

Judgment No S.C.110\2002
Crim. Appeal No 237\2001

SHEPHERD KASEMA v THE STATE

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & ZIYAMBI JA
HARARE NOVEMBER 18 , 2002 & JANUARY 16, 2003

G.T. Chapwanya, for the appellant

R.K. Tokwe, for the respondent

SANDURA JA: The appellant and two other men were charged with contravening paragraph 18(a) of the First Schedule to the Defence Act [Chapter 11:02], the allegation being that on 25 February 2001 and at Muzarabani they stole a 200 litre drum of Jet A1 fuel which belonged to the State. All of them were Sergeants in the Airforce of Zimbabwe (“AFZ”).

On 9 July 2001 they appeared before a General Court Martial at Manyame Air Base and pleaded not guilty. However, they were subsequently found guilty as charged after a trial had been conducted. The appellant was sentenced to nine months' imprisonment with labour. In addition, his rank was reduced to that of an aircraftsman, and he was dismissed from the Zimbabwe Defence Forces with ignominy. Aggrieved by the conviction and sentence, he appealed to this Court.

The background facts are as follows. At the relevant time the appellant and the two other men, i.e. Sergeant Mandivenga (“Mandivenga”) and Sergeant Tapfumaneyi (“Tapfumaneyi”) were members of the AFZ stationed at the Manyame Air Base.

On 24 February 2001 the appellant and Mandivenga were tasked with supplying Jet A1 fuel to the AFZ which was involved in the flood victims rescue operation at Muzarabani. The appellant was the supplier of the fuel and Mandivenga was the driver of the lorry which took the fuel to Muzarabani. They took twenty drums of Jet A1 fuel and one drum of diesel. Each drum contained two hundred litres of fuel. The diesel was for use by the lorry but the Jet A1 fuel was for use by aircraft at Muzarabani.

On the following day the appellant and his colleague arrived at Muzarabani Police Station (“the police station”). Seven drums of Jet A1 fuel were left at the police station and the remaining thirteen were taken to a nearby airfield. After leaving the thirteen drums at the airfield the appellant and Mandivenga returned to the police station.

Later that day, they loaded twenty empty drums onto the lorry intending to return them to Manyame Air Base. Some of these drums were collected from the airfield whilst others were collected from the police station.

In addition to the empty drums, a drum containing Jet A1 fuel which was leaking, and which was not part of the drums delivered to Muzarabani on that day, was put on the lorry at the police station and was supposed to be returned to Manyame Air Base. This is the drum which was the subject of the theft charge. It was not returned to Manyame Air Base, but was later found in the joint possession of Agnes Chaparira (“Chaparira”) and Christopher Mugari (“Mugari”), residents of Muzarabani, who claimed to have bought it from members of the AFZ for \$3 000.00.

Investigations by the police led to the arrest of the appellant, Mandivenga and Tapfumaneyi.

At the trial, the appellant’s defence was a bare denial. He denied seeing the drum at the police station, and denied that it had been put on the lorry. He also denied being paid the sum of \$3 000 by Mugari.

However, in my view, there was overwhelming evidence against the appellant. That evidence established beyond reasonable doubt that it was the appellant who released the drum to Mugari and, therefore, unlawfully appropriated the State’s property.

Firstly, there was the evidence of Sergeant Mapingure (“Mapingure”), the investigating officer, which was as follows. At the relevant time, he was the officer-in-charge of administration at the police station. On 25 February 2001 the appellant and Mandivenga delivered some drums of Jet A1 fuel to the police station. After the drums had been removed from the lorry, he informed the appellant that there

was a drum with Jet A1 fuel which was leaking and which had been left by the AFZ pilot because the fuel was no longer fit for use by aircraft. The reason for informing the appellant about the leaking drum was that it had to be returned to Manyame Air Base. In addition, he informed the appellant that there were some empty drums at the police station which had to be returned to the same Air Base. He then handed over to the appellant the leaking drum as well as the empty ones, and all the drums were then loaded onto the lorry.

It was Mapingure's evidence that when he subsequently questioned Tapfumaneyi, the latter told him that the release of the drum to Mugari had been authorised by the appellant. He later questioned the appellant who told him that the drum had been released to Mugari with the pilot's consent. However, this was later denied by the pilot.

Secondly, there was the evidence of Tapfumaneyi which was as follows. On 23 February 2001, he and other AFZ members left Manyame Air Base for Muzarabani where they were to take part in the flood victims rescue operation.

Two days later, on 25 February 2001, he was at the police station when he met Mugari, his brother-in-law. Thereafter, he heard policemen talking about a drum with Jet A1 fuel which was leaking. Subsequently, after seeing the drum, he approached the appellant, who was in the company of AFZ members, and asked him if the drum could be given to Mugari, as the fuel was no longer fit for use by aircraft but could be used for domestic purposes as paraffin. In reply, the appellant said Mugari could have the drum.

Thereafter, Tapfumaneyi asked Mandivenga to take the drum to Mugari's house, using the lorry. Before he could do that, Mandivenga sought the appellant's permission which was readily granted. Accordingly, Mandivenga, accompanied by Tapfumaneyi, took the drum to Mugari's house. However, as Mugari did not have a container into which the fuel could be emptied, the drum was taken to Chaparira who had such a container.

Thirdly, there was the evidence of Mandivenga which was as follows. He was the driver of the lorry which took the drums of Jet A1 fuel to Muzarabani Police Station on 25 February 2001 and was accompanied by the appellant. At the police station he and the appellant were informed that there was a drum of Jet A1 fuel, delivered to the station earlier, which was leaking and which had to be returned to Manyame Air Base. The appellant informed the policemen at the station that he would take the leaking drum and the empty drums back to Manyame Air Base. Accordingly, the leaking drum and all the empty drums at the station were loaded onto the lorry in the presence of the appellant, AFZ members and local policemen.

It was Mandivenga's evidence that the appellant, after being approached by Tapfumaneyi, subsequently authorised the release and delivery of the leaking drum to Mugari. He added that the drum was in fact taken by him to Mugari's house and then to Chaparira's residence.

Fourthly, there was the evidence of Sergeant Moyo ("Moyo"), an aircraft technician, which was as follows. Everyone at the police station knew that

there was a drum of Jet A1 fuel which was leaking, and when the appellant and Mandivenga arrived at the police station on 25 February 2001 they were informed by him and by Mapingure that the drum was to be returned to Manyame Air Base. He added that the appellant was not telling the truth when he said he did not know that there was a leaking drum at the station.

Fifthly, there was the evidence given by Squadron Leader Chabata (“Chabata”), a pilot, which was as follows. He knew that there was a leaking drum of Jet A1 fuel at the police station, and when the appellant arrived at the station on 25 February 2001 he informed him about it. He denied having authorised the appellant to give the drum to Tapfumaneyi or Tapfumaneyi’s brother-in-law, Mugari. This witness was not cross-examined by counsel for the appellant. His evidence was, therefore, not challenged.

Sixthly, there was Mugari’s evidence which was as follows. On 25 February 2001 he met Tapfumaneyi at Muzarabani Shopping Centre. Tapfumaneyi was with Moyo and both men were drinking some beer. Shortly thereafter, the appellant and Mandivenga arrived. Tapfumaneyi then asked the appellant if he (i.e. the appellant) could let Mugari take the leaking drum as the fuel was no longer fit for use by aircraft, but could be used for domestic purposes. The appellant’s reply was in the affirmative. The appellant then took Mugari to a spot about three metres away and informed him that he required payment of the sum of \$3 000 before he could release the drum to him. Mugari agreed to pay.

However, as Mugari only had \$1 500 he contacted Chaparira who contributed the sum of \$1 500 towards the purchase of the drum on the understanding that she would be entitled to half of the fuel. Shortly thereafter, Mugari paid the sum of \$3 000 to the appellant at the police station, and the drum was later delivered to Chaparira's residence.

During cross-examination it was put to Mugari that he was not telling the truth because in a statement which he had made to the police earlier he had stated that the drum had been sold to him by Moyo and Mandivenga and that he had paid the sum of \$3 000 to Mandivenga. In reply Mugari denied that he was lying. He added that he had mentioned Moyo and Mandivenga in error because when the identification parade was held the appellant was not on it but Moyo and Mandivenga were. He maintained that the truth was that the money was paid to the appellant and the drum was delivered by Mandivenga.

Finally, there was Chaparira's evidence which was as follows. On the day in question Mugari came to her residence and informed her that there was fuel which was not fit for use by aircraft and which was being sold by AFZ employees for \$3 000. He asked her to pay half of the purchase price on the understanding that they would share the fuel equally. She agreed and paid the sum of \$1 500. The drum of fuel was later delivered to her residence.

It is clear from the above evidence that the appellant lied when he said that he knew nothing about the leaking drum. On the contrary, the evidence established beyond reasonable doubt that he was informed about the drum and that,

having put it on the lorry, he undertook to return it to Manyame Air Base, which he did not do. Instead, he unlawfully appropriated it with the intention of permanently depriving the State of its property. The drum could not have been released and delivered to Mugari without the appellant's authorisation because it was the appellant who had full control over it, and not Moyo or Mandivenga.

Whilst it is true that in his evidence Mugari contradicted his earlier statement, I do not think that the contradiction has great significance because it does not detract from the rest of the evidence which established beyond reasonable doubt that the appellant, who had complete control over the drum, unlawfully appropriated it with the intention of depriving the State of its property. In the circumstances, the appellant was properly convicted.

I now deal briefly with the appeal against sentence. It was submitted on behalf of the appellant that the sentence imposed upon him was manifestly excessive. I respectfully disagree with that submission.

It has been stated by this Court in a number of previous cases that theft of property belonging to the State by people employed by the State is viewed seriously and that in such cases deterrent sentences are called for. In the present case, the appellant was the person in complete control of the property in question and occupied a position of trust. His conduct constituted a serious breach of that trust and deserved appropriate punishment.

Whilst I agree that the sentence imposed upon the appellant is a severe one, I do not think that it is so severe that it induces a sense of shock. There is, therefore, no basis for interfering with the sentence.

In the circumstances, the appeal against conviction and sentence is devoid of merit and is, therefore, dismissed.

CHEDA JA: I agree

ZIYAMBI JA: I agree

Tizirai-Chapwanya & Mabukwa, appellant's legal practitioners