

SIMANGO v THE PEOPLE (1974) ZR 198 (SC)

SUPREME COURT 25

DOYLE CJ, BARON DCJ AND GARDNER JS

6th AUGUST 1974

SCZ Judgment No. 35 of 1974

Flynote

Criminal law 30 - Theft by servant - Nature of offence - Failure to prove theft from employer - Possibility of conviction for simple theft - Whether minor offence for the purposes of s. 181 of the Criminal Procedure Code.

Criminal law - Theft by servant - Corporation alleged to be employer having ceased to exist at date of offence - Whether conviction possible.

Headnote

The 35 applicant was convicted for theft by servant by a subordinate court and made this application for leave to appeal.

It transpired that the corporation alleged to be the employer, a statutory corporation, had ceased to exist several years before the offence was committed. The employer was in fact the Government, which had 40 taken over the undertaking.

1974 ZR p199

DOYLE CJ

Held:

- (i) The offence of theft by servant has two ingredients: there must be actual theft of money and the money must be stolen from the employer.
- (ii) Where the second ingredient has not been proved the accused 5 can be convicted of simple theft which in relation to theft is a minor offence for the purposes of s. 181 of the Criminal Procedure Code.
- (iii) A person cannot be convicted of theft by servant of property belonging to a corporation if the corporation had ceased to exist 10 several years before the offence.

Legislation referred to:

Criminal Procedure Code, s. 181.

D M Lewanika, Shamwana & Co., for the applicant.

C Kawamba, Senior State Advocate, for the respondent.

Judgment

Doyle CJ: delivered 15 the judgment of the court: This is an application for leave to appeal. The applicant was convicted of the offence of theft by servant and there was certainly ample evidence that the applicant had received moneys and had not banked them. The learned magistrate was entitled to come to the conclusion that the 20 applicant had stolen the moneys. We see nothing to disturb this conclusion.

It transpires, however, that the employer was alleged to be the Zambezi River Transport, a statutory corporation. That corporation had ceased to exist several years before the offence was committed, so that plainly the applicant could not be convicted of stealing from it.

His 25 employer was in fact the Government which had taken over the undertaking. Had the charge been amended at trial to substitute the Government for the Zambezi River Transport the applicant could have been convicted of theft by servant from the Government. He cannot be convicted of stealing money from an employer who does not exist. 30

However, that does not finish the matter. The offence of theft by a servant consists of two ingredients: there must be actual theft of money and the money must be stolen from the employer. The second ingredient has not been proved, but the applicant can be convicted of simple theft, which in relation to theft by a servant is a minor offence for the purposes of 35 section 181 of the Criminal Procedure Code. Theft by servant is punishable by seven years' imprisonment, whereas theft is punishable by three. Accordingly we allow the appeal to the extent that we set aside the conviction of theft by a servant and substitute a conviction of theft. We set aside the sentence of three years' imprisonment with hard labour and substitute a sentence of two years' imprisonment with hard labour. 40

*Conviction of theft by servant set aside
and conviction of theft substituted*

1974 ZR p200