

ECHEBEL MUDADIRWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA and MUZENDA JJ
MUTARE, 19 September and 3 October 2019

Criminal Appeal

Ms *E. Ngorima*, for the appellant
Ms *T.L. Katsiru*, for the respondent

MUZENDA J: On 14 April 2019, appellant Echebel Mudadirwa, was convicted for contravening s 113 (2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] for theft of trust property and was sentenced to 12 months imprisonment of which 2 months imprisonment was suspended on condition of future good behaviour, of the remaining 10 months imprisonment, 6 months imprisonment on the further condition of restitution, the balance of 4 months imprisonment was suspended on condition that the appellant completes 140 hours of community service.

On 7 May 2019, the appellant noted an appeal outlining the grounds of appeal as follows:

1. As against conviction

- 1.1 The Learned Trial Magistrate erred in convicting appellant without sufficient evidence being led to secure the conviction.
- 1.2 The Learned Trial Magistrate erred when she failed to conclude that from the available evidence there were glaring inconsistencies from the State witnesses and that they contradicted each other on material aspects of the alleged offence which would prove improbable to convict the appellant beyond a reasonable doubt.
- 1.3 The court erred and misdirected itself in finding the appellant guilty by relying on hearsay and misdirected circumstantial evidence.

1.4 The Learned Trial Magistrate erred and misdirected herself by failing to consider the appellant's defence which was reasonably true given the circumstances of the case and the evidence adduced by both parties.

2. As against sentence

2.1 The Trial Magistrate erred and misdirected herself in her approach to sentence when she paid lip service to the highly mitigatory features in favour of the appellant.

2.2 The Trial Magistrate further erred and misdirected herself by sensationally refusing to impose a hefty fine on the appellant rather than community service since it was coupled with restitution.

BACKGROUND

Sometime in 2013 the complainant Dianarose Maramba approached appellant who is a war veteran officer based at Mutare District Administrator's office and requested appellant to process pension funds for complainant's late father Washington Matunhura who was also a war veteran pensioner. Appellant asked complainant for US\$30-00 transport costs to enable appellant to travel to Harare to obtain and process pension papers. Complainant paid the money to the appellant. After about two weeks appellant informed the complainant that the pension funds were ready for use. He invited complainant to call at his offices. Upon arrival at the appellant's offices, the appellant instructed complainant to hand him over complainant's CABS bank card as well as pin number, appellant was furnished with the card and the pin number. The appellant proceeded to the bank and went on to access complainant's account and withdrew all the pension lump sum from complainant's account.

Sometime in July 2015 the complainant went to the appellant to collect the bank card and appellant started to threaten the complainant. He refused to return the bank card. On 3 June 2016 the complainant visited her bankers where she obtained a bank statement which reflected that USD2 707-00 which was deposited from the pension office was withdrawn on 5 June 2015 but not to the knowledge of the complainant. Complainant with the use of the police trapped the appellant by lying to him that he was to come to CABS and get a token of appreciation from the complainant for successfully helping complainant to get the pension funds. Appellant then proceeded to the bank and upon arrival at the bank he was arrested by the police.

The whole appeal by the appellant is mainly founded on the adequacy or inadequacy of State evidence. Whether the Learned Trial Magistrate erred in finding the evidence of the complainant credible. The evaluation analysis and consideration of the quality and quantity of

evidence as well as its credibility is the privileged domain of the Trial Magistrate who was in the hearing who had the benefit of observing the witnesses testifying. The Learned Magistrate in this case believed the complainant and disregarded what the appellant perceived to be inconsistent and contradictory evidence. The most crucial evidence in this matter was whether the appellant received the complainant's bank card and pin number: if he did whether the bank card and pin number were used during that period to withdraw the money from CABS bank in the sum of \$2 707-00 and whether it was the appellant who did that? On those aspects the complainant fared well in court and the appellant incredibly failed to put questions to the complainant and as per the Learned Magistrate's judgment, the complainant was credible. The appellant demanded the playing or replaying of CCTV in order to prove that he is the one who withdrew the money from the bank. That was ingenuous but not necessary in my view.

The appellant did not dispute complainant's evidence to the effect that she surrendered her bank card and pin number to the appellant. During that period when appellant had the card and pin number the amount was withdrawn from the bank. These to me are common cause and uncontroverted by the appellant, appellant failed to challenge complainant on that, the only reasonable inference that can be drawn from this set of facts is that the appellant used complainant's bank card and pin number to draw the money from the bank (See *S v Tambo* 2007 (2) ZLR 35) and I see no misdirection by the Learned Trial Magistrate. It can be observed that the complainant was naive and unsophisticated and to some extent gullible but the appellant took advantage of that as well.

There is no judicial criticism that can be visited upon the trial court in my view. The appellant's version was properly rejected by the Magistrate as improbable. Appellant did not deny getting the card and pin number, he did not allege that on one occasion he gave someone else the card and the pin number. He had the card and pin number during the relevant time and used the two to access the complainant's money from CABS. Although, there was a single witness regarding the crucial aspects, on those factual issues complainant gave her evidence very well and more importantly the Trial Magistrate believed her. There is no legal basis to impugn the Magistrate's acceptance of complainant's evidence. In my view there is no basis to interfere with the conviction of the appellant by the court *a quo*. As a result, the concession made by the State is not proper and I reject it.

The appellant although he appealed against sentence in his grounds of appeal, did not pursue same in his heads of argument, though he did not abandon it, I infer that he did not

submit any argument to convince this court to interfere with the sentence passed by the court *a quo*. The appeal against sentence is equally baseless and it is dismissed as well.

Consequently the following order is given:

The appeals against conviction and sentence be and are hereby dismissed.

MWAYERA J agrees _____

Legal Aid Directorate, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners