Judgment No. S.C. 67/98
Crim. Appeal No. 749/97

HOWLEN SHAMBARE v THE STATE

SUPREME COURT OF ZIMBABWE
EBRAHIM JA, MUCHECHETERE JA & SANDURA JA
HARARE, MAY 4 & 18, 1998

B S Kaseke, for the appellant

M Zimba, for the respondent

EBRAHIM JA: The appellant was charged in the Harare Regional Magistrates Court with one count of making a false report to the police in contravention of s 11 of the Miscellaneous Offences Act [*Chapter 9:15*], one count of fraud and one count of theft. He pleaded guilty to the theft charge and to the charge of making a false report to the police and was duly convicted. At the conclusion of the trial he was also convicted on the fraud charge. He appeals against the conviction and sentence on the fraud charge.

The facts alleged by the State are that the appellant was employed by the Zimbabwe United Passenger Company ("ZUPCO") as a bus driver. On 11 February 1995 at about 0315 hours, he commenced duty and was given a "Fare Ticket Machine" ("the machine") to utilise during the course of his duties for the purpose of issuing tickets to customers. On the same date, at approximately 1900 hours, he reported to the police that the machine had been stolen. He also

informed his employers about the loss of the machine. On 13 September 1995 the appellant was seen to be selling tickets from the very same machine that he had reported stolen. At that time there was conclusive evidence establishing that ten tickets had been issued to the value of $20,00.

Ms *Zimba*, representing the Attorney-General in this Court, has conceded that the State failed to prove beyond a reasonable doubt that the appellant defrauded ZUPCO of tickets valued at $111 033,12. She concedes that on the evidence led only ten tickets valued at $20 were conclusively proved to have been issued therefrom. She supports the conviction on the fraud charge only to this extent. She also concedes that as the evidence discloses fraud only to the extent of $20, the sentence imposed by the trial magistrate is inappropriate. She concedes that as a result this Court is at large to assess the sentence afresh. It is my view that the concession made by Ms *Zimba* is justified.

It was not in dispute that the appellant stole the machine from his employers. It was also common cause that thereafter he made a false report to the effect that the machine had been stolen. It was accepted that the appellant was seen to be selling tickets from the stolen machine and that he was found to have sold a number of tickets valued at $20,00. The appellant did not deny printing the ten tickets and converting the proceeds to his own use.

The State, however, failed to prove that the appellant stole 106 045 tickets valued at $111 033,12. Whilst there was evidence to show that he printed much more than ten tickets, there was no evidence to show what number of tickets he

actually issued. The stolen machine was faulty and yet no attempt was made to tender evidence to establish the number of tickets which were fraudulently issued or, for that matter, how the figure of 106 045 tickets having been issued had been arrived at.

Ms *Zimba* conceded that as there was a malfunction of the machine there was a doubt on the figures reflected on the machine to indicate how many tickets in excess of the ten recovered tickets would have been issued by the appellant. She accepted that there was no evidence led to show that the State had taken into account the fact that the machine had a fault, and how the figure of 106 045 tickets alleged to have been issued by the appellant had been arrived at beyond a reasonable doubt. It is my view that Ms *Zimba's* approach is entirely justified.

There is merit, too, in her criticism of the trial magistrate's approach in relation to her analysis of the evidence led in this case. Ms *Zimba* concedes that the magistrate appears to have placed the *onus* on the appellant to show how he printed the tickets and how many he had issued. There was no cogent State evidence led to show that 106 045 tickets valued at $111 033,12 were sold to passengers. The only reliable evidence established that the appellant issued ten tickets and defrauded his employers of the amount of $20,00.

The conviction on the fraud charge therefore can only be sustained to the extent that the appellant defrauded his employers of the amount of $20,00.

The learned trial magistrate, in sentencing the appellant, also erred in the manner she recorded the sentences on the charge sheet. The sentence for theft, count three, is reflected as four years' imprisonment with labour. She confused the sentence to be imposed on that count with the sentence she intended to impose on count two, the fraud charge. It is clear, however, that the sentence of four years' imprisonment with labour she imposed was meant to be the sentence on the fraud charge and the sentence on the theft charge was meant to be one of three months' imprisonment with labour.

Ms *Zimba*, in any event, made the following concession:-

> "It is submitted that the learned trial magistrate misdirected herself by convicting the appellant of fraud involving $111 033,12 when the evidence disclosed only prejudice of $20,00. A substantial miscarriage of justice has occurred. May the sentence imposed by the trial magistrate be set aside and substituted with another more suitable one."

I agree with these sentiments and substitute a sentence of three months' imprisonment with labour on the fraud charge. The sentences in respect of each of the three counts, that is, three months' imprisonment with labour, are to run concurrently with each other. The effective sentence therefore is one of three months' imprisonment with labour.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

Chinamasa, Mudimu & Chinogwenya, appellant's legal practitioners