

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA

SCZ Appeal No. 4 of 1994

(Criminal Jurisdiction)

HENRY JERE

Appellant

VS

THE PEOPLE

Respondent

CORAM: Bweupe, A.C.J., Sakala and Challa J.J.S.

7th December, 1993.

For the Appellant : Mr. D.E. Ndhlovu, Luso Chambers, Chingola

For the Respondent : Mr. T.J.A. Perera, State Advocate

J U D G M E N T

Challa, J.S. delivered the judgment of the court.

The appellant was charged with theft by public servant.

The particulars of the offence were that, he, on 27th July 1989 at Chililabombwe in the Chililabombwe District of the Copperbelt Province of the Republic of Zambia, being a person employed in the public service namely, as a Court Clerk in the Ministry of Legal Affairs, did steal K2,000 cash, which came into his possession by virtue of his employment, the property of the Government of the Republic of Zambia.

He was prosecuted and he was convicted and was sentenced to two years imprisonment with hard labour.

The brief facts of the case were that he was employed as a Court Clerk in the Judicial Department of the Ministry of Legal Affairs. He was given K4,648 to change into the new currency but later it was discovered that money changed was short by K2,000.00. During trial he contended that the K2,000.00 he was being accused of having stolen was his private money. The learned trial magistrate did not agree with his explanation and he found him guilty of the offence. He appealed to the High Court against both conviction and sentence. The High Court dismissed the appeals. He now appeals to this court against both conviction and sentence. His Advocate

/2....Mr. Ndhlovu...

Mr. Ndhlovu has filed a number of grounds. The learned State Advocate Mr. Perera has indicated that the State was not supporting the conviction. The court inquired from him why he had taken that position. He explained that the learned trial magistrate who tried the case was his colleague and that they were working together in the Ministry of Legal Affairs. They had known each other and it was improper for the trial magistrate to take the case against the appellant. He further argued that the appellant had been denied legal representation and that either the case should be completely allowed, or be sent back for retrial.

We have considered Mr. Perera's argument which has been supported by his colleague Mr. Ndhlovu who argued that conviction and sentence should not stand for the reasons given by Mr. Perera and also on the grounds given by him in writing. This case came up before a magistrate Class I Mr. Mulonda on 14th August, 1989. The case was adjourned to 17th August, 1989 for plea. When the matter came up the appellant informed the court that he had engaged Messrs Mwanawasa and Company and that his lawyer was going to be free on either 14th or 15th September, 1989. The matter was duly adjourned to 14th September, 1989. On 21st August 1989 Magistrate Mulonda brought up the case in Chambers, the accused was not present. He reported that he had received instructions from the Principal Resident Magistrate, Kitwe to transfer the case to Mr. E.C. Kambanja, Magistrate Class III. The case was so transferred to Mr. Kambanja. On 1st September 1989 the accused appeared before C. Kambanja who informed the accused that the matter had been transferred to him on instructions of the Principal Resident Magistrate, Kitwe and that he was therefore going to take a fresh plea of it. The charge was explained to the accused. The accused made the following application, "the court is well known to me and to Mr. Chibwa who is representing the State. I therefore wonder whether I am going to have any fair trial at all. The Magistrate replied, "the accused and the court were once interpreters in the same Ministry but never before have we been at one station together or let alone associated myself with him. We had nothing in common before just as we have nothing in common now apart from the fact that we work in the same Ministry. As for the witness, there is no rule of law that forbids a court to try

a case where the witnesses are known to it. If it were so, very few trials would have taken off. It is not knowing the witnesses that matters but the nature of their evidence. I find no merit in both grounds and I dismiss them." The trial then commenced. The prosecution called their first witness. At that time the appellant never informed the new trial magistrate that he wanted his Advocates to be present. The trial continued from that day 1st September, 1989 until trial ended in March 1990. After judgment had been given, the accused was convicted and sentenced to 2 years imprisonment with hard labour. Mr. F. Msimuko of Msimuko and Company on 1st March 1990 applied for bail on behalf of the appellant.

Having read the record, we cannot find any information which shows that the appellant was denied legal representation. That complaint cannot therefore be up-held. On the question of the appellant having been tried by Mr. Kambanja who had worked with the appellant in the same Ministry, the Magistrate when the application was made, explained the position and he refused to excuse himself from taking up the case. We do not consider the learned trial magistrate erred in taking that stand. The appeal therefore cannot succeed on that ground.

Mr. Ndhlovu, counsel for the appellant, argued that the judgment of the lower court was unfair and unsatisfactory on the ground that the evidence adduced by the prosecution which supported the appellant's story that the money which was changed consisted of private and Government money was ignored. He gave an example of PW3 who told the court that she gave the appellant K2,000 to change for her and PW7 while waiting and the appellant were inside the bank. PW3 and PW5 waited for them out side the bank. Mr. Ndhlovu further argued that evidence showed that private money was to be changed. He further submitted that the evidence adduced by PW2 which was favourable to the appellant was ignored. On the other grounds of appeal the learned defence counsel argued that the money which was made subject of the offence was not Government money and the appellant should have not therefore been convicted of the offence of theft by public servant. He also raised the question of fair trial in one of his grounds. He submitted that the appellant had objected to the trial magistrate taking the case but he was over

ruled. The defence counsel argued that the learned trial magistrate missed the point. As we have already said the trial magistrate dealt with the objection and properly rejected the objection to him taking the case. We have looked at the judgment complained of and we have not found any bias on the part of the trial magistrate. We have considered other grounds submitted by Mr. Ndhlovu. We have considered the evidence adduced before the lower court and we are satisfied that the learned trial magistrate approached the issues before him correctly and came to the right conclusion. The evidence against the appellant was overwhelming. There was no prejudice during trial. The appellant was not denied legal representation. For the foregoing reasons the appeal against conviction is therefore dismissed. As to sentence we feel that suspended sentence will be appropriate. The sentence of 2 years is suspended for 12 months with immediate effect.

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B.K. Sweupe
ACTING CHIEF JUSTICE

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E.L. Sakala
SUPREME COURT JUDGE

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M.S. Chaila
SUPREME COURT JUDGE