

AUSTIN CHIWETU
versus
THE STATE

HIGH COURT ZIMBABWE
MATHONSI AND MOYO JJ
BULAWAYO 5 MARCH 2018 AND 8 MARCH 2018

Criminal Appeal

T Matshakaile for the appellant
Ms N Ngwenya for the state

MATHONSI J: The appellant was convicted by the regional court at Bulawayo on 17 December 2012 of 13 counts of fraud involving \$56 778-00 following a contested trial in which he had tried but failed to raise a frivolous defence. He was sentenced to 5 years imprisonment of which 4 years imprisonment were suspended on certain conditions including restitution of \$25589-00 and future good behaviour. He was then left with an effective 1 year imprisonment.

Although he initially appealed against both conviction and sentence, undergoing some damascene experience rather late, he abandoned his pursuit of overturning the conviction in favour of pursuing an appeal against sentence only. The state would have none of it contesting the appeal on the grounds that there is nothing wrong with the sentence considering both the aggravatory and mitigatory features of the case, in particular the amount involved.

In my view the amount involved, though huge, has been taken into account by the restitution that has been ordered and cannot have a huge impact in determining the balance of the sentence. The misdirection in the sentence exists in the sense that after settling for an effective imprisonment term of 12 months for whatever reason, the trial court did not inquire into the suitability of community service as an option.

It is now settled that where the sentencer settles for an effective imprisonment term of 24 months or less, he or she is required to inquire into the suitability of community service as an

option. This arises out of the fact that by settling for such term the court would have relegated the offence to a minor offence. Otherwise it would have settled for a longer term. For that reason it cannot, by the same breath, say that community service would trivialize the offence, an offence it would have trivialized itself.

As this court has stated before, inquiring into the suitability of community service does not mean that the court is obliged to impose it in all cases where the effective term is less than 2 years. All it means is that the court may still find, after inquiry, that community service is not suitable. In which event it is required to record the reasons for arriving at that conclusion.

In this case the court remarked:

“Although community service was recommended, I believe with the number of counts involved Community Service will not send a good message to the public.”

Therein lies the misdirection. As a result, this appeal court is therefore at large regarding sentence. Mr *Matshakaile*, who appeared for the appellant submitted that the appellant was in custody for a period of 2 ½ months after conviction and sentence before being granted bail. He urged the court to take that period into account when considering an appropriate sentence. It occurs to me that the period served should really atone for the community service which the appellant should have performed.

In the result, it is ordered that:

- 1) The conviction of the appellant is hereby confirmed.
- 2) The appeal against sentence is hereby upheld.
- 3) The sentence of the court *a quo* is altered to read:

“5 years imprisonment of which 1 year 10 months imprisonment is suspended for 5 years on condition the appellant does not, during that period, commit any offence involving dishonesty for which, upon conviction, he is sentenced to imprisonment without the option of a fine. Of the remaining 3 years and 2 months 3 years is suspended on condition the appellant compensates the complainant in the sum of \$25 589-00 through the clerk of court Bulawayo by 31 March 2018”

- 4) As the appellant has served the period of 2 months imprisonment he is entitled to his continued freedom.

Moyo J agrees.....

Lazarus and Sarif, appellant's legal practitioners
National Prosecuting Authority, state's legal practitioners