MARRY MUBAIWA
and
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO & KWENDA JJ
HARARE, 15 March and 17 May 2023

Criminal Appeal

B Mtetwa, for the appellant
C Muchemwa, for the respondent

CHIKOWERO J:

[1] This is an appeal against the judgment of the Magistrates court which found the appellant guilty of contravening s 35 of the Marriages Act [*Chapter 5:11*]. The sentence imposed was a fine of ZWL$60 000.00 in default of payment 6 months imprisonment. In addition, 12 months' imprisonment was imposed and wholly suspended on condition of good behaviour. In respect of the appeal against the sentence, the appellant is dissatisfied with the 12 months imprisonment wholly suspended by the court *a quo*.

THE BACKGROUND FACTS

[2] At the material time, the appellant was spouse in an unregistered customary law union to the Vice President of Zimbabwe, Constantino Chiwenga ("the complainant").

[3] The Magistrates court found that she knowingly made a false statement to the then Judge President of the High Court of Zimbabwe, George Mutandwa Chiweshe, that the complainant had agreed to solemnize their marriage on 2 July 2019 at Number 614 Nick Price Drive, Borrowdale Brooke, Harare, being their residence.

[4] Acting on the misrepresentation, the then Judge President had communicated with Munamato Mutevedzi, who was the Chief Magistrate at the time, to facilitate the solemnization of the marriage. The latter offered himself as the marriage officer, oversaw the preparation of the necessary paperwork and, on 2 July 2019 travelled to the venue of the intended marriage in the company of the Deputy Secretary of the Judicial Service Commission to preside over the wedding only to hit a brickwall. The supposed bride was attending to her husband in South Africa. Mutevedzi could not have access to the residence.

A few days later, he had no option but to cancel the partially completed marriage certificate. The complainant testified that he had not agreed to the solemnization of the marriage on the date and at the place aforementioned, or at all. At all material times he was seriously ill and hospitalized firstly in India and then in South Africa.

[6] The specific allegations as set out in the charge sheet were that:

> "….on the date unknown but during the period extending from June 2019 to 2 July 2019 and at Harare, Marry Mubaiwa the accused unlawfully made a false representation or a false statement to George Mutandwa Chiweshe the Judge President of Zimbabwe that Constantino Guvheya Dominique Nyikadzino Chiwenga had consented and wanted their marriage solemnized on 2 July 2019 at Number 614 Nick Price Drive, Borrowdale Brooke, Harare. Acting on the false statement, George Mutandwa Chiweshe advised Munamato Mutevedzi the Chief Magistrate to prepare for the marriage. Munamato Mutevedzi made all the necessary arrangements and completed the marriage certificate forms. When Marry Mubaiwa made the false representation she well knew that Constantino Guvheya Nyikadzino Chiwenga had not consented and did not want their marriage solemnized."

[7] The appellant pleaded not guilty to the charge, tendered a written defence outline and cross-examined (through counsel) all twelve State witnesses.

However, she did not give evidence in her defence having chosen to exercise her right to remain silent as enshrined in s 70(1)(i) of the Constitution of Zimbabwe, 2013.

PROCEEDINGS BEFORE THIS COURT

[8] Although the appellant had raised twenty-one grounds of appeal against the conviction, the court, cognisant of the provisions of s 38(1) (a)(ii) of the High Court Act [*Chapter 7:06*], drew both counsels' attention to the fact that all the grounds of appeal questioned the correctness of the conviction in light of the evidence.

[9] Consequently, the appeal was argued on the basis of the following grounds of appeal:

> "11. The court *a quo* erred and grossly misdirected itself when it failed to find that false representations for the purposes of the Act can only be made to a Marriage Officer or any other person recognized in the Marriages Act [*Chapter 5:11*].
>
> [12] The court *a quo* erred and misdirected itself in convicting the appellant when the State had failed to prove its case beyond reasonable doubt.
> [13] The court *a quo* erred and misdirected itself in convicting the appellant when there was direct evidence from Justice Chiweshe that not false representations were made to him.
> [14] The court *a quo* erred and misdirected itself in convicting the appellant when there was direct evidence from Justice Chiweshe that issues to do with the complainant's consent did not arise in his discussion with the appellant.
> [15] The court *a quo* further erred and misdirected itself in convicting the appellant on a basis other than what the State had alleged in its charge sheet and State outline.
> [16] The court *a quo* further and grossly misdirected itself when it fashioned its own case against the appellant which was wholly divorced and different from what had been alleged against her by the State."

10. Section 35 of the Act reads as follows:

> "Any marriage officer who knowingly solemnizes a marriage in contravention of this Act or any person who makes, for the purposes of this Act, any false representation or statement knowing it to be false, shall be guilty of an offence and liable to a fine not exceeding level ten or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment."

This section is clear and unambiguous. Not being a Marriage Officer, the appellant was charged under the second rung of the section. The Act does not say that the false representation or statement must be made to a marriage officer. It says it must be made for purposes of the Act. The preamble to the Act sets out the purposes of that piece of legislation. It is to consolidate and amend the laws relating to the solemnization of marriages and matters incidental thereto. We agree with Mr *Muchemwa* that the trial court correctly interpreted s 35 of the Act and properly applied it to the facts before it. It mattered not that the then Judge President was not a marriage officer. What was pertinent was whether the false representation or statement was made for purposes of the Act. We agree that the representation or statement was made for purposes of the Act, that is to facilitate the solemnization of the marriage between the complainant and the appellant on 2 July 2019 at number 216 Nick Price Drive, Borrowdale Brooke, Harare. In the circumstances the 11th ground of appeal is meritless.

[11] The 12th ground of appeal is in the nature of a submission. It is a conclusion which this court may or not reach depending on its resolution of the sole issue arising from the remaining grounds of appeal.

[12] We take the view that there was direct evidence from Justice Chiweshe that the appellant made a representation or statement to that witness that the complainant had agreed to solemnize his marriage to the appellant on 2 July 2019 at number 216 Nick Price Drive, Borrowdale Brooke, Harare. This is what Justice Chiweshe said, in examination-in-chief:

> "Q. Accused person is facing charges of contravening s 35 of the Marriages Act. Do you know anything in regard to that charge?
> A. All I can really say is that sometime mid-2019, the accused phoned me. I was at the office at the High Court, when I received a call, she said to me: "Uncle we would like to solemnize our marriage with your muzukuru" meaning the husband, The Vice President. She requested that the marriage be held at their residence in Borrowdale Brooke and she suggested a date which she said would coincide with another family event. I think it was a date in July. I advised her that we do not solemnize marriages at the High Court and that these are done at the Magistrates Court. I offered to assist by communicating with the Chief Magistrate there, Mr Mutevedzi. I phoned the Chief Magistrate and advised of this request. He said he was willing to help and offered himself as the marriage officer for that occasion. I then gave both parties, if I remember well, their numbers, I got them to exchange their numbers."

[13] There were various other pieces of evidence from Justice Chiweshe to the same effect. They include the following under re-examination:

> "Q. Now you were asked about the consent of the parties that wanted or that allegedly wanted to solemnize their marriage and to quote you, "the issue never arose because I didn't think anything was wrong". What \did you mean by that?
> A. I think I would have said I didn't think anything was amiss. I didn't think all that was leading to this case, you see what I mean. In other words, I assumed this was a request from the couple being channeled through the wife to me. So, I had no reason to misbelieve her. Don't forget they paid lobola, don't forget they were living together, don't forget they had three children, if not four. Everything looked like a marriage to me. So when the wife came and said this is what I and my husband have decided to do, I had no reason to ask her, is he agreeing and why. I had no reason to do so.
> ……..
> "Q. Okay, lastly the complainant in this matter you indicated that he was your senior, was senior and he is known to you. Maybe you may make it clear for the record, why he then did not confirm with you or call him to say I have heard the request?
> A. Because there was no need for me to do so, the request was directed at me but I was not the authority, so I referred them to the Chief Magistrate. I had no reason to believe that Marry was asking for was not something that they had not discussed at their home.
> Q. And this was the request that had been made or given to you by the accused person?
>
> A. Yes, she did so on behalf of both of them. That is what she told me this is what they had agreed to do and she had been sent to ask me how best to go about it.
> Q. So when she spoke to you, she categorically stated that she was acting on behalf of the two of them?
> A. She said "sekuru, we want to get married, how do we go about it, we want to get married."

[14] In light of this testimony from Justice Chiweshe, our view is that the trial court properly found as a fact that the appellant made a representation to that witness that the complainant had agreed to solemnize his marriage with her on the date and at the place already mentioned. The evidence speaks for itself. In any event, there would have been no point in the appellant seeking the advice of Justice Chiweshe, her uncle, on how to go about solemnizing that marriage if she had not at the same time told him that the complainant and herself had agreed to solemnize the marriage.

[15] When Justice Chiweshe spoke about the issue of complainant's consent to the solemnization of the marriage not having arisen during his discussion with the appellant, there is need to understand that evidence in its context.

In his mind, and as testified to by him, the issue of the complainant's consent to the solemnization of the marriage could not logically have arisen during his discussion with the appellant. This was so because the whole discussion was initiated by the appellant on the premise that the complainant had agreed – for that is what the word "consent" meant in the

circumstances – to the solemnization of the marriage on 2 July 2019 at number 216 Nick Price Drive, Borrowdale Brooke, Harare.

[16] The trial court did not convict the appellant on the basis of Justice Chiweshe's beliefs and assumptions. It did not convict on the basis of any inferences. Neither did it fashion its own case wholly divorced and different from that alleged in the charge sheet and State outline. What it did was to assess the evidence of Justice Chiweshe in light of all other material evidence placed before it by the prosecution.

We have already referred to pertinent testimony from Justice Chiweshe in this regard. The complainant's evidence informed the factual finding that he had not agreed to the solemnization of the marriage. That finding has not been appealed.

[17] The appellant did not end her interaction with Justice Chiweshe by holding the telephonic discussion aforesaid. She followed it up by forwarding to him, for onward transmission to the Chief Magistrate, her national identity card as well as the complainant's. This came hot on the heels of the phone call. The contents of those documents found their way onto the partially completed marriage certificate. Through the Secretary of the Judicial Service Commission, the appellant furnished the physical address of the place of the supposed marriage. These details too found their way onto the partially completed marriage certificate. That was not all. She also availed the supposed groom and bride's passport size photos, ordered and paid for the wedding rings. The preparations were in sync with the content of her discussion with the then Judge President.

[18] We must refer to a portion of the cross-examination of Justice Chiweshe. It proceeded as follows:

> "Q. Section 35 refers to certain misrepresentations. That is the section she is alleged to have contravened. Would you accept the proposition that if there was in fact a contravening of section 35 of the Act, that contravention was done by Mutevedzi?
>
> A. I don't know
>
> Q. You don't know?
>
> A. Well I am not familiar with the facts as you allege them to be.
>
> Q. <u>So the charge sheet and the state outline are clearly false in so far as they claim that the false representations or statements were made to you as your discussions never ventured to issues of consent and in any event you are not a marriage officer?</u>

A. That is true" (the underlining is our own)

Grounds of appeal 13 and 14 are predicated on the underlined question and answer. In our view, that portion of the record assists the appellant not at all. Two questions were put to the witness under the guise of a single question and solicited one answer. There were no follow up questions, in cross-examination, to obtain clarity to the answer given. The answer to the two-in-one question can mean that it was true, which it was, that the then Judge President was not a marriage officer. It can also mean that it was true, which it was, that issues of the complainant's consent to the solemnization of the marriage did not arise during the witness's discussion with the appellant because that discussion was held on the foundation erected by the appellant herself namely that the complainant had agreed to the solemnization of the marriage. The answer could also mean, which again was true, that the marriage officer would, on the day of the supposed solemnization of the marriage, ask both parties whether they consented to the marriage.

What we think to be key is this Justice Chiweshe, both in-chief and under cross-examination, simply related what the appellant told him, namely that the complainant and herself had agreed to wed on the date and at the place captured in the charge sheet. Whether the appellant was making a false representation or statement was not for Justice Chiweshe to say. The trial court could only make a finding on the falsity or otherwise of the representation or statement after listening to the complainant's evidence. This it did. In the circumstances, the two, possibly three-in-one question and answer thereto do not advance the appeal against the conviction. Justice Chiweshe was a witness. He was not the court.

[19] We have already noted that the appellant gave a defence outline. The defence outline was in the form of a confession and avoidance. She did not, in that outline, dispute the *actus reus*, to wit, that she represented that the complainant had agreed to have their marriage solemnized. The defence outline was clear that it was their intention from the time roora (bride price) was paid to solemnize the marriage. They bought rings for that purpose. Both were excited about the prospect of solemnization of the marriage. She also did not dispute, in the defence outline, that she told Justice Chiweshe that the marriage would be solemnized at their house and confirmed the venue to Walter Chikwanha, the Secretary of the Judicial Service Commission. Her defence outline did not put in issue the absence of consent which she now argues on appeal. Her failure to give evidence had the consequence that she did not refute the state evidence. Regarding the State case her point was that the complainant and

herself agreed to wed but he fell ill at the critical moment. Essentially, in presenting her defence outline, the appellant had agreed with the State witnesses Justice Chiweshe and Chikwanha that she represented that the complainant was aware of and had agreed to wed her.

After the complainant testified that the parties were enstranged and so they could not and did not agree to a solemnization of the marriage, the complainant neither retracted her defence outline nor adduced evidence to controvert the complainant.

In conclusion, the argument on appeal that she never said to Justice Chiweshe that the complainant and herself had agreed to solemnize their marriage has no basis in the defence outline or in evidence given by her at the trial. She did not give evidence at the trial.

[20] The appeal against the conviction is devoid of merit.

[21] The appellant contends that superior court sentencing guidelines were not followed in imposing the additional 12 months imprisonment, which the court wholly suspended on the usual conditions of good behaviour. Mrs *Mtetwa* argues that the result was the imposition of a sentence which induces a sense of shock.

[22] We cannot agree. The principle is that sentencing discretion reposes in a trial court. An appellate court does not interfere on the general ground that the sentence is excessive unless satisfied that the sentence imposed is disturbingly inappropriate. See *S* v *Nhumwa* S 40/88; *S* v *Ramushu & Ors* S 25/93.

The legislated penalty for this offence ranges from a fine not exceeding level ten to imprisonment not exceeding five years or both such fine and such imprisonment. The sentence imposed was wholly non-custodial. It fell within the range set by Parliament. The trial court considered that the circumstances of the case called for the need to reform the appellant as well as to deter her and like-minded persons from committing similar offences. Her poor health and status as a first offender weighed heavily with the court in assessing an appropriate sentence. The portion of the sentence appealled against neither shocks us nor is it marred by any misdirection. The mere fact that the offence is not prevalent cannot mean that the trial court improperly exercised its discretion in deciding that the addition of a wholly suspended twelve months period was justified for purposes of reforming the appellant as well as deterring her and other would-be offenders. Sound reasons were given for imposing that portion of the sentence.

[23] In the result, the appeal be and is dismissed in its entirety.

CHIKOWERO J…….

KWENDA J, agrees: ……

Mtetwa and Nyambirai, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners