FLORENCE MULENA
and
FREDDY MUCHONI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MANGOTA AND TAGU JJ
HARARE, 19 November, and 8 December 2014

Criminal Appeal

T.K Hove, for the appellants
R. Chikosha, for the respondent

MANGOTA J: The appellants are alleged to have defrauded Tapiwa Marere of the latter's $800-00 and a Nokia X2 cell phone. The State claimed that the incident which forms the subject of this appeal occurred on a date to the prosecutor unknown but in September, 2013 and at Whitehouse which is in Norton.

The appellants were, therefore, charged with the crime of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. Both appellants pleaded not guilty to the charge. They were, however, tried and convicted as charged. They were each sentenced to 4 years imprisonment; 6 months of which were suspended for 5 years on condition of good future conduct. A further 1 year imprisonment was suspended on condition of restitution. Each appellant was, therefore, slapped with an effective 2½ years imprisonment.

The appellants' appeal was against conviction and sentence. Their grounds of appeal which they amplified in their Heads of Argument form part of these proceedings.

During the hearing of the appeal, Mr. *Hove* for the appellants informed the court that the first appellant had benefitted from the Presidential Pardon and was, therefore, no longer part of the appeal process. The appeal, he said, centered on the second appellant only.

The respondent's Heads of Argument capture the salient features of this case. The features in question are that:

(a) on an unknown date in September, 2013 Tapiwa Marere whom the State cited as the complainant lost $800-00 and a Nokia X2 cell phone

(b) the complainant lost the mentioned cash and cell phone at Whitehouse which is in Norton

(c) appellants were arrested in Norton after skirmishes with the complainant as well as a vehicle chase with the complainant and a member of the police force – and

(d) appellants are known to each other.

Complainant who testified against the appellants in the court *a quo*'s proceedings was adamant that the latter persons stole from him, in a deceitful manner, $800-00 as well as his cell phone. He remained unshaken on the point that he was not mistaken at all in his identification of the appellants as the persons who had conned him of his money and cell phone. He placed the value of his allegedly deceitfully stolen money and cell phone at $880 and he informed the court that he recovered nothing of what was stolen from him. He said he could not have been mistaken about the appellants' physical features as the incident which he suffered occurred at about 1:00 pm. Put differently, the incident occurred in broad day light, according to him.

The appellants' version of events was a bare denial of what the complainant was alleging against them. They could not, and did not, profer a plausible reason as to why the complainant whom they said was not known to them, prior to the day of their arrest, suggested that they were the persons who conned him of his money and cell phone on an unspecified date in September, 2013. The nearest which they came to as a possible explanation was that the complainant mistook them for the persons who conned him of his money and cell phone. The complainant, on his part, remained adamant on the point that there was no case of mistaken identity. He insisted that the appellants, and no one else, were the real culprits.

A reading of the record showed that the complainant identified the appellants as the persons who stole from him, in a deceitful manner, $800-00 and a Nokia X2 cell phone. The following unchallenged evidence of the complainant supports the view which the court holds of the matter on the point in issue.

The complainant was asked in-chief and he answered as follows:

"X What did you do when you saw accused one

- I was in the same car and I parked and went to them and when she saw me she wanted to move but I shouted to her to stop

X Did she stop

- Yes and I asked her for my money. She then apologised and said we just helped each other but she said she had the money-----;

X What made you sure that accused one saw you

- She had pointed to the car saying that is where the money was. When accused two saw me, he said they would give me my money;

X What then happened

- They said I should get into his car and I refused and ordered him to park. Accused one was told to get inside and get the money. I then held the door and accused two tried to drive away;

X What then happened

- Accused two took an iron bar and hit my hand. I released the accused one fled from the scene;

X ----------

- ----------

X ----------

- ----------

X what made you conclude that accused one was the same person you had seen and took your money;

- it was the day when this happened. I was familiar with their faces

X When you apprehended accused one did you ask about your phone

- She said my phone was lost but promised to give it back

X You said accused one took your phone did you establish why she was not answering

- No, but she later said she switched it off so that I could not contact her. (emphasis added)."

Complainant stated in a clear and unambiguous language that, when he saw the appellants in Norton on 20 January 2014 and he inquired from the first appellant where his money was, the latter person apologised and she pointed to the second appellant's car where she said the complainant's money was. He said, on seeing him, the second appellant told him that they would give him his money. He stated that he inquired from the first appellant where the cell phone which she had taken from him on the day of the incident was. The first appellant told him that she had lost the phone, he said.

There is doubt that the complainant lost his $800-00 and the Nokia X2 cell phone at the hands of the appellants, in the court's view. The complainant was not at all mistaken in his identification of the appellants as the persons who conned him of his money and cell phone. He stated, under cross-examination, that he was with the appellants for close to one hour on the day that they conned him of his money and phone. The answer which he gave to the second appellant's question, under cross-examination, was not only relevant to the current case but is also of great importance in respect of people's everyday encounters with other persons. He was asked and he answered as follows:

"X Is it not possible that you may fail to identify a person you had stayed with

- No but <u>if someone does good</u> or <u>bad things</u> you are bound to remember them" (emphasis added)

Whilst the question was at best confused and at the worst meaningless, the answer which the complainant gave was relevant to his question as well as to people's daily encounters with other people. A person who walks down a street comes across many people. Some of those people will be walking in the direction which he takes or has taken. Others will be walking in the opposite direction. None of those persons leaves any impressionable memory on him. They all exist outside his mind for him to take any notice of them as he either walks side-by-side with them or in front of, or behind them, or even when he sees them walking in the direction which is opposite to the one he is going. He does not, and he cannot, remember them as they do not exist in his mind when he meets them.

The above described set of daily occurrences is, however, different and distinct from a situation where one, or two, or more of the persons whom he interacts with does something which affects the life of that person in a positive or negative manner. The good, or bad, impression which is created in the mind of the affected person, it is needless to stress, tends to remain in the mind of the affected individual for a little longer than otherwise if not for a

very long time. The affected person's cognitive faculties become alert to what will have occurred to him at the hands of the other person and he will, therefore, maintain the desire to recognise the person, or persons, who did whatever good or bad thing(s) to him. Human mind and human nature do, more often than not, operate along the suggested set of circumstances and, in the majority of cases, without fail.

It follows from the foregoing, therefore, that the complainant who was with the appellants for close to one hour and in broad-day light could not have mistaken the latter as the persons who conned him of his money and cell phone. What the two of them did to him left a clear impression of their physical appearances on his mind. The defence of mistaken identity which they raised is not supported by the evidence which the State adduced against them. The complainant, the court is satisfied, identified the appellants as the culprits who stole his money and his cell phone in a deceitful manner.

The defence outline which the first appellant gave was meaningless. It, however, did have some insight into what the second appellant and herself did against the complainant. She said:-

> "I deny the allegations on the basis that I do not know the complainant. I was surprised when he approached me and apprehended me. I was going to Gokwe and I told complainant to go and see my nephew who is accused two..." (emphasis added)

Whatever she meant to convey by the statement which she made remains a mystery which she, and no one else, can unravel. The truth of the matter was that she realised that the person whom the second appellant and herself conned of his money and cell phone in September, 2013 had approached her. She also knew that the complainant would demand that she accounts for the $800-00 and the cell phone which she took from him. She, therefore, had no option but to refer him to the second appellant with whom she committed the offence.

Some of the questions which the second appellant raised when he was cross-examining the complainant are pertinent to a proper determination of the present appeal. He, for instance, asked and the complainant answered as follows:-

> "Q: I put to you that you gave her your money so that you would get your share of the proceeds.
>
> A: I told you I didn't want anything, I was just trying to help.
>
> Q: .....
>
> A: .....
> Q: When I got to you did I not say accused one had failed to bring your money.

A: That is not true. I released you and I asked about my money."

The situation which the first appellant referred to in her defence outline as read with the second appellant's manner of cross- examining the complainant leaves the court with no doubt that the two of them had, in September 2013, conned the complainant of his money and cell phone. Evidence which the state led on the fraud aspect of the case was that, on an unknown date in September 2013, and when the complainant was driving from work, he reached a place called Whitehouse which is in Norton. He saw the first appellant and another male person. The two looked stranded, according to the complainant. He said he stopped as he remained of the view that the first appellant and the man who was then in her company were going to Norton. The first appellant, he said, was speaking in English. The two of them told him that the first appellant stayed in Mozambique and the latter's companion told him that they had chemicals which they were selling to a Manager at Shamu. The first appellant, he said, produced receipts and stated that she would be paid $16 000-00 but the buyer wanted to pay in Rands and the two of them could not understand each other. It was his testimony that the first appellant told him that she was looking for a person who would assist her to communicate with the buyer. He stated that the first appellant invited him to go with her to Webcon which is at Redan Service Station in Norton. It was at the mentioned place that he met the second appellant whom he said masqueraded as a manager. He said the second appellant told him that he wanted to pay the first appellant in Rands but the two of them – first and second appellants – could not understand each other. He stated that the second appellant requested the first appellant to supply him with one further bottle of chemicals as a result of which the first appellant requested the complainant to drive her to Pamuzinda to procure the requested bottle. He said the fist appellant and him drove to Pamuzinda where they met a woman who demanded cash upfront before the bottle could be furnished to the first appellant. The bottle was selling for $1000-00, he said. The first appellant requested the complainant to assist her with the money on the understanding that he would be refunded the same when they got to the second appellant whom he understood would pay the first appellant for the chemicals. He stated that he gave the first appellant $800-00 which he had on him and the latter person handed the money to the woman who had sold the bottle to her. It was his testimony that the two of them drove back to Whitehouse where the second appellant was. He stated that, before they reached the mentioned place, the first appellant

asked him to park his motor vehicle at a bus stop saying the two of them were to wait for the person who was going to collect the cash. The person had a bag into which he would put the money, the bottle of vaccine and a receipt, he said. It was his testimony that he told the person who was going to collect cash to bring him his money so that he would leave. The person did not return and the first appellant asked for the complainant's cell phone saying she wanted to call the person who had gone to collect the cash from the second appellant. He stated that he gave her his Nokia X2 mobile phone for the purpose. He said the first appellant called and requested the person to return to the car with the complainant's money. He stated that the first appellant told him that she had been requested to come and get the money. He said she told him to wait for her whilst she went to get the money. He said he asked for his phone and the first appellant told him that she was coming back. It was at that stage that she disappeared with his phone, he said.

The above is the version of events as narrated by the complainant. His account read extremely well. It left no stone unturned except to state what happened to him at the hands of the appellants. The drama which ensued when the complainant came face - to – face with the appellants corroborated, in a material way, the uncontroverted position that the appellants stole the complainant's $800-00 and his Nokia X2 cell phone, through deceitful means, in September, 2013. The appellants made every effort to escape the long arm of justice when they met the complainant at CABS suburb in Norton on 20 January, 2014. They drove away from the complainant in the second appellant's car with the complainant chasing after them in his own car. The assistance which the complainant enlisted from the police coupled with his desire to bring the two appellants to book for their misdeeds was not without a reward on his part.

The appellants were properly charged, tried and convicted of defrauding the complainant of his money and phone. The evidence which the state led against them on this aspect of the case was overwhelming. Their appeal against conviction cannot, therefore, succeed.

The appellant's second wrang of appeal was against sentence. It is trite that sentencing is, by and large, a discretion of the sentencing court. The appeal court has invariably limited powers which enables it to interfere with the sentence which the trial court will have imposed. Its powers in this regard can only be exercised by it where, *ex-facie* the record, the court *a quo* has misdirected itself or has imposed a sentence which is manifestly disproportionate to the crime committed.

The sentence which the trial court imposed on the appellants does not, in our view, induce a sense of shock in us. The manner in which they planned and executed their desired end-in-view to ripen into a crime showed a specific intent to defraud their victim who never suspected anything untoward befalling him at their hands. The offence which they committed is not only serious but it is also regarded as such by the courts and the legislature. The sentence imposed upon them does, in the view which we hold of the matter, fit both the offence and the offenders. We will, therefore, not disturb it.

The first appellant, the court was informed, benefited from the Presidential Pardon. She, therefore, remains off the hook as a result of the abovementioned development. That will be so the court's findings against her notwithstanding.

The second appellant's appeal against conviction and sentence fails. It fails for the reasons which have been made mention of in this judgment.

The court has considered all the circumstances of this case. It is satisfied that the second appellant was not able to establish his innocence on a balance of probabilities. It is, in the result, ordered as follows:-

That the second appellant's appeal be and is hereby dismissed in its entirety.

TAGU J agrees _____