

SARUDZAI HARRY
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO AND MHURI JJ
HARARE, 5 November 2021 and 19 January 2022

CRIMINAL APPEAL

Mr A Masango for the appellant
Mr T Mapfuwa for the respondent

MHURI J: In a judgment dated the 13th of November 2019 issued under MBR CRB 2580/19, appellant was found guilty of two counts under the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] (The Act) to wit:-

Count 1- theft of trust property as defined in s 113 (2) (d) of the Act in that:-

On the 30th of August 2018 at Tsiga Grounds Mbare Harare, Sarudzai Harry (appellant) in violation of a trust agreement which required her to sell 187 packets of MAQ Surf valued at US\$850 on behalf of Juliana Chimutwe (complainant) and to hand over the cash after the sale to Juliana on demand, unlawfully and intentionally converted the money to her own use.

Count 2- fraud as defined in s 136 of the Act in that:-

On the 30th of January 2018 and at Tsiga Grounds appellant unlawfully misrepresented to complainant that she had a relative by the name of Tawanda Mujikijera who was looking for a person to enter into a partnership with and that person was to contribute \$10 000 and whereas infact there was no such proposal nor partnership and when appellant made the misrepresentation, she intended to deceive complainant and cause her to act upon the misrepresentation to her prejudice. The misrepresentation caused prejudice to complainant by inducing her to pay appellant \$10 000.

Consequent to the convictions appellant was sentenced as follows:

Count 1- 5 months imprisonment wholly suspended on condition she does not commit an offence involving dishonesty.

Count 2- 22 months imprisonment, 6 of which were suspended and another 10 of which were suspended on condition of restitution and the remaining 6 were suspended on condition of performing community service.

Aggrieved by both the conviction and sentence, appellant noted an appeal in this court on 10 grounds against conviction, (grounds 1,2 and 3) being on count 1 and 4, 5, 6, 7, 7.1, 8, 9 and 10 being on count 2. Grounds 11, 12, 13 and 14 being on sentence. Appellant's prayer was that the appeal succeeds, the conviction be set aside and the court *a quo*'s judgment be substituted with:-

- I. appellant is found not guilty and is acquitted or in the alternative ,
- II. the sentence in count 2 be substituted with "appellant pays a fine and restitutes ZWL 10 000 to complainant"

At the commencement of the hearing of the appeal, appellant 's grounds 3, 4, 6, 7.1, 8, 9, 10, 13 and 14 were all struck out for either being a duplication of other grounds or not being concise and clear. That left grounds 1, 2, 5, 7, 11 and 12 as proper grounds for argument.

Ground 1 was that:-

1. The learned court *a quo* erred and grossly misdirected himself at law when it convicted appellant of theft of trust property yet there was no trust agreement proved to exist between the complainant and appellant but the debt had arisen from a savings club commonly called "round" and complainant confirmed the existence of the same debt and submitted the case to civil court and did not mention theft thereby confirming that the case was purely a civil case.
2. The court *a quo* erred at law in holding that complainant was a credible witness yet she had denied under oath ever receiving RTGS 850 which rendered her testimony unreliable and inconsistent going to the root of the charge.
5. The court *a quo* erred in finding the testimony of Tawanda Mujikijera to be credible yet Tawanda had sent photos of the gold he had bought and had not reported the appellant to the police and throughout his testimony he volunteered information which had not been asked which action showed a propensity to protect himself as a suspect witness.
7. The court *a quo* erred at law in making a finding that the appellant had defrauded complainant of 10 000 USD yet the charge sheet was not amended and state RTGS 10

000- hence appellant was charged of defrauding RTGS dollars and could not be found to have received 10 000 USD.

Ad Sentence:

11. The court erred in sentencing appellant to retribute complainant 10 000 USD yet the charge sheet recorded the amount as RTGS 10 000 not United states dollars and legally the court *a quo* could not make such an order in light of provisions of Finance (NO. 2) Act 2019 which regarded the funds valued in United states dollars as being RTGS dollars.
12. The court a quo was mistaken at law in ordering restitution in 10 000 USD payable at the prevailing interbank rate yet the charge had arisen prior to 22nd February 2018 and the amount was now RTGS dollars.

In an eleven-paged judgment, the trial magistrate analysed the witnesses' evidence, made factual findings and found the state witnesses credible. As regards the 1st count, the magistrate believed the complainant's evidence that the issue was about MAQ surf and not the social club round as stated by appellant. He found corroboration for this from complainant's daughter Makanaka who had assisted in delivering the MAQ surf to Bigman. He also found no reason why Bigman would put in writing the confirmation of payment to appellant.

The trial magistrate also found as credible, Tawanda Mujikichera who though he was related to appellant, gave evidence which nailed appellant. He denied totally the appellant's story in which she was implicating him. At page 19 of the judgment the trial magistrate stated

“ultimately, the evidence above has proved to be credible, it came from reliable witnesses.”

It is a trite position of the law that the appellate court will lightly interfere with the trial court's findings on credibility.

In the case of *S v Mlambo* 1994 (2) ZLR 410 (S) cited by Respondent, Gubbary CJ (as he then was) stated the principle clearly at p 413, para C-D

“The assessment of credibility of a witness is par excellence the province of the trial court and not to be disregarded by an appellate court unless satisfied that it defies reason and common sense.”

Do the trial magistrate's analysis of the evidence and findings on credibility of the witnesses defy reason and common sense, for this court to interfere? The answer in our view is in the negative.

Appellant and the complainant were close business associates. Their relationship was based on trust. Appellant is the one who found the buyer Bigman for the MAQ surf and the complainant together with her daughter delivered the surf to Bigman hence the reason why she went to Bigman asking for the payment only to find that payment had been made to the appellant. There was written confirmation of this.

It is the appellant again who approached complainant with the idea of a gold project in which Tawanda was engaged in. Complainant bought the idea and in the presence of witnesses gave appellant an amount of US\$10 000. Tawanda refuted having received the said money, he had no knowledge of said joint venture, he denied the suggestion that he was robbed in South Africa. He explained the photos he sent to appellant which appellant wanted to capitalise on to prove her case. In both incidences appellant gave dubious explanations hence she was found not to be a credible witness.

We find no basis to interfere with the findings made by the trial magistrate. To that end therefore the appeal against conviction must fail.

As regards sentence, the appeal is against the sentence in count 2 only.

The sentence reads:-

“22 months imprisonment of which 6 months imprisonment is suspended for 5 years on condition the accused does not during that period commit any offence involving dishonesty and for which upon conviction accused will be sentenced to imprisonment without the option of a fine. Of the remaining 10 months imprisonment is suspended on condition accused restitutes the complainant Juliana Chimutwe in the sum of \$10 000 USD through the clerk of court on or before 20 December 2019.

The remainder of 6 months imprisonment is suspended on condition accused completes 210 hours of community service at Hatfield Junior Primary school...”

It was submitted that the issue of community service no longer arises as appellant has since completed that sentence.

The only issue for determination is that of the restitution, the main submission being that the Magistrate erred in ordering restitution of \$10 000 in USD in light of the provisions of the Finance (No. 2) Act 2019 and also that the amount on the charge sheet was in RTGS and not in USD.

In response, it was Respondent’s submission that the Finance Act No.2 of 2019 and in particular s 22 (1) (d) thereof which refers to “financial or contractual obligations concluded or

incurred before the effective date” and restitution arising from a criminal offence is not covered by that Act.

Respondent further submitted that ordering appellant to pay \$10 000 RTGS would mean appellant would have benefited when the idea of restitution is to disgorge the appellant of his/her ill-gotten gains. Respondent cited the case of *S v Pemhiwa* and Others HH 717/18 and *S v Tapiwa Chikanga* HH 555/15. It is noted that these two cases cited by Respondent were decided before the promulgation of the Finance Act No.2 of 2019. The case of *S v Pemhiwa supra*, CHITAPI J aptly stated that

“...it appears to be a good practice in sentencing for crimes of fraud, theft and kindred offences where there has been loss of property with a determined value to disgorge the convict of ill-gotten gain and recompense the complainant of the loss suffered by imposing an order of restitution or compensation as the circumstances determine..”

I agree with the above position. *In casu*, the trial magistrate in compliance with the above, ordered restitution in the sum of USD\$10 000 which he had found to have been defrauded from complainant. The offence took place in January 2018 and the trial was finalised in November 2019.

As at the date of finalisation of the trial, the Presidential Powers (Temporary Measures) Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS DOLLARS) Regulations, 2019, SI 33 of 2019 had been promulgated. The date of promulgation being 22nd February 2019.

The provisions of s 4 of the above SI are inserted in s 22 (1) (d) of the Finance Act No. 2 of 2019.

The section reads as follows:-

22 (1)’’ Subject to section 5, for the purposes of section 44 C of the principal Act, the Minister shall be deemed to have prescribed the following with effect from the first effective date-

- (a) That the Reserve Bank has with effect from the first effective date, issued an electronic currency called the RTGS dollar and
- (b) that the Real Time Gross Settlement system balances expressed in the United States dollars (other than those referred in section 44 C (2) of the principal Act), immediately before the first effective date shall from the first effective date be deemed to be opening balances in RTGS dollars at par with the United States dollars, and
- (c) that such currency shall be legal tender within Zimbabwe from the first effective date,
- (d) that for accounting and other purposes (including the discharge of financial or contractual obligations) all assets and liabilities that were immediately before the first effective date, valued and expressed in United States dollars (other than assets and liabilities referred to in section 44 C

- (2) of the principal Act) shall on the first effective date be deemed to be values in RTGS dollars at a rate of one to one to the United States dollar,
- (e) that after the first effective date any variance from the opening parity rate shall be determined from time to time by the rate or rates at which authorised dealers exchange the RTGS dollar for the United States dollar on a willing - seller willing - buyer basis; and,
 - (f) every enactment in which an amount is expressed in United States dollars shall, on the first effective date (but subject to subsection (4), be construed as reference to the RTGS dollar, at parity with the United States dollar, that is to say, at a one on one rate..”

The interpretation and applicability of the above section was aptly done by the Chief Justice in the case of:-

ZAMBEZI GAS ZIMBABWE (PVT) LIMITED v (1) N. R BARBER (PVT) LIMITED, (2) THE SHERIFF FOR ZIMBABWE SC 3/20

In the instant matter the trial magistrate found as proved the fact that complainant paid appellant an amount of USD\$10 000. He then made an order of restitution in the same amount upon failure to retribute, appellant was to serve 10 months in prison.

Applying the provision of section 22 (1) (d) as interpreted in the case of *Zambezi Gas Zimbabwe (PVT) Limited (supra)* we find that the USD\$10 000 is a liability to the appellant and is an asset to the complainant. At page 9 of the cyclostyled judgment the Honourable Chief Justice had this to say when he was dealing with s 4(1) (d) of SI 33/19 referred to earlier,

“Section 4 (1) (d) of SI 33/19 is specific as to the type of assets and liabilities that are excluded from the reach of its provision. The origin of the liabilities is not a criterion for exclusion. In other words, the fact that the liability is based on a court order does not exempt the liability from the application of the provisions of 4(1) (d) of SI 33/19. What brings the asset or liability within the provisions of the Statute is the fact that its value was expressed in United States dollars immediately before the effective date and did not fall within the class of assets and liabilities referred to in 44 C (2) of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*]”

In view of the above, we are of the considered view that the Finance Act No.2 of 2019 also applies to criminal matters. The trial magistrate was therefore correct in ordering restitution in the amount of USD\$10 000. However considering sub para (d) of sub section (1) of s 22 of the Finance Act, the trial magistrate erred in indicating that the restitution is to be paid at interbank exchange rate prevailing at the time of payment. In terms of subparagraph (d) the rate is one to one. Therefore restitution ought to have been RTGS \$10 000. Appellant’s appeal with regards to sentence on count 2 is therefore allowed.

In the result, it is ordered as follows:-

- a) That the appeal against conviction be and is hereby dismissed

- b) That the appeal against sentence in count 2 be and is hereby allowed
- c) The trial magistrate’s sentence in respect of count 2 be and is hereby set aside and substituted with;

“10 months imprisonment is suspended on condition that appellant restitutes complainant in the sum of RTGS 10 000 through the Clerk of Court on or before 28-2-2022.”

CHIKOWERO J: I agree.....

Muronda Malinga Legal Practice, appellant’s legal practitioners.
National Prosecuting Authority, respondent’s legal practitioners.