

TANZANIA / JUDGMENT

19830127 TZHC Mbeya

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IN TRLJ nIGH COULit OF TN1 L'iYA.. i.mTflj JIhLI.UI GTIui. CR3JJ.iL 202 OF 1977 tx DODOMA Cr.pp. i.203/77 OrtIGJJi'ao. CRLJ.±I Cb iu. 70 0.? 1977 OF T.LI.LJ .1dDJuI CoTjiif 0.? Jj fliBtiiICT i2 IiLiG 1LJ0SalH. DAIMOND .CHDO Th i.J&lC 1*fr'UN.iJb.iNT C}LRGn: Stealing by Servant c/s 271 and 265 of the PoraJ. Code. JUJXIJNT kOS0, J.: Two appeals naucly Crinirial peal io. 202/77 in which .HFH.aL Jub±R is the appellant, hereixiafter ref rreu. to as the first peliaht, a.flo. Criminal pea1 hauber 203/77 in which iJal&LO..0 Cini0 is the hereinafter referred to a s the secona appellant, are cnsoUdatcd for the purposes ui hearinL. ann this judent. The two appellants, both bus concutors employeu. by the J-ringa Region Transport çoa.any, hieforth t be rferreu to simply . as IkaTC0, were each cagea sepat.e1y but on the same ch.rge sheet with theft by servant. 'phu first appellant was chrgoa on the first count With stealing shillings 1,781/80 from Iii2CO, which money allegealy cauc to his Possession by virtue his employment as a bus c..nauator. The second appellant was charged on the second count' with theft of shillings 7,531/50 from 111, TCo, the money having CauC to his possession by virtue of his employment with the cumpaay, also as a conuctor,, The perluLi within which both appellants were supposeatc have cemmitted their respective offencos is the same but ieither the charge sheet nor the eviu.once that was adnuced t0 the trial court aako clear, why they were charged ann trien t o gether. It is throfore apparent that there was a misjoinder of accusea persons... It was alleged thnt beth aolaaits cJ±uctcd b.s fares in their role as bus conuuctrs out uiL, not remit their reo ective fall collect- ions to their cap yer It is nt ol'.r if both wor ed in the same Ous as conductors and that they j ointay shared the work of collecting fires from passengers. it i s r,,j t also clear, il thit was the case, whether they were to acount separaeiy or jointly for their respectiw collections.' A misjoinder of accused persons io an irreuiacity. which is curable if it is shown that a miscarriage of. justice was not caused thereby. See .wUnihiahV. 'e•ei S.Ll eiJ 0 1977 LRT,n.29, (2) per hisanga, J. that was considered a case of misjoinder of dounts but the facts also conslited a misjoinder of accused persons and the irregularity was considred curable • The question in the present appeal is whether either appellant was prejudiced by the misjoinder. The eviuece as given by i-v.1 - a Cashier with L1jifCO, was that the second appellant (.Uaimond Ohando or Kyanno) returned frow Dat' es Salaam on 15/12/76 where he had gone aparently with the company bus as a Conductor. According to the witness Daimond did not hand over the fare collections to him as he should have done. From Daimond's icket book it was apparent that tickets had been issued to passengers who fare in the amounts shown on the duplicates of the tickets. P4.1 a claimed to have discovered that flaimona had a secret ticket 000k from hich he issued tickets to fare paying passengers. The

book was allegedly handed to the witness by flaimond. iLcom the official ticket cook it appeared that .L)ammond had collected shillings 220 5/= which the witness said was not handed over to him. Under cross-examination by the second appellant the witness appeared to say that hs,5,326/80 was collected by the second appellant using the secret ticket book between 12/11/76 and 14/12/76. Regarding the first appellant the witness merely said he issued a receipt for hs.900/= paid by his father Joseph. .blsowhere in his evidence the witness. said one iLfail LisLulsi was supposed to account to him for shillings 17/3 0 . It is not known if Rafail ksausi is also the same person as haphaci Joseph, the first appellant. The company accountant, i.2 Flician hasheshe said he received a report that "the accused had not paid over fares". I presume he meant the two appellants. The witness continued:- "I asked them about the money when they had not 'handed over to the cashier. They said that the money was not with them out promised to look for it and repay I expected shillings 79531/05 from kyando and shillings 1,7 81 /= from the other. The total amount was hs. 900/= they said they would pay 1 . It was said that on 24/1/77 Joseph the father of the first appellant paid hs.900/= on behalf of his son?). A receipt was issued, the payment was termed 'apato yn bus'. P.3 Iviwaiteocle who was the company General Manager said in his evidence that both appellants confessed that they had collected some money and they were ready to pay," he also said "ticket books show that accused 1. collected hs.1,781/= and accused 11 collected hs.7,531/05 which they did not hand over to us". It is not known which book showed that the first appellant had collected hs.1,7 81/= and which books showed that the second appellant collected hs.7,531/05, The witness further claimed to show the first appellant's signature - (3) although he does not say how he gained that knowledge. He purported to point out signatures of the first appellant from some mysterious book of which it is not known from the trial record if it was produced in evidence as an exhibit. The appellants denied that they stole any company money. The first appellant appeared to agree that any money due from him was repaid to the company. the second appellant denied that he had admitted having collected the money which was alleged to have stolen. The trial magistrate accepted as proved that both appellants collected the amounts they were said to have stolen and that they failed to hand it over to the cashier, *i.e. he also believed that both appellants admitted before the magistrate 'having occasioned the loss and were prepared to repay it, he therefore found them guilty of theft as charged. From the facts recapitulated above it is clear that the evidence against the first appellant is very scanty and inconclusive. The ticket books which were produced in evidence and from which the amounts alleged stolen were computed did not appear to be relevant - to the case against him. The trial magistrate however appears to have treated him as having been jointly charged. with the second appellant and - that the evidence - against the second appellant was also affected equally. As it has turned out, it is not at all known how the prosecution and the trial court arrived at the amount of Shs.17 81/ the first appellant is said to have stolen. Had the first appellant been charged and tried alone for the alleged theft imputed to him the trial magistrate would have found that there was no sufficient incriminating evidence against him. Therefore - the cashier who knew which bus conductor remitted money and which did not hardly said anything incriminating against him., The misjoinder, I referred to earlier, therefore, resulted in an miscarriage of justice against the first appellant. I quash the conviction against him for the misjoinder and also for the lack of sufficient evidence against him. - The sentence of three years imposed on him is set aside. - As he has already

completed his prison sentence, I find it unnecessary to order his release from prison. As for the second appellant there is no doubt he had been issued with the ticket book Lbch.. 'A' bearing serial numbers from 55801 to 56400. The ticket books -register Exh. 'B' shows that fact. The book was used on 9/12/76 and 15/12/76 during his bus trip to and from Dar es Salaam. Total cash received on those dates for the tickets issued amounts to Shs61,205/=. The cashier - Ii.1 admitted receiving only Shs.1,000/ thereof and a balance of shillings 2,205/= was unaccounted for by the second appellant. The appellant did not attempt an explanation of the money in his evidence. The only inference to be drawn is that the second appellant expropriated it. - 'I- (4). As for the money allegedly collected on the supposed secret ticket book amounting to Shs.5,326/50 the evidence was not clear. If it was true that the second appellant had used that ticket book, of which there was no record that it had been issued to him, with a view to appropriate the fares collected on it, I find it most unlikely that that appellant would have given it over to Pd.1, knowing that it would incriminate him. After all no one knew that he had and used such a ticket book, if he indeed he had used it. The evidence that he collected the money as reflected on the duplicates of issued tickets was based on the claim that his signature was seen on those duplicates. But there was no proper evidence to prove that it was his signature. The claim that he admitted having collected the entire amount stated on the charge sheet was denied by the appellant and I am inclined to the view that he never admitted it. In all, I am satisfied that the evidence only proved that appellant Daireond Chando stole by servant only Shs.2,205/=. I therefore dismiss his appeal against conviction, except as regards the amount stolen. . The sentence of 1 year imprisonment imposed on him was on the high side but cannot be termed manifestly excessive to justify interference by this court MBuYA J. A4 hRO sO, 27.183 . . JTJTJcJ)

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