

TANGWARA MATIMBA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 18 November 2014

Concession in terms of section 35 of the High Court Act, (Cap 7: 06)

ET Matinenga, for the appellant
F Kachidza, for the respondent

HUNGWE J: The appellant was convicted of theft of trust property as defined in s 113 (1) (d) of the Criminal Law (Codification and Reform) Act, [*Chapter 9: 23*]. He was sentenced to 7 years imprisonment of which 2 years were suspended for 4 years on condition of good behaviour and a further 3 years were suspended on condition the appellant made restitution.

The facts upon which the appellant was convicted are simple. These may be set out as follows. The appellant runs an estate agency under the name and style of Property Hopes. One Brian Mafurambudzi rented a property belonging to Liberty Madzingira and his wife. The couple is based in the USA. Jimias Madzingira held a power of attorney from his brother over the property. That power of attorney authorized Jimias Madzingira to manage the sale of the immovable property when the sale was under way through the appellant's agency. Appellant advised Jimias Madzingira that he had found a buyer for the property for the price of US\$95 000, 00. The terms of sale were cash. Jimias Madzingira signed off the Agreement of Sale on 12 October 2012. A week later no money had been deposited into the account which he had given to the agent. Madzingira left for Cape Town. When he returned he wrote to the appellant cancelling the agreement of sale. The evidence show that the buyer paid the full purchase price to the seller's agent, the appellant. Upon receipt of the money the appellant had invested it with one Amanda Dunken.

This explains why the full amount was not available when Madzingira requested it upon return from Cape Town hence the suspicion that the money had been abused by the

appellant. The defence is that he was able to account for the trust property when required to do so. His explanation as to why, on the trial date he was unable to articulate such a simple defence, he told the court that he had briefed counsel who failed to turn up. The stand-in counsel also failed to turn up resulting in the matter proceeding to trial without proper legal representation. This confused him and omitted to mention this fact. The police also failed to explore this defence hence there was no evidence to suggest that this explanation was a recent fabrication by the appellant. Faced with this evidence, the state properly conceded the appeal, and quite rightly so in our view.

Consequently, the appeal be and is hereby allowed. It is ordered as follows:

1. The conviction in the court *a quo* be and is hereby set aside and the sentence is quashed.
2. The verdict in the court *a quo* is substituted with “Not Guilty and Acquitted.”

BERE J: agrees

Chatsanga & Partners, appellant’s legal practitioners
National Prosecuting Authority, respondent’s legal practitioners