CAVEN SHESHE
and
PETROLEUM TECHNOLOGY (PVT) LTD
and
LATIFE ZHANIAN
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU AND CHIKOWERO JJ
HARARE, 14 February and 3 March 2022

Criminal Appeal

I Mavuto for the 1st and 2nd appellant
M F Chapeta, for the 3rd appellant
R Chikosha, for the respondent

CHIKOWERO J:

THE BACKGROUND:

The appellants and two others appeared before the magistrates court and were jointly charged with fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Code"). The latter (Faroza and Chiguware) were discharged at the close of the State's case. The appellants were acquitted of fraud but convicted on the permissible verdict of theft as defined in s 113 of the Code.

The first appellant was sentenced to 48 months imprisonment of which 12 months imprisonment was suspended for 5 years on the usual conditions of good behaviour. A further 18 months imprisonment was suspended on condition the first appellant pays restitution to the complainant in the sum of US$35 309.67 on or before 20 November 2020. This means the first appellant would undergo 18 months imprisonment if he restitutes in full.

As for the second appellant, it was sentenced to pay a fine of ZWL$35 000.00 with the Clerk of Court being authorised to issue a warrant for the attachment and sale of the second appellant's property, by public auction, if there was default in paying such fine.

In addition, the second appellant was ordered to pay restitution to the complainant in the sum of US$35 309.67 on or before 31 October 2020 failing which the Clerk of Court would

issue a warrant to attach and sell the second appellant's property at a public auction to raise the restitution.

The third appellant was sentenced to 48 months imprisonment of which12 months imprisonment was suspended for 5 years on the usual conditions of good behaviour, 18 months imprisonment suspended on condition she paid restitution in the sum of US$35 309.67 and the remaining 18 months on condition she performs 630 hours of community service at Rhodesville Police Station.

All the appellants have appealed against the convictions. The first appellant has also appealed against the sentence. The second and third appellants intended to appeal against sentence. However, their notices of appeal in respect of the sentences are invalid to the extent that no relief is prayed for.

The respondent had alleged that Faroza Chiguware and the appellants had acted in common purpose in misrepresenting to Rosaria Legend Trust (the complainant) that they would supply the latter with cash in the sum of US$115 929.00 within one week of receiving a US$131 000.00 transfer from the complainant well knowing that each or some or all of them would not do so. Acting on that misrepresentation, the complainant had transferred US$131 000 into the second appellant's bank account and suffered actual prejudice in the sum of US$115 000 since it never received the latter amount.

The complainant was represented by Linda Mbidzo. Her testimony, which was in line with para 13 of the State outline, was found to have proved theft by the appellants of the sum of US$131 000.00. This was the amount that was deposited into the second appellant's bank account.

In convicting the appellants of theft, the trial court found that the following facts were common cause:

- The complainant, though Mbidzo, approached the third appellant looking for cash.
- The two entered into a verbal agreement in terms whereof the complainant would transfer US$131 000.00 to the third appellant and thereafter receive cash in the sum of US$115 000.00 from the latter. This would be a week after the transfer.
- In entering into this contract, the complainant neither met or interacted with the first and second appellants.

- However, it was the third appellant who provided the complainant with the second appellant's banking account details leading to the transfer of the US$131 000.00.
- The US$115 000 was to be handed over to the complainant by the third appellant after the latter had procured the same from some colleagues.
- These colleagues were unknown to the complainant.
- The US$131 000 was transferred into the second appellant's account.
- The first appellant is a director of the second appellant.
- The third appellant engaged other persons including Ashley Muzvidziwa, Felix Chinhamo and one Takaruza in a bid to raise the US$115 000.
- Whereas the complainant discharged her obligation in terms of her contract with the third appellant, the latter failed to meet her end of the bargain.
- This is so because the third appellant failed to deliver the US$115 000 to the complainant.

The court also found that the complainant had instructed its client, Croxwell Investments, to effect the transfer in favour of the second appellant. Croxwell proceeded to do so because it owed the complainant US$131 000 for goods sold and delivered.

Further factual findings made were these. The appellants had connived to steal the complainant's US$131 000 as demonstrated by their respective roles in the matter. Despite initially endeavouring to distance herself from the offence by clearly asserting in her defence outline that she was not the account holder, had not furnished the account details to the complainant, did not receive the US$131 000 and had nothing at all to do with the second appellants account into which the money was deposited the third appellant fundamentally contradicted herself once she took to the stand. In evidence in chief the third appellant admitted that she provided those account details to the complainant, received copy of proof of transfer of the US$131 000 from the complainant herself, communicated with the complainant when the latter followed up on availing of the US$115 000 including revealing that "the company" did not work overnight despite still maintaining that she did not know the first and second appellants. The second appellant, into whose account the US$131 000 transfer was effected, is a company duly incorporated in terms of the laws of this country. The court rejected the third appellant's evidence that she was furnished with the second appellant's account details by Felix Chinhamo. Firstly, Chinhamo was not the account holder. Secondly, the third

appellant, if she did not know the first appellant, could not have instructed the complainant to transfer the whopping sum of US$131 000 into the account of a person unknown to the third appellant herself.

The first and second appellants' defence was found to be beyond reasonable doubt false. They denied having dealt with the complainant at all. They asserted that they were approached by Ashley Muzvidziwa. He wanted to purchase fuel from the second appellant. They furnished him with a US$131 000 quotation whereupon he transferred this amount into the second appellant's account. Muzvidziwa cancelled the fuel transaction, claiming that the second appellant was taking too long to deliver the fuel. Meanwhile Chiguware, employee of the second appellant, had already effected a cash withdrawal of US$500 from the US$131 000 transfer as salary. Chiguware together with first appellant are signatories to the second appellant's account.

The outstanding balance was remitted to various persons on the instructions of Muzvidziwa. The first and second appellants asserted in their defence outline that they never misappropriated the US$131 000.

The court accepted Muzvidziwa's testimony that he neither effected the US$131 000 transfer in favour of the second appellant, never bought any fuel from the second appellant, did not know Croxile Investments nor instructed the appellant to transfer the US$131 000 to the various accounts. Clever Nziramasanga, the Croxile Investments' bookkeeper, testified as the respondent's second witness. His evidence was that it was him, on the instructions of his superiors, who transferred the amount in question to the second appellant. This was a debt for goods sold and delivered by the complainant to the witness's employer. The evidence of these two witnesses were believed. It corroborated that of the complainant. Hence the rejection of the first and second appellant's testimony.

Further, the court found that the speed with which the US$131 000 was wiped out of the second appellant's account demonstrated that the three appellants had, right from the word go, connived to steal those funds. The third appellant's testimony that he did not know the first and second appellants was manifestly false. Likewise, the latter's evidence that they did not know the third appellant was beyond reasonable doubt false. All that the appellants were doing at trial was to try to distance themselves from each other in a bid to evade criminal ability. The court accepted that the complainant neither knew nor had anything to do with the persons to whom the first, second and third appellants disbursed the US$131 000.

As for the sentences imposed, the court explained why it settled for the same. We shall revert to this in determining the sole appeal against sentence.

THE APPEAL AGAINST CONVICTION

Having been represented by one legal practitioner at trial, the first and second appellants relied on the same notice and grounds of appeal. For convenience, we will concomitantly deal with such grounds of appeal raised by the third appellant where the same grounds appear in the first and second appellant's notice of appeal.

The first and second appellants raised 8 grounds of appeal against the convictions. However, they did not pursue the 5th to 8th grounds in heads of argument. Neither did nor could they present oral argument on the latter grounds. In the circumstances, we proceed on the basis that grounds of appeal number 5 – 8 were abandoned.

All three appellants take issue with the finding that they acted in common purpose. The first and second appellants contend that they were not known to the third appellant prior to their arrest and trial. On her part, the third appellant contends that the evidence discloses no link between her and the first and second appellants. There can be no merit in this contention. There was no way that the third appellant could have obtained the second appellant's bank account details without the knowledge of her co-appellants and gone on to furnish the same to the complainant, again without the co-appellant's knowledge. Less than twenty-four hours after the complainant, through Croxile Investments, had transferred US$131 000 into the second appellant's account, a total of five withdrawals had been effected on that account on a single day. Four days later a further two transfers were effected from the account. The bank statement produced by the second appellant shows that the US$131 000 was transferred into the second appellant's account on 20 October 2016 with five and two transfers effected from the same account on 21 October 2016 and 25 October 2016 respectively. The credit balance on 19 October 2016 was a paltry US$18.60. On 25 October 2016 the credit balance was left standing at a princely US$89.40. The first appellant was a signatory to the second appellant's account. His defence, which was rejected, was that the US$131 000 was money received from Muzvidziwa as purchase price for fuel and, after the buyer had cancelled the fuel transaction was paid out to various persons on the instructions of the same Muzvidziwa. We observe that the defence of the first and second appellants on the one hand and that of the third appellant on the other contradicted each other to such an extent that the trial court had no option but to convict all the appellants. This is not to say the onus lay on the appellants to prove their

innocence. We cannot ignore the following. The first and second appellants were steadfast in testifying that they did not know the third appellant. The third appellant sang the same song. The latter said the US$131 000 was complainant's money, paid into the account in question to raise cash for the complainant. The latter said the US$131 000 was Muzvidziwa's money, remitted to buy fuel. The same money could not belong, at the same time, to two different persons. In addition, the third appellant had, in outlining her defence, categorically denied providing the complainant with the second appellant's bank account details into which complainant's money was deposited and had asserted that she had completely nothing to do with that account. Needless to say, she executed a somersault when testifying-in-chief that the truth was that deposed to by the complainant, to wit, that the third appellant furnished the complainant with the second appellant's account details, that the complainant effected the transfer of funds through Croxile Investments, that the complainant and the third appellant communicated on the subject of the cash due to the former, that the complainant never received such cash and that the complainant's US$131 000 was in the circumstances stolen. We are satisfied that the trial court's effective finding that the appellants connived to steal the complainant's US$131 000 is correct.

Muzvidziwa himself testified and was believed, that the funds in question did not belong to him, he did not purchase any fuel from the second appellant, did not know Croxile Investments and never instructed the second appellant to disburse the US$131 000.00. This evidence is in accord with that of the complainant and the third appellant. Reduced to its bare bones, it is this. The US$131 000.00 belonged to the complainant. It was spirited away from the second appellant's account. This was without the complainant's knowledge and consent.

The first and second appellants' fourth ground of appeal is misplaced. It also is the third appellant's 11th ground of appeal. The investigating officer did not say that he failed to investigate the various accounts to whose credit the US$131 000.00 was effected once it had landed in the second appellant's account. He said that he did not investigate that issue. The trial court was alive to that reality but considered that this circumstance was of no consequence. We share the same view. The investigating officer would have been embarking on a wild goose chase if he had acted as suggested in this ground of appeal because there is cogent evidence proving that the funds in question belonged to the complainant. By disbursing the same the appellants were actually stealing that which was complainant's.

The appellants were convicted of theft as defined in s 113 of the code. Section 113(2)(d) of the code does not create an offence called theft of trust property. There is no such offence in that statute. Nothing turns on the court's pronouncement that it convicted the appellants of theft of trust property as defined in s 113 (2)(d) of the code. There is no merit in the first and second appellants' second ground of appeal. Therein the duo complain that they were convicted of the permissible verdict of theft of trust property in the absence of evidence of a trust agreement between the complainant and themselves. On that basis alone, we dismiss the said ground of appeal.

The third appellant contends that the court misdirected itself in finding that it was common cause that she was entrusted with the US$131 000.00 when the bank statement produced as an exhibit reflects that the money was transferred into the second appellant's account. The third appellant is splitting hairs. It indeed is common cause that, notwithstanding the name of the account holder, the complainant dealt with the third appellant. It was the third appellant who furnished the complainant with that account, received proof of such transfer, assured the complainant that since "the company" did not operate overnight the third appellant would deliver the cash amounting to US$115 000.00 to the complainant as soon as the same was to hand. We agree with the learned magistrate that the contradictory nature of the appellant's defence, noted elsewhere in this judgment, clearly demonstrated a desperate attempt to distance herself from those with whom she committed the offence. The third appellant's first ground of appeal is unmeritorious.

Felix Chinhamo and Ashley Muzvidziwa were not on trial. These were state witnesses. The court could neither convict not acquit them. There is sufficient evidence on record justifying the conviction of the third appellant even in the circumstances of Chinhamo and Muzvidziwa not having been charged with the same offence. Such evidence has already been traversed in discussing the grounds of appeal relied upon by the first and second appellants in seeking to overturn their convictions.

There was no need for evidence of a partnership agreement between the third appellant on the one hand and the fifth appellant on the other before the court could convict the third appellant. This is a criminal matter. There is adequate evidence justifying why all three appellants were found criminally liable as co-perpetrators. See s 196A of the Code. What brings them together is the second appellant's account never mind their professed ignorance of each other. This is not surprising. The day of reckoning had arrived.

The third appellant's sixth ground of appeal is vague. It reads:

> "The court *a quo* erred and misdirected itself in disregarding the chain of evidence and link between Felix Chinhamo, Ashley Muzvidzwa, Manjoro and fourth accused person which evidence would exonerate the appellant from the offence."

This purported ground of appeal is indeed meaningless. It is invalid. We strike it out. The third appellant criticises the court for not treating the evidence of Muzvidzwa and Chinhamo

> "as that of accomplice witnesses to enable the court to treat their evidence with caution because of their involvement in the offence".

This is a mouthful. This appellant was legally represented at trial. He did not, through counsel, suggest to the court that Muzvidziwa and Chinhamo were accomplice witnesses who should therefore have received the accomplice warning before they testified. The appellant cannot make an issue out of that which was never an issue at trial. In any event, the court treated the evidence of these two witnesses with caution, despite warnings not having been administered on them.

The foregoing also disposes of the third ground of appeal relied upon by the first and second appellants. The conviction was not anchored solely on the evidenceof Chinhamo and Muzvidziwa.

It is not correct that there was evidence of an acknowledgement of debt made by Muzvidziwa and that such evidence clearly exonerated the third appellant. No such exhibit was produced by either side. What counsel for the third appellant asked Muzvidziwa to comment on during cross-examination was an intended affidavit. Muzvidziwa said he appended his signature thereon under duress. It bore neither a signature nor a stamp of a commissioner of oaths. The document was of no evidentiary value. It was not produced. Nothing turned on such colourless evidence.

The third appellant was not a victim. She was a co-perpetrator. She hid behind the ruse of entering into a verbal contract with the complainant while conniving with the co-appellants to steal from the complainant.

The 10th ground of appeal is self-defeating. It reads:

> "The court *a quo* grossly erred and misdirected itself in disregarding that appellant's evidence that appellant attempted to collect and talk to 4th accused person which is some form of reporting."

The first appellant was the fourth accused person at the trial. It was common cause that the third appellant never filed a police report alleging that the first and second appellants had stolen the complainant's US$ 131 000 which had been transferred into the second appellant's account. In the circumstances how could she expect the trial court to believe her manifestly false testimony that she not only attempted to talk to the first appellant (whom she maintained, throughout the trial, not to know) but also to collect cash from him for onward transmission to the complainant? How could she do either or both from a person whom she was emphatic, in her defence outline that she did not know? How could she do either or both when she was clear, in the same defence outline, that she neither furnished the complainant with the second appellant's account details nor had anything to do with that account? We have already recorded her *volte face* in examination-in-chief.

In all the circumstances, therefore, we find no merit in the first, second and third appellant's appeals against their convictions.

Despite effectively finding that the appellants stole the complainant's US$ 131 000 the learned magistrate was, in our view, confused by the wording of the charge of fraud. It reflected the actual prejudice suffered by the complainant as the cash it never received, to wit, US$115 000. As alluded to elsewhere above, the state outline not only reflected the actual prejudice as US$131 000 but the trial was fought on the basis that the allegations were that the appellants stole the sum of US $131 000. The evidence is clear in this respect. Mr *Chikosha* asked us to dismiss the appeals against conviction but to fall back on our review powers to correct the conviction in this respect. The appellants, through counsel, made no submissions on the point. We accede to the request.

THE FIRST APPELLANT'S APPEAL AGAINST THE SENTENCE

The sentence is challenged on four grounds. Firstly, that the court did not consider community service regard being had to the first appellant's status as a first offender who had not benefited from the commission of the offence. Secondly, the first appellant complained that the court had imposed grossly disparate sentences between him and his co-appellants yet a finding had been made that they connived to commit the offence. Thirdly, the court's finding that the first appellant had played a dominant role compared to that of the third appellant was attacked. Fourthly, the court's decision to order restitution in United States dollars was faulted. Finally, the first appellant was aggrieved by the sentence in so far as it entailed him still serving a custodial sentence when another portion of the overall sentence was suspended on condition

that he pays restitution as this would render it difficult if not impossible for him to raise the restitution as he would be incarcerated.

The learned magistrate considered imposing the non-custodial options of a fine and community service and gave sound reasons for rejecting both. There is no rule of law militating against the incarceration of a first offender. The first appellant cannot, in appealing against the sentence, attack the factual finding that he benefitted from the commission of the offence. That is impermissible because this finding of fact was made in convicting the appellant of theft.

The second and third grounds of appeal raise one issue namely the basis for imposing different sentences on the first and third appellants.

The reasons for the distinction are these:

- The third appellant is a female offender. Female offenders are generally treated more leniently than their male counterparts as males commit more offences than females.
- Females often have young children to take care of.
- The third appellant's participation was different from that of the first and second appellants in that the first appellant was a dominant partner. As a company director it was through him that the complainant's funds were transferred into the second appellant's account and expended.
- As the decision maker in the second appellant the first appellant had abused his fiduciary position by providing the company account to camouflage the dishonesty. The court viewed his conduct as a disgrace to both the public and the corporate world. Accordingly, it considered that his participation and moral blameworthiness was higher than that of the co-appellants. For this reason the options of either community service or a fine were regarded as likely to send a wrong message to like-minded company directors.

The court found that the complainant had transferred US$131 000 into the second appellant's account. Since the finding of fact was that the appellants had unlawfully obtained US$131 000 from the complainant it was not a misdirection for the court to order restitution of an equivalent amount of money. The court had a discretion, which it judiciously exercised: see s 365(2)(a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

Finally, there ceases to be any exercise of discretion in sentencing if it were to be accepted that the mere ordering of restitution automatically excludes an effective jail term[1]. Every case depends on its own circumstances. *In casu* we are of the view that there is no basis to interfere with the trial court's sentencing discretion. We cannot substitute the effective term of imprisonment by ordering the performance of community service.

Disposition

In the result, the following order shall issue:

1. The first, second and third appellants' appeals against the convictions be and are dismissed.
2. The first appellant's appeal against sentence be and is dismissed.
3. In the exercise of our powers of review:
   (a) The judgment of the court *a quo* is altered to read "the first, fourth and fifth accused be and are found guilty of theft as defined in s 113(1)(a) and (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]
   (b) Portions of the sentences imposed on the appellants ordering restitution are altered to read:
      (i) Accused 1: of the remaining 36 months imprisonment 18 months imprisonment is suspended on condition the accused restitutes the complainant in the sum of US$43 666-66 through the Clerk of Court Magistrates Court Harare on or before 20 November 2020
      (ii) Accused 4: A further 18 months imprisonment is suspended on condition the accused restitutes the complainant in the sum of US$43 666.67 through the Clerk of Court Magistrates Court Harare on or before 20 November 2020.
      (iii) Accused 5: The accused is further ordered to restitutes the complainant in the sum of US$43 666.67 through the Clerk of Court, Harare Magistrates Court on or before 31 October 2020 failing which the clerk of court shall issue a warrant for the attachment of property belonging to Petroleum Technology (Pvt) Ltd for sale by public auction.

[1] S v Allergrucci 2002(1) 674(H)

ZHOU J, I agree:……

Masiya-Sheshe and Associates, first and second appellants' legal practitioners
Antonio and Dzvetero, third appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners