REGINA MLISA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND NDOU J J
BULAWAYO 21 JUNE AND 2 SEPTEMBER 2010

K Ncube, for appellant
K Ndlovu, for respondent

Criminal Appeal

NDOU J: The appellant appeared before a Bulawayo magistrate facing two charges of fraud. She pleaded not guilty to both charges. Despite her protestation she was eventually convicted and sentenced to twelve (12) months imprisonment of which four (4) months were suspended on the usual condition of good future behaviour. A further four (4) months were suspended on condition the appellant pays restitution. The remainder was suspended on condition the appellant performs two hundred and forty-five (245) hours of community service. The appellant now appeals against both conviction and sentence. The salient facts of the case are the following.

It is common cause in count 1, that the appellant approached the complainant who runs CP Cunningham, a commodity broking company for a loan of Z$950 million on 30 November 2005. The appellant was given Z$350 million against which she issued the complainant a post dated cheque of the same amount which she averred will be met on 5 December 2005. The cheque was dishonoured on presentation.

In count 2, it is alleged that the appellant approached the complainant once more for a loan of Z$270 million. She said the money was going to be paid by her husband the following day. The complainant's husband refused to pay as he stated that he had not given the appellant the authority or mandate to borrow the amount as she had told the complainant. The appellant's defence is that she paid back the monies advanced as loans. She stated that the money now demanded by the complainant is interest on the amounts advanced to her. However, no record of such payment was availed during the trial in the court *a quo*. Therefore, the question for determination in the trial court was whether in the circumstances the offences of fraud had been committed and whether in the final analysis the state had discharged the onus on it. In other words whether the state had proved beyond reasonable doubt that when the appellant made the representations she was lying and she impliedly had no intention to

keep the promises. The charge in count 1 has to do with a post-dated and dishonoured cheque. It was held in *S* v *Tinago* SC-197-88 that in such cases the state of mind of the accused at the time of the issuing is all important. Proof of that wrongful state of mind is not easy. It is trite that the onus is on the state to show that at the time the appellant made the representations, she knew she was lying, that she never at the time when she made them had an expectancy of being able to honour the cheque – *S* v *Copley* 1973 (4) SA 111 (RAD). Where the accused had no honest belief that the cheque would be met on presentation, he is guilty of fraud – *S* v *Jakarasi* 1983 (1) ZLR 218 (S); *S* v *Van Neikerk* 1981 (3) SA 787 (T); *R* v *Deetlefs* 1953 (1) SA 418 (AD) and *R* v *Blackmore* 1959 (4) SA 486 (FC). An accused cannot be convicted if the evidence reveals that at the time the cheque was drawn, he or she honestly believed that it would be met on the post date. Criminal law is not there to punish people who break promises – but only those who make promises at a time when they have no intention of performing – *South African Criminal Law and Procedure* by PMA Hunt (2nd Edition by JRL Milton) at 762-3. *In casu*, the appellant took out a loan. She made out a post-dated cheque. The complainant banked the cheque on the post-date and it was dishonoured. There was no reason for the complainant to bank the cheque earlier than the agreed date if she had been told that the appellant had no funds. After the cheque had been dishonoured, the appellant approached the complainant to state that she had a problem and asked for time to pay. As alluded to above, the question is whether she had the potential to pay when she made out the cheque. The court *a quo* arrived at a decision that the appellant never had any expectancy to meet the post-dated cheque and did not intended to do so. I agree with the said finding of the trial court. The appellant did not adduce evidence that she expected money from specific sources to make her defence realistic. That is why she lied about having repaid the moneys when there is no evidence of such repayment. She did not have sufficient cash inflow to cover the cheque on presentation when she drew up the post-dated cheque she knew that she had no means to raise and bank enough funds to cover the cheque thus she had the requisite mental element when she committed the act. She was properly convicted in count 1. In respect of count 2, she made a representation to the complainant that she would repay the following day with the aid of her husband.

When her husband was contacted the following day, he refused to pay as he had not given the appellant the mandate to raise the loan in the first place. It is trite that fraud charges are often based on what the accused has represented or promised ostensibly in regard to some future time. The true inquiry in such cases is whether the accused has honesty impliedly expressed his present state of mind in regard to the matter represented, or in regard to the promise – South African Criminal Law and Procedure supra, at 762; *S* v *Harper* 1981 (2) SA 638 (DC) at 649A-B; *S* v *Copley supra*, at 112; *S* v *Hubbard* A 40-75 and *S* v *Black* 1975 (1) RLR 355 (G). *In casu*, the appellant obtained the loan by falsely representing that her husband had agreed to pay the complainant the following day when he returned from his travel. She had

not spoken to her husband about the loan before she approached the complainant stating that he had made such an undertaking. The appellant's state of mind was dishonest when she made the promise. She knew she had no money to repay the following day. She knew that her husband was not even aware of the presentation she was making to the complainant. When the complainant approached her husband he revealed that the appellant had lied about his alleged involvement. She lied in order to defraud the complainant. There is no merit in the appeal against conviction in both counts.

Coming to the sentence, it is trite that this is the domain of the trial court – *S* v *Ramushu* SC-25-93. I do not see any misdirection on the part of the trial magistrate. The trial magistrate exercised her sentencing discretion judiciously. The appellant must realize that she is being punished for her criminal conduct. She should not be allowed to think that because she travels extensively in neighbouring states, she cannot be imprisoned for her serious criminal conduct. The trial court was not in any way negotiating a convenient sentence with her. She was being punished. She can surely perform community service and resume her travels thereafter. In the event that she does not want to perform community service the sentence of the court a quo makes a provision for such an eventuality. The appeal against sentence is, therefore, devoid of any merit.

Accordingly, the appeal against both conviction and sentence be and is hereby dismissed.

Cheda J …….. I agree

Kossam Ncube & Partners, appellant's legal practitioners
Criminal Division, *Attorney General's Office*, respondent's legal practitioners