KINGSTONE KABVUWA
and
MARTIN MASHAYAMOMBE
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 15 May 2023

Criminal Appeal

R E Mhandu, for the appellants
Ms *F Kachidza*, for the respondent

CHIKOWERO J:

1. This is an appeal against conviction only.
2. The appellants were convicted on a charge of theft as defined in s 113(1)(a) and (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code). Both were sentenced each to 36 months imprisonment of which 12 months imprisonment was suspended for 5 years on the usual condition of good behaviour. The remaining 12 months imprisonment was suspended on the condition that the appellants paid restitution.
3. The first and second appellants were employed as fuel attendant and supervisor respectively. They were based at Flo Petroleum's Acturus Service Station.
4. On 21 July 2022 they were approached by two ladies. The latter indicated that they needed smaller denominations of United States dollars for use as change. This prompted the appellants, who had helped the same ladies on two previous occasions in similar circumstances to take their employers money, in small denominations, and gave it to the ladies in exchange for what they thought was an equivalent amount, in the same currency, in large denominations. It was only after the ladies had gone that the appellants discovered that the former had included several one United States dollar notes in what was supposed to be a wad of exclusively large denominations of the currency. The result was that the

appellants lost US$8000 to the unknown ladies. The appellants were charged with and convicted of stealing the US$8000.

5. The state witnesses accepted, and the trial court found, that the appellants may have lost the money in question to the ladies. This was so because a certain state witness, also employed by Flo Petroleum, saw the appellants in the company of the ladies as he walked into the office. Further, it was common cause that the appellants had, without incident, used their employer's money on two previous occasions in exchanging small for large denominations of the same currency with the same women.
6. The court convicted the appellants because it found that, without the consent and authority of their employer, they took the employer's money with the intention of permanently depriving the employer of its ownership, possession or control of those particular United States dollar notes or realizing that there was a real risk or possibility that they may so deprive it of its ownership, possession or control. In fact, the court found that it was contrary to their employer's policy for the appellants to use their employer's money in the manner they did. Indeed, evidence adduced from the employer's representatives was that the appellants were not even allowed, in terms of company policy, to have in their custody any amount belonging to their employer in excess of two hundred United States dollars. That evidence was never challenged at the trial.
7. Three points are taken in challenging the conviction. First, that the court misdirected itself in finding that the appellants had the intention to permanently deprive the employer (complainant) of its money. Second, that the court misdirected itself in convicting the appellants in circumstances where the state failed to rebut the appellants' defence that they fell victim to the two women's fraudulent conduct. Finally, the appellants contend that the conviction was erroneous because it was predicated on a finding that they breached the complainant's company policy.
8. The appeal is completely devoid of merit. The money which was the subject of the charge was trust property. The appellants held it on behalf of the complainant. Contrary to the terms on which it was held, the appellants intentionally handed it over to persons other than the person to whom they were obliged to hand it over. They were not allowed to hand it over to the two women, whether in exchange for other notes of similar value or at all. The

purported or intended exchange of the money also meant that the appellants intentionally used the particular United States dollar notes for the purpose other than the purpose for which there were obliged to use it for.

9. Section 113(3)(b) of the Criminal Law Code reads:

> "subsection (2) shall not apply if-
> (a)…….
> (b) the person disposing of the property retains the equivalent value thereof for delivery to the person entitled thereto, unless the terms under which he or she holds or receives the property require him to hold and deliver back the specific money."

Section 113(2) of the Criminal Law Code provides that theft of trust property is theft. In other words a person is also guilty of theft in circumstances where he holds trust property and in breach of the terms it is so held, he intentionally either hands the property over to a person other than the person to whom he is obliged to hand it over or uses the property for a purpose other than the purpose for which he or she is obliged to hand it over.

10. Even if the appellant had received and retained the equivalent value of the money that they handed over to the women they would still have committed the offence of theft because they were not allowed by their employer to deal with that money in the way that they did. By giving the specific United States dollar notes to the women the appellants were actually disposing of that money. Their conduct did not cease to be a disposal or taking of the money merely because they were expecting to receive, in exchange, large denominations of the same currency of the same value. The offence consisted of taking the complainant's money with the intention of permanently depriving it of its ownership, possession or control of those specific United States dollar notes that they gave to the women. It follows that the first ground of appeal is without merit.
11. So too is the second. What the appellants thought was a defence was not such at all The offence related to that which they took and gave to the women, for whatever reason, not that they did not get an equivalent value in exchange thereof.
12. The court did not convict the appellants on the basis that the complainant's policy prohibited them from conducting themselves in the manner that they did. The policy was only relevant for the purpose of excluding what may have been an essential requirement of the defence contemplated in s 113(3)(b) of the Criminal Law Code. We note that in the circumstances of this matter it was in any event common cause that the appellants were

prohibited not only from exchanging the complainant's money at all but also from keeping such of the complainant's money to the extent that it exceeded two hundred United States dollars at any one time. We therefore observe in passing that they should not have been holding money, belonging to the complainant, in the region of that which formed the subject of the charge. Thus, there is no merit in the third ground of appeal.

13. Although it pertained to the common law crime of theft (the offence of theft in our jurisdiction is now Codified), we fortify our judgment by referring to JRL Milton in *South African Criminal Law and Procedure Volume 11*, Third Edition, where the learned author says at 620:

> "(2) where the accused's contract requires him to hold in trust or to deliver the specific coins handed to him it will be theft for him to spend them, even if he intends to replace what he takes. This is so because there can be no *furtum usus* of money, and because the money never in any sense passed into the accused's ownership."

14. Although the appellants became possessed of the complainant's money through a contract of employment, and despite it being complainant's policy which prohibited them from exchanging that money for other money, what the learned author says applies to the matter before us with equal force.

15. To similar effect is the ratio *decidendi* in *Rex* v *Albertyn* 1931 O PD 178. Jonathan Burchell in Cases and *Materials on Criminal Law*, Fourth Edition, at 1021, reproduces the, following pertinent passage from De VELLIERS JP's judgment in Albertyn:

> "the consumption terminates the owner's enjoyment of his rights in the thing taken, notwithstanding that the appellant intends to return a similar thing to the owner. It seems to me that this remark applies to all things, whether they be or not be resfungibles , or *res quae usu consumutur*: and that theft is committed when a thing is taken with the intention of consuming it, and such thing is actually consumed, notwithstanding that the appellant intends to return a similar thing to the owner."

The appeal be and is dismissed

CHIKOWERO J:

ZHOU J:……. Agrees

R Mhandu Attorneys, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners