CA 364/01
HH 100-2002

TARA WHITE
vs
THE STATE

HIGH COURT OF ZIMBABWE
BLACKIE & MAKARAU JJ,
HARARE, 8 May 2002

Criminal Appeal

Mr.*J.C.Andersen SC* for the appellant.
Mr. *M.Nemadiri* for the State.

BLACKIE J: The appellant was convicted of the theft of $500 000 from her employer. She was sentenced to serve four years imprisonment with one and two years, respectively, suspended on conditions of good behaviour and restitution. She appeals to this court against both her conviction and the sentence imposed on her.

The following background and facts of this case are common cause. The appellant was the financial consultant and accountant to a group of three companies with the same directors and shareholders. The Tax Department assessed one of the companies as being liable for $3 500 000 in unpaid arrear Sales Tax and demanded payment of that sum. The chairman of the company instructed the appellant to resolve the matter with the Tax Department 'in the manner most beneficial to the company'. The appellant discussed the matter with the Tax Department. It was agreed that the company would pay an initial installment on the arrears of $500 000 in cash before the end of December 2000. The company gave the appellant cash to pay this liability. She then left with the money ostensibly proceeding to the Tax Department to pay the money to that department.

The issue in this case is whether the appellant did pay the money to the Tax Department. The appellant says that she did. She has produced a receipt that she says is from the Tax Department acknowledging receipt of the money. The State says that the

appellant did not pay the money to the Tax Department. It says that the receipt is a forgery and that the appellant has not accounted for the money or satisfactorily explained what has happened to it.

Before dealing with the general merits of the State case against the appellant, it is necessary to deal with the manner in which certain of the evidence was lead from or given by two of the State witnesses and the content of that evidence.

Some further factual background is necessary to explain the point. At the time that the appellant is said to have paid the money to the Tax Department, the chairman of the complainant was out of the country. He said in his evidence that, when he returned to the country, he investigated complaints that had been made to him against both the appellant and the bookkeeper, then employed by the companies, concerning unauthorised withdrawals of money from the companies. In giving evidence against the appellant, the chairman was led by the prosecutor, despite objection by the defence, to refer to other money, which he said the appellant and the bookkeeper had taken from the company and which, he said, they had admitted stealing from it. The legal practitioner for the company gave similar evidence when he was in the witness stand. He persisted in repeating the allegations over the objections of the defence.

The reference by these witnesses to what they said were other matters of a similar nature to the charge that the appellant was facing in this case and the admissions said to have been made by her and the bookkeeper in respect of those matters are totally irrelevant to and inadmissible in respect of the charge that was being faced by the appellant. The references were also highly prejudicial to the appellant. The evidence should never have been led by the State. The trial magistrate should not have permitted

its admission. The legal practitioner, who gave evidence for the State, should have been aware of the inadmissibility of the evidence that he gave. The effect of that evidence was to show that the appellant had taken money other than that for which she was being charged in this case and had admitted taking that money. The evidence can only have been led with the idea of showing that the appellant had a propensity to steal. She had taken other money from the companies and was therefore likely to have stolen the money in this case. Such evidence is inadmissible in law.

S v *Malindi* 1996 (4) SA 123 (PC) at 130F-G.
S v *Khan* 1967 (4) SA 673 (NPD) at 677H –678A.

By reason of the admission of this evidence alone, the conviction of the appellant should be set aside.

There are, however, other grounds for allowing the appeal.

Firstly, there was a curious and crucial omission from the State case. There was no direct evidence from the Tax Department or from the complainant to show that the Tax Department had not been paid the $500 000, which, it was common cause, should have been paid to it in December 2000. No witness was called from the Tax Department. None of the State witnesses spoke of any inquiry by them at the Tax Department about the payment or any demand from that department for payment between the December 2000, when it was due, and the trial of the appellant in the last quarter of the following year. Evidence that no payment had been made to the Tax Department was a vital part of the State case.

Secondly, the State proceeded on the basis that the only possible inference from the evidence led by it was that the appellant had taken the money. However, the facts from which the State sought to draw that necessary inference of theft were not, even if

proved, sufficient to establish that inference beyond reasonable doubt. They were, in any event, not adequately proved.

The evidence the State led against the appellant (apart from the inadmissible evidence of other thefts and admissions) amounted to this. The appellant had been given $560 000 to pay the Tax Department. The $560 000 was paid to her in cash in three amounts - two in December and one in January. The figure of $560 000 and the dates of encashment of the three amounts making up that total were taken from the stubs of three cheques in the complainant's chequebook. The cheques belonging to the stubs in the chequebook had been prepared by the bookkeeper and countersigned by the appellant The State then said that, when asked to produce proof of payment of the money to the Tax Department, the appellant delayed production of such proof until she was charged and being tried. She finally produced the receipt, which the State said was a forgery. It was a forgery, the State said, because it antedated the date on which the State witnesses said that she had been given the final installment of the money, because it was computer typed rather than hand written and because it had been issued in respect of another company as a receipt for a different tax.

The appellant's evidence was that she had been given $500 000 in one payment in December 2000, that she had paid the money to the Tax Department in that month and received in exchange the receipt that she produced at her trial. She explained that she had not produced the receipt before the trial because its production did not become an issue until immediately before her trial.

The trial magistrate accepted the allegations made by the State as being proved. He did not believe the appellant. He found the appellant guilty of theft as charged.

The main reasons that the trial magistrate gave for disbelieving the appellant and for convicting her were that the money given to the appellant to pay the Tax Department originated from the three cheques totaling $560 000, whose stubs were produced in evidence; that the appellant had received all the money she was charged with stealing in three payments made in December and January; that the last payment to the appellant had been made on 7th January 2001. The trail magistrate then found that because the receipt produced by the appellant was dated before 7th January 2001, it could not be genuine, the appellant was being untruthful and that she could not have paid the money to the Tax Department.

There are a number of difficulties in accepting the findings of the trial magistrate. There is considerable confusion and discrepancy in the State evidence concerning the amount alleged to have been given to the appellant and the date on which she received it. Further, the evidence called to establish that the receipt produced by the appellant does not exclude the possibility that the receipt was genuine.

The main State witness on how much money was to the appellant and when she was given it, said she had received $560 000 in three installments in December and January. The cheque stubs were produced to substantiate this fact. There is, however, other evidence to suggest that this was not correct. The charge and the preamble to the appellant's warned and cautioned statement both said the appellant had stolen $500 000. It was common cause that the amount due to be paid to the Tax Department was $500 000. It was never explained, and it is difficult to is difficult to see why, if the appellant needed $500 000 to pay the Tax Department, she should have been given $560 000 and, why if she was given $560 000, she was not charged with the theft of that amount.

Further, two of the State witnesses and the appellant said that she was given the money to pay the Tax Department in December and not in January. If the appellant was given sufficient to pay the Tax Department in December, that money must have come from some source other than the cheques and cannot have been given to her as deposed to by the main State witness. Once there is doubt about the source of the money and the date that it was received by the appellant, one of the main props of the trial magistrate's finding of adverse credibility against the appellant falls away.

In regard to the receipt, the State called a witness to say that that document could not be genuine. However that the evidence of that witness goes no further than establishing that the receipt was, at best for the State, dubious. It does not show that it was not genuine. The paper, the date stamp and the printing were all those of the Tax Department. The witnesses' evidence was that the receipt should have been hand written and not computer printed, that the date stamp was for the wrong date and that, in any event, the receipt was that given to another company for payment of a different type of tax. However, an analysis of this witness' evidence shows that there were facilities for the computer printing of receipts in the Tax Department, that the possibility of human error in the date stamping of the receipt existed and that the number of the receipt did not exactly correspond with the number of the receipt supposedly given to the other company for its tax payment.

In the result, the appeal is allowed and the conviction and the sentence imposed on the appellant are set aside.

Coghlan, Welsh & Guest,appellant's legal practitioners
Office of the Attorney-General, respondent's legal practitioners