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S.C. 48/85

Judgment No. S.C. 48/85
348/84

Crim. Appeal No.

TEC LA FARAYI MARI v THE STATE

SUPREME COURT OF ZIMBABWE,

DUMBUTSHENA, CJ, BECK, JA GUBBAY, JA,
HARARE, MAY 27, 1985.

The appellant in person,

F.S. Chambakare, for the respondent

DUMBUTSHENA, CJ: The appellant was convicted of fraud by the Regional Magistrate sitting at Harare. She was sentenced to three years' imprisonment with labour of which one-and-a-half years' imprisonment with labour was suspended for five years on the usual conditions. She now appeals to this Court against conviction and sentence.

At the conclusion of argument the Court announced the dismissal of the appeal against conviction and the setting aside of the sentence and its substitution with a sentence of a fine, and indicated that reasons would be handed down later. These are our reasons:

The allegations made by the State against the appellant were that she committed the crime of fraud because she wrongfully, unlawfully and falsely prepared two invoices purporting to show that Raradza (Pvt) Limited had supplied certain goods to Mazowe Mine Secondary School at Mazowe Mine. Mazowe Mine is a subsidiary of Lonrho (Zimbabwe) Limited, hereinafter referred to as "Lonrho". It was alleged that the appellant had prepared these invoices with the intention to defraud Lonrho of the sum of \$7 547,43. To the potential loss and

prejudice of Lonrho she presented the invoices, Exhibits One and Five, to one Miss Audrey Manhanga, a creditor's clerk employed by Lonrho at its Headquarters in Harare, demanding immediate payment, whereas she knew that the invoices were false and that no payment was due to Raradza (Pvt) Limited.

I need not repeat all the facts in this case because they are fully set out in the judgment of the learned trial magistrate.

It is common cause that the appellant was employed by Barclays Bank, First Street Branch, as an assistant to the Head of the Tobacco Department. It is also common cause that she used to visit Raradza (Pvt) Limited during her spare time mainly to see one of its Directors, Madamombe, who was her boyfriend and that during these visits she was asked to do some work for the Company.

She used to prepare a few invoices, type documents and mark prices on goods for the Company. She was not paid for her work. She usually did this work for them on Wednesday afternoons, a day she used to finish work in the Bank early.

On one of these Wednesdays Raradza, the Managing Director of Raradza (Pvt) Limited, asked her to prepare two invoices, Exhibits One and Five. He handed her four invoices, two white with information written on them and two pink ones on which she had to transcribe the information from the white invoices. The appellant said in her evidence that when she completed writing down the information on to the pink invoices, she handed all four invoices to Raradza. She denied taking the invoices to Lonrho. She denied demanding a cheque in payment of the goods reflected on the invoices. The court a quo did not, however, believe her.

Miss Manhanga's evidence was to the effect that the appellant brought two invoices to Lonrho. She was called from her office by the receptionist and the appellant handed the two invoices to her and requested immediate payment. She testified that she was struck by the appellant's facial features and the way she was groomed - "she was exceptionally well-

groomed". Miss Manhanga was asked:-

"Q. 'What is it about her facial features in particular?

I would say her nose.

Q. What about her nose? — You know, it sort of to me, It's not normal, you know. A person I'd say has got a fat nose. .. It is very difficult for me, but when I looked at her that particular day, I said to the receptionist there, 'This lady's face, her nose looks sort of different', you know, and the way she had done her face.

Q. Anything else about her features at all? Well, she hasn't got a broad face. She has got a sort of slim face, you know. Looking at her that time, I thought, you know, she was very particular about the way she carried herself.

Q. And what about her build? — You know, the way she was dressed, she was tall, slender."

That somewhat graphic description of the appellant was confirmed by us when the appellant argued her appeal in this Court.

From her facial features and deportment we were left in no doubt that the appellant was the person who handed the invoices to Miss Manhanga at Lonrho Headquarters.

However, the appellant contended before us that her identification by Miss Manhanga in the Barclays Bank was improper because she had spent four days in police custody and the police had taken her passport which had her photograph in it. The burden of her submission was that Miss Manhanga must have been shown her photograph before she identified her in the Bank.

There was no formal identification parade held. The appellant was identified at the Bank during working hours. D.S.O. Kadungure, Charles Nyakuwa, a commissionaire at the Bank, and Miss Manhanga walked through the Bank. Miss Manhanga did not identify

the appellant the first time they walked round the Bank. On the second round she saw the appellant in her cubicle with two white or coloured ladies and identified her. It was said in

evidence that the appellant was not in her cubicle when Miss Manhanga first walked through the Bank.

Although the appellant's identification was informal I am satisfied that the presence of fifty other black ladies in the Bank and the very prominent and striking features of the appellant excluded the possibility of mistaken identification. Besides, D.S.O. Kadungure was careful not to mention to Miss Manhanga the name of the appellant and he did not talk to her about the appellant. Nyakuwa, who worked in the Bank and knew the appellant, walked in front of D.S.O. Kadungure and Miss Manhanga who were walking abreast following him. We are satisfied that the identification of the appellant by Miss Manhanga was proper.

The facts of this case suggest that the appellant was drawn into the commission of this offence through her association with Raradza and her boyfriend, Madamombe. I am inclined to believe that when the appellant found how difficult it was to obtain a cheque from Lonrho, she informed those that had devised the fraud and from that moment onwards she kept out of it. Support for the view I take of her involvement after that time comes from the fact that the telephone call made to Miss Manhanga after the appellant had left Lonrho Headquarters and the telephone calls on two other subsequent occasions were, according to Miss Manhanga's evidence, made by men.

On the evidence on record the appeal against conviction is without merit. There can be no doubt that the appellant was correctly convicted.

The appellant is a young woman aged 24 years. She is

not married. She has two children who were at the time of the trial aged three and six years. When she appeared before us she looked pregnant. When she was employed by Barclays Bank she used to earn a gross salary of \$510 per month. She has now lost her employment. For a girl who is unmarried and who supports two children, the loss of a job is, in itself, in my view, a painful punishment.

In assessing sentence the learned magistrate took into account the fact that the appellant was a first offender, and that Lonrho did not suffer actual prejudice. However, he took too serious a view of this case - a view which would have fitted the facts of this case had he been considering an appropriate sentence to be passed on those who schemed and devised the fraud. That this is so is clear from his judgment on sentence. After considering the mitigatory circumstances he said:-

"However, the evidence indicates that this was a well planned attempt to defraud Lonrho (Zimbabwe) Limited of seven-and-a-half thousand dollars. A false rubber stamp was made, purporting to come from the Mine School. After the invoices had been presented by yourself, there was a 'phone call soon afterwards to the lady who was handling it in connection with this matter. There was a ' phone call the next day, probably from someone working in Raradza (Pvt) Limited, enquiring about the progress of the cheque to be made in payment of these invoices. When that person was told that Lonrho would have to check with the school before payment could be made, there was a call the following day, purporting to come from the School Secretary or the Mine Secretary. All these calls were false in that they impersonated a person who would have the right to make such a call, and indicates a determination on the part of the conspirators to proceed with this attempt to defraud the company."

That is a serious view prompted by the meticulous scheming and planning made by those who devised the plan to defraud Lonrho of the sum of \$7 547,43. There is no evidence that

that the appellant was involved in the planning of the commission of this crime.

In my judgment the learned magistrate failed, when he assessed the sentence he imposed on the appellant, to distinguish between the part played by those who devised the scheme to defraud Lonrho of its money and the part played by the appellant, who was sent by Raradza.

Mr Chambakare, who appeared for the respondent, drew this distinction and conceded that a sentence of three years' imprisonment with labour was manifestly excessive. He indicated in his submissions on sentence that the appellant was used by Raradza and Madamombe. He submitted that the appellant might not have gained anything had the fraud been successfully accomplished a point the learned magistrate considered in his judgment on sentence when he said:-

"I accept that if the attempt to defraud the company had been successful, payment would have been made by cheque in favour of Raradza, and the cheque would have been crossed either 'not negotiable' or 'account payee only'. In any event, you would not have the right to apply that cheque exclusively to your own purposes. It would have to go into the Raradza company."

It seems to me that the learned magistrate did not take into account what he said above when he assessed his sentence.

In my view, we are at large to assess an appropriate sentence. There is no doubt that the offence is a serious one. Had the people who devised the fraud succeeded Lonrho would have suffered actual prejudice in the sum of \$7 547,43.

What we are concerned with, in this case, is the part played by the appellant in the executing of the fraud. She agreed to

to write out the invoices and to deliver them to Lonrho in order to collect a cheque there from. She said she wrote the invoices innocently. That piece of evidence was rejected by the court a quo. There is, however, no evidence that once she had sensed the difficulties in obtaining the cheque from Lonrho she persisted with the fraud as did the men who telephoned Miss Manhanga three times with the intention of making her believe that the Mine Secretary had cleared the invoices for payment. She seemingly withdrew from further participation in the scheme. If, upon returning to Raradza Company, she had telephoned Miss Manhanga about the cheque her moral blameworthiness would have been as grave as that of the people who devised the fraud. In my view she played a lesser part in the whole scheme of things. I hold this view because of the absence of evidence to the contrary.

In assessing the appropriate sentence one has to have regard to her personal circumstances, her young age, the loss of her employment, the fact that she is a first offender and the part she played in the scheme. We did not think that she should be sent to prison. This is a case where sending a first offender to prison may be inappropriate. I derive support from what was said by FIELDSEND CJ in *S v Gwarada* 1981 (2) SA 531 (Z, AD) at 533 C-E.

Besides, I agreed with the appellant and Mr Chambakare that the sentence is manifestly excessive and for that reason we set aside the sentence of imprisonment and substituted one of a fine.

For these reasons we dismissed the appeal against conviction and the appeal against sentence succeeded to this extent. We set aside the sentence of three years' imprisonment with labour of which one-and-a-half years' imprisonment with labour was suspended for five years on appropriate conditions and substituted the following sentences

"A fine of \$750 or, in default of payment, five months' imprisonment with labour. In addition, six months' imprisonment with labour suspended for three years on condition that the appellant does not, during that period, commit any offence involving dishonesty for which she is convicted and sentenced to imprisonment without the option of a fine."

BECK, JA: I agree.

GUBBAY, JA: I agree.