

STATE
versus
LAWRENCE PEMHIWA
and
RUSSEL MASHONGEDZA
and
IGNATIOUS NYAMVURA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 29 October 2018

Review Judgment

CHITAPI J: The 3 accused persons are political and community leaders in Chegutu. They are members of the Zimbabwe National African Union Patriotic Front (ZANU PF) party. They hold the positions respectively of chairperson of the main wing, secretary and chairperson of the youth wing of Umvovo District, Chegutu. They appeared before the senior magistrate at Chegutu on 26 January 2018 jointly charged of fraud as defined in s 136 of the Criminal Law Codification and Reform Act, [*Chapter 9:23*].

The charge against the trio alleged that they each, all or one or other of them misrepresented to Grain Marketing Board that persons indicated on a list which they purported to be true and correct had received a bag of fertilizer each issued for free to beneficiaries identified under the Presidential input scheme (2017). The accused were in charge of the distribution. They hatched a plan to defraud the scheme and prepared a fictitious list which contained non-existent persons whom they passed off as having received fertilizer. Through their connivance, the accused defrauded the scheme of 108 x 50 kg compound D fertilizer and 2 x 10 kg bags of maize seed which they shared amongst themselves.

The 1st accused pleaded guilty and was a first offender. When asked to explain why he committed the offence, he stated that the fertilizer had been looted and that he created the fictitious list in order to reconcile the records. The value of the fertilizer which the scheme was defrauded of was \$3 300.00 and nothing was recovered.

The magistrate sentenced the accused to 24 months imprisonment with 6 months suspended on condition of good behaviour and the remaining 18 months on condition of performing 630 hours of community service. In his reasons for sentence, the magistrate stated that the accused did not benefit from the offence. The finding contradicted the facts which the accused agreed to, that the fertilizer and maize seed was shared amongst the accused and his two co-accused. Where facts are agreed and the accused has indicated in the plea proceedings that he has nothing to add or subtract from them, then the court must treat the agreed facts as common cause. Where the accused makes subsequent statements inconsistent with the agreed facts, the court should interrogate the variance. It was thus improper for the court to make a finding that the accused did not benefit from the fraud without investigating and redetermining the correct facts.

I have considered the nature of the fraud *in casu*. It bordered on corruption because the accused and his accomplices prepared and uttered the fictitious list to their principal in a bid to deceive the principal into accepting that the inputs had been properly distributed as mandated. The inputs which were involved had been entrusted to the accused and were for the benefit of the community or a section thereof. I am not persuaded that the sentence imposed accords with real and substantial justice given the nature and circumstances of the fraud which was aimed at defeating a government project to assist the community to sustain itself through agricultural production which in turn would contribute to food security for the deserving beneficiaries. This fraud was wantonly and elaborately thought out and schemed. The false document uttered to GMB as proof of inputs distribution was indispensable to the success of the fraud. The motivation for committing the fraud was selfishness and greed.

It is my view that sufficiently deterrent sentences must be considered as necessary particularly in cases of fraud which involve corrupt conduct. Such crimes are endemic in Zimbabwe currently and should be adequately punished. The crime of fraud is punishable by a fine of up to level fourteen which is the highest level of fine which a court may impose or to a fine not exceeding twice the value of the property obtained as a result of the fraud provided that the

aggregate monetary punishment falls within level fourteen. The thrust here is to divest the convict of the ill-gotten gains and punish such offender further by making the offender pay an additional amount equivalent to the fine imposed. The sentence provisions also provide for imprisonment of up to 35 years. There can therefore be no gain saying that the offence of fraud is viewed seriously as evidenced by the band of sentences which may be imposed. Courts have a duty to interpret the law and give effect to the legislative intent.

The sentence imposed being wholly inappropriate, I therefore withhold my certificate in relation to the sentence imposed. The magistrate did not adequately apply his mind to the statutory sentencing provisions for the offence of fraud. He imposed a sentence which given the circumstances of the case have the potential to bring the public perception of the administration of justice into disrepute. At best, there ought to have been imposed orders of restitution for the loss of public property which resulted. Community service albeit a competent sentence was wholly inappropriate in the absence of an order of restitution. As a general observation, it appears to be good practice in sentencing for crimes of fraud, theft and kindred offences where there has been loss of property with a determined value, to disgorge the convict of the ill-gotten gains and recompense the complainant of the loss suffered by imposing an order of restitution or compensation as the circumstances of each case may determine. Sections 362 and 365 of the Criminal Procedure & Evidence Act should be considered and applied where circumstances permit. Thus, where appropriate and in such cases, magistrates must always keep in mind the provisions of s 358 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] which deal with suspension of sentences and conditions applicable thereto.

In the premises an appropriate order is therefore one to the following effect:

- (i) The conviction is confirmed
- (ii) The sentence is not confirmed as being in accordance with real and substantial justice
- (iii) Since I have made pronouncements on the inadequacy of the sentence and given pointers that the magistracy should have regard to in assessing sentences for fraud in circumstances where the facts reveal corrupt practices, I have availed this short judgment to my brother FOROMA J to consider the case in the light of my judgment and he agrees with me.

FOROMA J agrees