

**THANDO DUBE**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA AND NDOU JJ  
BULAWAYO 8 FEBRUARY AND 20 MAY 2010

*E Mashindi and M Dube* for the appellant  
*T Makoni* for the respondent

Criminal Appeal

**NDOU J:** After hearing both counsel we dismissed the appeal in its entirety and indicated that our reasons for doing so will follow. These are they.

The background facts are the following. The appellant was an employee of the National Railways of Zimbabwe ('the NRZ') at the time of the offence. He was a train conductor. The appellant was aged 50 years at the time of the conviction. The appellant was convicted by a Hwange magistrate of five (5) counts of theft. All counts were treated as one for the purpose of sentence and he was sentenced to a term of three (3) months imprisonment which was wholly suspended for a period of five (5) years on condition of good future behavior.

On the fateful day i.e. 10 December 2006 in the evening the appellant was executing his duties in the Bulawayo-Victoria Falls passenger train. In count 1 he was paid \$2 000,00 by one Tapiwa Nyoni being fare to travel from Bulawayo to Hwange. The appellant pocketed the said amount and did not issue a ticket to Tapiwa Nyoni. All this is common cause.

In count 2, on the same date and on the same train journey, the appellant also received \$3 000,00 from a passenger Tafadzwa Dube as fare to travel from Bulawayo to Hwange. Likewise, Tafadzwa Dube was not issued with a ticket. In counts 3 to 5, in the same journey, the appellant was approached by Edna Ncube in the company of Primrose Vandal and Mary Yunda Yunda. All three requested an upgrade from the economy class to first class. From each of the three, the appellant received \$4 200,00 for the upgrade. The appellant directed the three to coach number 2089 i.e a first class compartment. For these three amounts the appellant did not issue tickets and he once more pocketed the cash.

These offences came to light when the ticket checker requested tickets from the passengers. All the above-mentioned five passengers indicated that they had paid the fares to

the appellant and he had not issued them with tickets. From the record of proceedings in the court *a quo*, it is clear that on the day in question the appellant was acting as “a train manager supervising the conductors.” He was the man in charge of the conductors. He, therefore, had the freedom to roam the train in the course of his duties. We can assume that in such capacity he was authorized to collect fares on behalf of the NRZ from passengers. State witness Amon Muzhamba shed light on the operations of conductors in the NRZ trains. The appellant, as train manager, was a conductor in the first class and only supervised conductors in the economy class. This in essence would mean that the appellant was not supposed to collect fares in counts 1 and 2. On the other three counts it would seem the appellant was not supposed to collect the fare for the upgrading from economy class to first class. It would have been the job of the conductor in the economy class. This irregular conduct by the appellant does not *per se*, mean that the appellant had the necessary *mens rea* to steal. However, the trial court took this conduct together with non-issuance of tickets by the appellant. The appellant’s explanation that he was going to do reconciliations when the train reached its final destination in Victoria Falls does not make sense either. The appellant has been in the employ of the NRZ from 1989. It can safely be deducted that with such vast experience he appreciated the need to issue tickets to the passengers paying fares. The court *a quo* rightly found that he ought to have known that tickets are issued upon receipt of the cash. In any event the appellant did not even alert the conductors and ticket checkers that he had collected the fares. From the record of proceedings the passengers in count 1 and 2 were in the process of disembarking when it was discovered that they had not been issued with tickets for the fares that they had paid. When tickets were checked from other passengers the offences in counts 3 to 5 were also discovered. The court *a quo* rightly concluded that all these factors taken into account, the state established that the appellant took the fares with dishonest mind. He had no intention of surrendering the cash to the NRZ as the passengers would have disembarked without the tickets being issued. In any event how was he going to remember all these fares and the distances they related to when he arrived in Victoria Falls? The only reasonable explanation from the proven facts is that he pocketed the cash with the intention to convert the same into his own use. There is no possibility of his explanation being true from the proven facts – *R v Difford* 1937 AD at 370. The state proved all the averments necessary to establish his guilt on the five charges of theft – *R v Ndhlovu* 1945 AD 369.

It is for these reasons that we dismissed the appeal against conviction.

Cheda J ..... I agree