

GEORGE MAVENGERE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & MOYO JJ
BULAWAYO 22 OCTOBER 2018

Criminal Appeal

B. Masamvu for the appellant
N. Ndlovu for the respondent

MAKONESE J: The appellant is a former employee of T M Supermarket. He is the former branch manager at the Southwold branch, Bulawayo. The appellant was charged and convicted with the crime of theft of trust property as defined in section 113 (2) (a) of the Criminal Law (Codification and Reform) Act Chapter 9:23. The appellant was sentenced to 60 months imprisonment of which 12 months imprisonment was suspended for 5 years on the normal condition of future good conduct. 24 months imprisonment were suspended on condition appellant restituted complainant a sum of US\$42 415, 70 on or before 11th April 2017.

Aggrieved with both conviction and sentence the appellant has noted an appeal with this court. *Ms Ndlovu*, appearing for the state conceded that she does not support the conviction. We do agree that the concession was properly made.

The brief allegations against the appellant were that he was employed as a branch manager at T M Supermarket Southwold branch, Bulawayo, from 16th June 2012 to 6th June 2013. A stock- take was conducted in July 2013. It revealed that the goods in the shop were not as captured in the system. Some fast moving goods in the system had been falsified using the appellant's code. It was also discovered that some procedures had been flouted by the appellant in respect of goods received. The total prejudice was placed at US\$42 415, 70.

The state alleged that appellant would place orders for various commodities. He would enter the invoices into the system electronically before receipt of the goods. It was contended by the state that these goods were never received by the complainant and that T M Supermarket ended up paying for goods which were not received. It was alleged further, that the appellant raised fictitious and falsified figures to facilitate the cover up. In his defence, the appellant averred that all the goods ordered were delivered and that his password was used to capture stock returns. He further argued that he could not reasonably adhere to set down procedures because there was shortage of staff at his branch. He sometimes performed functions that were not part of his duties. The appellant indicated that he was not a buyer and it was the function of the buyer to order products that are eventually delivered to the shop. The supervisor was supposed to receive the products before they were entered into stock.

The court *a quo*, after considering all the evidence led on behalf of the state and the appellant's defence, convicted the appellant on the charge of theft of trust property as defined in section 113 (2) (a) of the Criminal Code. In convicting the appellant the court held that:

“the only reasonable inference that can be drawn is that it is the accused who intentionally and unlawfully incorrectly accounted for trust property to the complainant's actual prejudice in the sum of US\$42 417,70.”

In her response to the notice of appeal the learned trial magistrate had this to say:

“With regard the conviction, the trial officer stands by the judgment filed of record. In essence the court was satisfied that the state managed to prove beyond reasonable doubt that the accused kept making orders for goods that were in stock. Stock takes done on 5 occasions revealed that the record of goods in the shop did not tally with the record in the system. In the system only the accused's password was used to update the fictitious figures. Evidence before this court is, such employee had his own password.”

The learned magistrate goes on to explain her reasoning by stating that:

“It was further proven to the court's satisfaction, that the accused flouted standard procedure of receiving goods until they were processed for payments. He conducted all the steps on his own contrary to policy ...”

The two main issues for determination by this court are:

- (a) Whether the only reasonable inference drawn was that it was appellant who intentionally and unlawfully caused complainant's prejudice in respect of goods worth US\$42 615,70.
- (b) Whether the charge of contravening section 113 (2) (a) of the Criminal Code was the proper charge under the circumstances and in light of the state outline, summary jurisdiction and evidence led during the trial.

In his grounds of appeal, the appellant raised the first issue. The issue regarding the charge was raised by state counsel. The second issue was belatedly raised by appellant's defence counsel, *Mr Masamvu*, in a notice of amendment filed on 19th October 2018. The appellant mainly dealt with the issue of circumstantial evidence in his heads of argument.

The appellant was charged with theft of property. The charge sheet makes the allegation that during the period 16 June 2012 to 11th May 2013 and at T M Supermarket, Southwold, Bulawayo, the appellant as branch manager as per contract of employment between himself and T M Supermarket Ltd which gave him the overall responsibility for receiving stock, before remitting the proceeds to T M Supermarket omitted to account or accounted incorrectly for the supermarket stock and caused the complainant to suffer actual prejudice of US\$42 615, 70. The state alleged that appellant had unlawfully converted trust property. The assertion was made that appellant would place orders with suppliers, raise invoices and capture into the system that the goods were received enabling him to deliver stock to a destination of his choice. The evidence was that appellant raised fictitious and false figures in order to cover up the shortfall. Section 146 (1) of the Criminal Procedure & Evidence Act (Chapter 9:07) provides that:

“Subject to this Act and except as otherwise provided in any other enactment, each count of the indictment, summons or charge shall set forth the offence with which the accused is charged in such manner, and with such particulars as to the alleged time and place of committing the offence, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.”

It is trite that the material facts constituting the offence must appear *ex facie* the indictment. If the charge does not disclose an offence, it is fatally defective, and unless it is amended, no conviction can be founded upon it. See the case of *S v Siphambili* 1995 (2) ZLR 337 at 340A-B.

It would appear that the trial magistrate paid little regard to the correctness of the charge. Indeed, in her response to the notice of appeal, the trial magistrate took the position that the state had managed to prove its case beyond reasonable doubt that in the appellant “*kept making orders for goods that were in stock*”. I do not consider this to be a sustainable argument. The fact that a person orders goods that are in stock does not necessarily lead to a conclusion that the placing of an order for goods in stock is done with any fraudulent intent. At any rate, depending on the type of goods being ordered, a manager or a buyer depending on the circumstances may deem it fit to ensure a constant supply of goods by ordering in advance. The question this court has to deal with however, is whether the charge discloses the offence of theft of trust property. In other words, do the material facts appearing *ex facie*, the indictments constitute an offence of theft of trust property? The material facts appearing in the indictment in this matter read together with the evidence led in the trial do not constitute an offence of theft of trust property. A reading of the charge sheet and summary jurisdiction and the evidence on the record support a charge of fraud. The offence of fraud is defined in section 136 of the Criminal Code. The offence of theft of trust property is defined thus:

“subject to section (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 or she intentionally –

(a) omits to account or accounts incorrectly for the property.”

The essential elements of the crime of theft of trust property as defined in section 113 (2) (a) of the Criminal Code are:

- (i) intention to;
- (ii) hold trust property

- (iii) breach the terms under which the property is held; and
- (iv) omission or incorrect accounting of the property

On the facts of this matter the state case is premised on the following:

- (a) appellant would raise purchase order for goods from suppliers
- (b) appellant would generate a document called a goods received note (GRN)
- (c) appellant would process the goods received note by entering it into the system
- (d) the suppliers would then be paid for the goods received
- (e) appellant did not follow proper procedures for receiving and processing the invoices
- (f) appellant generated purchase orders and entered and processed the invoices in the system on his own in violation of laid down procedure
- (g) the appellant inflated the figures in the computer system to cover up the anomaly
- (h) the goods ordered by the appellant were never delivered to the complainant
- (i) appellant misrepresented that he was causing invoices to be captured into the system whereas the goods were delivered elsewhere

The evidence led in court did not satisfy the essential requirements of the crime of theft. The evidence led did not prove beyond reasonable doubt that the accused had the requisite intention to commit the alleged offence. The evidence led largely depended on assumptions and did nothing to prove the mental element of the crime. Intention is proved through a subjective test see *S v Ndlovu* HB-317-17 and *A Guide to Criminal Law in Zimbabwe* by G Feltoe at p 9.

The state did not seek to prove that the appellant was holding trust property. The appellant was employed as branch manager. The state outline sets out the duties of the appellant as being responsible for the supervision of all staff, overall security of all property, ordering of new stock, receiving new stock, selling of all received stock, remitting the relevant cash to T M Supermarket, doing reconciliation of all transactions, accounting correctly for all stock dealt with at the supermarket among other responsibilities. There was no evidence led, to show that all the property at the supermarket was held “in trust” by the appellant. This was not practicable and in

any event, to further compound this anomaly, is the fact that the whole basis of the state case is that goods were ordered by the appellant but never delivered. If the goods were never in the possession of the supermarket, the goods were never under the control or ownership of the complainant. The appellant would not, under those circumstances be liable for property that was never under his control. The state failed to lead evidence to satisfy the essential element that *“there must be a breach of the terms under which the property is to be held”*. There is no evidence relating to the items under which the appellant was supposed to hold as trust property, if he held any such property at all. The terms of holding such trust property were not set out in the indictment and throughout the trial.

It is my view, that having regard to the essential elements of the offence of theft as defined in section 113 (2) (a) of the Criminal Code, the evidence brought before the court a quo falls far short of satisfying any single essential element of the offence. The basis of the state case is that appellant falsified figures in the system and ordered goods which were never delivered to the supermarket. The actual evidence led in court was to the effect that appellant inflated figures in the system, the objective being to cover-up for the missing goods. The state avers that the missing goods did not find their way to the shop and were diverted elsewhere. The trial magistrate made a specific finding that:

“No one saw the accused actually remove the goods from that shop ...”

There was clearly insufficient evidence to prove that the appellant by whatever device or mechanism either inflated goods in the system or ordered goods that were not eventually delivered. It should be borne in mind that the reason for conducting a stock- take was to establish whether the goods on the shop floor and the goods in the system were tallying. If the argument by the state was that the process of ordering and invoicing the goods was motivated by misrepresentation, with an intention to steal, the proper charge would have been fraud. There is no trust property to talk about since the state alleges that the ordered goods were never delivered to the complainant. The complainant never received the goods hence could not place them in the trust of the appellant.

It is provided under section 113 (4) of the Criminal Code that:

“For the avoidance of doubt it is declared that where a person, by means of a misrepresentation as defined in section one hundred and thirty five (135), takes any property capable of being stolen, intending to deprive another person of the ownership, possession or control of the property, the competent charge is fraud and not theft.”
(emphasis added)

In the present matter, the gravamen of the state case is that the appellant’s password was used to capture false figures for goods which were ordered but not physically delivered to the shop. The allegation being that the supermarket paid for goods that were not delivered, causing actual prejudice amounting to US\$42 415, 70. The competent charge ought to have been fraud and not theft of trust property. To that extent, therefore, the appellant was wrongly convicted. I am mindful that section 274 of the Criminal Code provides that:

“where a person is charged with a crime the essential elements of which include the essential elements of some other crime, he or she may be found guilty of such other crime, if such are the facts proved and if it is not proved that he or she committed the crime charged.”

On the facts of this matter, however, and the evidence led at trial, not all the essential elements of fraud are found in the charge sheet in relation to theft of trust property. The element of misrepresentation is not found in the charge sheet. I hold the view that fraud would not be a competent charge on the facts of the matter. In any event, the trial court largely depended on circumstantial evidence. In terms of our law the requirements of circumstantial evidence as a basis for a conviction is now settled. The leading authority on this aspect of the law is old case of *R v Blom* 1939 AD 188 at 202-3 where it was held that:

“The inference sought to be drawn must be consistent with all the proven facts. If it is not, then the inference cannot be drawn. ... The true facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences then there must be doubt whether the inference sought to be drawn is correct.”

See also; *S v Marange* 1999(1) ZLR 244 and *S v Masawi & Anor* 1996 (2) ZLR 472 (S).

The state mainly relied on the fact that as a result of the stock- take a shortfall was detected. There are several possible explanations for the shortfall. The computer system was not for the exclusive use by the appellant. Other persons had their own passwords and could enter information into the system. The duties of the appellant as set out by the state were too vast and general. One could not expect the appellant, reasonably, to take responsibility for every shortage or shortfall that occurred. Failure to record goods in the goods received book could not lead to the inference of theft as the only reasonable inference.

For the foregoing reasons, there was indeed reasonable doubt and the conviction of the appellant is unsafe.

Accordingly, and in the result, the following order is made.

- 1. The appeal is upheld
- 2. The conviction and sentence is set aside.

Moyo J I agree

Dube-Tachiona & Tsvangirai appellant’s legal practitioners
National Prosecuting Authority respondent’s legal practitioners