

PAUL MUHABE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA & MUZENDA JJ
MUTARE, 5 February 2020 and 27 February 2020

Criminal Appeal

I Mandikate, for the appellant
Mrs J Matsikidze, for the accused

MUZENDA J: The appellant was convicted of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and sentenced to 24 months imprisonment of which 4 months was suspended for 5 years on conditions of future good behaviour, of the remaining 20 months, 5 months imprisonment was suspended on condition that appellant restitutes complainant. In addition 2 months imprisonment suspended previously were brought into effect.

Appellant noted an appeal against both conviction and sentence and outlined the grounds as follows:

1.0. Ad Conviction

- 1.1. The Learned Magistrate erred by accepting and putting reliance on the evidence of the complainant on single witness whose evidence was not clear and satisfactory in each and every material respect.
- 1.2. The Learned Magistrate erred in concluding that there was overwhelming evidence that appellant committed the offence when the evidence relied on was riddled with serious inconsistencies which were never clarified when the state closed its case.
- 1.3. The Learned Magistrate also erred in her assessment of the guilty or otherwise of the appellant when she made a comparison to say of the two versions complainant's version was more plausible.

1.4. The learned Magistrate erred by accepting it as a fact that complainant had been referred to the appellant by his distant sister without any evidence having been led from the state to buttress this point.

1.5. The Learned Magistrate erred by rejecting appellant's defence that the engagement was over the issue of bales and a laptop a defence which was corroborated by the bank slip as well as some concessions by complainant during cross-examination.

2.0. Ad Sentence

2.1. The sentence imposed by the Learned Magistrate was manifestly excessive to the extent that it induces a deep sense of shock given the mitigatory factors in favour of appellant which outweighed factors in aggravation.

2.2. The Learned Magistrate erred at law by sentencing appellant without proffering reasons for opting for such a sentence.

2.3. The Learned Magistrate erred upon her arrival at effective sentence of 15 months imprisonment on appellant, by failing to consider the imposition of community service in lieu thereof.

2.4. The Learned Magistrate erred in imposing an effective custodial sentence on appellant when a fine and a wholly suspended prison sentence on condition of restitution thereof were ideal and permissible of the offence.

FACTS

According to the state outline, the appellant is a lecturer at Zimbabwe Distance Education, Mutare, complainant Cain Qongo resides in Chivhu, he is unemployed. Sometime in April 2018, the appellant hatched a plan to defraud unsuspecting members of the public who were looking for college training places at Mutare Polytechnic where he roamed around looking for possible clients. On unknown date, but during the same month, complainant went to Mutare Polytechnic College intending to find a college place as a full time student but he failed to secure a place. Whilst at the college, the complainant met the appellant who introduced himself as a lecturer and that he was in the college selection team. The complainant who was desperately in need of a place warmed up to the appellant and asked for assistance to get a training place at the institution. The appellant indicated to the complaint that he would facilitate a training place for the complainant at the college. He told complainant that his place was automatic and that he should deposit \$940-00 into appellant's

Steward Bank Account so that appellant would tender the money to the college as school fees. The appellant asked for complainant's particulars and dismissed him later after telling him to wait for the next intake. On 26 October 2017, the complainant deposited \$940-00 into appellant's account. From that day the complainant made frantic efforts to have receipts as proof of payment of college fees from the appellant but to no avail. The complainant continued with his efforts until the appellant was no longer reachable on his mobile phone. Later complainant proceeded to Mutare Polytechnic College enquiring about his place but was told there was none. He enquired about the appellant and the college expressed no knowledge of him. On the same day complainant made a report at Mutare Central Police leading to the arrest of the appellant. Total value of prejudice is \$940-00 and nothing was recovered.

The following aspects were on hearing of the appeal found to be common cause:

- (1) appellant met complainant and complainant deposited an amount of \$940-00 into appellant's account.
- (2) after the payment of \$940-00 by the complainant to the appellant, appellant became elusive till he was arrested.
- (3) the appellant admits that he did not refund the \$940-00 to the complainant up to this date.

Although the appellant admits that he was paid \$940-00 by complainant he denies that the money was for the facilitation of assisting complainant to get a training position at Mutare Polytechnic. The court *a quo* analysed the credibility of the complainant's evidence and believed the complainant; we fail to see any basis for upsetting that given the issues of common cause outlined herein. The appellant did not dispute that the complainant actually went to Mutare Polytechnic to check whether his name was among those reserved for the appropriate course. He did not get any confirmation from the Registry thus he decided to lodge a report with the police. Appellant in his heads of argument submitted that the complainant's evidence was packed with inconsistencies which were never clarified by the state. He further averred that the court *a quo* made a comparison between testimony of complainant and appellant's version and adjudged that the version of the complainant was plausible. We had the opportunity to critically look at the judgment of the trial magistrate and we came to the conclusion that there were no inconsistencies allegedly perceived by the appellant at complainant's evidence. Given the fact that there was no eye witness relating to what transpired between appellant and complainant, there is nothing untoward done by the

trial court in adjudging the veracity of both appellant and complainant's version before reaching the decision the court did. In any case the conduct of the appellant in this matter left a lot of issues unexplained more particularly as to why he avoided the complainant when he knew that he had not paid back the \$940-00 nor found a place for the complainant at Mutare Polytechnic. The issue of the laptop alluded to by the appellant in his appeal papers was not pursued on the date of hearing. We are satisfied that the appeal against conviction has no merit and the concession made by the state does not find favour with us and we reject it. The appeal against conviction is dismissed.

As regards sentence, given the value of the prejudice in this matter being \$940-00 and taking into account that there is also an order for restitution, the sentence of 24 months imprisonment is rather on the excess. We are aware that the appellant is a repeat offender, but that does not bar the court from passing a sentence of community service if the ultimate sentence contemplated by the court comes into the realm of community service. Appellant's legal practitioner indicated during hearing that the appellant had already served three months imprisonment that would cover the 2 months imprisonment which was brought into effect on the day of his sentence. The appellant is employed at Zimbabwe Distance Education and a custodial sentence may have caused loss of his employment. The appeal against sentence succeeds:

Accordingly the sentence of 24 months imprisonment of which 4 months imprisonment is suspended for 5 years on condition of future good behaviour and 5 months is set aside on condition of restitution and substituted as follows:

"15 months imprisonment of which 5 months imprisonment is suspended on condition that accused restitutes complainant in the sum of \$940-00 through the clerk of court, Mutare on or before 30 April 2020 and the remaining 10 months imprisonment is wholly suspended on condition accused performs 350 hours community service at an institution to be agreed between accused's defence counsel and the state."

The trial court is directed to summon the appellant and have his sentence explained to him and also agree on an institution at which the appellant is going to serve the community service.

MWAYERA J agrees _____

Mugadza Chinzamba & Partners, appellant's legal practitioners
National Prosecuting Authority, state's legal practitioners