CRIM APP 331/01

JOHN ZACHARIA
versus
THE STATE

HIGH COURT OF ZIMBABWE
GARWE JP and CHINHENGO J
HARARE 15 November 2001 and 23 January 2002

Mabuye, for the appellant
R.K. Tokwe, for the respondent

CHINHENGO J: The appellant was employed by Mashonaland Cooperative Hardware Stores (Mashco) as a depot supervisor at Kotwa in Mudzi. On 11 June 2001 he was arraigned before the magistrates court at Mtoko on 27 counts of fraud. He was not legally represented at his trial. He pleaded guilty to all the twenty seven counts and all counts being treated as one for sentence, was sentenced to thirty months imprisonment of which ten months were suspended on condition of good behaviour and a further ten months on condition of restitution. He appealed to this court against both conviction and sentence.

The first ground of appeal against conviction was that the trial magistrate misdirected himself "in that the several thefts from different persons were treated as several different offences when in substance it (sic) was one criminal offence and should have been charged as one offence". This, it was argued, amounted to an improper splitting of charges. The second ground of appeal against conviction was that the appellant's "uncorroborated statement … is not proof *aliunde* of the commission of the offence for basing a conviction".

The appeal against sentence was based on two grounds:

first that the magistrate failed to consider community service as an appropriate punishment and, second, that in arriving at the sentence, he ignored the fall in the value of the Zimbabwean dollar.

In the notice of appeal several cases were cited in support of the grounds of appeal. Further authorities were referred to in the heads of argument. I will refer only to *S v Jabulani* 1982 (2) ZLR 213 which was cited for the proposition that there was an improper slitting of charges.

In *S v Jabulani supra)*, the accused pleaded guilty to one count of theft by false pretences, six counts of forgery and six counts of uttering. The facts were that he pretended to be a school teacher who was entitled or authorised to collect other teachers' pay cheques. He collected six cheques and took them to the bank. With the assistance of another teacher there at the bank, he encashed the cheques and converted the money to his own use. The theft charge related to the theft of the six cheques from the school official. The six charges of forgery related to his signing the names of the payees and the uttering charges related to the cashing of the cheques so forged. McNALLY J (as he then was) referred to *R v Peterson & Ors* 1970 (1) RLR 49 at 53B-F; *Gordon v R* 1909 EDC 254 at 268-9; *S v Mutawara* 1973 (1) RLR 292 at 296 and to *S v Grobler & Anor* 1966 (1) SA 507 (AD) at 523. He then stated at 215H-216C as follows –

> "I now return to the facts of the present case. It seems to me to be abundantly, clear that there was one dominant purpose in the mind of the accused and that was to steal the proceeds of the six pay cheques. In order to steal the proceeds he had first to acquire the cheques from the school official, second to forge the payee's endorsement (and, for some unknown reason, Gondo's as well) and third to utter the cheques to the bank.
>
> In my view therefore he should have been charged with the overall offence of theft by false pretences of the proceeds of the cheques from the bank. Since he was not so charged, there is no objection to his being convicted on 6 counts of forgery and six counts of uttering (Cf *R v Hymans* 1927 AD 35). But to charge him, on top of that, with the theft of six cheques from the school official has brought about a

duplication which has prejudiced the accused.

I am satisfied that, whatsoever test one applies, the "theft" of the cheques themselves from the school official should not have been charged separately. That "theft" was merely a step in the achievement of the dominant purpose."

Quite clearly the application of the dominant purpose test was fully justified on the facts of this case. There are basically two tests as to whether there has been an improper splitting of charges or a duplication of convictions.

There is the single intent or continuous transaction test and the same evidence or dominant intent test. McNALLY J applied the dominant intent test. This test means that where the accused performs a series of acts or more than one act which standing alone would constitute an offence but which are a necessary adjunct or necessarily incidental to the commission of the offence which he intends to commit then the accused should be charged of one offence. In my view the dominant purpose test is not related to the accused's intention as regards the one act in the literal sense so as to say that a person who, for example, steals from three people different kinds of property at different times should be charged with one count of theft. Rather it relates to the intention of the accused person as he performs the several acts which are logically and intrinsically connected to the one offence which he then commits. Although in *Gordon's* case, *supra,* KOTZE JP said that –

"it is difficult, if not impossible, in view of the decided cases, to lay down a hard and fast rule which will apply with fitness in every case",

it is quite possible and in fact easy, to apply the rule in many cases and exclude them from its ambit.

The difficulty which may have led the court to move in the wrong direction in this case may have originated from the facts which were not at all clear. In paragraph 3 of the outline of the State case it is stated as follows –

"3. On various dates shown on Column One of the

> Schedule to the indictment, the accused person would receive cash from customers who would have bought Hardware from Mascho – as on receipts with serial numbers as shown on column two of the Schedule to the indictment charging them sales tax.
>
> Later when the customer would have gone the accused person would alter the sales tax portion and total portion on the receipts with serial numbers and tax exemption numbers purporting as if sales tax was not charged and would convert the sales tax money with the amounts shown on column three to the indictment, to his own use."

It is apparent that these facts do not make it clear whether the accused made the alterations each time a customer had paid and left or whether he would make the alterations at one sitting at the end of the day or at the end of the month or whether he did so at the end of the whole period concerned. If the accused made the alterations at one sitting at the end of the entire period then there would be an improper splitting of the charges. But if he did so at the end of the day or at the end of the month then there would be no splitting of the charges in the first case but there would be some splitting of the charges in the second case and the number of counts would have to be reduced to align them with the number of months.

The facts as given in the outline of the State case are not clear enough to assist the court in deciding whether there has been a duplication of convictions. Thus on the facts as they are there could well have been a splitting of the charges or a duplication of convictions. I prefer the use of the phrase "duplication of convictions" because it more clearly expresses the concern of the courts about this problem. The concern of the courts is with the conviction, *in specie,* i.e. the duplication of convictions which prejudices or is potentially prejudicial to the

accused. The concern whether the criminal conduct is in reality a single conviction is aimed at avoiding prejudice to the accused where the duplication of convictions arises. If no prejudice is occasioned to the accused, then the question whether or not there has been a duplication of convictions becomes one of little or no consequence. The prejudice to the accused may be avoided by treating all the separate counts as one for the purposes of sentence. In*R v Makanza & Ors* 1969 (1) RLR 97 BEADLE CJ approved of this proposition when he said that –

> "Many magistrates … treat all counts arising out of the same transaction as one for the purposes of sentence, and the sentence ultimately imposed is generally one appropriate to the most serious of the charges with which the accused is charged … I commend this approach, and if it were universally adopted, much of the objection to multiple charges would disappear."

This statement emphasises the point that the courts' concern with the splitting of charges is the likely result that the accused will be prejudiced. I do not however think that if the number of counts is large and the magistrate is affected by their number in assessing the sentence that the objection would quite disappear. But if in every case the judicial officer properly applied his mind to the sentence which he imposes the prejudice will indeed disappear.

In practice and in the majority of cases judicial officers do assess sentence after a careful analysis of the gravity of the overall offence and in this way they eliminate any prejudice to the accused. In the present case the magistrate treated all the twenty seven counts as one for the purposes of sentence. If the factual position had been that the appellant altered the invoices at one sitting at the end of each month and then submitted the invoices so altered to his head office then he should have been charged with six counts and not twenty seven counts. The magistrate however cured the prejudice that may have

arisen from a splitting of the charges by treating all the twenty seven counts as one for the purpose of sentence. He was guided not by the number of counts but by the overall prejudice caused to the complainant. I am therefore satisfied that the magistrate eliminated any prejudice that may have been occasioned to the appellant by basing his sentence on the overall prejudice caused to the employer i.e. $68 524,56 and not on the number of counts. The conviction of the appellant cannot therefore be attacked on the basis that there was a splitting of charges.

The second ground on which the conviction is attacked has no validity. The appellant, though not legally presented, pleaded guilty to the charge of theft. There is no suggestion that his plea was misconceived. He admitted the facts and there was, in my view, no need for other evidence to be adduced to establish his guilty. The conviction cannot therefore be set aside on that basis.

The grounds of appeal against sentence were framed without due regard to the principles on which an appeal court operates. It does not simply operate on the basis that the sentence imposed appears to be or is indeed severe and should therefore be set aside. An appeal court does not lightly interfere with the sentencing discretion of a judicial officer in the lower court. There must be a misdirection which warrants the setting aside of the sentence. The sentence must also be so severe as to induce a sense of shock – see *S v Ramushu* SC 75/94. The appellant was employed in a very senior capacity. He planned the offence meticulously. His offence is a typical white collar offence which is often difficult to detect. He betrayed the trust reposed in him and prejudiced his employer of thousands of dollars. I am not persuaded that the sentence imposed is at all so excessive as to induce a sense of shock. The appeal against sentence must also fail.

Accordingly the appeal is dismissed.

Garwe JP agrees.

Mabuye & Company, appellant's legal practitioners.
Attorney General, respondent's legal practitioners.