

**CHIEDZA MATIVENGA**

**VERSUS**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA AND NDOU JJ  
BULAWAYO 27 FEBRUARY 2006 AND NOVEMBER 2006

*S S Mlaudzi* for the applicant  
*K Amon* for the respondent

Judgment

**NDOU J:** The appellant was a young unmarried expectant mother at the time of her trial.

She was arraigned before a Bulawayo Regional Magistrate sitting in Beitbridge on 9 September 2006. She was duly convicted on her own plea on one count of Contravening Section 5(1)(a)(i) of the Exchange Control Act [Chapter 22:05] as read with Section 4 (1) (a)(i) of the Exchange Control Regulations, 1996 [S1 109/96], and, nothing turns on her conviction. She was sentenced to pay a fine of Z\$10 million (old currency) or in default thereof, 4 months imprisonment. In addition, she was sentenced to nine months imprisonment of which three (3) months was suspended on condition future good behaviour. She now appeals against sentence only, and more specifically against the additional sentence of imprisonment. The background facts of the case are the following;

The appellant was employed by the Reserve Bank of Zimbabwe as a foreign currency teller. On 7 August 2005, and at the Express Holiday Inn in Beitbridge she was approached by Itai Mbewe, an unlicensed foreign currency dealer. Itai Mbewe intimated

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to her that he wanted foreign currency amounting to ten (10) thousand South African Rands. The appellant decided to facilitate this illegal foreign currency deal. She approached one Edias Muchigere who is also not licensed to deal in foreign currency for the foreign currency which he did and gave the foreign currency, to the appellant. The appellant then surrendered the South African Rands to Itai Mbewe who was in turn going to give her Z\$57 million. Itai Mbewe did not fulfil his promise and disappeared with the rands causing panic resulting in the matter being reported to Police despite its criminal nature. This resulted in the arrest of the appellant.

In mitigation she stated that she did not benefit from the deal but participated in helping the people who are known to her. This assertion is dubious coming from a person of her position. Be that as it may, this statement was not challenged by the trial prosecutor. The Respondent has conceded that it does not support the effective term of imprisonment, on the basis that the court overlooked the appellant pregnant status at the time. The respondent submitted that this is a misdirection. I hold the view that the concession was properly made. In *S v Samuel* 1976(1) RLR 222(G), GOLDIN J held that it is highly undesirable to imprison a pregnant woman and where a term of imprisonment is justified, it should be suspended on appropriate conditions.

In *S v Mpofu* 1992(2) ZLR 68 (H) at 70 B-C; BLACKIE J, held:

“It is not desirable to imprison a pregnant woman even where a term of imprisonment might otherwise be imposed. Because of the woman’s condition, the suspension of any otherwise justifiable sentence of imprisonment is usually rendered just and necessary”.

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-See at the judgment of MALABA J (as he then was) in *S v Ncube* 1996(1) ZLR 577 (H) at 582 C-G.

In *S v Naran* (2) 1984(1) ZLR 110(H) SMITH J, after referring the plethora of cases, altered the prison sentence by suspending its operation wholly. In that case in one of the two counts the amount of foreign currency illegal possessed was 36 020 South African Rands. In *S v Dos Santos* AD 271/77, DAVIES JA, at page 5 of cyclostyed judgment said:

“This court cannot shut its eyes to the fact that many currency offenders who have indulged in conduct far more serious than the appellant’s conduct in this particular instance have been punished by substantial fines but have not been sent to prison”

–See also *S v Ridley* AD 142-74, *AG v Smith* 1978 RLR 158, *S v Fusaro* 1972(1) RLR 219 and *S v Horowitz* 1976(1) RLR 238.

Imprisonment may be imposed in cases involving gross breach of trust and of a privileged position on the part of the offender and/or a large amount for foreign exchange was lost to the country – *S v Baker* 1978 RLR 89 and *S v Haritakiis* AD 204-72.

The appellant is a young female first offender who was preparing for her wedding. She pleaded guilty showing contrition. She served just under a month of her sentence before she was admitted to bail pending appeal. She was placed under tremendous temptation when approached by Itai Mbewe and ended up doing something out of her character. This is an understandable human failing which greatly reduces her moral blameworthiness – *S v Vherukayi and another* HH 420-87, *S v Ncube* HB 20-91 and *S v Paulo and others* 1971(1) RLR 251 (A) and *S v Ncube* 1996(1), *supra*.

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The weight one would have placed on aggravation of sentence is the fact that a large sum of foreign currency is involved. The appellant was in a position of trust and privilege as foreign currency teller with the Central bank.

She abused this position. In view of the present state of the economy of Zimbabwe and this apparent serious shortage of foreign currency it is imperative that employees of the

Reserve Bank and other agencies of the fiscus operate honestly and not to come to the aid of the illegal foreign dealers like the appellant has done. Were it not for the above misdirection as far as the appellant's status is concerned, I would have been reluctant to alter the sentence.

I would accordingly allow the appeal to the extent that I would suspend the entire period of the additional sentence nine months for a period of five years on condition that the appellant is not convicted of any offence in terms of Section 5(1) of the Exchange Control Act [Chapter 22:05] committed within that period for which s

he is sentenced to a term of imprisonment without the option of a fine.

Cheda J.....I agree

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*Samp Mlaudzi and Partners*, appellant's legal practitioners  
*Attorney-General's Office*, respondent' legal practitioners