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REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
MZUZU REGISTRY: CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 145 OF 2017

(Being Criminal Case No 153 of 2016 in the Chief Resident Magistrate Court sitting at Mangochi)

BETWEEN

ALFRED BANDA.....APPELLANT

AND

THE STATE.....RESPONDENT

CORAM:

HONOURABLE JUSTICE D. A. DEGABRIELE

Mr. W. Nkosi

Mr. A. Siadi

Mrs. L Munthali

Mrs. R Luhanga

Counsel for the State

Counsel for the Appellant

Official Interpreter

Court Reporter

DeGabriele, J

JUDGEMENT ON APPEAL

Introduction

The appellant was arrested, and charged together with 2 others namely Lozani Muliwu and Leonard Zintambira, with the offence of Theft by Servant contrary to section 286 of the Penal Code. The brief particulars of the offence were that the convicted person, between the month of January, 2016 and July 2016 at Chibuku Breweries in Mangochi District being the servants employed by Chibuku Products Limited as stores supervisors, production controller and stores clerk respectively stole 19300 empty packets of Chibuku all valued at K1,100,090.00 the property of Chibuku Products Limited. All the accused

pleaded not guilty. After trial the 1st and 3rd accused were convicted and the 2nd accused was acquitted. They were each sentenced to 5 years imprisonment with hard labour. The appellant is now appealing against both conviction and sentence.

Grounds of Appeal

The grounds of appeal are as follows;

1. The lower court erred in law and fact in convicting the appellant of theft by servant when there was no such evidence against him.
2. The learned magistrate court erred in law and fact in convicting the appellant when elements of the offence of theft by servant was not provided against him.
3. The lower court erred in law and fact in failing to take into consideration all the factors which clearly pointed to it that the appellant did not commit the said offence.
4. The sentence of 5 years imprisonment with hard labour was excessive in the circumstances regard being had to all the mitigating factors e.g. being a first offender.

The Law

In cases of appeals to the High Court, the Malawi Supreme Court of Appeal laid the principles in *Pryce v Republic (1971-72) 6 ALR (Mal) 65*, that

"In our opinion the proper approach by the High court to an appeal on fact from a magistrates' court is for the court to review the record of the evidence, to weigh conflicting evidence and to draw its own inferences. The court must then make up its own mind, not disregarding it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong".

The High Court would, after perusing the record of the lower court come to a conclusion of whether or not there was sufficient evidence to justify the finding of facts and law of the lower court.

The State has a duty to prove each and every element of this offence and the standard required by the criminal law is beyond a reasonable doubt. Section 187(1) of the Criminal Procedure and Evidence Code provides that,

"The burden of proving any particular fact lies on the person who wishes the court or jury as the case may be to believe in its existence, unless it is provided by any written law that the proof of such fact shall lie on any particular person.

Provided that subject to any express provision to the contrary in any written law the burden of proving that a person is guilty of an offence lies upon the prosecution".

Under section 187 of the Criminal Procedure and Evidence Code, the law stipulates that the burden of proving that a person who is accused of an offence is guilty of that offence lies upon the prosecution. Further, under sub-section (2) of the above section the law places the burden of proving any fact necessary to be proved in order to enable any person to give evidence of another fact is on the person who wishes to give such evidence. A court of law will, on being satisfied that the case has been proved beyond reasonable doubt, convict a person charged with a crime. Failing to prove a criminal matter to the requisite standard of proof beyond reasonable doubt will lead to an acquittal, see *DPP vs Woolmington (1935) A.C. 462*

The Evidence

The first prosecution witness told the lower court that he worked in the accounts department as Chibuku Products Limited. He stated that on 12th July 2016, 16 bags of maize which were in the custody of Alfred Banda, the first accused (and the appellant herein) were stolen. He was taken to the police together with G4S guards. While in custody the appellant admitted to have carried out the theft and that Leonard Zintambira was also involved. Leonard Zintambira was suspended. A requisition for sleeves to pack beer was made but it was discovered that 38 boxes were empty without the sleeves. On 14th July 2016, the 1st Accused was due to be released on bail but he was further detained as he was the one who had custody of the cartons. The 1st and 3rd accused were stores clerk and assistant stores clerk and were responsible for supplying the cartons. The witness was of the view that since no other company uses the sleeves, they did not go

out empty but were used to steal beer. The dispatch clerk ran away and remains at large. In cross examination the witness stated that a stock taking was done every Friday. When the 1st accused was arrested, the keys were given to the 2nd Accused. The keys were given to the witness on the night of the 13th of July 2016 by the 3rd Accused and the next day the missing cartoons were discovered. During stock take the number of boxes were counted but not the number of sleeves in each of the boxes. The missing sleeves were for the consignment of March 2016.

PW2 told the court that each of the boxes had 500 sleeves inside and 38 boxes were found to be empty as the sleeves were missing. At the scene of crime, the witness explained and demonstrated how the boxes were packed. He also stated that the theft of the sleeves was done systematically and bit by bit. The 3rd accused was the production controller who requisitioned the cartons from the 1st Accused who was the stores clerk and his assistant stores clerk who was the 2nd accused. There was no possibility of receiving empty boxes from suppliers. Once the sleeves were used, the empty boxes were sold off by management and were not brought back to the stores. In cross examination he stated that the sleeves can go up to the next month depending on production and consignments, and that the 2nd accused followed procedures on writing requisition forms. He did not know why the 3rd accused was not called on the day the discovery was made.

PW3 was the casual labourer who had been sent to collect 45 boxes and discovered that the boxes were empty. He also stated that he was involved in putting the boxes in the warehouse supervised by the 1st and 2nd accused persons. In cross examination he stated that the boxes were full on arrival as they were sealed and the 1st accused was present when the boxes arrived.

PW4 was the investigation officer. He stated in cross examination that he did not meet all three accused persons when he visited the scene of crime as the 1st accused was in custody and the other 2 were not there. The keys to the warehouse were with Mr. Munthali who had reported the matter.

DW1 was the 1st accused who told the lower court that he reported for work in November 2015 and there was a stock taking between him, the acting stores assistant and another

for purposes of handover. He told the court that there were 50 boxes remaining and the production department had received 45 boxes, and there were 5 remaining in the warehouse. A stock taking was done in February 2016 and Blessings was removed and Zintambira came to join the 1st accused as assistant stores clerk. During the Fridays and monthly stock taking no boxes were found to be empty. In May 2016 the 1st accused and 2nd accused agreed among themselves that one of them should come to work early to facilitate speedy processing. The 2nd accused came early and he had the keys. DW1 went to Blantyre for a 2-day training on 25th or 26th June 2016 and on return he found out that a consignment of 560 boxes had been received and the 2nd accused had signed the delivery notes. DW1 stated that some maize was received and was kept in a room where boxes and maize were stored and the accountant had the keys to this room on 11th July 2016.

On 14th July 2016 he was taken back to the office where he was told that some sleeves were missing from their boxes. He was shown the store house, then he was taken to the production and was arrested. DW1 explained that production department requisitions the boxes of the sleeves and the stores issues the boxes with a note. The accountant then verifies the requisition and the supplied boxes. In cross examination he stated that he never gave out shortages and he never dispatched without a requisition form. He stated that he was not present when the shortage was discovered and he had handed over keys when everything was in order. He stated that he was taken to police on maize issue. In cross examination he stated that he had the keys from January to May and Zintambira had keys from May to July. He also stated that the boxes which were empty which he was shown were from the January to May period. He also said that there was no way that empty boxes were taken back to the stores but that sometimes production returned boxes which still had some sleeves back to stores. He stated that he received a consignment of 595 boxes in December only. He knew that the dispatch rider was at large.

DW2 was the production controller who had requested 50 cartons through a requisition. The accountant then asked if he was ready to receive and he sent some labourers deliver the cartons. The labourers then reported that the boxes were empty. He then told Zintambira who advised him to talk to the accountant who had opened the store room on that day. There were 38 boxes which were empty. DW2 was then arrested. In cross

examination he stated that that on the date it was different men who went to collect the cartons and discovered the empty cartons. This was also the first time Munthali was issuing cartons and Leonard was fueling a car. He also stated that no boxes were issued without the accountant signing off the requisition. He said that empty boxes were laid flat and could not be stacked. He also stated that he used to send his own men to collect the boxes. He also stated that some empty boxes will return from production team after failing to sell them but they would be flattened out. He just sent people to collect the boxes but he himself never went to the stores. He stated that all empty boxes were sold on 12th and 14th July 2016 and none were returned to the store room. He also said that one of his men was the one taking empty cartons back to the stores. He said that he knew the dispatch rider and that he was at large. He also stated that some boxes would be pulled of the delivery van when they ran out of boxes.

DW3 stated that he was an assistant stores clerk and that on 14th July 2016 he was told on arriving at work that there were empty cartons found in the store house. He was fueling a vehicle at that time. He said the accountant then bought police officers to the store house and the witness was arrested. He stated that he kept keys for only 2 days. He also stated that the accountant had spare keys and had access to the store room also. He stated that the accountant never issued cartons. He also stated that he was the one who did the physical count of the cartons during stock taking. He said after the 1st accused was arrested he kept the keys only for 2 days but from January to July 2016 it was him and the 1st accused who kept keys and had access to the warehouse. He said in stock taking they counted boxes from the top to the bottom and from the left to the right but not checking the contents of the boxes. The concerned boxes were packed against the wall and it was not easy for anyone to know that they were empty.

There are four grounds of appeal. A look at the four grounds of appeal reveals that the first three grounds talk to the same thing which is the prosecution did not prove the elements of the offence against the appellant beyond reasonable doubt. I have looked at the evidence before the lower court and I have examined the judgment of the lower court. The lower court was very clear in its process of identifying the elements of the offence

and analyzing the evidence. I do not find fault with the judgement of the lower court. Section 286 (1) of the Penal Code stipulates that;

"if the offender is a clerk of servant and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he shall be liable to imprisonment for fourteen years"

The elements of the offence of theft by servant are that the accused must be an employee, that he must have custody of the things stolen, that the things belong to the employer and that the accused fails to produce the things when required to do so. In this case, the appellant was an employee and some 38 boxes containing 500 sleeves each were missing and the appellant had control and custody of the same and he failed to account for the same.

In his evidence in the lower court the appellant admitted that he had custody of the keys from January to May 2016, and that the 38 empty boxes were from the consignment of the same period of January to May 2016. The evidence of all the witnesses indicate that the way the empty boxes was stores was that they were packed against the wall at the back and it was difficult for anyone to notice that they were empty unless they lifted them. Further, all evidence shows that there was regular stock taking but it was stock taking that only counted the boxes from top to bottom and from left to right without physically checking the contents. The stock taking would not have revealed that the sleeves contained inside the boxes were missing or stolen.

The appellant's evidence about a stock taking of 50 boxes was for the year 2015 when he arrived in Mangochi and does not make sense or add value to the 2016 stock, unless he showed the court that the 5 remaining boxes were empty as well. The appellant also acknowledges that sometimes boxes with some sleeves were returned to the storehouse. It is the conclusion of this Court that returning such partially filled boxes opened up the possibility of pilfering; in that other boxes were opened and their contents re-distributed based on the number of sleeves returned in some of the boxes. The appellant was aware of this and he was in sole control together with the 3rd convict of the store house. He had the time and opportunity to systematically pilfer the boxes.

The evidence of PW1 showed that the sleeves were unique to the company and could not be sold at the market. His opinion was that the sleeves were used to sell beer. At this point, it was not essential for the prosecution to prove that the appellant had stolen beer through the use of the sleeves. The elements require that the appellant who was an employee, was in custody and control of the property belonging to his employer and he failed to account for it when he was called to do so.

The evidence of DW2 showed that specific men were the ones sent to collect the boxes. On this day of discovery, different men went to collect the boxes. It seems to this Court the 'usual' men knew which boxes not to take while the new men just decided to take whichever boxes. The theft was only discovered when the persons who had the usual and daily control and custody of the warehouse or storeroom were not in control. This goes to the point that the theft of the sleeves from the 38 boxes was systematic and done over a period of time and the theft was only discovered in July 2016. The evidence shows that the theft did not occur on the days the keys had been handed over to Mr. Munthali or the accountant. The appellant together with the 3rd convict had full access to the warehouse and when their full access was interrupted, the systematic theft was discovered. The appellant has argued that when he handed over the keys when he was put into custody for the maize issue, there was no problems on the stock in the warehouse. This Court notes that there is nothing in evidence here to state that an actual stock taking was done on that day. The handing over of the keys were just done because the appellant was being taken into custody.

In view of the foregoing, I find that the lower court correctly found that the prosecution had proved the offence against the appellant. I therefore confirm the conviction and the appeal against the conviction fails and its dismissed.

The appellant was sentenced to 5 years imprisonment for the offence of theft by a servant. The sentence is punishable by a maximum prison sentence of 14 years. The appellant has appealed against the sentence, stating that the sentence was manifestly excessive because they were strong mitigating factors; which were that he was a first offender and there was no harm occasioned in the commission of the offence. It is settled law that where a convicted person has been shown to have a lead a clean and blameless life prior

to his conviction, such factors goes to his credit and ought to be given meaningful consideration as the court address its mind to the question of sentence, see *The Republic v Eneya and others criminal case no 53 of 2000*. However, every sentence or punishment has to be considered based on the circumstances of the case, and the aggravating and mitigating factors attendant thereto. Indeed, in mitigation, the appellant is a first offender. However, the aggravating factors were that the breach of trust as he was employed for the specific reason of taking care if the very storeroom he stole from, and the theft occurred in a systematic well-planned manner and the stolen sleeves valued at MK1,000,090.00 were not recovered. Against a maximum sentence of 14 years as provided by the law, I find that the sentence of 5 years imprisonment with hard labour was not manifestly excessive in the circumstances. I therefore confirm the sentence.

The appeal against the sentence fails in its entirety.

Made in Chambers at Mzuzu Registry this 22nd day of February 2018



D.A. DEGABRIELE

JUDGE