THE STATE
versus
BRIAN CHITANDA

HIGH COURT OF ZIMBABWE
MUZOFA& BACHI – MZAWAZI JJ
CHINHOYI, 1 & 25 July 2024

Criminal Appeal

F Murisi, for the appellant
R Nikisi, for the respondent

MUZOFA J: This appeal against both conviction and sentence was not opposed by the State. Our finding is that the conviction must be upheld. The concession by the State was not properly made. The sentence is excessive in the circumstances and the appeal partially succeeds.

The appellant was convicted after trial on a charge of theft of trust property as defined in s113 (2) (d) of the Criminal Law (Codification and Reform Act) [Chapter 9:23]. A sentence of 60 months imprisonment with 12 months conditionally suspended for 5 years and a further 42 months suspended on condition of restitution was imposed. Six months effective.

Dissatisfied by both conviction and sentence he approaches this court on appeal. The State did not oppose the appeal.

The accused was employed by Access Forex Zimbabwe based at its Kariba branch. Part of his duties included receiving and safe keeping of money on behalf of his employer.

It is alleged that the appellant on the 12th of August 2023 converted US$9 673.32 to his own use in violation of the trust agreement that required him to keep the money on behalf of his employer.

<u>Proceedings in the court aquo</u>

The state led evidence from two witnesses the country director one Munashe Kazangarare ‘Munashe’. He conducted a spot check where he discovered the shortfall. It also led evidence from the arresting detail Lazarus Muzanenhamo ‘Lazarus’.

The two witnesses’ evidence was that the appellant had cash in the cash box but there was no money in the safe. The appellant had confessed that he had used the money for some personal business that flopped.

The accused denied the offence and alleged that the money was in the safe. The safe was not opened. Munashe took the safe keys and did not check in the safe. He also averred that the police assaulted him on arrest.

In coming to its judgment, the court found the state witnesses credible. It accepted that Munashe conducted a spot check. The appellant had confirmed that he had US$13 256.00 at hand through an email. However, on checking the actual cash held, the appellant had US$3 543.00 and ZAR4900 in the cash box. The appellant had indicated that there was nothing in the safe. The safe was eventually opened in the presence of the police, indeed there was no money.

The court aquo dismissed the appellant's explanation that the money was in the safe. It accepted that the safe was opened in the presence of the police and there was no money therein.

In respect of sentence the court reasoned that the appellant breached the trust reposed of him by the employer and imposed the sentence as already stated.

Dissatisfied by both the conviction and sentence the appellant noted this appeal on the following grounds.

<u>The grounds of appeal</u>

The grounds of appeal are inelegantly set out. In our view the grounds of appeal using different expressions raise two issues whether the court a quo properly assessed the evidence before it and the propriety of the sentence.

I reproduce the grounds of appeal against conviction to demonstrate the point made that the grounds of appeal though numerous raise one issue on assessment of evidence.

1. The court a quo erred in law in finding the state witnesses credible and reliable without explaining the basis for such a conclusion nor critically analyzing the entire evidence for the state and the accused before reaching that conclusion, rendering the conviction unsafe.
2. The court erred in law and fact in dismissing the appellant's defence on the sole basis of his purported demeanour when it is a legal requirement that a Court cannot rely on demeanour only but has to assess the evidence holistically looking at the probabilities and the improbabilities of the case.
3. The court a quo erred in law in convicting the appellant without assessing and dismissing the appellant's defence that when he was arrested, the appellant had not opened the safe *where* part of the money allegedly stolen was kept and that the complainant now had the keys to the safe which renders the situation unsafe for a conviction.
4. The court a quo erred in fact in holding that the appellant knew the complainant prior to the date of the offence on the basis that the appellant had cooperated with the complainant without showing how that pointed to the guilty of the appellant and when in actual fact such cooperation came after introductions and the safe where money was kept was never opened before or after arrest by appellant.
5. The court a quo erred in law in failing to exercise caution and relying on the single witness evidence of the 1st state witness that the appellant opened the safe and failed to balance when in actual fact it was merely his word versus the appellant and the 2nd State Witness had not seen how the safe was opened and

the keys were now in possession of the state witness, rendering it unsafe to convict.

Ad sentence

6. The court a quo erred in fact and law in passing a sentence that is manifestly too excessive so as to induce a sense of shock and repulsion in the circumstances of the case.
7. The court a quo erred, having settled for an effective sentence of six (6) Months which is within community service threshold, in failing to impose the option of community service when in actual fact there was a clarion call for the court a quo to impose that sentencing option in the circumstances of the case.

The relief sought is that the appellant be found not guilty and acquitted alternatively that the sentence be set aside and substituted by 12 months imprisonment of which 6 months is suspended on the usual conditions and the remaining 6 months suspended on condition of restitution.

The main issue for determination in respect of the conviction is whether the Court a quo misdirected itself in coming to the conclusion that the safe was opened in the presence of the appellant and no money was found. The issue turns on credibility of witnesses.

Submissions before this Court

As already stated, the State did not oppose the appeal. On assessment of evidence both the appellant and the State relied on the same authority *Ramasela Solomon Mafusela v The State 2018 (ZAFSHC)170* that in assessment of evidence the court must assess the evidence as a whole taking into account the probabilities, the weaknesses and the strength of both the state case and the defence case. Demeanour on its own cannot be the only determinant factor in issues of credibility.

The appellant further contended that the Court a quo misdirected itself by relying on Lazarus' evidence who knew nothing about the case. He was not credible since he could not remember how the safe was opened. He prevaricated on the issue. In any event no audit was conducted to confirm the shortfall

Further to that, it was averred that the appellant's version was supposed to be accepted, the safe was not opened. The appellant had handed over the key to the complainant.

For the respondent nothing much was submitted except that the State witnesses contradicted each other. The State failed to prove that the appellant had misappropriated the complainant's money. In short that the essential elements of the offence were not proved. We were not told which of the said essential elements were not proved.

Analysis

Grounds of appeal 1 and 5 impugn the court a quo's finding on the credibility of the State witnesses. The following was common cause. That the appellant was employed by the

complainant. That he received money on behalf of the complainant which he was supposed to account for.

It is common cause that the appellant sent an email to Munashe confirming that he had US$13 256. When Munashe arrived to conduct the spot check he had done two transactions amounting to US$136-00. It is the appellant who provided this information when Munashe arrived.

The appellant confirmed that money in the drawer was counted. It is then that all hell broke loose. He refused to sign the cash count form with the breakdown of monies he held in his drawer.

We do not accept that the Court a quo concluded that the State witnesses were credible in a vacuum. The Court a quo clearly explained why it accepted the witnesses' evidence. 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 s38 (2) & (3) of the High Court Act (Chapter 7:06), *Shuro* v *Chiuraise* SC 20/19.Thus even if there is a misdirection by the Court a quo , that is not the end of the matter,an appeal court must consider whether the evidence indeed proved the case beyond a reasonable doubt.

In this case, we wonder why both counsel believe that the State witnesses were not worth of any belief. Munashe stated that when he arrived and asked the appellant about the money in the safe, he said there was no money in the safe. So the safe was not opened. It was only opened when the police directed so. This was corroborated by Lazarus the police officer.

Mr Murisi emphasised that officer Lazarus did not know anything about the case and was not credible because he prevaricated on how the safe was allegedly opened. This point was overstretched. In his evidence in chief, Lazarus said the appellant opened the safe. He was asked to describe the locking system and he said it uses codes which the accused entered. Under cross examination this is what transpired, I reproduce it for completeness on the point we make,

Q. You said we opened safe?
A. Yes.
Q. Are you aware there are cameras at Profeeds?
A. Yes.
Q. Can you describe how many safes are in that room?
A. I would not know you directed us to one safe I did not count.
Q. Safe we use at Profeeds has keys where did you get safe with codes explain to court where exactly you got that key?
A. I might have make a mistake on the codes I retract my statement and I not sure of the type of safe but when we went to open it was 6 of us.
Q. The safe has a puzzle not a core a pattern?
A. That is what I meant as code.

Q. You already made a mistake to question what else did you make a mistake on do you journal?

A. Case happened in August and we in November I might have been mistaken I have been mistaken but what he said is correct it is a puzzle which I thought was the code.

That exchange in our view should not be overstated. That the appellant referred the key as a puzzle and the witness called it a code is of no moment. The cross examination actually confirms that the key was not an ordinary lock key it was something different and anyone is at large to call it a code or whatever. Lazarus actually said the safe was at the back office at Profeeds the appellant led the six of them there. This was not disputed nor taken further, infact the line of questioning was abandoned immediately after to dwell on the assault by the police.

We take note that the State witnesses contradicted each other on the route taken to the police. Munashe said they went straight to the police yet Lazarus said they passed through the appellant's house. Munashe remained in the car when the police and the appellant went into the house. Those contradictions are immaterial to the resolution of the case. They do not directly impact the issue on whether the safe was opened or not.

The issue of the audit raised by the State does not arise at all. It is a red herring. This offence is not based on an audit. It is based on the spot check. The audit would rely on the spot check among other issues. So nothing detracts the complainant from relying on the spot check. Similarly, that the spot check was not procedurally done does not help the appellant. It may have been necessary for Munashe to follow the proper protocols but what the court was supposed to determine was not the procedural irregularities of the spot check but the theft.

The grounds of appeal have no merit.

Grounds of appeal 2, 3 and 4 deal with the appellant's defence. Every trial court in its assessment of evidence must have regard to the accused's defence. This is now elementary. The accepted approach is that where the trial court is of the opinion that there is a reasonable possibility that the defence may be substantially true the scales tip in the accused's factor, See *R v M 1946* AD 1023.

It is factually incorrect that the Court aquo failed to properly assess the appellant's explanation. The Court a quo was up to the task. It commented on his demeanour and related to the evidence why it did not accept his defence. It opined that the appellant had said he did not know Munashe but before he verified with his supervisor, he engaged with Munashe. He printed some information for him, allegedly gave him the safe keys (we note that the appellant did not state at what point he gave Munashe the keys to the safe) and gave him money to count. In essence the finding was that he knew Munashe that's why he then cooperated with him before checking with his supervisor. We also noted that Munashe said he knew the appellant and the appellant knew him as they met in Banket where the appellant once worked. This was not disputed. It is on this basis that the Court a quo found the appellant not credible and consequently evidence of the non-opening of the safe false.

In *S v Isolano* 1985 (1) ZLR 62 (SC) the court delineated the extent to which an appeal court can interfere with findings of credibility based on demeanour. The headnote to the judgment aptly captures it as follows,

> 'Where a magistrate makes an adverse finding on the credibility of an appellant and his witness and the finding was based on the facts before him and his observations of demeanour, an

appellate court should not disturb that finding without having been shown that the decision on credibility was wrong.'

The onus is on the appellant to show that the factors taken into consideration by the Court a quo in coming to its decision were misdirected. *In casu*, what the Court a quo relied on was not shown to be unfounded. We find no misdirection. The grounds of appeal have no merit.

Ad sentence

Sentencing is within the province of the trial court, the appeal court can only interfere with the sentence where there is a misdirection. The first misdirection is that the Court finally settled for an effective custodial sentence of 6 months but it did not consider suspending the sentence on condition of performance of community service.

The approach to sentence can be glimpsed from similar cases.In *Chivende v State HH147/23* a sentence of 7 years imprisonment with 1 year conditionally suspended was imposed for theft of trust property in the sum of US$ 200 601 -54 and ZAR 630, all of which was not recovered. In *Kabvuwa & Anor v The State* HH 344/22 a sentence of 24 months imprisonment of which 12 months was conditionally suspended and the remaining 12 months suspended on condition of restitution was confirmed on appeal for theft of US$8000.In the *Kabvuwa* case the appellants were involved in a botched deal using their employer's money. They did not benefit from the offence. The trend in such cases is to order restitution. The value and modus operandi then can inform whether an effective custodial sentence is appropriate.

In this case the shortfall was around US$9000 and nothing was recovered. It is trite that sentence should fit the offender, the offence and meet the interest of justice. The interest of justice in such offences is first to place the complainant into the position it was before the commission of the offence. This is by way of restitution. The rehabilitative part of the sentence must not necessarily be imprisonment unless the circumstances require such. Sending the appellant to prison might break him instead of rehabilitating him. The appellant who is fairly young and a first offender must benefit from community service which will help him reflect on his choices in life.

Disposition

The evidence before the Court a quo established that the appellant was an employee of the complainant. His duties involved receiving money on behalf of the complainant. He received US$9 673.32.On the day of the spot check he could not account for the money. The state witnesses had no reason or motivation to falsely implicate the appellant. There was proof beyond a reasonable doubt that the appellant failed to account for the money held.

Accordingly the following order is made.

1. The appeal partially succeeds.
2. The appeal against conviction is dismissed.

3. The appeal against sentence succeeds. The sentence of the court a quo is set aside and substituted by the following:

   ’24 months imprisonment of which 12 months imprisonment is suspended on condition within that period the accused does not commit an offence involving dishonesty of which upon conviction he is sentenced to imprisonment without the option of a fine. A further 6 months imprisonment is wholly suspended on condition the accused restitutes the complainant in the sum of US$ 9 673.32 on or before 31 October 2024. The remaining 6 months imprisonment is wholly suspended on condition of performance of community service.’

The matter is referred to the court a quo for placement on community service.

Murisi & Associates, the appellant’s Legal Practitioners

National Prosecuting Authority, the respondent’s Legal Practitioners

BACHI- MZAWAZI J Agrees