DACHA CHABALALA
versus
THE STATE

HIGH COURT OF ZIMBABWE
WAMAMBO J & ZISENGWE J
MASVINGO, 10 November 2021
WRITTEN REASONS PROVIDED ON 23 FEBRUARY 2022

Criminal Appeal

Mr C Ndlovu, for the appellant
Mr C Mbavarira, for the respondent

ZISENGWE J: US$53 820 (Fifty-three thousand eight hundred and twenty united state dollars) is a substantial sum of money, whichever way one looks at it. It is a sum that has the potential of unlocking many possibilities. Defrauding a supposed business partner of that sum of money almost invariably invites upon the offender a deserved stint in gaol. The appellant in the present matter, however simply cannot stomach such a prospect. This is despite having candidly admitted having employed guile and deception to defraud the complainant of the said sum of money in cash. On the 10th of November we delivered an *ex-tempore* judgment in which we dismissed the appeal against the sentence imposed by the court *a quo* on the appellant in the wake of his conviction. The appellant has since requested for written reason thereof and what follows therefore are the reasons informing that decision.

The appellant as aforesaid was convicted, following his plea of guilty to two separate but related offences, namely forgery and fraud both stemming from a series of events which culminated in the complainant in count 2 losing the said sum of money to the appellant. In order to achieve that the latter used an elaborate con-trick to lure and ultimately defraud the complainant.

In a nutshell the facts are these. The appellant who happens to have a mining claim in the Bikita area of Masvingo province lured the complainant in count 2 into entering into what appeared to be a joint mining venture with him. He did so by falsifying a document to suggest that his mine was endowed with a lucrative and commercially viable lithium ore content, when in fact it did not. To make the documents appear authentic this document falsely bore a Bikita Minerals Company letter head. This misrepresentation was designed to mislead and did in fact induce the complainant into entering into the said business partnership with the appellant. The falsification of that document with the concomitant intention of causing another to act on it to his prejudice led to the charge in count 1.

Armed with that fake document bearing false mineral assay results, the appellant managed to convince the complainant (via various electronic modes communication) into entering the aforementioned mining partnership and eventually into remitting the said sum of money from Australia where she (i.e. complainant) was based. However, a potential purchaser of the lithium ore upon a testing of the samples discovered that the ore bore a lithium content nowhere near the levels touted by the appellant leading to the complainant reporting the matter to the police and subsequently the appellant's arrest.

Consequent to his conviction the appellant was sentenced to 2 years' imprisonment in respect of count 1 (the forgery charge) and to 5 years' imprisonment in respect of count 2 (the fraud charge). Of the total 7 years' imprisonment, 2 years were conditionally suspended for 5 years on the usual conditions and a further 3 years were suspended on condition appellant restituted the complainant in count 2 of the amount defrauded leaving an effective custodial sentence (should restitution be made) of 2 years' imprisonment.

Stung by what he perceived as the severity of the punishment, the appellant instituted this present appeal contending that the sentence induces a sense of shock particularly if regard is had to the set of mitigatory factors. He itemised these as his plea of guilt, that he is a first offender, his 'onerous' family responsibilities, as well as the loss of his employment and business contracts.

He further averred that the court should have considered treating the 2 counts as one for purposes of sentence thereby ameliorating the severity of the punishment. An additional argument put forward in support of the appeal was that since there is provision for the imposition of a fine

the trial court should have afforded the appellant such an option or some other non-custodial sentence such as community sentence.

The appeal was opposed by the state the thrust of whose argument was the inherent seriousness of the offence in light of the amount defrauded from the complainant.

After hearing arguments, we dismissed the appeal as lacking merit and stressed in our *ex tempore* judgment as we once again do that the question of sentence is pre-eminently in the discretion of the trial court and the appeal court will not lightly interfere with the exercise of such discretion unless the sentence so imposed is manifestly excessive or lenient in light of all the circumstances of the case. *In State v Nhumwa S -40-88 Korsah JA* at page 5 of the cyclostyled judgement had this to say:

> *"It is not for the court of appeal to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from that imposed. If the sentence complies with the principles, even it is server than one the court would have imposed, sitting as a court of first instance, this court will not interfere with the discretion of the sentencing court."*

Reference was made with approval to *State v de jager & Anor 1965(2) 616 (A) AT 628-9* where Holmes JA said the following:

> *"It would not appear to be sufficiently realised that a court of appeal does not have a general discretion to ameliorate the sentences of the trial courts. The matter is governed by principle. It is the trial court which had the discretion, and a court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say, unless the sentence is vitiated by irregularity or misdirection or it is so severe that no reasonable court would have imposed it. In this latter regard, an accepted test is whether the sentence induces a sense of shock, that is to say, if there is a striking disparity between the sentence passed and that which the court of appeal would have imposed. It should therefore be recognized that the appellate jurisdiction to interfere with punishment is not discretionary but in the contrary, is very limited."*

In the present case we could not find any misdirection on the part of the court *a quo* in imposing the sentence it did. In its reasons for sentence, the trial court struck the correct balance in arriving at the sentence it did after taking into account the triad of sentencing factors (although it did not label them as such) consisting of the personal circumstances of the accused (relevant for sentencing purposes), the nature and seriousness of the offences committed and the interests of society.

With regard to the personal circumstances of the accused, it is apparent from a reading of the reasons for sentence that the court took into account that accused is a first offender, that he pleaded guilty to both counts and that he shoulders the responsibility of providing for his family. As for the offences committed, the court correctly considered that the prejudice occasioned to the complainant in count 2 was quite high and that the appellant used deviousness to pull off his confidence trick.

As for the interests of society the court *a quo* in its reasons for sentences stated that a non-custodial sentence such as community service would have the effect of trivialising the offences (thereby sending the wrong message to society) hence rejected it as an option.

A perusal of cases on sentencing in fraud cases will reveal that whereas the value of the prejudice in fraud cases is not always the decisive factor it is nonetheless a crucial consideration in arriving at the appropriate sentence. The following few cases have been sampled for illustrative purposes.

In *Chamisa v The State HH 400-88* the accused who was a married man with children was employed by a charitable organisation to recommend projects worthy of receiving assistance from an international donor. Over a period of nearly two years he fraudulently obtained $28 154 from beneficiaries of his employer. He made full restitution, pleaded guilty and was sentenced to six years' imprisonment of which half were suspended. His appeal against sentence was dismissed on inter alia on the basis of the need to deter likeminded offenders.

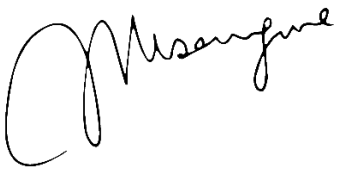
In *Hamandishe v The State S50-90*, a clerk employed with the Airforce took advantage of his position to defraud his employer of the sum of $42 528 by purchasing meat meant for rations for Airforce personnel but diverting the same to butchery outlets. He was initially sentenced to 10 years' imprisonment with 4 conditionally suspended. However, on appeal to the Supreme court, the sentence was reduced to 5 years and three months of which fifteen months were conditionally suspended.

A sentence of seven years' imprisonment was held to be appropriate in *State v Moyo* HH 258/90 (substituting on review one of 12 years' imprisonment with three suspended) for 24 counts of fraud involving a total prejudice of $45 876. Of the seven years' imprisonment, three years were suspended on condition of restitution and one further year of good behaviour

Other comparable cases include *State v Mupika HH 23-91* where on appeal 12 years' imprisonment with 4 years suspended was held to be appropriate for fraud involving $78 800 and *Slater v The State* S-196-90 where the Supreme Court held that a term of 10 years' imprisonment with 3 suspended was a suitable sentence for defrauding a finance company through a fictitious sale of equipment. The actual prejudice in that case was $100 000 with a further potential prejudice of $50 000.

The maximum permissible sentence for a contravention of section 136 of the Criminal Code is 35 years' imprisonment which in itself is emblematic of the serioussness with which the offences fraud is viewed. This was not a case committed at the spur of the moment, nor was it one of sudden temptation. To the contrary the appellant set out an elaborate and well-thought-out con trick to induce the complainant into parting with her money. He had ample time to reflect and desist from his conduct but he allowed greed to get the better of him. He should harness and direct his intelligence and efforts towards productive and socially acceptable economic pursuits.

Ultimately therefore, in light of appellant's degree of moral blameworthiness coupled with the value of the prejudice, we found that the sentence imposed by the court *a quo* could not by any stretch of the imagination be deemed to be excessive, hence we dismissed the appeal.

ZISENGWE J 

WAMAMBO J agrees