

FRANCESCO MARCONATI  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
**ZHOU & CHIKOWERO JJ**  
HARARE, 26 September, 21 October & 11 November 2024

*Criminal Appeal*

*T. L. Mapuranga*, with him *C. Chingwe*, for the appellant  
*C. Muchemwa* for the respondent

ZHOU J: This is an appeal against both conviction and sentence. The appeal follows the conviction of the appellant on three counts of theft of trust property as defined in s 113 (2) (d) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Pursuant to the conviction the appellant was sentenced to 7 years imprisonment of which 2 years imprisonment was suspended for a period of five years on the usual condition of good behaviour. The remaining 5 years imprisonment was suspended on condition of community service.

The respondent, through counsel, filed a notice in terms of s 35 of the High Court Act [*Chapter 7:06*] stating that the conviction was not being supported. After considering the grounds upon which the concessions were being made on behalf of the respondent, this court directed that the matter be addressed on the merits notwithstanding the concessions having been made.

**Background**

The appellant is the majority shareholder in a company known as Eagle Italian Shoes (Private) Limited wherein he holds fifty-one percent (51%) of the shareholding. The other shareholder with forty-nine percent (49%) shareholding is one Li Song. The appellant is the director of the company following the removal of Li Song from directorship in circumstances that are not really material to the resolution of the instant case. The appellant is also a shareholder and director of another company, ECIS Investments (Private) Limited (hereinafter referred to as ECLS). Li Song is neither a shareholder nor a director in ECIS.

It is common cause that in October 2023, the appellant caused to be transferred from the account of Eagle Italian Shoes (Private) Limited, certain monies into the account of the

Zimbabwe National Parks and Wildlife Department on three occasions. These transfers were made to pay the lease fees for ECIS Investments (Pvt) Ltd t/a Mana Pools Lodge, the company in which the appellant had interests by virtue of being the shareholder and director. The loan agreement that was produced by the defence shows that the appellant was the one who represented Eagle Italian Shoes (Private) Limited in the transaction while ECIS was represented by the appellant's son. The three transactions gave rise to the charge of theft of trust property against the appellant. The appellant's defence which was rejected by the Court *a quo*, was (a) that there was no trust agreement, (b) that the money taken did not belong to Li Song who instigated the prosecution or to the appellant, but to Eagle Italian Shoes (Private) Limited, (c) that Li Song had no business getting involved in the day to day management of the company since she was a shareholder while the appellant was both shareholder and director, (d) that Li Song had no right to or interest in the money that was transferred from the company in which she was not a director, (e) that the appellant had no obligation to account to Li Song for the money belonging to Eagle Italian Shoes Investments (Private) Limited, including the money that was appropriated for the benefit of ECIS, and (f) that the money in question was disbursed in order to meet the obligations of Eagle Italian Shoes (Private) Limited to ECIS.

The Court *a quo* found that the existence of a trust agreement had been established beyond reasonable doubt and, further, that the trust agreement had been violated by the appellant. The Court *a quo* further found that the other essentials of the offence had also been established, hence it found the appellant guilty as charged.

#### **Appellant's grounds of appeal**

As against the conviction, much of the debate at the hearing revolved around the issue of whether or not there was a trust agreement the breach of which was committed by the taking of the money belonging to Eagle Italian Shoes (Private) Limited and appropriating it towards the obligations of ECIS. The issue of the trust agreement is raised in the appellant's third ground of appeal. The other issues raised in the grounds of appeal are (a) that the Court *a quo* went on a frolic of its own by relying on the Companies and Other Business Entities Act to convict the appellant when this Act was not raised in the charge or debated in court, (b) that the Court *a quo* misdirected itself by not giving due regard to the loan agreement that was tendered in evidence by the appellant and by finding that the loan agreement did not benefit Eagle Italian Shoes (Private) Limited and by finding that the loan to ECIS was not part of the business of Eagle Italian Shoes (Private) Limited. As regards the sentence, the appellant's complaint is that the sentence imposed is too excessive and induces a sense of shock, and that

the court misdirected itself when it converted part of the stolen money that was in the local currency to United States dollars for the purposes of restitution.

### **The concessions by the respondent**

There are basically three grounds upon which the respondent submitted that it could not support the conviction. These are (a) that the money did not go into the personal account of the appellant; (b) that there was a loan agreement to show that the money was loaned to ECIS; and (c) that it was not established as to who the complainant in the matter was.

As regards the first ground of concession, the submission seems to be that the appellant did not derive a benefit or profit from the transfer of the money from the account of Eagle Italian Shoes (Private) Limited. Of course, he did benefit albeit indirectly, because he was a shareholder of ECIS and also its director. However, most significantly, the fact that the taking was for a benefit or profit to the person taking the property, known in the Latin expression *lucri faciendi gratia*, is not an essential element or aspect of theft in our law, see *S v Maswana* (1909) 23 EDC 352 at 355; *S v Siboya* 1919 EDL 41 at 43-44; *S v Laforte* 1920 CPD 487 at 489-93; *S v Kinsella* 1961 (3) SA 519(C) at 526. The concession is therefore premised upon an incorrect basis in law.

The fact that there was a loan agreement that was produced does not exclude any of the elements of the offence which the appellant was being charged with. Once the taking of the money was found to be contrary to the relationship of trust then the ultimate destination of the stolen property is irrelevant. What the money taken was destined for speaks to the motive for the taking of the money which is covered by the principles earlier on. The fact that the person who took the property did not intend to benefit himself does not clothe the transaction with legality. Indeed, in *S v Kinsella, supra*, the accused was an officer in command of a military camp. In order to provide his men with recreational facilities, he sold a quantity of scrap material belonging to the state. He knew he was not permitted to do this without permission. He argued that he lacked intention to steal since he did not intend to prejudice the owner of the property, but rather to benefit it. The court held that an intention to prejudice was not an element of the *mens rea* for theft and thus found that the accused had intentionally stolen the property concerned.

As regards the issue of the complainant, the concession is not sound at law because the commission of an offence of theft does not depend upon the existence of a complainant. By its very nature a criminal offence is a wrong against the public and not, legally, a wrong against a private individual whose recourse generally lies in the civil or private law. This is the reason

why when it comes to classification theft is categorised as a crime, perhaps the oldest crime, against property. The basic definition of theft under the common law is an “unlawful appropriation (or *contrectatio*) with intent to steal of a thing capable of being stolen”. See Jonathan Burchell, *Principles of Criminal Law* 5<sup>th</sup> Ed. P. 689. The state, not the victim of the offence, is the *dominus litis* in criminal proceedings.

For the foregoing reasons, this court did not consider that the concessions submitted were properly grounded.

### **Analysis of the grounds of appeal**

The reference to the provisions of the Companies and Other Business Entities Act was clearly understood out of context by the appellant as it was made in the context of explaining the position of trust in which the appellant was by operation of law. The appellant was not charged with contravention of any provision of that Act. His conviction is not for contravening that Act. The first ground of appeal is therefore misplaced.

Nothing turns on the existence of the loan agreement. It merely shows the purpose for which the money was taken which is immaterial for the purposes of a theft of trust property. It is not as if Eagle Italian Shoes (Private) Limited was repaying a loan owed to ECIS, which would have been a defence. But in this instance the so-called loan agreement was correctly rejected as it was merely a device for syphoning money from the coffers of Eagle Italian Shoes for the benefit of a company in which the appellant had exclusive control.

In the third ground of appeal the issues raised are that the money did not belong to Li Song or the appellant. That is common ground. The court *a quo* was clear that the money belonged to Eagle Italian Shoes (Private) Limited. The question of the person to whom the stolen money belongs is not in dispute notwithstanding the gratuitous statements suggesting that company money belongs to the shareholders. However, the undeniable fact is that every shareholder has an interest in the manner that the finances of his company are being appropriated because he or she would have invested in that company. It is therefore unnecessary pedantry to debate the question of whether the money belonged to the company or to the shareholder because that fact is common cause. Indeed, even in the outline of the state case it is clear that money was transferred from Eagle Italian Shoes to the account of the Zimbabwe National Parks and Wildlife. The theft was constituted by that transfer and not by any prejudice to the shareholders as such. The portion of the third ground of appeal dealing with whether the money belonged to Li Song or anyone else is therefore without substance.

The question of the trust agreement was decided by the court *a quo* with reference to the position of trust that a director occupies in a company. That position demands *uberime fides*, as firmly established at law, hence the principle that a director of a company owes a fiduciary duty to the company, see *Regal Hastings Limited v Gulliver & Others* [1942] 1 ALL ER 378(HL). Fiduciary duty entails acting in the utmost good faith. The Board of Directors of a company is the agent of the company, but the individual directors as individuals are not agents unless there is a committee constituted by one director that has been put in place, *Visser et al, Gibson South African Mercantile & Company Law* 8<sup>th</sup> Ed. P. 350 *et seq.* In other words, the trust agreement between the director of a company and the company is constituted by operation of law. If the director purports to represent the company in appropriating its assets and channelling them to a company in which he, to the exclusion of the shareholders of the company whose assets are being taken away is in control, then he is clearly converting trust property to his own use within the meaning of s 113(2)(d) of the Criminal Law (Codification and Reform) Act. The appellant *in casu* did precisely that.

The case of *S v De Jager and Another* 1965 (2) ZLR 616(AD) decidedly seals the fate of the appellant as well as that of his defence. In that case, the appellants had been directors of several limited liability companies and they had been charged with, *inter alia*, theft. The trial court had found that the first appellant, in conspiracy with one S, a co-director, had caused payments totalling R22 665 to be paid out of the FGG Company's funds that such payments had been unauthorised and had been for the first appellant's own purposes and not for the FGG Company. The defence was that the first appellant had been entitled to a credit of R25 000 in his loan account, being his share of the sale of shares which the court found had never taken place, and that this amount exceeded that which he had caused to be paid out. In an appeal, it was held that the fact that the first appellant, with S, had been the sole beneficial shareholder of FGG, did not enable him as director to use any funds for his own purposes. In the present case the appellant was not even the only shareholder of Eagle Italian Shoes (Private) Limited albeit he held fifty-one percent of the shareholding. There was the other shareholder with forty-nine percent. In the face of a clear situation of conflict, he signed a loan agreement representing the company in order to take money for the benefit of his other company, ECIS which was the beneficiary of the transaction. The transaction has all the hallmarks of a theft disguised as an innocent loan agreement. For these reasons the Learned Magistrate was correct in finding that there was theft of trust property by the appellant.

The foregoing findings in relation to the issue of the loan agreement effectively dispose of appeal grounds 4 and 5.

We find no merit in the submission made on behalf of the respondent urging the remittal of the matter to the court *a quo*. We have dealt with the context in which the court made reference to the principles of company law. The conviction was not for contravening the company laws, but for theft of trust property.

The appeal against conviction is therefore meritless and cannot succeed.

### **Sentence**

There are basically two issues raised in relation to the sentence as noted earlier on. The issue of whether the sentence is so excessive as to induce a sense of shock is assessed with reference to comparable cases. It must be shown that the sentence imposed is disturbingly higher than the sentences imposed in similar cases. We were not referred to any case upon which that contention could be founded or sustained. The established principle of the law is that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited. The rationale for that principle is that the trial court is one that is better placed to assess an appropriate sentence following a conviction and the mandate entails judicial exercise of discretion. That discretion which cannot be readily interfered with in the absence of evidence of a misdirection such as the misapplication of principles or taking into account irrelevant principles or ignoring relevant principles. In this case we find no misdirection. The court *a quo* diligently balanced the mitigating factors against the aggravating features of the offence.

As regards the amount of the restitution, we agree that there was a misdirection in ordering the amount to be paid in the currency of the United States of America. The charge sheet and the outline of the state case show that the amounts transferred were in the local currency. The proper order of restitution must therefore direct that the amounts be paid in the local currency.

### **Conclusion**

In the result, IT IS ORDERED THAT:

1. The appeal against conviction be and is dismissed.

2. The appeal against sentence partially succeeds to the extent that the restitution must be rendered in the local currency.

**CHIKOWERO J:** .....

**ZHOU J:** .....

*Madzima & Company*, appellant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners