PEARSON KADZVITI
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU and CHIKOWERO JJ
HARARE, 24 March & 23 May 2022

Criminal Appeal

OD Mawadze, for the appellant
R Chikosha, for the respondent

CHIKOWERO J:

INTRODUCTION

1. This is an appeal against conviction and sentence. The appellant, charged with the crime of theft as defined in s 113 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] was, following a protracted trial, convicted of stealing a 500 kva transformer serial number T9294LC14 belonging to the Zimbabwe Electricity Transmission and Distribution Company (ZETDC). The offence was committed on 4 July 2013 at the ZETDC Mabelreign Depot, Mabelreign Shopping Centre, Harare. For his troubles, the appellant was sentenced to twenty-four months imprisonment of which six months imprisonment was suspended for five years on the usual conditions of good behaviour.

THE PROCEEDINGS *A QUO*

2. Most of the material facts were common cause. Such included the following. The appellant, then a lead Artisan in the employ of the ZETDC, was the Acting Foreman at Mabelreign Depot at the material time. He signed a ZETDC Stores Transaction Form authorizing a much bigger transformer to be moved to Mabelreign Depot to replace the transformer which was the subject of the charge. This was so because, having moved the latter transformer from ZETDC Mt Hampden Depot to Mabelreign, he had proceeded to

move the same transformer to Zesa Enterprises (Pvt) Ltd (ZENT) citing that it was faulty. Despite his employer being in a contractual relationship with Chayamiti Brothers, the appellant took it upon himself to hire the latter to provide a crane to transport the 500kva transformer from Mabelreign Depot to ZENT. The appellant paid the crane driver, in cash, and out of his own pocket. There was debate on whether the 500kva transformer was truly faulty and hence required to be tested at ZENT. However, the unchallenged testimony of Manditamira, the crane driver, was that he received instructions to ferry the transformer in question from ZETDC Mabelreign Depot to Zent for testing. On delivering the transformer to Zent, the crane driver was then issued with a ZENT quotation reflecting the cost of the testing of the transformer as $403.65. This quotation, which was produced as exhibit number 5 at the trial, does not bear the serial number of the transformer but creates the false impression that the transformer belonged to a company called Speartech Electrical whose representative is reflected as the appellant. The crane driver, who testified for the respondent at the trial, forwarded the quotation to the appellant. ZENT issued two receipts reflecting that Speartech Electrical had paid the sums of $308 and $96 being the fees for testing the transformer in question. These receipts were produced as exhibits.

Thereafter, the appellant again phoned Manditamira to ferry the transformer from Zent to Innscor in the Central Business District, Harare. The appellant paid Manditamira in cash. It was common cause at the trial that the appellant personally hired and paid Manditamira to ferry the transformer from Zent to Innscor.

3. The offence was discovered when Shepherd Marunga, the ZETDC's Loss Control Officer Urban District, appeared at Innscor while investigating the case of a Ring Main Unit which had been stolen from ZETDC Borrowdale Depot. He identified the Ring Main Unit and a cable as belonging to ZETDC. He also stumbled upon the transformer in question, which had been installed at Innscor's premises. Through its serial number, he identified it as ZETDC's property and was able to trace it all the way to ZETDC Mt Hampden. Tirivangani Muringani, Speartech Electrical's director, was the respondent's star witness. The trial court believed his evidence that his company purchased the transformer in question from a company called EUCONO Transformers and that he paid the appellant cash in the sum of $8 316 (eight thousand three hundred and sixteen dollars) being seventy

percent of the price of $13 200 (thirteen thousand two hundred dollars). The EUCONO Transformers quotation to Speartech Electricals reflects the price of the 500kva 11/0.4 kv transformer as $13 200 (thirteen thousand two hundred dollars). The serial number of the transformer is not indicated. Payment was required to be effected in cash. At the top of the quotation, which was produced as exhibit 3, the following narration was endorsed in ink "To contact Mr Kadzviti". This appears to have been for purposes of payment for the transformer. Indeed, four days after the quotation was issued, a petty cash voucher (exhibit number 4) was issued by Speartech Electrical's accounts department as proof that the appellant had been paid $8 316 (eight thousand three hundred and sixteen dollars) in cash, being seventy percent of the price for the transformer. The reason for the payment appears under a column headed "DETAILS". It is given, in long hand, as "payment for transformer to Mr Kadzviti". Also in long hand, the following appears on the receipt "paid 70% cash to Kadzviti". The appellant who, after tendering a defence outline, elected not to give evidence but was cross-examined and called two witnesses who testified in his defence, made two admissions in this regard. Firstly, that he was neither a director nor an employee of EUCONO Transformers. Secondly, that he received the sum of $8 316 (eight thousand three hundred and sixteen dollars) from EUCONO Transformers.

4. The trial court rejected as manifestly false the appellant's defence that he had been authorized by Godfrey Mundora, the Acting Network Manager for the ZETDC (then stationed at Head Office) to temporarily lend the transformer in question to the Central Business District Depot for installation at Innscor pending delivery of that customer's own transformer from South Africa. The court rejected too the appellant's explanation that it was some other transformer (not that which was the subject of the charge) to which exhibits 3 and 4 related.

5. In assessing an appropriate sentence, the court considered the following mitigatory factors. Firstly, that the appellant was a first offender. Secondly, that he was a family man with dependants. Thirdly, that the conviction had resulted in him losing employment. Finally, that his fall from grace was a punishment on its own.

6. The aggravating factors considered were these. The appellant abused his position as depot foreman. His receipt of 70% of the price of the transformer meant that he benefitted from

the crime. The appellant's abuse of the duty of trust to his employer lay in him stealing the transformer and proceeding to sell it instead of safeguarding his employer's asset. Having conducted an inspection in *loco* the court observed that the transformer was inscribed "Zent Transformer. Customer: ZETDC". This indicated that it belonged to the ZETDC. Consequently, the court found that Speartech Electricals, represented by Muringani, was not an innocent purchaser of the transformer. For this reason, to drive home the message that it did not condone crime, the sentencer exercised his discretion against ordering restitution in favour of the purchaser. Having factored in the element of mercy, the court found that a lengthy custodial sentence was counter-productive. However, since the appellant held a position of responsibility at the time that he committed the offence, a custodial sentence was deemed appropriate hence the imposition of twenty-four months imprisonment of which six months imprisonment was suspended for five years on the usual conditions of good behavior.

THE GROUNDS OF APPEAL

7. They are:

    1. The court *a quo* erred and misdirected itself in wrongly putting the appellant on his defence after close of state case without providing any full reasons and without touching on all the evidence led during trial for its decision on the basis that more reasons would follow in the main judgement.
    2. The court *a quo* erred and misdirected itself in convicting the accused on the reasoning that the appellant had taken without authority or that authority was vitiated when he sold and received payment of complainant's property when there was no evidence to that effect.
    3. The court *a quo* erred and misdirected itself in reasoning that the appellant's explanation of a loan agreement which in fact was possibly true and corroborated in all material respects by evidence of state and defence witnesses did not exist.
    4. The court *a quo* erred and misdirected itself in convicting the appellant on the basis of an unreliable and incredible witness Tirivangani Muringani and

failing to give full reasons why it disregarded all the evidence led during the trial by the other witnesses.

5. The court *a quo* erred and misdirected itself in sentencing the appellant to custodial sentence without first giving due regard to available non-custodial sentences prescribed by the code and without giving reasons why appellant was non-suited.

8. The relief sought was the setting aside of the conviction and the substitution thereof with a verdict of not guilty and an acquittal failing which the contention was that the sentence should be set aside and substituted with imposition of a level 14 fine not exceeding twice the value of the property.

THE PROCEEDINGS ON APPEAL AND DISPOSITION OF THE APPEAL AGAINST THE CONVICTION

9. Reduced to its bare bones, the appeal against conviction requires us to bear in mind the provisions of s 38(1)(a)(ii), (c) and (2) of the High Court Act [*Chapter 7:06*]. They read as follows:

"Determination of appeals in ordinary cases

1) Subject to this section and section thirty-nine, on an appeal against conviction the High Court shall allow the appeal and quash the conviction if it thinks that the judgment of the court or tribunal before which the appellant was convicted should be set aside
   (a) On the ground that…
      (i) ……
      (ii) It is not justified, having regard to the evidence; or
   (b) ……
   (c) because on any other ground there was a miscarriage of justice; and in any other case it shall dismiss the appeal
2) notwithstanding that the High Court is of the opinion that any point raised might be decided in favour of the appellant , no conviction or sentence shall be set aside or altered unless the High Court considers that a substantial miscarriage of justice has actually occurred."

10. We must determine whether the evidence on record justifies the conclusion that the appellant stole the complainant's transformer from ZETDC Mabelreign Depot. Secondly, although this arises from the first ground of appeal, there is also the issue of whether the magistrates court committed an irregularity in refusing to discharge the appellant at the close of the case for the prosecution and, if it did, whether a substantial miscarriage of justice has actually occurred.

11. The appellant pleaded not guilty. He tendered a defence outline. However, he declined to give evidence, although he answered questions put to him by the prosecutor. To this extent, the state and defence witnesses had nothing to corroborate because the appellant himself did not tender any explanation before the court. A defence outline is not evidence. Much of the force in the contentions taken in the second and third grounds of appeal (which are essentially two sides of the same coin) is thus taken away. This matter demonstrates the invidious position that an appellant finds himself in where, at the trial, he would have pleaded not guilty, tendered a defence outline, answered questions put to him by prosecutor, calls defence witnesses and otherwise participates fully in his trial save for declining to give evidence. However, we do not decide the appeal on this basis since the appeal was not argued on this premise.

12. We take the view that there was overwhelming evidence against the appellant. His defence that he was authorized to lend the transformer in question to the Central Business District Depot for installation at Innscor was not only improbable but was proved to be beyond reasonable doubt false. The taking of the transformer in question by the appellant, from ZEDTC Mabelreign Depot, constituted the theft. The intention to permanently deprive the complainant of that transformer was manifest on that taking. We say this for a variety of reasons. A much bigger transformer was brought to ZEDTC Mabelreign Depot to fill in the gap created by the stolen transformer. The appellant hired the crane driver from Chayamiti Brothers to ferry the stolen transformer from Mabelreign Depot to ZENT, and paid him out of his own pocket. Both the hiring and the payment need not have been done by the appellant because this was not his transformer. He conducted himself in this manner because he had stolen the transformer. The cost of the hiring was inconsequential to him compared to what he stood to gain from that which he had stolen. His first defence witness, Mundora, appeared to have been an accomplice to the theft. The latter, who also occupied a position of authority, purported to verbally authorize the movement of the transformer from Mabelreign Depot to the Central Business District Depot. What shows that criminality was at play is that Mundora did not give written authority. In any event, Mundora admitted under cross examination that, although he was called as a defence witness, he was unable to tell whether or not the appellant stole the transformer. We

observe that instead of the transformer being sent to the Central Business District Depot by the ZETDC and at its expense the same was sent by the appellant, at his own cost, to Innscor via ZENT. After all, why lend a faulty transformer to a customer? What all this shows is that the appellant's defence was as water-tight as a sieve. It was full of loopholes.

13. Jeriphanos Singende was in court when the appellant was being cross examined. This circumstance reduced the weight of his evidence. So too was the fact that he was jointly charged with the appellant in another case of theft of a ring main unit and a cable from the same complainant, ZETDC. He was the second defence witness. He was at the material time employed by the ZETDC as the Senior Customer Services Officer and was stationed at the Central Business District Depot. It is true that the trial court did not make a blow by blow analysis of his evidence. In the circumstances of this matter, that does not change anything. This witness spoke to the appellant's defence *viz* that the two agreed that the ZETDC Mabelreign Depot lends the transformer to the Central Business District Depot for temporary installation at Innscor. Implicit in the court's rejection of the appellant's defence was a rejection of Singende's evidence to the same effect.

14. The same applied to Ishmael Makahamadze's testimony. He testified for the prosecution. He was employed by ZENT as a marketing and sales officer. He too appears to have facilitated the theft. Besides testifying to that which was common cause (that the transformer in question was brought to ZENT from Mabelreign Depot at the instance of the appellant) where upon it was taken to Innscor, the witness' evidence was otherwise clearly unsatisfactory in so far as it sought to exonerate the appellant from criminality. It could not lie in this witness' mouth that the appellant phoned him instructing that ZENT documents should reflect that Speartech Electrical would foot the bill for testing the transformer. This was not Speartech Electricals' transformer. That company had no lawful business in paying for the purported cost of testing ZETDC's transformer. Further, ZENT had no lawful cause in issuing a quotation to Speartech Electricals for testing the transformer (reflecting the appellant as the latter's representative) and therefore issuing two receipts in favour of the latter acknowledging payment of the purported testing fees. These documents had the undesirable effect of facilitating the release of the transformer from ZENT's custody on the false premise that it belonged to Speartech Electricals. It is

true that Makahamadze testified that nothing was stolen. That statement is immaterial because the function of deciding whether the appellant stole the transformer lay on the shoulders of the magistrates court. The witness could not usurp that role. He was not the court. In all the circumstances, that the trier of fact did not in so many words discuss and give reasons for rejecting the witness' evidence is of no moment. A rejection of the appellant's defence was a rejection of those pieces of Makahamadze's evidence seeking to exonerate the appellant.

15. Muringani was believed in testifying that the transformer which his company purchased from EUCONO Transformers, represented by the appellant, was that which was the subject of the charge. It appears that Muringani may not have disclosed the whole truth at the trial. We say this because even when the transformer was still in the custody of ZENT three documents had already been issued suggesting that his company owned or at the very least, already had an interest in the transformer. We are referring to the ZENT quotation and the two receipts suggesting that Speartech Electricals paid the testing fees for the transformer. We record that Muringani testified that, all the same, he did not know who had paid those fees.

16. Imperfections in the evidence of a state witness can only result in an acquittal where they are fatal to the prosecution's case. See *S* v *Lawrence and Anor* 1989 (1) ZLR 29 (SC). The totality of the evidence on record satisfies us that the danger of false incrimination of the appellant was excluded. The appellant engineered and executed the theft from start to finish. He moved the transformer from Mt Hampden through Mabelreign and ZENT to Innscor picking up the bills in the process. Despite being neither a director nor an employee of both Speartech Electricals and EUCONO Transformers he represented both companies in dealing with the transformer. Ultimately, he pocketed 70 % of the purchase price of the transformer which he sold to Speartech Electricals. No reason was given why EUCONO Transformers' own representative could not have received that payment. On attempting to check the names of the directors of EUCONO Transformers at the Registry of Companies and Deeds, the investigating officer (who was the prosecution's last witness) was met with the official written response that EUCONO Transformers' file was missing.

17. The learned magistrate was on firm ground in reposing credibility in Muringani because his testimony is substantiated by other evidence on record. For example, the crane driver's unchallenged testimony was that the recovered transformer was the same transformer that he ferried from Mabelreign to ZENT and thereafter from ZENT to Innscor. Muringani said this was the transformer that his company purchased. He rejected any suggestion of a loan agreement. In any event, why would his company be paying the sum of $8316 to buy the same transformer when in fact this was not a sale but a loan?

18. The upshot of it all is that no case has been established for interference with the factual findings made by the trial magistrate. Those findings were partly predicated on the credibility of Muringani. The relevant principle is captured in *S* v *Soko* SC 118/92 where, at p 8, EBRAHIM JA, writing for the court said:

> "A court of appeal will not interfere with the trial court's assessment on credibility lightly. There must be something grossly irregular in the proceedings to warrant such interference. This is so because the trial court by having the witnesses before it is able to make all other factors relevant in assessing credibility. The court of appeal on the other hand is confined to the record."

19. Further, the factual findings by the trial court leading to the conclusion that on 14 July 2013 and at ZETDC Mabelreign Deport, Mabelreign Shopping Centre, Harare the appellant stole the transformer in question are not irrational and are fully supported by the evidence. In *Shuro* v *Chiuraise* SC 20/19 at pp 13-14 the court expressed itself thus:

> "It is an established tenet of our law that an appellate court should be slow in interfering with the factual findings made by a lower court and that this should happen only where it is clear that the decision of the lower court is irrational, in the sense that no sensible court, seized with the same facts, could have reached such a conclusion… In short, an appellate court can only interfere with the findings of a lower tribunal where it is convinced that the findings by the lower court are not supported by the evidence or are otherwise irrational. See *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664 (S)."
> See also *Chevhu Housing Cooperative Society Limited and Ors* v *Crest Breeders International (Private) Limited and Anor* SC 19/21.

20. It follows that we are unable to interfere with the factual findings of the trial court, the majority of which were in any event common cause.

21. Section 12 of the Supreme Court Act [*Chapter 7:13*] is the provision which regulates how that Court determines appeals in ordinary cases. To that extent, it is

similar to s 38 of the High Court Act [*Chapter 7:06*]. Of particular importance is s 12 (2) of the former statute. It reads:

> "Notwithstanding that the Supreme Court is of the opinion that any point raised might be decided in favour of the appellant, no conviction or sentence shall be set aside or altered unless it appears to that court that a substantial miscarriage of justice has in fact resulted."

This provision is virtually identical to s 38(2) of the High Court Act [*Chapter 7:06*].

22. What the Supreme Court stated in *S* v *Kachipare* 1998(2) ZLR 271 (S) applies with equal measure to the circumstances of this matter vis-a- vis the first ground of appeal. There, at 280D-281A GUBBAY CJ, with the concurrence of SANDURA JA, said:

> "I think there is good sense in the approach that a refusal to discharge the accused upon the conclusion of the state case is not in itself a sustainable ground of appeal against an ultimate conviction. At the stage the appeal is heard, and in order to decide whether the conviction was justified, it would be absurd for the appeal court to close its eyes to any evidence led on behalf of the accused, or a co-accused, which taken in conjuction with the state evidence, had been held correctly by the trial court to prove guilty conclusively.
> However, it is unnecessary to consider whether to adopt the reasoning of the courts in South Africa, attractive and commendable though it is for in a situation like the present this court is enjoined to have regard to s 12(2) of the Supreme Court Act [*Chapter 7:13*]
> Proceeding on the premise that the learned judge committed an irregularity in refusing to discharge the appellant at the close of the case for the prosecution, the question is whether it appears, in the words of S 12(2) "that a substantial miscarriage of justice has in fact resulted." Put simply, whether the court hearing the appeal considers on the evidence (and credibility findings if any) unaffected by the misdirection or irregularity that there is proof of guilty beyond reasonable doubt. If it does so consider, and the onus is on the state to satisfy it, then there is no substantial miscarriage of justice. See *S* v *Strydom* (*supra)* at 367F; *S* v *Ngara* 1987(1) ZLR 91 (S) at 97B-C.
> It follows that if the totality of the evidence allows of no reasonable possibility of the appellant's innocence in the crime, the irregularity in failing to discharge her at the close of the case for the prosecution will be of no consequence and is to be ignored by this court."

23. We have already traversed the totality of the evidence on record and concluded that the conviction was justified. In the circumstances, it becomes unnecessary for us to determine whether the trial court committed an irregularity in refusing to discharge the appellant at the close of the case for the prosecution. There is thus no merit in the first ground of appeal.

24. To sum up, the evidence on record justified the conclusion that the appellant stole the complainant's transformer when he removed the same from ZETDC Mabelreign Depot. Everything that he did thereafter was to disguise the theft with the ultimate goal of

disposing of the transformer by selling the same. But the offence itself had already been convicted. Even if one were to consider that the sale of the transformer to Speartech Electricals constituted the theft, as Mr *Chikosha* argued, the end result is that the appellant was correctly convicted. Whichever way one looks at it, the fact that theft is a continuing offence means that for as long as the appellant exercised possession or control of the transformer with the intention of permanently depriving the complainant of ownership, possession or control, he was committing the offence with which he was charged.

25. The appeal against conviction is totally devoid of merit.

THE APPEAL AGAINST SENTENCE

26. The appellant contends that the trial court misdirected itself in the manner that it approached the issue of sentence because it did not first of all consider the imposition of a non-custodial sentence. In particular, he complains that the court did not consider the imposition of a fine not exceeding level 14 or twice the value of the stolen property, whichever is greater as provided in the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] s 113 (1)(a)(b)(i)

> Mr *Mawadze* argued that the absence of reasons why a non-custodial sentence was found to be inappropriate was not only a misdirection but evidence of the fact that the court never considered imposing a non-custodial sentence in the first place.

27. Drawing our attention to the reasons for sentence, Mr *Chikosha,* for the respondent, submitted that the sentence was appropriate.

28. Sentencing is an exercise in discretion. Our view is that the sentence imposed is not disturbingly inappropriate. We are unable to interfere with the trial court's sentencing discretion on this basis. See *S* v *Ramushu and Ors* S 25/93, *S* v *Mundowa* 1998(2) ZLR 392(H). Considering the factors of aggravation, which we have already set out, a custodial sentence was inevitable. This offence was pre-meditated and well executed. A number of persons, although not tried, appear to have assisted the appellant in committing the offence. It seems that this was so because he could not have committed the offence all by himself.

29. As for the alleged misdirection, we share the view expressed in *S* v *Gono* 2000(2) ZLR at 63H:

> "…that merely because the magistrate had not mentioned community service that did not mean that he had overlooked that option. While it would have been better for him to have specifically dealt with the matter, his reasons for finding one form of punishment as appropriate and another as inappropriate could be deduced from what he said."

The magistrate found that a custodial sentence was justified because the appellant, who held a position of trust, had abused that trust by stealing from his employer. He had benefitted from the crime because he had received the purchase price. However, the personal circumstances of the appellant, his loss of employment, that he was a first offender and the element of mercy in sentencing required that a lengthy custodial sentence be not imposed. Implicit in the trial court's reasons for finding that a custodial sentence was appropriate is that the court was concomitantly finding that a non-custodial sentence was inappropriate. The express finding of a custodial sentence as justified necessarily meant the exclusion of a non-custodial sentence.

30. For these reasons, we find no merit in the appeal against sentence.

ORDER

32. The appeal be and is dismissed in its entirety.

ZHOU J AGREES: …….

Mawadze and Mujaya Legal Practitioners, appellant's legal practitioners
The National Prosecuting Authority, respondents' legal practitioners