

TAKUNDA CHIVENDE
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 9 and 16 February 2022

Criminal Appeal

M Macheka for the appellant
C Muchemwa, for the respondent

CHIKOWERO J :

1. This is an appeal against both conviction and sentence.
2. The appellant was convicted on a charge of theft of trust property as defined in section 113 (2) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]
3. He was sentenced to 7 years imprisonment of which 1 year was suspended for 5 years on the usual conditions of good behaviour. A further two years imprisonment was suspended on condition the appellant paid restitution, to leave the effective custodial term as 4 years.
4. It was common cause that the appellant, a cashier in the employ of N Richards Group Marondera, had from 1 October 2020 to 7 November 2020 received various amounts of cash from thirteen till operators. Instead of banking the money intact the appellant had on occasions banked less than the amounts received and on other occasions not banked such money at all. At the end of the trial it became common cause that the appellant had not banked US\$ 200 601 -54 and ZAR 630, all of which was not recovered.
5. In endeavouring to account for the shortfall , the appellant explained that his Supervisor, one Admire Makuvire had on the fifty-three occasions accessed the cash box in the absence of the appellant and helped himself to the cash whose quantum we have already mentioned. The defence was rejected.

6. An appellate court only interferes with the factual findings of a trial court where it is clear that the decision of the lower Court is irrational in the sense that no sensible Court faced with the same facts could have reached that conclusion. See *Shuro v Chiuraise* SC 20/19.
7. The court accepted that the supervisor and the internal auditor were truthful in testifying that it was only the appellant who was the custodian of the keys to the cash box. The Supervisor had duplicate keys to the safe with the appellant having the other keys to that safe where the cash box was kept. This was in line with the standard operating procedures for handling cash. One of the reasons for having in place the standard operating procedure for the handling of physical cash was to ensure that there was accountability. Indeed, it was common cause that the thirteen till operators maintained daily records of the cash received by each of them and, in turn, handed over to the appellant at the end of each working day. The appellant was supposed to bank the cash the following day. Meanwhile, for safekeeping, he deposited the money in the cash box overnight. The cash box was secured in the safe. The appellant and each one of the thirteen till operators affixed their respective signatures, on a daily basis, on records reflecting the cash handed over to the appellant by the till operators.
8. The Court rejected the appellant's explanation that he handed over the keys to the cash box and the safe to the supervisor at the end of each working day. The court was correct to do so. That version was never put to the supervisor and the internal auditor for their comments. Indeed, no purpose would have been achieved in the appellant handing up the safe keys to the supervisor at the end of each working day because the supervisor, as was common cause, already had the duplicate keys to the safe. Similarly, it would defy all logic for the supervisor to receive the keys to the cash box from the appellant at the end of each working day, or at all, without compromising the very existence of the standard operating procedures. There was documentation at the point that the appellant received cash from each of the thirteen till operators. If the supervisor also had access to the cash box he needed to be a signatory to that documentation failing which there was need for records to be signed reflecting handover takeover of the cash box keys and its contents between the appellant and the supervisor.

No such records existed. This to us means the court was on firm ground in finding as a fact that the only custodian of the cash box keys at N Richards Group Marondera

branch was the appellant. This was so because he was the cashier. His duty it was, as cashier, to receive, keep and bank all cash received.

9. The email of 7 November 2020 assisted the appellant not at all. He did not send it to the supervisor. All that the appellant did was to use his official email address, as the cashier of N Richards Group Marondera, to send the email to his other email address. To that email was attached a record of those amounts under banked and of those not banked at all. The court correctly found that the email was not a reminder to the supervisor by the appellant to pay back the amounts reflected thereon. Indeed the email, being documentary evidence, does not reflect that it was a reminder to the supervisor to refund the amount whose theft the appellant was ultimately convicted of. The email was simply for the appellant's own use, to keep track of that which he had diverted.
10. Whether the shortfall was discovered by Patience Chitsaka, who took over the appellants duties as the latter was proceeding on leave, or by the supervisor, does not go to the root of the matter. The fact remains that the money went missing in the hands of the appellant.
11. Despite delaying the escalation of the matter to the police by claiming that he could still recover the same from some bitcoin trader in Harare, and causing his employer's representatives to travel all the way from Marondera to Harare to meet that trader for that purpose, the appellant eventually shot himself on the foot. In cross –examining the bitcoin trader, the appellant put it to that witness that the appellant had only invested not more that US 2000 in bitcoin trading. The appellant disputed that he had poured in between US \$ 15 000 and US \$ 20 000 of his employer's money into bitcoin trading. Surprisingly, in the defence case, the appellant totally denied any knowledge of and trading with the bitcoin trader. The court correctly found that the appellant was now in a desperate mode. He was eager to dissociate himself from anything to do with the missing cash. We observe too that the appellant spurned the invitation to participate in the audit exercise despite the bail conditions having been relaxed for the express purpose of enabling him to do so.
12. Both the supervisor and the auditor were clear that there were no signed petty cash vouchers reflecting that the latter had taken money from the appellant. The cash box contained no such records.

13. The appellant had worked for N. Richards Group for six years two of which as cashier. He certainly knew how to carry out his duties. He received on the job training and signed standard operating procedures to guide him in discharging his functions. We are satisfied that the court correctly found that the appellant lied in claiming that he was inexperienced and out of ignorance of what he should have done as cashier, his supervisor took advantage of him by taking money from the cash box on the pretext that the superior would repay it. In any event, the appellant never suggested that he saw the supervisor taking the cash. We have already determined that the court did not err in finding that it was only the appellant who had access to the cash box.
14. The appeal against the conviction is devoid of merit.
15. The sentence imposed does not induce any sense of shock. The appellant's status as a first offender and his family commitments were considered in assessing an appropriate sentence.
16. As for the contention that a custodial sentence should not have been imposed to enable him to raise the restitution the impression must not be created that restitution is a passport to avoid imprisonment. See *S v Allegrucci* 2002 (1) ZLR 6 74(H)
17. Against the appellant were the following aggravating factors. He took advantage of his position as a cashier entrusted with the safekeeping of his employers funds to steal that which he should have secured and banked. This was theft from employer. His moral blameworthiness was very high. The amount stolen was quite substantial. Nothing was recovered. The court found that a deterrent sentence was warranted.
18. Having balanced the mitigation against the aggravation the court imposed seven years imprisonment. It suspended a whole year on the customary conditions of good behaviour since the appellant was a first offender. Further, the court suspended the generous portion of two years imprisonment on condition the appellant paid restitution. All in all close to one half of the sentence was suspended on appropriate conditions.
19. Sentencing is pre-eminently a matter for the discretion of the trial court. We cannot erode such discretion. The sentence imposed is not disturbingly inappropriate. Accordingly, we cannot interfere. See *S v Ramushu* and Ors S 25/93.
20. The appellant's submissions that a non-custodial sentence should have been imposed are completely wanting in merit.

21. In the result, the appeal be and is dismissed in its entirety.

CHIKOWERO J.....

ZHOU J..... I agree

Mazani and Associates appellants legal practitioners
The National Prosecuting Authority respondent's legal practitioners