Judgment No. HB 37/2002
Case No. HCA 190/2001
CRB REG 685/2001

JEAN CLAUDE ALLEGRUCCI

and

THE STATE

IN THE HIGH COURT OF ZIMBABWE
SIBANDA & CHEDA JJ
BULAWAYO 20 JUNE 2002

R M Fitches for the appellant
Mrs M Moya-Matshanga for the respondent

Criminal Appeal

SIBANDA J: This is an appeal from the Regional Magistrates' court in which the state has conceded that "the sentence does shock the conscience, and that a fine would meet the justice of the case."

In view of the state concession we decided not to hear submissions on merits, but invited both counsel to make submissions on the quantum of the fine to be imposed.

On 24 September 2001 the appellant, a South African citizen was arraigned before a Regional Magistrate on a charge of fraud. He was convicted on his own plea of guilty and sentenced to 3 years imprisonment with labour of which one year imprisonment with labour was suspended for 5 years on the usual conditions of good behaviour. He now appeals against sentence only.

The appellant owned a Mazda (twin cab) registration number 726-226H. The said vehicle was under an insurance cover with Eagle Insurance Company. He fraudulently misrepresented to the insurance company that the said vehicle was stolen in South Africa. On that basis he claimed and was paid an indemnity cover in the sum

of $1 560 000,00 for the vehicle. He defrauded the company in order to raise funds for the operation of his business in particular to set up a new business in Zimbabwe.

The insurance company after paying the said amounts conducted its own investigations of the alleged theft. It discovered that the alleged theft was false but that the appellant had in fact sold the vehicle. When approached, the appellant admitted the fraud, co-operated with the insurer and voluntarily on his own initiative and accord made full restitution including the costs of investigations plus interest at the rate of 45% per annum which rate was 23% per annum above the then prevailing rate of 22% per annum. He paid in restitution the sum of $2 300 000,00.

The appeal is against sentence only on the grounds that the court *a quo* misdirected itself in that it failed to have due regard and accord due consideration to all the mitigating factors, in particular, that the appellant had made full restitution in an amount far in excess of the amount defrauded.

It appears to me that this case falls within the ambit of the case of *Richard Muguji Mambo* v *The State* SC 14/95 (not reported) cyclostyled judgment at page 5 in which the learned judge of appeal, McNALLY JA stated, "it seems to me that it is also in the Zimbabwean tradition that compensation, restitution and restoration are at the heart of criminal justice, rather than mere punishment which benefits the victim not at all."

See also *R* v *Zindoga* 1980 RLR 86 AD at 88F
S v *Mpofu* 1985(1)ZLR 285 (HC) at 294 et seg
S v *Hapaguti* 142/87 (not reported) at 3
S v *Marimba* S 58/90 (not reported)
S v *Mvula* S 69/92 (not reported) at 8; and
S v *Malume* 1998(2) ZLR 508 at 512g

The instant case is distinguishable from the general line of cases cited *supra*, in that while they mainly deal with the issue of the desirability to induce an accused to pay restitution by suspending part of the sentence on those conditions whereas in the present case the appellant has already made full restitution without inducement and indeed on his own initiative prior to conviction and sentence.

The state has in my view, on these facts, properly conceded that the sentence does induce a sense of shock and that a fitting punishment should have been to give the appellant the option of a fine.

I am in agreement with state counsel that the sentence is rather on the punitive side. It has not, given credit to appellant's payment of restitution far in excess of the amount he defrauded the complainant. Further he brought into this country US$480 000,00 for investment. He invested into mining at Turk Mine where he employs 80 people. In addition he employs 37 people in the construction industry and further he is building a lodge between Bulawayo and Victoria Falls which upon completion will employ about 35 people. He is, therefore, an employer and potential employer of 152 people most likely with families. Thus the appellant has a direct responsibility of providing means for subsistance to approximately 500 people assuming of course that each of the 152 employees has a family of between 2 to 3 members apart from himself.

Yes, the court *a quo* is correct when it states that the amount involved in this case is substantial even if inflation is taken into account. It was for that reason, that, even though appellant had paid restitution in full and was sorry, the magistrate still felt that a "certain term of imprisonment would meet the justice of the case."

This reasoning creates an unmistakable impression that only accused convicted of theft of lesser amounts may be given the option of a fine and not those in the category of the appellant. That approach, to me, would constitute an untenable situation that would amount to pre-judging such cases of theft involving substantial amounts of money or goods of substantial value.

Such notion or view, in my respectful opinion can only be based upon a false perception that all accused convicted of theft of substantial amounts or goods of substantial value are incapable of contrition repentence and indeed reformation.

The difference between them may be accounted for in respect of courage, ability and opportunity that avail itself or indeed created. But the fact remains the same that they are all dishonest members of society. Thus each case must be considered on its own merits. I would neither subscribe to the notion nor view, that in all cases of accused convicted of theft of substantial amounts of money or goods of substantial value, for that matter, who have on their own initiative and accord prior to conviction and sentence made good their damage by paying full restitution and in circumstances that clearly indicate that the said accused is contrite, repentent and certainly reformed, should not be given the benefits of the option of a fine in punishment.

In my respectful view, what should be of paramount consideration and importance is the individual accused and the facts of the case in respect of his conduct. The question in my submission ought to be, does his conduct subsequent to the commission of the offence, signify that of a contrite, repentent and reformed individual. If all the relevant factors consistent with the above factors are found to be

present then the individual ought to be rewarded by a none custodial punishment.

In the instant case, appellant paid restitution on his own initiative and accord prior to conviction and sentence. He defrauded the complainant of the sum of $1 560 000,00. He repaid to the complainant a total amount of $2 300 000,00. The appellant paid an amount of $740 000 in excess of the amount he defrauded his insurer, which amount is said to include unspecified expenses paid by the insurer in respect of investigations and interest at the rate of 45% per annum which was 23% per annum above the prevailing rate of 22% per annum interest at the time. Further, the court found as a fact that the appellant was sorry.

It is my respectful opinion that the extent of the restitution elevates the instant case to a level of its own which is none comparable to any of the decided cases that I have had occasion to study. In addition the appellant is and has been out on bail since his conviction and sentence. In these circumstances it is my respectful view that to send the appelant to prison would amount to punitive punishment without purpose and objective. I am of the view therefore, that the appellant deserves credit for his conduct

and the same to be expressed by affording the appellant the option of a fine.

The appeal is against sentence only. I would, therefore confirm the conviction. I would give the appellant the option of a fine, coupled with a wholly suspended term of imprisonment.

Counsel for the appellant with the concurrence of the state counsel, submitted that a fine in the region of $100 000,00 would meet the justice of the case. This submission is based on the fact that appellant apart from payment in restitution of the actual sum defrauded, has in addition paid a total sum of $740 000,00. That a fine of

$100 000,00 would bring the cost of the crime to appellant to $840 000,00. Thus, it is submitted that, that amount should constitute adequate punishment of the appellant.

I am in agreement with that submission. Had the appellant not paid in addition to the restitution, the sum of $740 000,00 I would have found nothing amiss in sentencing the apellant to a fine in the region about $500 000. Indeed, to a business person in the mould of the appellant, the cost of his fraudulent conduct in the total sum of $840 000,00 must have conveyed a solitary lesson to him. That, in my view, ought to constitute a just reward for appellant's misadventure into the realm of dishonest. Most certainly, he must have learnt his lesson that crime does not pay. For these reasons, I am of the respectful view, that in these circumstances punitive punishment is not called for as it would serve no useful purpose.

Accordingly, the sentence is quashed and set aside, and the following substituted. Accused is to pay a fine in the sum of $100 000,00 or in default of payment 3 years imprisonment with labour. In addition the accused is sentenced to 3 years imprisonment with labour wholly suspended for 5 years on condition the accused is not, during that period, convicted of a crime in which dishonest is an element and that upon conviction is sentenced to imprisonment without the option of a fine.

Cheda J: I agree

Webb, Low & Barry appellant's legal practitioners
Criminal Dvision of the Attorney-General's Office respondent's legal practioner