

(1) FUNGAYI NYANGARI (2) HEATHER SHAMU
v
THE STATE

**SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GOWORA JA & PATEL JA
HARARE, MARCH 20, 2014**

B Pesanai, for the appellants

E Nyazamba, for the respondent

GOWORA JA: After hearing counsel in this matter, we dismissed the appeal against both conviction and sentence. We indicated that our reasons would follow. These are they.

This is an appeal against the decision of the High Court, dated 13 September 2011, confirming the conviction of and sentence imposed upon the appellant by the Magistrates' Court. The appellant and one other were convicted of one count of contravening s 136 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*], ("the Code") i.e. one count of fraud involving the sum of USD 15 200. They were each sentenced to four (4) years imprisonment, of which one year was suspended for five years on condition of good behaviour. A further one year was suspended on condition that each paid restitution to the complainant in the sum of USD 7 600 by 31 (*sic*) February 2010.

The court *a quo* found that the evidence showed that the appellant and her sister, one Mary Nyangari, were liable as co-perpetrators of the offence in terms of s 195 of the Code. From the evidence led, the appellant approached the complainant seeking foreign currency. It was agreed that the appellant would give the complainant the equivalent in local currency which would be transferred into the complainant's creditors' accounts electronically. Between 25 and 27 September, the complainant gave the appellant the sums of USD 8 000, USD5 000 and USD 3 000.

The Magistrates' Court found, and the High Court confirmed, that the appellant and her co-accused, a supervisor within the Bank, used fake RTGS forms to dupe the complainant into believing that the equivalent in local currency had been transferred into the specified accounts.

In our view the evidence before the Magistrates' Court clearly supported a finding of guilty and the High Court cannot be faulted in upholding the conviction of the appellant.

As regards sentence, the appellant contended before us that the court *a quo* erred in holding that a custodial sentence was the only appropriate sentence and in disregarding the mitigatory circumstances advanced before the Magistrates' Court, in relation to the appellant's health. In that court no medical evidence was adduced to establish the appellant's medical condition and that of her child. In this regard the court *a quo* cannot be faulted for having accepted the reasoning of the Magistrates' Court.

The second ground for challenging the sentence was that the court *a quo* erred in disregarding an order of restitution coupled with a wholly suspended sentence as the appropriate sentence in the circumstances.

In our view the authorities do not support the proposition advanced on behalf of the appellant. An order for the payment of restitution does not necessarily entail the imposition of a wholly suspended sentence.

Taking the sentence as a whole, we do not consider that it is so manifestly excessive as to induce a sense of shock, having regard to the gravity of the offence and the personal circumstances of the appellant. It cannot therefore be said that the High Court misdirected itself in the exercise of its sentencing discretion.

It was the unanimous view of the court that the appeal lacked merit in its entirety and it was for this reason that the appeal against both conviction and sentence was dismissed.

GWAUNZA JA: I agree

PATEL JA: I agree

IEG Musimbe & Partners, first appellant's legal practitioners

Messrs Masawi & Partners, second appellant's legal practitioners

Attorney General's Office, respondent's legal practitioners