

KETIAS ZINGUNZI
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE AND MAVANGIRA JJ
HARARE, 19 March and 10 April 2013

Criminal Appeal

R. Muchirewesi, for the appellant
S. Fero, for the respondent

MAVANGIRA J: The appellant was arraigned before the Magistrates' Court sitting at Harare on the following charges. Firstly, 66 counts of theft as defined in s 113(2)(c) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*] alternatively theft as defined in s 113(2)(d) of the same Act. Secondly, 73 counts of fraud. He was convicted after a lengthy trial of 66 counts of theft and of 70 counts of fraud. He was found not guilty and acquitted on the alternative charge of theft. He was sentenced as follows. All the theft counts were taken as one for purposes of sentence and he was sentenced to 2 years imprisonment. All the fraud counts were taken as one for purposes of sentence and he was sentenced to 7 years imprisonment. Of the combined total of 4 years imprisonment, 2 years imprisonment was suspended for 5 years on condition of future good conduct. A further 1 ½ years imprisonment was suspended on condition of payment of restitution. The resultant effective term of imprisonment was thus for a period of 6 months.

The appellant has now appealed to this court against both conviction and sentence.

In heads of argument filed on behalf of the respondent it is submitted that it is an essential element of the offence of fraud that actual or potential prejudice on the part of some person ensues as a result of the misrepresentation and that in *casu*, it remains unclear how the complainant company was prejudiced. It is submitted that for that reason it was unsafe for the court *a quo* to convict the appellant of fraud under the circumstances. It is further submitted that in light of this concession this court should, in addition to setting aside the conviction, also set aside the sentence in respect of the conviction for fraud.

On a consideration of the evidence on record the concession by the respondent's counsel is in my view, properly made. The conviction and sentence in respect of the fraud charge will consequently both be set aside.

The respondent's counsel has also submitted both in heads of argument and in oral submissions before the court, that the conviction in respect of the theft charge was proper and does not warrant interference by this court. Furthermore, that while a short sharp custodial sentence was proper in the circumstances the theft involved breach of trust on the part of the appellant, nevertheless the quantum of restitution will have to be adjusted in view of the concession relating to the fraud charges.

The appellant was employed by Aviation Ground Services as head of Finance and Administration. He was entrusted as the custodian of the company's petty cash and was to ensure that the petty cash was used for authorised company expenses and authorised staff loans only. The appellant engaged in a series of unauthorised money advancements for himself. Most of the monies that he borrowed were for personal use including but not limited to issues like DSTV payments, kitchen refurbishments, medical fees, fuel. The appellant accessed these monies from the petty cash float without authorisation. The Managing Director's evidence was that he did not authorise these borrowings by the accused. It is not necessary to regurgitate his evidence relating to the respective borrowings by the appellant, suffice to say that his evidence reads well and was believed by the trial court. The appellant's conduct falls within that conduct criminalised in s 113(2)(c) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. The appellant's claim that he reimbursed part of the money borrowed does not absolve him from criminal liability.

The appellant was aware that any money taken from the petty cash float had to be authorised. Furthermore, that for any borrowings by him such authorisation was to be from the Managing Director. Regardless of this he proceeded and without such authorisation, accessed the cash on the 66 occasion forming the basis of this charge. Section 113(2)(c) of the Act provides as follows:-

- “(2) Subject to subs (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 intentionally
- (a)
 - (b)
 - (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.
 - (d)

On a perusal of the record of proceedings the learned trial magistrate was justified in convicting the appellant, as he did, of theft as defined in s 113(2)(c) of the Act. The conviction warrants no interference by this court.

As stated earlier the conviction and sentence of 2 years imprisonment imposed in respect of the 73 counts of fraud cannot stand. The conviction is set aside. The sentence is also set aside.

On the conviction for the 66 counts of theft for which the appellant was properly convicted, he was sentenced to 2 years imprisonment. The trial court had however, proceeded to deal with the sentence for these counts as well as the sentence that he had imposed for the fraud counts. Of the combined total of 4 years imprisonment the trial court had proceeded to suspend 2 years imprisonment on condition of future good conduct. A further 1^{1/2} years was suspended on condition of restitution in the amount of \$18 388. The effective sentence was a term of 6 months imprisonment.

From a perusal of the record the 66 counts of theft totalled US\$15 701 whilst the 70 fraud counts totalled US\$10 950. From the total of US\$26 651 an amount of US\$8 263 was recovered. If the \$10 950 for the fraud counts is deducted from the US\$18 388 that he had been ordered to retribute, the total outstanding amount will be US\$7 438-00. The sentence that this court will substitute for the lower court's will thus reflect this calculation that has been necessitated by the setting aside of both the conviction and the sentence on the fraud counts.

The appellant is a 52 year old first offender. In his reasons for sentence the learned trial magistrate rightly stated that the appropriate punishment in the circumstances of this matter can safely be scaled down to the minimum necessary, serving the interests of the accused, society and justice. The reasons for the sentence that he imposed are well set out in the record of proceedings. What has now changed for purposes of this appeal is the fact that the conviction for the fraud charges has been set aside and is no longer of relevance in the determination of a proper sentence. The trial magistrate had properly and justifiably suspended a substantial portion of the combined custodial sentence on condition of good behaviour. A greater portion of the remaining term was also suspended on condition of restitution and the learned trial magistrate thereby achieved the aim of scaling down to the minimum necessary the effective custodial term that the appellant was to serve. That minimum necessary, in the circumstances facing the trial magistrate was an effective 6 months imprisonment. With the setting aside of the fraud conviction and sentence the said

effective term of imprisonment cannot stand. It appears however, that suspension of the whole of the remainder on condition of restitution would not only encourage the appellant to retribute the complainant but would also act as a personal deterrent on the 52 year old appellant who is a first offender and who, from the record of proceedings suffers from hypertension which has apparently been worsened by stress and the criminal charges for which he has been convicted.

In the result the sentence of the court *a quo* is hereby set aside and substituted with the following:-

“All counts of theft taken as one for purposes of sentence – 2 years imprisonment, of which 1 ½ years is suspended for 5 years on condition that during that period the accused does not commit an offence involving dishonesty or breach of trust, for which upon conviction he is sentenced to imprisonment without the option of a fine. The remaining 6 months imprisonment is suspended on condition the accused restitutes US\$7 438 to the complainant company, (Aviation Ground Services) through the clerk of Court, Harare by 4 pm on 31 May 2013”.

HUNGWE J: agrees