TEDIOUS DULI
and
TRY MANYAMA
and
THE STATE

IN THE HIGH COURT OF ZIMBABWE
HUNGWE AND BERE JJ
HARARE, 6 August 2015 & 30 August 2017

Criminal appeal

Mr *S Chako*, for the appellants
Mr *R Chikosha*, for the respondent

BERE J: After a protracted trial the two appellants were convicted of theft as defined in s 113 (1) (a) and (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The appellants were each sentenced to 30 months imprisonment of which 6 months were suspended for 5 years on the usual conditions of good behaviour. A further 12 months were suspended on condition the appellants restitute complainant leaving each of the appellants with an effective prison term of 12 months.

The appellants have now appealed to this court against both conviction and sentence.

The grounds of appeal against conviction are that the learned magistrate misdirected herself by returning guilty verdicts in circumstance where the guilt of the appellants was not proved beyond a reasonable doubt.

Secondly, the learned trial magistrate was said to have erred and misdirected herself by relying on circumstances where several other reasonable inferences could be drawn from the same facts.

Finally, the learned magistrate was said to have erred and misdirected herself by disbelieving the appellants' version of events in circumstances where their stories were reasonably possibly true which pointed to their acquittal.

As regards sentence, the attack against the lower court was that the court did not pay sufficient attention to the factors in mitigation and that there was no serious attempt made by the court to consider the imposition of community service as an alternative to imprisonment. The respondent opposed the appeal in its entirety and sought to support both the conviction and sentence.

I propose to deal with the appeal against conviction and as should always be the case, one must consider the judgment of the court *a quo* against the evidence to see whether or not the appeal is merited.

A fair reading of the learned magistrates' judgment shows that the magistrate fairly applied her mind to the issues that were presented to her for determination.

Most of the issues were common cause and in particular the fact that the first appellant was employed by the complainant company as a sales representative whilst the second appellant was employed as a stores clerk with virtually sole custody of the keys to the storeroom and warehouse where the goods forming the subject matter of the proceedings were housed and distributed from. All returns were to be equally deposited with the second appellant and appropriate documentation compiled to enhance transparency and accountability.

It was also not in dispute that no person other than the second appellant had access to the goods and that the normal procedure was that when the second appellant took out goods for sale from the company premises he would obtain managerial authorization before handing them over to the first appellant.

The lower court correctly found out that on the thirteen counts which both appellants were facing, the second appellant had taken the goods and gave them to the first appellant without authorization from his manager. In all these thirteen counts in issue there were no corresponding Goods Returned Vouchers (GRVs) to show that the goods had been returned to the company as alleged by the appellants.

The appellants knew the procedure to be followed when goods were returned to the company. The appellants had no reasonable explanation as to why they did not adhere to company procedure. In my view it is idle reasoning to argue that on all the thirteen separate occasions the appellants just "failed" (as argued by their counsel in this appeal) or forgot to fill in the appropriate documentation. The learned magistrate, having taken all the factors into

consideration reasoned and concluded that this was a deliberate act of connivance by the two appellants to cover up their theft. It was a sound finding. To me this is the only reasonable inference in the circumstances of this case. If this position is taken (as it should be), then the question of stock taking not having been done is neither here nor there. The goods could not have been returned without the necessary paper work.

The first appellant was paid on commission and it was in his interest to maintain a proper record of his sales and returns. This appellant must not have been believed when he tried to argue that sometimes his sales would not be officially acknowledged by the accounts clerk. The legal position on conviction by circumstantial evidence is well settled. The case of *R* v *Blom*[1] lays the foundational principles of our law. See also *S* v *Marange and Others*[2].

In essence the inference sought to be drawn must be consistent with all the proved facts and these proved facts should be able to exclude every other reasonable inference save for the one sought to be drawn from them.

The established facts upon which the learned magistrate established guilt of the appellants can be briefly summarized as follows:

Both the appellants were employed by the complainant company with the first appellant as salesman whilst the second appellant worked as stores clerk. In all the thirteen counts in issue the two took the goods out of the company premises with no authorization from management. There were no corresponding "Goods Returned Vouchers" to confirm that indeed the goods had been returned as argued by the appellants. In all the thirteen counts no money was remitted to the company in respect of the sales.

There is no inference that the court could have made other than that which it made pointing to the guilt of the appellants. The conviction of the appellant cannot be disturbed.

Let me deal with the issue of sentence.

The reasons for sentence are stated on record page 20 and with respect to the learned magistrate, the way the evidence in mitigation is summarized does not suggest that serious

[1] . 1939 AD 188
[2] . 1991 (1) ZLR 244 (S)

thought was given to the submissions made on behalf of the appellants in mitigation of sentence. The only factors which are well laid out are with regards to aggravation.

Accepted, these offences are serious and I would not agree more with the views expressed by REYNOLDS J in *State* v *Munyoro* when he stated as follows:

> "It must be made clear, however that in normal circumstances, even where first offenders are involved, persons in the position of the appellant will not be dealt with leniently. To steal from an employer is an abuse of trust that flows from the special relationship of employer and employee."[3]

I also recognize the accepted position that the appeal court must be slow to interfere with the sentencing discretion of the lower court. In this regard HOLMES JA, in *S* v *de Lager and Another*[4] had this to say:

> "--- it would not appear to be sufficiently recognized that a Court of appeal does not have general discretion to ameliorate the sentence of trial courts. The matter is governed by principle. It is the trial Court which has the discretion and Court of appeal cannot interfere unless the discretion was not judicially exercised, ---- or is so severe that no reasonable court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say if there a striking disparity between the sentence passed and that which the Court of appeal would have imposed."[5]

I have already commented on the shortcomings of the reasons in mitigation of sentence as captured by the court *a quo*.

Apart from this, I am also concerned with what strikes me as lack of serious effort by the learned magistrate to consider the imposition of community service particularly given the fact that she had settled for a sentence falling within the community service grid.

In my view it was clearly not sufficient for the learned magistrate to disregard community service by stating as she did as follows:

> "All non-custodial sentences will trivialize this offence."

That dismissive approach does not seem to sit well with the current way of looking at community service which among other things calls for a proper inquiry into it before it can be found to be inappropriate.

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[3]. HH 28/89 at page 2
[4]. 1965 (2) SA 616
[5] .at 628H-629A

In this regard, this court remains at large on the aspect of sentence. We think community service would have been appropriate as opposed to an effective term of imprisonment of 12 months.

Consequently that portion of imprisonment is set aside and the matter is remitted to the trial magistrate to carry out the appropriate enquiry to pave way for the imposition of community service in place of 12 months imprisonment.

To this extent the appeal against sentence succeeds but the appeal against conviction is dismissed.

HUNGWE J agrees…….

Mushangwe and Company, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners