THE STATE

versus

DOUGLAS MATHUTHU

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 3 March, 2017

Criminal Review

MAWADZE J: I am amazed by the reasoning of the trial Magistrate in this matter. The mind boggles why a lot of time and resources were wasted in this case by embarking on a trial when the accused was clearly pleading guilty to the charge. To make matters worse, the trial Magistrate decided to convict the accused on a charge or offence which is not even a permissible verdict. The faulty and warped reasoning by the trial Magistrate is that since theft entails an element of dishonesty it would stand to reason that fraud which also entails an element of dishonesty is a permissible verdict on a charge of theft. This is in total disregard of the provisions of the Fourth Schedule of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*].

The accused was arraigned before the Magistrate sitting at Beit Bridge facing the charge of theft [of trust property] as defined in s 113(2) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*]. The brief facts of the case are as follows;

The accused was given US$3000.00 by the complainant in order to convert the whole amount into South African currency (undoubtedly on the black market). The accused proceeded to convert a total of US$2 650.00 to his own use and only gave back to the complainant US$350.00.

The accused's explanation is that accused had had a shortfall at his workplace and decided to use the complainant's money to cover up for this shortfall with the misplaced hope that accused would later on raise the money and pay back the complainant.

After the accused had given such a clear explanation the trial court in its wisdom, or lack thereof, believed that the accused was proffering a defence to the charge and proceeded to conduct a trial! I am surprised that the trial court discerned any facts in dispute worthy to be ventilated through a trial process or procedure.

Section 113(2) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*] provides is follows;

> "113. Theft
>
> (1) ------- irrelevant
>
> (2) Subject to subsection (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; or
>
> (b) hands the property or part of it over to a person other than the person to whom he or she is obliged to hand it over; or
>
> (c) converts the property or part of it to his or her own use." (my emphasis)

From the facts of the case the accused clearly converted complainant's US$2 650.00 to his own use.

In terms of 2 of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*] trust property is defined as follows;

> " "trust property" means property held, whether under a deed of trust or by agreement or under any enactment, on terms requiring the holder to do any or all of the following –
>
> (a) hold the property on behalf of another person or account for it to another person; or
>
> (b) hand the property over to a specific person; or
>
> (c) deal with the property in a particular way;" (my emphasis)

The trial Magistrate simply failed to grasp these simple and clear provisions and misdirected himself or herself that the essential elements of the offence had not been proved, worse still that the accused was not admitting to the charge. Reduced to its bare bones the facts of the matter are that accused was given US$3000.00 by the complainant and the

agreement was for the accused to in turn hand over to the complainant the equivalent in South African rand. The accused failed to do so but converted US$2 650.00 to his own use to cover up for a shortfall at his work place. The trial court clearly misdirected itself by failing to appreciate this fact.

The other misdirection by the court *a quo* is its assertion that the offence of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] is a permissible verdict to the charge of theft as defined in s 113 of the same Criminal Code [*Cap 9:23*]. Again the Fourth Schedule of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] is clear in that regard. Fraud is not one of the permissible verdicts.

In the circumstances it was improper to convict the accused of the offence of fraud as defined in s 136 of the Criminal Code [*Cap 9:23*] which had not even been charged in the alternative.

The facts of the matter, which are common cause, are that the accused breached s 113(2) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*].

Accordingly, the verdict by the court *a quo* of "Not Guilty of Theft of Trust Property and found guilty of fraud" is set aside and substituted with the following;

> "Guilty as charged or of contravening s 113(2) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]."

The accused was sentenced to 24 months imprisonment of which 6 months imprisonment were suspended for 5 years on the usual conditions of good behaviour. A further 6 months imprisonment were suspended on condition of restitution on a specified date and the remainder of 12 months imprisonment on condition accused performs 420 hours of community service at Beit Bridge District Hospital on the usual conditions. In my view although the overall sentence of 24 months imprisonment is rather on the excessive side I nonetheless do not believe that it amounts to a misdirection which warrants the interference of this court. The sentence is therefore confirmed as in accordance with that and substantial justice.

The accused should be called and be advised of the altered verdict.

Mafusire J. agrees……