CHARITY NDHLOVU
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIWESHE JP & HUNGWE J
HARARE, 1 October 2015 & 18 May 2016

Criminal Appeal

C Daitai, for the appellant
E Mavuto, for the respondent

HUNGWE J: The appellant was found guilty of theft of trust property as defined in s 113 (2) of the Criminal Law (Codification and Reform) Act, *[Chapter 9:23];* ("the Criminal Law Code"). The circumstances leading to the conviction and sentence can be summed up as follows:

The appellant was employed as an accounts clerk by the complainant, the Zimbabwe Open University. On the day of the alleged offence, 15 August 2014, she had receipted an amount of US$832, 00 on her employer's behalf during the course of her duty. She was due to begin her leave on 18 August 2014 therefore she would not be available to do her regular banking on Monday 18 August 2014. Her version of the events immediately prior to her departure is that she had placed the money inside a cash box and alerted her workmate of this fact, reminding her that she had prepared the bank deposit slip so that it is banked as usual. She states that she had placed the cash box inside the safe before logging off in the manager's office. According to her, one Zuwai Shumba remained inside the cash office. Zuwai Shumba would in the circumstances have access to both the cash box keys as well as the cash office keys. The appellant claims that she had physically handed over to Zuwai the cash box keys before announcing that she had prepared the banking paperwork and was leaving. She maintained that she had complied with all the office procedures in respect of cash handling. She denied stealing the cash box with the cash inside as the box would have been noticed upon her exit.

The above version was rejected by the trial court which held that the state had proved its case beyond a reasonable doubt. She was convicted of theft and sentenced to 7 months imprisonment which was suspended on appropriate conditions including making restitution to her employer. The thrust of all the four grounds of appeal stating that the court *a quo* erred in disbelieving the appellant.

The first ground advanced on appellant's behalf is that the court erred in finding that the appellant failed to account for the money and the cash box yet she had indicated to the court that she had placed both the items inside the safe; an averment which was not disputed by the state witnesses.

The second ground of appeal was that the court erred in finding that the only reasonable inference that can be drawn from the proved facts was that the appellant stole the money.

The third ground advanced on appellant's behalf is that the court misdirected itself by relying on circumstantial evidence without finding that the appellant's explanation was beyond doubt false. The contention on behalf of the appellant was that her explanation was not disputed by the State witnesses.

Finally, it was contended on appellant's behalf that the court erred in relying solely on the alleged flouting of cash handling procedures by the appellant as the basis of convicting the appellant for theft of trust property.

The two state witnesses upon whose testimony the state case was built described the events which occurred immediately before the appellant left her workstation on the day. She was proceeding on vacation. Zuwai Shumba's evidence went to show that the appellant spoke to her indicating that she had prepared a deposit slip which one Gracious would use to make a deposit at the bank on Monday. After completing her own cash and book reconciliation the witness had locked away her takings into a safe, presumably the same one which the appellant claimed she had left her cash box and cash for Monday banking. She did not check whether appellant's cash box was there or not. However, when she opened the safe to formalise the bank procedures she noticed that appellant's cash box together with the cash were not in the safe. When she enquired with the appellant where her cash box could be, the appellant expressed surprise and asked her to check under her desk. According to Zuwai the procedure when one of their team was proceeding on vacation was for the incumbent proceeding on vacation to do a reconciliation formal reconciliation of the book entries with that cash on hand with the person taking over the duties of the one proceeding on leave. That

person would have to hand over the cash deposit book as well as the keys to the cash box with a specified person. At the time, the appellant was working with an intern called Gracious besides herself and the manager, Kachambwa as well as the acting finance director one Shoko. Keys to the safe are left overnight with Kachambwa but the office door keys are left in the custody of a different person, the accountant. When she reported for duty on the Monday she obtained the keys from these individuals and opened the office door and then the safe. She noticed that her cash box was there but not that of the appellant.

She reported her findings to the person who conducts daily cash checks that appellant's cash box was missing. When she sent a short message service to the appellant advising of the discovery, the appellant asked her to check for the cash box under the appellant's desk!

Tambaoga Kachambwa's evidence established the laid down procedures for cash handling. It is not disputed that the appellant did not adhere to these. There are regulations which govern these matters at the appellant's workplace. She has an impressive record in the banking sector. It is against this background that the court *a quo* rejected her explanation as undoubtedly false. It preferred the evidence of the two state witnesses. There is no doubt that the witnesses do not for once aver that they saw the appellant make away with money. All they depose to are the events before and after the discovery of the offence. It amounts to this: Appellant said something about how she had dealt with the money in preparation for the banking in her absence. No-one could confirm that in fact the appellant placed the cash box inside the safe. It is not a correct statement of fact that no-one disputed appellant's version. The definition section of the offence under which the appellant was charged reads:

> Section 112 of the Criminal Law Code provides;
>
> **"112 Interpretation in Part I of Chapter VI**
>
> In this Part-
>
> 'property capable of being stolen' means any movable corporeal thing or object, or any incorporeal right vested in a person relating to movable or immovable property, and:-
>
> (*a*) includes:-
>
> (i) money, whether in the form of cash, specific notes or coins, an entry in an account or other abstract sum of money or claim to be paid an amount of money; and
>
> (ii) shares in any business undertaking;
>
> (iii) the following incorporeal things in so far as they may be illegally tapped or diverted from their intended destination;
>
> A. electricity; and
>
> B. electromagnetic waves emitted by a telecommunications or broadcasting system;

…

"trust property" means property held, whether under a deed of trust or by agreement or under any enactment, on terms requiring the holder to do any or all of the following:-

(*a*) hold the property on behalf of another person or account for it to another person; or

(*b*) hand the property over to a specific person; or

(*c*) deal with the property in a particular way;

but does not include property received on terms expressly or impliedly stipulating that:-

(i) the recipient is entitled to use the property as his or her own; and

(ii) there would only be a debtor and creditor relationship between the parties;"

If the point that the money appellant admits having received on her employer's behalf is indeed trust property, then the appellant does have more that an explanation to make. I make this observation for the following reasons.

First, the appellant knew the applicable procedures regarding the handling of cash, not less by virtue of being an employee, but more because of her daily duties involving putting into practice the well-known procedural requirements. She gave the impression that she counted her cash, folded it up neatly and placed it in a cash box which she took and placed inside a safe with an instruction to her colleague that Gracious was to do the banking on Monday. She left without properly handing the cash to her colleagues. That alone does not suggest that she appropriated the money in question but when one reads into all this the legal prompting in s 112 of the Criminal Law Code, the inference becomes so irresistibly strong that only the appellant could account for the missing money.

The appellant received the cash in the course of her duties. She therefore received the money in trust as she received it for the purposes of dealing with it in a particular way. The manner in which she was expected to deal with it was described to the trial court by her boss, Tambaoga Kachambwa. The appellant dealt with the money in some other way than authorised. Only she can say how she dealt with it.

The appellant contends that there are other possible inferences to be drawn from the proven facts. As such, she must gain the benefit of the doubt as to whether she stole the money or not. I am unable to agree with that reasoning. Proof beyond reasonable doubt does not mean proof beyond any doubt. Rather it means that a threshold of proof would have been reached if in answer to whether it is possible that someone else took the money and a reasonable person fully appraised of the facts of the matter answers with the proverbial: "Of course it is possible but not in the least probable!"

It also follows from the fact that the onus rests on the State to prove the guilt of an accused beyond reasonable doubt that no onus rests on the accused to prove his or her innocence. See *S* v *Mhlongo* 1991 (2) SA 207 (A), at 210d-f; *R* v *Hlongwane* 1959 (3) SA 337 (A), at 340H. In order to be acquitted, the version of an accused need only be reasonably possibly true. The position was set out thus by Nugent J in *S* v *Van der Meyden* 1999 (1) SACR 447 (W), at 448f-g:

> "The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, *R* v *Difford* 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other."

Much the same point was made by Zulman JA in *S* v…… 2000 (1) SACR 453 (SCA) (SCA), at para 3 (i) when he stated:

> "It is trite that there is no obligation upon an accused person, where the State bears the onus, "to convince the court". If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true."

In *S* v *Makanyanga* 1996 (2) ZLR 231 this court stated the same point thus:

> "A conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of a criminal complaint, but the fact that such credence is given to testimony for the State does not mean that conviction must necessarily ensue. Similarly, the mere failure of the accused to win the faith of the bench does not disqualify him from an F acquittal. Proof beyond a reasonable doubt demands more than that a complainant should be believed and the accused disbelieved. It demands that a defence succeeds wherever it appears reasonably possible that it might be true."

The State filed a concession in terms of s 35 of the High Court Act, [*Chapter 7:06*]. In the Notice a concession is made that the conviction is unsafe. The reason given for the concession is that the court a quo relied solely on the fact that the appellant flouted cash handling procedures. The further reason given is that there was no proof that the appellant took the money. It is also alleged that the court failed to apply the law regarding circumstantial evidence.

Circumstantial evidence is more complex. A witness did not see the act constituting the crime charged. As an example, a witness did see the defendant go into the house carrying a knife. That witness heard a scream inside the house and saw the accused run out, not carrying the knife. The victim is later found inside with a knife in her back. A reasonable inference is that the defendant stabbed the victim. Whether that fact is true will determine if the defendant is guilty.

Circumstantial evidence is direct evidence of a fact which reasonably infers the existence or nonexistence of another fact. Circumstantial evidence is not direct observation of a fact that is in dispute. In the stabbing above, no one saw the victim being stabbed, and the accused said he did not do it, but the eye witness saw things that led to the conclusion that the man running out of the house stabbed the victim. The witness' testimony is circumstantial evidence of the defendant's guilt.

Circumstantial evidence is a collection of facts that, when considered together, can be used to infer a conclusion about something unknown. Circumstantial evidence is used to support a theory of a sequence of events. The sum total of multiple pieces of corroborating evidence, each piece being circumstantial alone, build an argument to support how a particular event happened. In *R* v *Sibanda & Ors* 1965 RLR 363 (A) at 370 A-C; 1965 (4) SA 241 at 246B-C Beadle CJ put the matter in the following terms;

> "Generally speaking, when a large number of facts, taken together, point to the guilt of an accused, it is not necessary that each fact should be taken in isolation and its existence proved beyond a reasonable doubt, it is sufficient if there are reasonable grounds for taking these facts into consideration and all the facts, taken together, prove the guilt of the accused beyond reasonable doubt: See *R* v *de Villiers* (1944 AD 493). Where, however, there is a particularly vital fact which in itself determines the guilt of an accused, it must be proved beyond reasonable doubt."

Dealing with the element of taking first, it must have escaped counsel for the State that by accepting and receipting the money, the appellant took into her possession the subject matter of the charge. She was then obliged to deal with it in a particular way as outlined by her boss, Kachambwa. She does not dispute it. That the procedure exists is not open to doubt. Zuwai Shumba confirmed this same procedure. If that is so it became her obligation to account for what she received on behalf of her employer. Her account is that she placed the money inside a cash box which in turn she left inside the safe. No-one observed her place the cash box inside the safe. Not that it is a basis for drawing the inference that she did not do so

but it adds to the strands of suspicion pointing in her direction as being less than truthful. Curiously Zuwai's cash box remained when hers disappeared. Going away on vacation is no basis to suspect the appellant of appropriating money to herself but if that is then taken together with her failure to physically undertake a proper case hand-over take-over, then the inference that she must be the one is inexorably made stronger to a point where one must say of course all that she claims occurred is possible but not in the least probable. When she is informed that her cash box cannot be found in the safe she urges Zuwai to check under appellant's desk. She does not indicate, with conviction, that the cash box was stolen from the safe where she placed it. Further, she did not hand over the key to the cash box to her workmates. It was found in her drawer on the Monday following. All these facts, though separately innocent, do cumulatively in our view, point to her guilt rather than her innocence.

These single strands, which taken separately do not amount to any *facta probanda* pointing towards the guilt of the appellant but do inexorably point to the appellant and only her as the person who committed the offence.

In light of the above we were unable to find any basis for disturbing the magistrates finding regarding appellant's guilt. Consequently the appeal against conviction be and is hereby dismissed.

CHIWESHE JP: agrees.

Magwaliba & Kwirira, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners