstrate. The first appellant in her first and second grounds of appeal says:

> "1. The court *a quo* failed to take due cognisance of the fact that the complainant conceded that the appellant engaged in own business of selling generators whilst at the same time working for the complainant.
>
> 2. In light of the above the trial court erred when it rejected the submission that in counts 1 to 15 the issue of whether or not appellant had supplied generators to the people she issued with the listed receipts was critical to the just determination of the case and that issue could not be resolved beyond doubt without hearing the evidence from the customers in question rebutting the appellant's assertion."

I could go on and on. The point I make here is that such "grounds of appeal" fall foul of the rules and ought to have been adjudge a nullity by the registrar.

The appellant was convicted of all 24 counts. The principle applicable is that in multiple counts, the ground of appeal applicable to each count must be clearly indicated. Unless a given ground applied to certain specific counts, there was need therefore to clearly and specifically give notice in respect of each count against which an appeal was noted. In

essence the thrust of the appeal in the present case is no more than a call to revisit and review the factual findings by the court as well as issues of credibility regarding the witnesses called by the defence. Even so where the court is required to revaluate the propriety of a conviction, it may amount to a serious misdirection to view a single piece of evidence in isolation and ask the court to conclude that the conviction as a whole was unsafe. The proper approach always, is to take the evidence led as a whole and ask whether, viewed as a whole, it can be said the State has managed to tender sufficient evidence which qualify as proof beyond a reasonable doubt. There is no requirement to prove the commission of an offence beyond all doubt. Pitched so high, the detection and prosecution of crime may well prove impossible except in those cases where an accused pleaded guilty. The reasoning given in judgments in the lower court cannot possibly plug all avenues of criticism which an astute legal practitioner may be able to pick at will should such a desire grip him or her. What is expected, in the reasons for judgment, is an elucidation of the factual findings and conclusions of law upon which a particular conclusion is arrived at. As such the appeal court will, in most cases be able to infer that the necessary considerations which led to a particular conclusion were taken into account.

In *Rex* v *Dhumayo* 1948 (2) SA 677 (A) at 702, DAVIS AJA remarked that:

> "It would be most unsafe invariably to conclude that everything that is not mentioned [in a judgment] has been overlooked. … Lord Wright cites with apparent approval … the statement of Lord Buckmaster in *Clarke's* case; [*Clarke v Edinburgh and District Tramways Company* (1919 S.C (H. L.), 35] with which Lord Atkinson had expressly associated himself, that "Courts of appeal should not seek anxiously to discover reasons adverse to the conclusions of the learned Judge who has seen and heard the witnesses and determined the case on the comparison of their evidence."

MARAIS JA in *S* v *Naidoo* 2003 (1) SACR 347 (SCA) para 26 also emphasized the above quotation by saying the following:

> "In the final analysis, a Court of appeal does not overturn a trial Court's findings of fact unless they are shown to be vitiated by material misdirections or are shown by the record to be wrong".

I respectfully agree with the above sentiments and have approached this appeal with these remarks in mind.

The following facts were generally common cause and not in dispute. Complainant employed the first appellant as a salesperson for her generator agency. In that position the first appellant dealt with all of complainant's customers who placed orders for new generator sets, after sale warranty service; repair service and so on. As an agency, complainant did not have to sell what was in the show-room only. She could sell what was on display and deliver it ex-show-room or ex-stock. Their supplier would ensure that complainant maintained adequate stocking levels. It was complaint's practice not to issue sales receipts but rely on the warranty cards as reflecting what sales had been made. The first appellant was aware of this anomaly. She operated the system whereby she would indicate what had been sold by merely passing on to the complainant the warranty cards reflecting the model of the set sold; its serial number and the date of sale. Complainant would keep the other records such as the price of the set and so on. There was no stock strictly belonging to the complainant but as an agency complainant would request from her suppliers what the customers had bought. She would at times take in sets for service and repair in terms of the generator set's warranty. The first appellant knew and co-ordinated the stock movement as part of her duties.

It is common cause that the first appellant acting alone or in cohorts with her boyfriend, the second appellant, decided to take advantage of the system employed by the complainant. She opened her own set of books where she would keep records of sets that she sold on the side. She did not disclose that she was now venturing into a similar line of business with her employer using both her employer's time, facilities and customers. To avoid detection, she opened an outlet in Hatfield which was manned by the second appellant. Matters came to a head when complainant's customers sued complainant for generators which were disappearing at her shop. When complainant's clients showed her their receipts which were issued by the first appellant, she made good their loss. She confronted the first appellant who admitted that she was running a racket in which the business clients lost their money or assets to her machinations. She offered to refund the complainant. The second appellant also came out in support of the lady and offered security for the due discharge of the first appellant's indebtedness to complainant. They failed to meet their commitments. The first appellant admitted to complainant that she was literally running a similar but separate outfit using complainant's resources and customers as well as her suppliers. This was the basis of her conviction. The claim that she had her own clients and was conducting her own

business different from that of the complainant was rejected by the trial court. I am unable to find fault with the reasoning of the trial court which led it to reject this defence as false.

Besides the reasons given by the learned trial magistrate for disbelieving her when she changed her story from the one which she gave to the complainant to the version that she gave in court where she stated she was running her own agency from complainant's premises, there are other reasons why her story cannot be believed. First, here is an employee entrusted to accept money on behalf of her employer. She initially honestly conducts her duties with exceptional fidelity. Suddenly she decides to start and grow her own business inside that of her employer's. She does not disclose this intention to her employer, nor does she disclose this to the complainant's clients. Everyone sees her there and believes she is conducting her employers' business. When she fails to account for certain purchases and repair jobs for certain of her employer's clients, she suddenly claims these were her own clients. She does not call any one of her own clients to testify in order to establish her *bona fides* regarding this claim.

During argument Mr *Kwenda*, for the appellant attempted to take issue with the fact that no evidence was given in respect of certain counts therefore these ought to be struck off her conviction. There was no evidence therefore in respect of those counts, so the argument went. I disagree. During the trial complainant was going through each count. Mr *Kwenda*, without being prompted by the State, indicated that the defence was not disputing those counts. The witness was, therefore, excused from having to go into evidence which would have proved those counts. Section 314 of the Criminal Procedure and Evidence Act *[Cap 9:07]* permits the court to accept as facts any issue which was an issue at trial to be recorded as fact as long as the parties indicate that the issue is no longer in dispute. Where an accused indicates that there was no need for proof to be tendered in respect of a fact which made up an offence, that admission, in my view, amounts to an admission of those facts which would have been led to establish the offence. The appellant cannot, on appeal, turn round and say evidence on this and that count was not led therefore there is no proof of the offence. But that is not all. The complainant meticulously went through each and every count in her evidence in chief showing how the appellant admitted to failing to account for either cash or a specific item which she had accepted on behalf of her employer.

A similar argument that because the charge referred to trust money, therefore where the misappropriated property was a generator as such the conviction was bad in law cannot, in my view, be good in law. The charge relates to theft of trust property. Trust property must be read to include both the money and the generators which the appellant failed to account properly when called upon to do so by her employer.

It is useful to examine the meaning of the term "trust property". *The Criminal Law (Codification and Reform) Act, [Cap 9:23]*, ("the Criminal Law Code"); defines trust property as property held, whether under a deed of trust or by agreement or under any enactment, on terms requiring the holder to do any or all of the following (a) hold the property on behalf of another person or account for it to another person or; (b) hand the property over to another person; or (c) deal with the property in a particular way. From the statutory description it follows that trust property is a personal obligation for paying, delivering or performing anything, where the person trusting has no real right or security, for by that act he confides altogether to the faithfulness of those entrusted. This is its most general meaning, and includes deposits, bailments, and the like. In its more technical sense, however, it may be defined as being an obligation upon a person, arising out of a confidence reposed in him, to apply property faithfully, and according to such confidence.

Dealing with the property in a particular way as provided in (c), in my view can be read to include what one must term "implied trusts" which extend over the business and pursuits of men, so to speak. These are trusts which, without being expressed, are deducible from the nature of the transaction, as matters of intent; or which are superimposed on the transaction by operation of law, independently of the particular intention of the parties. The most common form of an implied trust is where property or money is delivered by one person to another, to be held by the latter and delivered to a third person. *In casu*, these instances include the various instances where complainant's clients left generators for repair; money paid over for the purchase of new generators; generators retuned for warranty service or just for general repairs.

Section 112 of the Criminal Law Code provides;

"112 Interpretation in Part I of Chapter VI

In this Part-

'property capable of being stolen' means any movable corporeal thing or object, or any incorporeal right vested in a person relating to movable or immovable property, and:-

(*a*) includes:-

(i) money, whether in the form of cash, specific notes or coins, an entry in an account or other abstract sum of money or claim to be paid an amount of money; and

(ii) shares in any business undertaking;

(iii) the following incorporeal things in so far as they may be illegally tapped or diverted from their intended destination;

A. electricity; and

B. electromagnetic waves emitted by a telecommunications or broadcasting system;

…

"trust property" means property held, whether under a deed of trust or by agreement or under any enactment, on terms requiring the holder to do any or all of the following:-

(*a*) hold the property on behalf of another person or account for it to another person; or

(*b*) hand the property over to a specific person; or

(*c*) deal with the property in a particular way;

but does not include property received on terms expressly or impliedly stipulating that:-

(i) the recipient is entitled to use the property as his or her own; and

(ii) there would only be a debtor and creditor relationship between the parties;"

A dissection of each transaction as described by the complainant demonstrates how the appellant committed these offences over a long time. The complainant explained the first appellant's duties as follows. She would book customers' generator sets for repairs. When customers came to collect she would call the customers, make a receipt and liaise with workshop for the release of the generators. When customers paid for new generators, she would bring the money and warranty slip to management. Management would sign the warranty slip which would take the place of a receipt. Where there has been transfer into the bank account, she would liaise with complainant for confirmation that the payment had gone through. Upon confirmation by the complainant, she would release the generator after the warranty slip had been signed by the complainant. The first appellant would also make arrangements for the collection of the generator from the warehouse and its delivery where

required. The complainant is a consignment agent who works on commission. The first appellant was also required to do stock reconciliation with their supplier. She was responsible for the stock on the complainant's premises. She kept the keys to the storage facility at the complainant's premises. She dealt with all queries regarding generator sales.

In her assessment of the evidence before her the learned trial magistrate made the following findings:

> "By her own admission, accused one said she was running her own business within complainant's business. She said the customers were so many that she was overwhelmed by them and this could have led to the mix up and her client's with complainant's clients. The court however does not understand how she was running her own business within complainant's business. If she was running her on business there obviously had to be a delivery of her own stocks from suppliers. There was however no evidence that there was such a delivery specifically for her yet she was selling stock and receipting money received in her own receipt book. It would therefore mean that the stock that she was selling was the consignment stock for complainant and was converting the money received to her own use. Since she was overwhelmed with clients and got mixed up, she cannot deny that complainant's stock went missing. This is because both herself and complainant were selling the consignment stock that was meant for complainant. If accused one had her own stock then she would have managed to reimburse complainant all the stock that she gave to customers who came demanding generators at the time she was released on bail."

This finding sealed her fate. It cannot be faulted in any way when regard is had to the defence the appellants tendered. That defence was correctly rejected. In any event the first appellant had made certain admissions to the complainant which were properly admitted during trial as further evidence pointing to the manner in which the offences were committed. I am satisfied that the first appellant's conviction was proper. Her appeal should therefore be dismissed.

As for the second appellant the learned trail magistrate correctly convicted him of only two counts. Counsel for the second appellant was unable to advance any basis for attacking the conviction. It is clear that the second appellant was convicted on the basis of circumstantial evidence. The learned trial magistrate pointed to the different pieces of evidence which when cumulatively considered, point to the fact that he was a willing conduit in first appellant's nefarious activities in at the very least two counts; i.e. counts 19 and 20, for which he was convicted. That position is eminently understandable in light of the lucid

reasoning displayed in the reasons for the judgment. The learned trial magistrate properly convicted the second appellant. In the event his appeal against conviction fails.

Regarding the appeals against sentence by both appellants, the court considers that sentencing is entirely within the judicial discretion of the trial court. An appeal court will only interfere where that discretion has not been exercised judicially, for example where the sentencing authority acted on a wrong principle. In this case, counsel for both appellants did not suggest that the trial court's discretion was vitiated by material misdirections or were shown to be wrong; nor were the sentences imposed shown to be unduly harsh given the circumstances in which the offences were committed. As such the appeals against sentence should meet with failure.

In the result, the appeals by both appellants are dismissed in their entirety.

MANGOTA J agrees.

Kwenda and Associates, legal practitioners for the appellants
National Prosecuting Authority, legal practitioners for the respondent