

THE STATE

Versus

(1) SIBONGILE NCUBE

(2) COSTAIN SIBANDA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 1 APRIL 2004

Criminal Review

NDOU J: The matters were dealt with by the same magistrate sitting at Lupane. In each case the sentence imposed was a fine of \$500 or in default thereof one month imprisonment. In the circumstances the cases were not subject to automatic review as provided for in section 57 of the Magistrates' Court [Chapter 7:10]. These matters somehow came to the attention of the Provincial Magistrate in charge of Matabeleland North. He referred the cases to this court for review under cover of a minute which reads, *inter alia*-

“The accused persons, through misrepresentation were conferred War Veterans status resulting in them receiving \$50 000 gratuity each and monthly pensions totalling \$36 000,00 and \$26 000,00 respectively.

For defrauding the state of \$86 000,00 and \$76 000,00 respectively, each was sentenced to pay a paltry fine of \$500,00 in default of payment to one month imprisonment. No order of compensation was made.

Although the two cases are non-reviewable, we have decided to refer the cases to the learned Judge for his opinion as we are of the respectful view that the sentences imposed appear to be too lenient as they appear to give the impression that crime does pay.”

These cases are indeed reviewable under the provisions of section 29 (4) of the High Court Act [Chapter 7:06] – *R v Van Grevnen* 1939 TPD 167. In *Criminal*

Procedure in Zimbabwe the learned author John Reid Rowland at 26-11 rightly

observes:

“The fact that a case is not subject of automatic review does not preclude it from being reviewed. Whenever it comes to the notice of the High Court or, a judge of the High Court that any criminal proceedings in an inferior court are not in accordance with real and substantial justice, the court or judge may exercise the powers exercisable on automatic review. Under this provision a magistrate who entertains doubt about the propriety of a case which is subject of automatic review may submit the case for review.”

This court has very wide powers of review of criminal proceedings – *R v Chidongo* 1939 SR 210 and *S v Nyathi* HB-90-03. The objective of section 29 (4) *supra*, is to ensure that the accused person and state receive fair treatment and that the proceedings of the lower court were substantially just – *R v Leggate* 1941 SR 2 and *Fikilini v Attorney-General* 1990 (1) ZLR 105 (S). The review system is aimed at providing a curb on any misdirection or arbitrary exercise of power – *R v Van Grevnen, supra*. The learned Provincial Magistrate referred the two matters in furtherance of the objective of section 29(4) *supra*. This route should be used in those cases where it appears that if the criminal proceedings were not reviewed, there would be a possibility that a miscarriage of justice would occur. From the facts of these two matters the judgment of the learned Provincial Magistrate in this regard was correct. The sentences imposed in both these cases signal that crime pays. There is no judicious exercise of sentencing discretion. The offences are serious. Some of the benefits of being conferred war veteran status are recurring which would have resulted in enormous loss to the state. Fraud involving state funds is viewed in a serious light. The criminal conduct of the accused persons was well planned and well executed. Detection is not easy in such matters. Giving a fine of \$500 for fraud involving between \$76 000,00 and \$86 000,00 amounts to trivialising a serious

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offence. There are no special mitigatory features calling for such ridiculous low fines. The moral blameworthiness of the accused persons in these matters was very high and custodial sentences were called for. Sentences in the region of 12 to 18 months imprisonment with part suspended on conditions of good behaviour and compensation or wholly suspended on conditions of community service, good behaviour and compensation. As the mitigation was scant to the extreme I am unable to go beyond this suggestion.

In fact, the trial magistrate misdirected himself right from the commencement of these proceedings when he conducted the summary trial in terms of section 271 (2) (a) of the Criminal Procedure and Evidence Act [Chapter 9:07]. He should have proceeded under section 271 (2) (b). The sentences were disturbingly lenient.

Accordingly, I am unable to certify these proceedings as being in accordance with true and substantial justice. Accordingly, I withhold my certificate in both matters.