HB 23/18
HCA 44/17

TICHAONA CHIKWAVA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & MOYO JJ
BULAWAYO 12 FEBRUARY 2018

Criminal Appeal

D. Dube, for the appellant
Ms N. Ndlovu, for the respondent

MAKONESE J: The appellant appeared before a magistrate sitting at Tredgold Magistrates' Court on the 24th March 2017 facing a single count of contravening section 136 (1) of the Criminal Law (Codification and Reform) Act (Chapter 9:23), that is fraud, involving potential prejudice of US$1 000. Appellant was convicted on his own plea of guilty and sentenced to 12 months imprisonment of which 4 months were suspended for 5 years on the usual conditions of future good conduct.

The brief facts of the matter as gleaned from the state outline are that on the 22nd March 2017 accused person who was in the company of one Blessed Mashandu, who is still at large proceeded to the complainant's business premises armed with a fake ZANU (PF) donation letter. The appellant handed the fake letter to one Robert Noel Peter Hugo at Tribal Logistics. The "donation request" was purportedly written by the party's provincial treasurer, one Simon Khabo. The appellant also produced a fake BD12 (Medical Certificate of Cause of Death) form, indicating that the deceased Khumbulani Mpofu (a former ZANU (PF) Provincial Youth Chairperson), had passed on, and that donations to assist in his burial were being sought. Khumbulani Mpofu was in fact alive and the appellant and his associate intended to obtain a cash donation by fraudulent means. The appellant's scheme however, collapsed spectacularly, when the complainant became suspicious and made enquiries from other ZANU (PF) party members. Complainant was informed that the appellant and his associate were using a fake request for a donation and that there was no such death. The police were quickly alerted and the appellant

was arrested whilst in the process of trying to secure the cash "donation" from the complainant. Appellant's colleague vanished from the scene and is still at large.

In his reasons for sentence, the learned trial magistrate had this to say:

"*In coming up with the appropriate sentence the court considered the following:*

The accused person is a first offender and pleaded guilty to the offence. It is trite from our superior courts that under the circumstances justice be tempered with mercy.

The offender is married with 2 children and therefore has ordinary family responsibilities.

However, the offender is convicted of fraud. The accused person wanted to prejudice complainant of US$1 000.

There was a high-level of pre-meditation and planning as the offender used a fake or imitation of an official document in the form of the BD12 from which is a medical certificate establishing cause of death. He also produced a fake ZANU (PF) donation letter purported to be written by the party's Provincial Treasurer.

The moral blameworthiness of the accused is very high as e faked the death of an existing person.

The offender abused his position as a ZANU (PF) Youth Deputy Commissar to fraudulently solicit for a donation. He put the organisation into disrepute by soliciting US$1 000 for the burial of an existing person.

The offence was motivated by greed as the accused person was gainfully employed.

The offender started his criminal enterprise from the deep end. A fine or community service would trivialize the offence. A custodial sentence partially suspended on condition of good behaviour meets the justice of the case."

There can be no doubt that the moral blameworthiness of the appellant was high. The conduct of the appellant put the image of the ruling ZANU (PF) party into disrepute. The appellant almost succeeded in his criminal scheme and was only prevented from pocketing US$1 000 from his fraudulent conduct when the complainant became suspicious and verified that the request or a donation was in fact fake.

It is however, well established that in sentencing a first offender to a term of imprisonment that falls within the 24 month grid, the trial magistrate must enquire into the possibility of community service. See *S* v *Silume* HB-12-16. It is not adequate for the trial court to simply state that community service is not appropriate. The learned trial magistrate fell into the trap of failing to give due weight to the fact that appellant was a first offender who pleaded guilty. The plea of guilty is valuable to the smooth administration of justice. See *S* v *Sidat* 1997 (1) ZLR 487 which was cited with approval in the case of *S* v *Katsaura* 1997 (2) ZLR 102 (H). Trial magistrates are urged to carefully examine the facts and circumstances of each case on its own merits. It is common knowledge that our prisons are full to capacity and community service serves in ensuring that prison sentences are only reserved for serious cases, where non-custodial sentences would be wholly inappropriate.

While it is settled that issues of sentence are the domain of the trial court, an appeal court will interfere with a sentence of a lower court where there is a misdirection or where the sentence is so excessive as to induce a sense of shock. See *S* v *Ramushu* SC-25-93.

It is my view that an effective sentence of 8 months imprisonment in the circumstances of this case is excessive and induces a sense of shock. The learned magistrate over emphasised the aggravating circumstances, whilst downplaying the factors in mitigation. In fact, the trial court held that the appellant had commenced his criminal enterprise at the deep end and yet the facts reveal that the complainant only suffered potential prejudice. The appellant did not benefit from his criminal conduct. He deserved a second chance. A prison sentence suspended on condition of performance of community service would have served the interests of justice. I must emphasise that community is a form of punishment. Its intended purpose is to deter the accused from committing criminal offences in future and at the same time, the offender provides a service to the public. In other words, sentencing an offender to community service is not in any way a form of trivializing the offence, in appropriate circumstances.

In the result, the sentence imposed in the court a quo is attendant with misdirection and as such this court must interfere with the sentence.

The court accordingly makes the following order:

1. The appeal succeeds.
2. The sentence of the court a quo is set aside and substituted with the following:
   (1) Accused is sentenced to 12 months imprisonment of which 4 months is suspended for 5 years on condition accused is not within that period convicted of an offence involving dishonesty and for which upon conviction he is sentenced to imprisonment without the option of a fine.
   (2) The remaining 8 months is wholly suspended on condition accused performs 260 hours of community service at Mzilikazi Police Station.
   (3) The record is remitted to the trial court for the terms of the community service to be explained to the accused.

Moyo J ……. I agree

Mathonsi Ncube Law Chambers, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners