

MAX NDLOVU
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAKONESE AND TAKUVA JJ
BULAWAYO 13 JULY AND 23 JULY 2015

Criminal Appeal

Mrs *D. Shirichena* for applicant
Mr *W. Mabhaudhi* for respondent

MAKONESE J: The appellant appeared before a Zvishavane magistrate facing one count of fraud. The allegations against him were that he misrepresented to the complainant that US\$13000 she had received as compensation for her husband's death was required for traditional purposes and that after taking the money to the deceased's grave the money would be returned to the complainant. As a result of the misrepresentation the complainant was prejudiced of US\$13 000. After a trial the appellant was convicted for violating section 113 (2) (d) of the Criminal Law (Codification and Reform) Act [Chapter 9:23], that is theft, in that he took trust property and converted the money to his own use. The appellant was sentenced to six years imprisonment of which three years imprisonment was suspended on condition he pays US\$12980 to the complainant, of the remaining three years, one year was suspended on the usual condition of good behavior. The appellant has filed an appeal against both conviction and sentence.

Background

The appellant is the complainant's father in law. The complainant was married to accused person's son who died in a work related accident at Mimosa Mining Company on 5 September 2010. The appellant's son had been married in terms of customary law to the complainant. The marital union had been in subsistence for a period in excess of 10 years and at the time complainant's husband died, complainant was pregnant with their second child. In accordance with standing company policy, the complainant was entitled to receive compensation from Mimosa Mining Company. It is not in dispute that the accused person was instrumental in the

processing of the death benefits due to complainant. The appellant was also employed at Mimosa at the relevant time. The appellant assisted the complainant to open a bank account with ZB Bank in Zvishavane where the death benefits were deposited. A sum of US\$13000 was deposited into complainant's account and appellant and complainant proceeded to the bank where complainant withdrew a sum of US\$12980. The complainant then handed the money to the appellant who placed the money in his black bag. The appellant indicated that the money would be taken to Mberengwa for rituals. This was indeed subsequently done and the rituals involved placing the money on the deceased's grave, whilst appellant and his wife "spoke to the grave." Upon their return from the rural areas, the appellant failed to return the money to the complainant. Instead, the undisputed evidence reveals that appellant used the sum of US\$2000 to purchase four head of cattle and some goats, "for the deceased." A further sum of US\$700 was allegedly used to pay part of the bride price to the then complainant's parents. This involved the purchase of suits and other clothes for complainant's parents.

The totality of the evidence presented in court proved beyond reasonable doubt that the appellant had squandered a sum of US\$4390 which he failed to account for. In his judgment the trial magistrate stated (page 13 of record) as follows:

"Overall, it was hard to believe what the accused person said in his evidence in chief. There were discrepancies in his evidence. Accused was not truthful because he could not account for the missing money. At the time of his arrest he said he was left with US\$500. He managed to account for US\$ 7 594 out of the US\$12980. He could not account for US\$4390."

It became clear during the hearing of this appeal that the state had failed to prove beyond reasonable doubt that the appellant had converted to his own use, the amount of money stated in the charge sheet. The appellant's legal practitioner, all but conceded that the conviction was proper, save that appellant should have been convicted of converting the sum of US\$4390. The undeniable fact is that complainant never expressly nor impliedly consented to her money being spent by the appellant. He had no right to do so. The attitude of the appellant in the handling of the money is well articulated in his heads of argument on the fifth page where he states as follows:

“Furthermore, the money in question which the accused is alleged to have stolen or defrauded is compensation money paid by Mimosa Mining Company after, the untimely death of the accused’s son as a result of an accident which occurred in the mine. As a consequence to receive a custodial sentence on top of the terrible loss accused suffered definitely is severe and induces a sense of shock. Moreover, the accused is not a stranger in terms of the subject money or money in question, various consultations had been held between Mimosa Mine and accused before the compensation money had been paid and he was very much included in the process.

Moreover, accused and complainant despite being father in law and daughter in law had a very close father-daughter relationship, during cross-examination complainant conceded that this was not the first time she had given accused money for safe-keeping and they always planned together. It is submitted that by virtue of this, accused’s moral blameworthiness is very low.”

The appellant’s reasoning is hard to follow. He seemed to suggest that he had a right to use the money and that for that reason the court ought to have been lenient with him.

Evidence on the record clearly shows that the appellant, through a clever and mischievous device duped the complainant by asserting that rituals had to be performed at the deceased’s grave. The appellant took custody of the money and recklessly spent the money without consulting the complainant and without her consent. The appellant’s version of events of what happened with the money is full of improbabilities and was proved to be false. The conviction was proper. The trial court ought to have made a finding that the money converted by appellant was US\$4390 and not the amount reflected in the charge sheet.

On the issue of sentence, while it is trite that the issues of sentence are the domain of the trial court and that the appellate court will not normally interfere with the sentence imposed by the *a quo* unless it is vitiated by irregularity or misdirection, in the instant case the money unlawfully converted is much less than what is alleged in the charge sheet. This court is therefore at large on the issue of sentence. The State Counsel forcefully argued that a custodial sentence was appropriate regard being had to the fact that the appellant was motivated by greed and nothing else. It was also argued that the sentence must serve as a deterrance against persons who are in the habit of abusing widows as has happened in this case. The complainant was taken advantage of by a manipulative father in law.

It is my view that, a custodial sentence is not the only appropriate sentence in this matter and that this rigorous form of punishment must only be resorted to as a last resort. See the case of *S v Kashiri* HH 174/94. In *S v Mpofo* 1985 (1) ZLR 285 at page 296 it was stated as follows:

“It is well recognized that it is highly desirable to keep anyone out of prison as much as may be possible, particularly first offenders. It is also most desirable to impose the least possible punishment that would meet the justice of the case.”

At page 297 of the same judgment it was stated as follows:

“An additional notion is that a person who breaks the law should not be allowed to enjoy a financial advantage over those who are law-abiding. “Justice requires that the unlawful advantage be removed and the social balance be restored “.... In principle, the offender should be punished for the offence he has committed, and in addition to that, his unlawful gain should be taken from him.”

I am of the considered opinion that the principle of restorative justice has the advantage that the complainant will to some degree recover her financial loss. The justice of this particular case is better served if the complainant were to be restituted for her financial loss. The court is not in any manner closing its eyes to the seriousness of the offence and the degree of greed exhibited by the appellant. The manner in which the appellant tricked the complainant is deplorable. The appellant ought to have protected the complainant and assisted her. He chose instead to cheat her.

In the result, the following order is made:

1. The conviction is hereby confirmed.
2. The sentence is hereby set aside and substituted with the following:

“3 years imprisonment, of which 2 years is suspended for 5 years on condition accused is not within that period convicted of an offence involving dishonesty, and for which he is sentenced to a term of imprisonment without the option of a fine, the remaining 1 year is suspended on condition accused pays restitution in the sum of US\$4390, through the Clerk of Court, Zvishavane by not later than 30 September 2015.”

Takuva J..... agrees

Chidawanyika, Chitere & Partners, C/o Mabhikwa, Hikwa & Nyathi appellant’s legal practitioners
National Prosecuting Authority’s Office, state’s legal practitioner