

ADMIT TICHAONA NHIDZA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUSAKWA AND MUZOFA JJ
HARARE, 13 May 2019 & 29 January 2020

Criminal Appeal

T. M. Mutema, for appellant
F. I. Nyahunzvi, for respondent

MUSAKWA J: Having dismissed the appeal in which reasons were given *ex tempore*, a request was subsequently made for our detailed reasons.

In this matter the appellant was convicted of theft, having originally been charged with forgery and fraud. He was sentenced to pay a fine of \$600 or in default of payment, to undergo 3 months' imprisonment. In addition, 8 months were wholly suspended on condition of restituting \$7 290.00 by 15 April 2018. Appeal was noted against conviction and sentence.

The grounds of appeal, two of which are outrightly defective are as follows:

- (1) The trial magistrate erred in making a finding that there was no contingency fee agreement between the complainant and Zimbabwe Federation of Trade Unions despite having found that the complainant's law suit against his erstwhile employer had been financed and prosecuted by Zimbabwe Federation of Trade Unions.
- (2) The trial magistrate erred in holding that there was a trust agreement between the complainant and the appellant despite the fact that neither the state nor the defence led evidence that would have led to that conclusion.
- (3) The trial magistrate erred by shifting the burden of proof to the appellant to produce evidence regarding the contingency fee arrangement whereas it was the duty of the state to prove that there was a personal agreement between the parties.
- (4) The trial magistrate erred in failing to appreciate that whether the appellant remitted funds to Zimbabwe Federation of Trade Unions was not a material issue as Zimbabwe Federation of

Trade Unions acknowledged receiving the funds and as such the appellant could not have converted the funds.

The Facts

It is common cause that the complainant, Jephath Makumbinde (the complainant) engaged the appellant to represent him in his claim against the National Housing Development Trust. Having won his claim in the sum of \$47 000, the complainant sought to execute judgment by having the National Housing Development Trust's bank account garnisheed. The garnisheed funds (this time \$27 940) were deposited into the appellant's personal account.

The appellant's defence was that he is the Manicaland officer of the National Education Workers' Union of Zimbabwe which is an affiliate of the Zimbabwe Federation of Trade Unions. By virtue of such membership, he was mandated to represent workers in labour disputes in terms of s 29 (4) (d) of the Labour Act [*Chapter 28:01*]. Since the complainant was not affiliated to the relevant unions he would have to pay fees in order to get representation by Zimbabwe Federation of Trade Unions. The complainant agreed to a 35% contingency fee which was to be paid to National Housing Development Trust since the complainant was not a member of Zimbabwe Federation of Trade Unions.

On the other hand, the complainant claimed that they had agreed on a token of appreciation of 5% of the money recovered. The complainant claimed that it is the appellant who offered to assist in his individual capacity after the complainant balked at the contingency fee of 35% that was said to be demanded by the Zimbabwe Federation of Trade Unions.

There was a dispute regarding whether the complainant instructed the Sheriff to deposit the recovered money into the appellant's Barclays Bank account. The complainant disputed authoring the letter dated 8 December 2016. He disputed the signature. He stated that the appellant had told him not to have the funds deposited into his account as the judgment debtor might seek to recover it. With \$27 000 having been deposited into the appellant's account, the complainant gave instructions to disburse money into various accounts. Notwithstanding the instructions, \$7 290 remained outstanding which became the subject of the criminal proceedings.

Analysis

As previously stated, the appellant was charged with forgery and fraud, it being alleged that he misrepresented to the Sheriff by masquerading as the complainant and instructing that money meant for the complainant be deposited into his account. However he was found guilty of the permissible verdict of theft. This is because no expert evidence was led on the disputed letter.

Despite the appellant's defence and his witness standing in his corner, no evidence was led on the existence of a contingency fee agreement. There was also nothing to back the claim that funds were transferred from the appellant's account to that of Zimbabwe Federation of Trade Unions. The investigating officer testified on these aspects. Therefore there is no question of shifting the burden of proof to the appellant as the state led evidence on the non-existence of the contingency fee arrangement. One would have expected that such an agreement existed in writing. It is inconceivable that such an agreement would be verbal. In any event that was not Mr *Mutema*'s argument. If the appellant was relying on the existence of such an arrangement he ought to have availed it during his testimony in order to counter the evidence for the state. The same applies to the defence witness who testified in support of the appellant.

The letter instructing the Sheriff to deposit funds into the appellant's account was disputed by the complainant as he claimed not to have authored it. The complainant, the investigating officer and the Sheriff all testified that the signature on the letter did not resemble that of the complainant. The investigating officer failed to submit the disputed letter for handwriting analysis by an expert because the appellant declined to submit a specimen of his standard handwriting.

Mr *Mutema* submitted that the state ought to have resorted to other measures to ensure that there was proof regarding the disputed letter. I agree that the state was not diligent in the manner in which it dealt with the issue. However, one need not lose sight that an inference may be drawn from the appellant's refusal to submit a specimen of his handwriting and I only state this in passing.

Irrespective of the disputed letter, it is not in dispute that the appellant received money meant for the complainant into his bank account. There is no convincing explanation why the money was not deposited into the complainant's account. It turned out this was a strategy to ensure that the appellant would withhold part of the funds. Assuming this was a contingency fee, 35% of \$47 000 amounts to \$16 450. Going by the complainant's testimony, the appellant would have been entitled to \$2 350, which constitutes 5%.

If the idea of depositing the funds into the appellant's account was done to secure a contingency fee on behalf of Zimbabwe Federation of Trade Unions it is doubtful that Zimbabwe Federation of Trade Unions would have agreed to disburse the payments on behalf of the complainant without securing their 35% in the first place. This gives the lie to the defence that the withheld funds constituted contingency fees. The defence is dispelled by the fact that the figures do not add up and the fact that the funds were not properly accounted for. The argument that Zimbabwe Federation of Trade Unions was satisfied that they received the funds is hollow. This is because there is no paper trail showing how the funds were dealt with. This adds to the conclusion that the money was not properly accounted for as it constituted trust funds.

Since the complainant disputed authorising the appellant to receive money on his behalf, it follows that the money in question does not fall within the definition of trust property in terms of s 112 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. In terms of s 113 (1), the appellant was aware that the money belonged to the complainant. Therefore the act of depriving the complainant of \$7 290 by withholding it amounted to theft in contravention of s 113 (1). I am mindful that the trial court did not embark on this analysis. However, such conclusion is inescapable from an analysis of the facts of the matter.

The State had filed a notice conceding the appeal in terms of s 35 of the High Court Act [*Chapter 7:06*]. However, at the hearing Mr *Nyahunzvi* relented and abandoned the concession.

Disposition

Purely based on the fact that there is no proof of the existence of a contingency fee agreement and the fact that there was no proof of the remission of funds to Zimbabwe Federation of Trade Unions, it is inescapable that the appellant failed to account for the funds that were due to the complainant. Thus the appellant was properly convicted of theft. The conviction is not marred by the omission by the trial court to specify the provision under s 113 of the Criminal Law (Codification and Reform) Act it convicted the appellant.

It is for these reasons that we dismissed the appeal.

MUZOFA J agrees.....

Sawyer & Mkushi, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners