

THE STATE
versus
DOESMATTER MUCHENGA
and
KUDZANAI MUCHIMWE

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 29 October 2015

Review Judgment

DUBE J: The two accused persons were convicted of two counts of contravening section 36 (a) and (b) of the Criminal Law Codification and Reform Act [*Chapter 9:23*], that is two counts of fraud. The brief allegations preferred by the state are as follows. Sometime in June and July 2014 the two accused persons did on two separate occasions approach the two complainants. They misrepresented to them that they were in a position to secure employment for them at Proton Bakeries. The two complainants were invited to pay \$100-00 and \$50-00 respectively for the facilitation of employment. The complainants were induced to pay these monies on the understanding that they would be able to secure some employment. The complainants paid the monies to the accused persons. By means of this misrepresentation, the complainants were induced to part with their money. The accused persons knew and realised that they were not in a position to facilitate employment for the complainants. The first accused was convicted of both counts whilst the second accused was convicted on one count.

The second accused was sentenced as follows;

“\$150 in default of payment 30 days imprisonment. In addition 3 months imprisonment wholly suspended for 5 years of which that the accused does not within that period commit any offence which involving dishonesty of which if convicted accused will be sentenced to imprisonment without the option of a fine. To reconstitute complainant in the sum of \$75-00 in default of payment 30 days imprisonment.”

It is this sentence that is in issue today. The learned Regional Magistrate who scrutinized the record has raised concerns regarding the manner in which the sentence imposed is worded.

The Regional Magistrate was concerned that the sentence appears as if three different sentences were imposed. The trial court accepted that it erred. The court however sought to correct its sentence and proposed a new sentence which is worded differently.

The penalty section to s 136 of the Criminal Law Codification and Reform Act provides in part as follows.

“136 Fraud

Any person who makes a misrepresentation...

(a)

(b)

.....shall be liable to

(i) a fine not exceeding level fourteen or not exceeding twice the value of any property obtained by him or her as a result of the crime, whichever is the greater; or

(ii) imprisonment for a period not exceeding thirty-five years;

or both.”

The penalty section to s136 provides for a fine or imprisonment or both. The trial magistrate imposed both a fine and a custodial sentence which is permissible at law. The trial court went on to impose sentence of restitution. That part of the sentence requires the accused to retribute the complainant in the sum of \$75-00, in default of payment 30 days imprisonment. The court fell into the error of thinking that it could impose a stand-alone sentence of restitution. Once the court decided to order restitution the correct approach would have been to suspend a portion of the additional sentence of three months on condition that the accused does not commit any offence involving dishonesty and another portion suspended on condition of restitution.

The order of restitution imposed ought to have been part of the custodial sentence. Once a court has imposed restitution it is incompetent and undesirable to impose a default condition on top of the restitution order. What the trial court was required to do is to give the accused person time within which that restitution was required to be made. The accused is at large, he can pay the restitution when he wants to. The payment of the restitution is not checked. There result of the approach to sentencing is that there are two default conditions on the same sentence and that is undesirable. A condition once imposed cannot have another condition put on it. The effect of the sentence imposed as it currently reads is that 3 sentences in total were imposed.

The trial court fell into the error of thinking that it could actually correct its sentence after the query raised by the Regional Magistrate. A trial court which has convicted and sentenced an accused becomes *functus officio* once it has passed sentence. It may not alter the sentence

imposed. The trial was required to refer the record to this court for correction. It was inappropriate for the trial court to alter the sentence and type a fresh scrutiny cover.

I am not satisfied that the sentence imposed was properly worded. In the result I will set aside the sentence imposed and substitute it with the following,

\$150-00 in default of payment 30 days imprisonment. In addition 3 months imprisonment of which 2 months imprisonment is wholly suspended for 5 years on condition of good behavior.

The remaining one month imprisonment is suspended on condition accused restitutes the complainant in the sum of \$75-00 through the clerk of court Marondera on or before 31 December 2015.

The trial court is to recall the accused and advise him of the revised sentence. The trial court is free to change the date when restitution is to be made after conferring with the accused.

TAGU J agrees.....