

LOU YU LING
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & WAMAMBO JJ
HARARE, 29 March 2018 & 27 June 2018

Criminal Appeal

V.C Maramba, for the appellant
T. Mapfuwa, for the respondent

WAMAMBO J: Appellant was convicted of contravening s 113 (2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (theft of trust property) and sentenced to 24 months imprisonment of which 6 months imprisonment was suspended on condition of good behaviour while 18 months imprisonment was suspended on condition of performing community service.

She now appeals against both conviction and sentence. The circumstances are that the complainant was having business transactions involving clothes with the appellant's son for about two years. Thereafter complainant was now transacting with the appellant directly. The complainant would give appellant clothes to sell on her behalf and at a later stage appellant would give her money realised from the sale of the clothes.

Complainant would give appellant invoices along with the clothes. On the invoices would be written the particulars of the clothing supplied. The invoices were supplied to the appellant but she (appellant) would not sign on the invoices neither would her employees. Appellant would be given the clothes for resale and would place her own mark up and give complainant money after selling the clothes.

Appellant who speaks Chinese would apparently communicate in English with complainant. In the course of time there was a misunderstanding over US\$9 454.00 that complainant understood was owed to her by appellant.

Without traversing the entire evidence placed on record, the evidence of the complainant on the agreement reached between herself and appellant deserves close scrutiny. The question begging an answer being was there an offence committed considering the arrangement or agreement between complainant and appellant.

Section 113 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] reads as follows:-

“(2) Subject to subsection (3) a person shall also be guilty of theft if he or she holds trust property and in breach of the terms under which it is so held, he or she intentionally –

- a) omits to account or accounts incorrectly for the property, or
- b) hands the property or part of it over to a person other than the person to whom he or she is obliged to hand it over, or
- c) uses the property or part of it for a purpose other than the purpose for which he or she is obliged to use it, or
- d) converts the property or part of it to his or her own use.

(3) Subsection (2) shall not apply if –

- a) the person holding or receiving the property has properly and transparently accounted for the property in accordance with the terms of the trust, or
- b) the person disposing of the property retains the equivalent value thereof for delivery to the person entitled thereto unless the terms which he or she holds or receives the property require him or her to hold and deliver back the specific property.”

Trust property is defined as follows: “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.
(emphasis added)

The exception (as underlined above) is directly relevant to this case. The facts clearly reveal that complainant would give appellant clothes for resale. In return depending on the circumstances, appellant would give complainant money and later resell the clothes supplied. Sometimes appellant would first resell the clothes after placing her own mark up and then hand over the agreed amount to complainant.

The transactions giving rise to the offence were recorded in a book which got lost and complainant, produced invoices which she wrote herself and were not signed by appellant. Appellant after receiving clothes from complainant would record the details in Chinese and there was no consolidation of the books as the complainant and appellant spoke English and Chinese respectively. There appears to have been a communication breakdown between the two.

It is clear that the agreement between the two was impliedly or expressly a debtor-creditor relationship and thus falls within the exception as referred to earlier. Indeed by allowing appellant to first resell the property and put her mark up the appellant was clearly entitled to use the clothes as her own. The fact that he need not even sell the clothes for she could donate them to charity for instance or give to her family members then give complainant the agreed amount still demonstrates that she was entitled to use the clothes as her own.

In the circumstances this case falls in the realm of civil cases that have no place in the criminal court. See *Brian Tarisai Kambasha and another v The State* HH 36-17, *Dalvin Dean Green v The State* HH 283-16. In the light of the above we are satisfied that the appeal against conviction is meritorious, thus the appeal against conviction is upheld and the sentence it follows is hereby quashed.

It is ordered that:-

1. The conviction of appellant is hereby set aside and the sentence quashed.
2. The verdict of the court is substituted with the verdict that appellant is hereby found not guilty and acquitted.

HUNGWE J agrees

Tawona & Jaravaza Attorneys, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners