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MARY SAMUTSA MOYO  
**and**  
THE STATE

HIGH COURT OF ZIMBABWE  
MAKARAU and KARWI JJ  
HARARE , 6 February and 12 March 2003

### **Criminal Appeal**

*Mr Ndlovu*, for the appellant;  
*Mrs Ziyambi*, for the respondent.

MAKARAU J: The appellant appeared before a magistrates' court facing one count of fraud. It was alleged against her that on 30 October, 1997, at ZANU-PF offices in Kwekwe, the appellant, with intent to defraud, misrepresented to the Zimbabwe National Liberation War Veterans vetting members ("the vetting officers"), that she was a war veteran and had participated in the war of liberation in Mozambique. As a result of that misrepresentation, the appellant was regarded as a war veteran and was entitled to a gratuity in the sum of \$50 000-00 and thereafter a monthly pension in the sum of \$2 000-00, thereby causing prejudice in the sum of \$56 000-00.

Prior to pleading to the charge, the appellant raised an exception to the charge. She was of the view that a charge of fraud in the circumstances of her case was improper. She was of the further view that she should have been charged with contravening s 24(b) of the War Veterans Act, [Chapter 11.15]. The section provides that:

"24. (a).....

(b) *Any person who obtains or attempts to obtain assistance to which he is not entitled knowing that he is not entitled to it shall be guilty of an offence."*

The exception was dismissed and the trial proceeded on the fraud

charge to which the appellant pleaded not guilty. After trial, she was convicted. She was sentenced to 4 years imprisonment, 1 of which was suspended on condition of good behaviour.

The appellant appealed against both conviction and sentence. Against conviction, the appellant alleged *in limine*, that the trial magistrate erred in finding that fraud was the proper charge in the circumstances of the matter. She alleged in the main that fraud had not been proved beyond reasonable doubt. Regarding sentence, the appellant was of the view that the sentence imposed by the trial magistrate was so severe as to induce a sense of shock, in light of the fact that the War Veterans Act provides for a penalty of \$500-00 or 6 months imprisonment.

The first issue that falls for determination is whether or not the trial magistrate erred in dismissing the exception by the appellant. The main ground advanced by the appellant in support of the contention that the trial magistrate erred in accepting that fraud was the proper charge in the matter is that the War Veterans Act provides for a similar offence and the statutory offence supercedes the common law offence of fraud.

In my view, there is nothing in the wording of s 24 of the Act that suggests that the legislature intended the offence created by that section to supercede the common law offence of fraud. As such, both offences are to me, competent, depending on the facts of the case before the court. As correctly submitted by Mrs *Ziyambi*, the State in all criminal proceedings is *dominus litis* and has a discretion as to which charge to prefer against the accused. It is however prudent practice for prosecutors to charge the one offence in the main and the other in the alternative, to avoid a situation like the one that occurred in this matter as I shall detail hereunder.

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It is common cause that for the State to prove that the appellant misrepresented to the vetting officers that she was a war veteran, the state had to rely on the definition of “war veteran” as provided for in the Act. The term “war veteran” can have various meanings in ordinary parlance. As somewhat humorously put by the trial magistrate in his judgment: *“Now war veteran is defined for the purposes of the Act. Its not going to be colloquial war veteran or what we perceive to be a war veteran. Its specific to the Act. One who falls outside the definition is not a war veteran, no matter how much how one may want to be a war veteran.”* It was necessary to put the term in a specific context for it to found a charge of fraud. The context in which it was put was that of the Act as the appellant had allegedly misrepresented to the vetting officers that she was a war veteran for the purposes of accessing the financial assistance provided for under the Act.

In my view, the fact that the State had to rely on the definition of the term war veteran as given in the Act to prove its alleged fraud, should have sounded the first warning bells to the prosecution to charge the appellant with the statutory offence in the alternative. Specific statutes creating specific offences are generally meant to cater for specific instances that may not be covered by the common law offences. It is presumed that the legislature is aware of the common law when it enacts statutes and is supplementing the common law by creating additional offences.

Section 2 of the Act defines a war veteran as meaning *“any person who underwent military training and participated consistently and persistently in the liberation struggle which occurred in Zimbabwe and in neighbouring countries between 1 June 1962 and 29 February 1980 in connection with the bringing about of Zimbabwe Independence on 18*

*April 1980”.*

It is apparent from this definition that for one to be regarded as a war veteran for the purposes of the Act, one must have undergone military training and must have participated consistently and persistently in the liberation struggle. I may also add at this stage, that for one to be passed by the vetting officers as a war veteran, one must have represented to them that they are possessed of both qualifications if I may use the term loosely.

The evidence that the state relied on to found the alleged misrepresentation on the part of the appellant is a form (exhibit 1) that the appellant filled in 1997 and submitted to the vetting officers. On the form, the appellant indicated that she underwent military training at Samakweza Camp between 1979 and 1980. She further indicated that she underwent both guerilla warfare and regular warfare training.

In respect of her operational development, she was required to fill in the section starting at paragraph 21 of the form, to paragraph 25. Under this section, she had to indicate her point of entry into Zimbabwe, (presumably as the commencement of her participation in the struggle), the name of her detachment, the name of her commander and any sectors, up to 4, in which she was deployed and her sector commanders, the name of her head or department during the struggle and the name of her “provincial” in the field.

In regard to point of entry, the appellant wrote the word “Manyene”. She did not supply any information regarding the name of her detachment, her commanders, any sectors where she was deployed and her section commanders or head of department during the struggle. In other words, she left the spaces where she was supposed to fill in this information blank. She then deleted the entire section dealing with operational development and running from paragraph 21 to paragraph 25 by running two crossing lines across the section.

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On the basis of the above and other information supplied by the appellant on the form, the appellant was passed as a war veteran by the vetting officer and was declared entitled to assistance under the Act.

It is clear from the foregoing that the appellant should not have been passed as a war veteran by the vetting officers. This is so because her form did not contain any information showing that she had consistently and persistently participated in the struggle. She not only left that entire section blank, (other than one entry relating to her point of entry into Zimbabwe), but actually crossed it out as if it did not apply in her case. In the absence of this information, the appellant is not a war veteran in terms of the Act and the vetting officers should have rejected her form for the purposes of the Act. However, although relevant to my inquiry, the issue of what the vetting officers should or should not have done in the circumstances is not the issue that is before me for determination.

The basis of the charge of fraud against the appellant is the allegation that the appellant misrepresented to the vetting officers that she was a war veteran. This allegation cannot be supported by the evidence as demonstrated above. The appellant merely furnished the vetting officers with an incomplete form upon which the vetting officer passed her as a war veteran. That the vetting officers did not thoroughly do their work can hardly be the basis of criminal liability on the appellant's part. When the issue of the blank and crossed out section of exhibit 1 was pointed out to Mrs *Ziyambi*, she graciously and properly in my view, conceded that the charge of fraud cannot stand against the appellant. The appellant did not misrepresent as alleged. She merely presented certain information upon which the vetting officers pronounced her a war veteran. If any misrepresentation was made, it

was made by the vetting officers.

On the basis of the foregoing I would quash the conviction of the appellant on the fraud charge.

One other issue remains. It is whether or not there is any other verdict that can be passed in the circumstances of this case. This issue arises from the fact that the appellant is clearly not a war veteran in terms of the Act. I have already laid a basis for my belief in that regard. She did not participate in the struggle as provided for in the Act. The appellant clearly obtained assistance meant for war veterans while knowing that she was not entitled to it. She thus committed an offence in terms of s 24 (b) of the Act.

The issue that I have to determine is whether on appeal I can substitute a conviction of contravening s 24 of the Act as the verdict. Both Mr *Ndlovu* and Mrs *Ziyambi* are agreed that I can. I am not convinced that I can.

The appellant was charged with the common law offence of fraud. The evidence before the court is that she did commit another offence, contravening s 24 (b) of the War Veterans Act. This statutory offence is not a competent verdict on a charge of fraud.

The State did not see it fit to charge the appellant with a contravention of the Act in the alternative. I know of no law that allows me, even with the consent of the appellant, to substitute a conviction for a common law offence with a statutory offence where the statutory offence was not charged in the alternative.

In the result, I would make the following order:  
The conviction and sentence of the appellant are hereby quashed and set aside.

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**Karwi J agrees.**

*Muzenda & Partners*, appellant's legal practitioners.

*Office of the Attorney-General*, respondent's legal practitioners.