THE STATE
versus
ANOPAISHE MASHIRI

HIGH COURT OF ZIMBABWE
CHATUKUTA & MUSAKWA JJ
HARARE, 7 October 2016

Criminal Review

MUSAKWA J: This matter concerns the interpretation of a penal provision. The matter has vexed many a judicial officer. Following a difference in such interpretation, the scrutinising magistrate addressed a minute to the Registrar in which he drew attention to one judgment of this court and two review minutes that touch on the same issue.

The accused person pleaded guilty to two counts of contravening s 113 (2) (d) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The agreed facts were that on 30 April 2016 the complainant in the first count and the accused who were known to each other were at Ultimate Bar, Westview, Kadoma. The accused asked for the complainant's Nokia 2700 cell phone in order to conduct a financial transaction. The accused then indicated that he wanted to have his sim card activated in town. He went away with the cell phone which he proceeded to sell without the complainant's consent. The cell phone was valued at $30.00.

In respect of the second count, the accused was in the company of the complainant on 18 May 2016. The accused asked for the complainant's ZTE cell phone on the now obvious pretext that he wanted to make a call. When the complainant emerged from a building he had entered he could not locate the accused person. It turned out that the accused proceeded to sell the cell phone. The cell phone was subsequently recovered and it was valued at $50.00.

Both counts were treated as one for purposes of sentence and the accused was ordered to pay a fine of $100 or in default to undergo 30 days' imprisonment. It is this sentence that the scrutinising magistrate thinks is inadequate. The learned regional magistrate is of the view that the fine should be at least twice the value of the stolen goods. According to him this is in tandem with an interpretation of the wording of the relevant penal provision. Reference was made to the judgment of DUBE J in *The State* v *Thomas Benhura* HH-528-15.

The case of *State* v *Thomas Benhura* was a review involving an accused who was convicted of theft of trust property. Having sold a stand on behalf of the complainant the accused received a payment of $10 000.00. Of this amount the accused converted $1 700.00 to his own use. On conviction he was sentenced to pay a fine of $200.00 or in default to undergo 4 months' imprisonment. In addition 6 months' imprisonment was wholly suspended on condition of restitution. The sentence was criticised by the scrutinising magistrate as inadequate on the basis of his interpretation of the penalty as provided in s 113 (1) (i). In not certifying the proceedings DUBE J was of the view that once a court decides to impose a fine, that fine should equate to twice the value of the stolen property. Essentially the learned judge was implying that the penalty provision strictly entails a minimum mandatory fine. I respectfully disagree with that proposition. I shall endeavour to give my reasons in due course.

On the other hand, the trial magistrate defended the sentence he imposed. Apart from referring to a review minute by MAWADZE J, he also placed reliance on the judgment of CHINHENGO J in *S* v *Vusumuzi Sigauke* HH-108-2000. In dealing with a similar issue relating to s 206 (2) (a) of the Customs and Excise Act [*Chapter 23:02*] CHINHENGO J in *S* v *Vusumuzi Sigauke supra* remarked that the phraseology was unfortunate as it seemed to create a minimum mandatory penalty. In that case the penal provision stated that-

> "Any person who is guilty of an offence in terms of this Act for which no special penalty is provided shall be liable in respect of each offence-
>
> (a) In the case of an offence involving goods, to a fine not exceeding treble the duty-paid value of the goods or five thousand dollars, whichever is the greater."

The learned judge further noted that if the legislature intended to impose a minimum mandatory sentence the provision should have been couched with the words "the court shall impose a fine of not less than treble the duty paid value of the goods or five thousand dollars whichever is the greater."

CHINHENGO J went further to underscore that the intention was never to impose a mandatory penalty by analysing the phrase 'liable to pay' in the penalty provision. As can be noted, s 113 has a similar phrase which reads "liable to either or both of the following". CHINHENGO J held that the term 'liable' cannot be used for imposing a mandatory sentence and he referred to s 344 (2) of the Criminal Procedure and Evidence Act which provides that-

> "A person liable by law to be sentenced to pay a fine of any amount may be sentenced to pay a fine of any lesser amount."

Section 113 of the Code provides that-

"(1) Any person who takes property capable of being stolen—

(*a*) knowing that another person is entitled to own, possess or control the property or realising that there is a real risk or possibility that another person may be so entitled; and

(*b*) intending to deprive the other person permanently of his or her ownership, possession or control, or realising that there is a real risk or possibility that he or she may so deprive the other person of his or her ownership, possession or control; shall be guilty of theft and liable to either or both of the following—

(i) **a fine not exceeding level fourteen or twice the value of the stolen property, whichever is the greater;** or

(ii) imprisonment for a period not exceeding twenty-five years; or both:

Provided that a court may suspend the whole or any part of a sentence of imprisonment imposed for theft on condition that the convicted person restores any property stolen by him or her to the person deprived of it or compensates such person for its loss."

As can be noted, the vexing question centres on the meaning of "**a fine not exceeding level fourteen or twice the value of the stolen property, whichever is the greater"**

I find the reasoning by CHINHENGO J in *S* v *Vusumuzi Sigauke supra* quite appealing. In my respectful view the fine that may be imposed should neither exceed level fourteen ($5 000.00) nor twice the value of the stolen goods whichever is the greater of the two figures. In other words, if a court decides to impose a fine, that fine should not exceed $5 000.00 or twice the value of the stolen goods. In the present case the greater of the penalties is level fourteen ($5 000.00). In the likelihood of imposing the maximum fine, the court would not exceed $5 000.00. The same reasoning could have applied had the value of the two cell phones exceeded level fourteen.

The provision does not entail any minimum mandatory fine as has become the other school of thought. This could be on account of how the penalty provision is phrased. See for example the penalty provision for fraud in s 136 of the code which is phrased in a better way as follows-

"Any person who makes a misrepresentation—

(*a*) intending to deceive another person or realising that there is a real risk or possibility of deceiving another person; and

(*b*) intending to cause another person to act upon the misrepresentation to his or her prejudice, or realising that there is a real risk or possibility that another person may act upon the misrepresentation to his or her prejudice; shall be guilty of fraud if the misrepresentation causes actual prejudice to another person or is potentially prejudicial to another person, and be liable to—

(i) **a fine not exceeding level fourteen or not exceeding twice the value of any property obtained by him or her as a result of the crime, whichever is the greater**; or
(ii) imprisonment for a period not exceeding thirty-five years; or both."

There are many such provisions in the Code that are similarly worded like s 136 (i) above. In my view s 113 (1) should have been similarly phrased to avoid the current confusion. To remove any doubt on s 344 (2) of the Criminal Procedure and Evidence Act one only has to look at s 344 (3) which provides that-

"Subsections (1) and (2) shall not apply to any offence for which a minimum penalty is prescribed in the enactment prescribing a punishment for the offence."

Therefore s 113 (1) does not strictly require the imposition of a fine that is equivalent to twice the value of the stolen property. Obviously a judicial officer ought to take into account that it is a serious penalty provision as in a deserving case it may entail the imposition of a fine in excess of $5 000.00. Nonetheless, it is trite that maximum punishment is reserved for the worst crimes or for repeat offenders.

I could have certified the proceedings to be in accordance with real and substantial justice were it not for something that escaped scrutiny by the scrutinising magistrate. This is the propriety of the charges preferred.

Although the charges cite s 113 (2) (d) and the essential elements put to the accused relate to theft of trust property, the actual averments of the charges relate to theft. The charges read as follows-

"Count One

Contravening Section 113 (2) (d) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] "THEFT"

In that on the 30th day of April 2016 and at Ultimate Bar, Westview, Kadoma, Anopaishe Elton Mashiri unlawfully and intentionally took a Nokia 2700 cell phone, knowing that Linky Phiri was entitled to own, possess, or control the property or realising that there was a real risk or possibility that Linky Phiri may (sic) be so entitled and intending to permanently deprive Linky Phiri of his property…….

Count Two

Contravening Section 113 (2) (d) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] "THEFT"

> In that on the 18th day of May 2016 and at Mashayamombe building, Kadoma, Anopaishe Elton Mashiri unlawfully and intentionally took a ZTE cell phone S/N 325941478 F 25, knowing that Clever Shonhiwa was entitled to own, possess, or control the property or realising that there was a real risk or possibility that Clever Shonhiwa may (*sic*) be so entitled and intending to permanently deprive Clever Shonhiwa of his property…….”

As can be noted above the charges preferred were those of theft in terms of s 113 (1). Despite that being the case, the elements of the offences that were canvassed relate to theft of trust property. Either way, the facts of the matter do not amount to theft in terms of s 113 (1) or theft of trust property in terms of s 113 (2). The appropriate charge as disclosed by the facts is fraud. This is because the accused misrepresented to the complainants that he intended to use their cell phones for certain purposes. This induced the complainants to accede to the misrepresentations to their prejudice. In this respect see s 113 (4) of the Code which provides that-

> “For the avoidance of doubt it is declared that where a person, by means of a misrepresentation as defined in section *one hundred and thirty-five*, takes any property capable of being stolen, intending to deprive another person of the ownership, possession or control of the property, the competent charge is fraud and not theft.”

Unfortunately, the charges cannot be amended in terms of s 202 of the Criminal Procedure and Evidence Act. This is because an amendment is meant to cure an imperfect charge and not to substitute with a different one. In this respect see *S* v *Moyo* 1994 (2) ZLR 24 (H) and *S* v *Shand* 1994 (2) ZLR 99 (S).

In the result the convictions and sentences are hereby set aside. It is ordered that the accused be tried afresh on a charge of fraud.

CHATUKUTA J agrees_____