STEWART MAGONDO
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA and TAGU JJ
HARARE, 21 May 2014

Criminal Appeal

I Gonese, for the appellant
J Uladi, for the respondent

TAGU J**:** This is an appeal against sentence only. On 21 May 2014 we delivered an ex-tempore judgement and dismissed the appeal. The appellant has requested for our written reasons for the decision. These are they.

The appellant was charged with one count of theft as defined in s 113(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was convicted after a contested trial. The trial court sentenced him to 6 months imprisonment of which 2 months imprisonment were suspended for 5 years on the usual conditions of good behaviour. A further 2 months imprisonment were suspended on condition he restituted complainant in the sum of US$ 423.00 through the clerk of court Mutare on or before 30 August 2013, leaving an effective term of imprisonment of 2 months.

It is against this effective term of imprisonment that the appellant lodged an appeal to this court.

The appellant attacked the decision of the court *a quo* on the basis that the sentence passed by the learned magistrate was so severe, harsh and induces a sense of shock. It was contented that the appellant should have been sentenced to 6 months imprisonment of which 2 months imprisonment are suspended for 3 years on conditions of future good conduct, and the remaining 4 months being suspended on condition of restitution in an amount of US$ 423.00.

The respondent was not opposed to the appeal. However, we were not in agreement

with that concession.

The facts giving rise to this charge were that the appellant was employed by the complainant Wholesale Fruiters as a Retail Operations Manager. On 17 February 2011 complainant supplied 8 x 2 litres orange crush, 132 x 125 grams Bisto and 6 x 50 grams Mandras to Metro Peach Mutare. The complainant instructed one Takesure Matanha, a merchandiser, to go and collect the money from Metro Peach Mutare and to deposit it into appellant's personal account. The appellant then converted the money amounting to US$ 423.00 to his own use without telling his employer. The offence came to light on 7 September 2012 when one Livingstone Muzamwese proceeded to Metro Peach in a bid to obtain the payment. Of the stolen money nothing was recovered.

The appellant was a first offender. However, he did not show any contrition. He denied the theft despite the fact that there was a payment requisition form which showed that the cash had been collected by Takemore Matanha and bank statement showing that the money was deposited into his personal account.

In passing sentence the trial magistrate observed that this was theft from an employer and that there was a breach of trust on the part of the appellant.

A factor which needed to be taken into account in accessing the appropriate sentence in this matter was that the appellant had made an illicit profit from his dishonesty, which profit had not been recovered. One cannot overlook the consequences that would follow the appellant's conduct. The customer had paid for the deliveries and could be inconvenienced or disadvantaged as if they had not paid when in fact they would have paid. *Bokani Ncube* v *State* HC-B -3/97.

When dealing with a case involving theft from employers in *Donah Ncube and Anor* v *State* HC-B-43/97, Chatikobo J, as he then was, had this to say-

> "Appellant is guilty of biting the finger that fed him and in doing so he also acted in a selfish way by stealing tools which the college needed for training others."

In casu, the appellant was biting the finger that fed him. Be that as it may, we noted that the sentence imposed was in line with sentences for similar cases. Hence the appellant in his heads of arguments suggested a sentence in the same region as imposed by the court *a quo.* This court can only interfere with the sentence if it is shown to be out of the ordinary. In the case of *State* v *Nyakatawa* HH 288/91 cited by the appellant, it was said in the cyclostyled judgment by Sandura J that-

> "It is trite a sentence will be interfered with if the Court comes to the conclusion that it is so excessive as to induce a sense of shock and also if it is so out of conformity with sentences usually passed for offences in similar circumstances".

In this case there was no misdirection committed by the trial court in sentencing appellant as it did.

Wherefore, in the result, it is ordered that-

The appeal be and is hereby dismissed.

CHATUKUTAJ: agrees……

Gonese and Ndlovu, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners.