

SINDISO MZACA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND NDOU JJ
BULAWAYO 21 MARCH 2005 AND 19 OCTOBER 2006

R Nyathi for appellant
A V Mabhande for the respondent

Criminal Appeal

NDOU J: The appellant was arraigned before a magistrate sitting at Nkayi Magistrates' Court on 23 February 2004 facing a charge of fraud involving a total sum of \$716 984,68. The appellant pleaded guilty and was sentenced to 24 months imprisonment of which 8 months was suspended on condition she paid full restitution. The appellant appeals against sentence only. The main thrust of the charge is that she misrepresented herself to War Veterans vetting team that she underwent military training and that she participated consistently and persistently in the liberation war. In truth and in fact she did not receive military training. The record of proceedings is scant so it is difficult to say whether she left the country or not or whether she was in a camp outside the country under the auspices of a liberation movement. She was aged 42 at the time of the trial. She is now a productive citizen [that was also the case at the time of her sentence]. She is in gainful employment as a lecturer at the Department of Applied Physics at the National University of Science and Technology. She is now an invalid who is afflicted by two

chronic medical conditions i.e. chronic heart condition (chronic cardiomyopathy) and chronic back problem known as Osteo Arthritis. Her condition requires the constant

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attention of a Cardiologist. I should point out that these medical conditions had not been diagnosed at the time of the sentence. The respondent has conceded that these two chronic medical conditions justify a revisit of the sentence “as a special circumstance factor”. Looking at the facts of this matter, the appellant did not commit a common law fraud, but fraud within the ambit of section 24(1)(b) of War Veterans Act [Chapter 11:15]. It was, therefore, undesirable to charge the appellant under common law, where the Act caters for the situation – *Moyo v S* HH-43-03; *S v Sibanda* HB-76-05 and *S v Sibanda & Ors* HB-96-06. In terms of section 224 of the Criminal Procedure and Evidence Act [Chapter 9:07] it is possible to remedy this anomaly by altering the charge from one of common law fraud to one of a contravention of section 24(1)(b) of the Act as there is no prejudice to the appellant. In exercising my review powers, the word “fraud” is deleted from the citation of the charge sheet and substituted with the words “contravening section 24(1)(b) of the War Veterans Act [Chapter 11:15]”. The conviction is confirmed in this amended form. In light of the alteration of the conviction to a statutory offence, the punishment has to be considered afresh as the Act provides for far much lesser penalties than those imposed by the learned trial magistrate. In terms of section 24(2) of the Act the penalty is a fine not exceeding Level Six (revalued \$2 000) or to imprisonment not exceeding one year or both such fine and such imprisonment. It is clear that the legislature, in its wisdom, did not attach the same seriousness to this conduct as stated by the trial magistrate (and the state counsel in his submissions). In *S v Sibanda*,

supra, CHEDA J, confirmed a fine of \$200 000 or default of payment 2 months imprisonment, plus a 2 months sentence suspended on condition of restitution. The prejudice in that case was more than the amount here by over \$300 000. In the

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circumstances a fine coupled with a custodial sentence suspended on condition of restitution will meet the justice of the case.

The appeal succeeds. The sentence imposed by the trial court is set aside and substituted with the following:

“\$2 000 [revalued] or in default of payment 12 months imprisonment. In addition 12 months imprisonment all of which is suspended on condition the accused restitutes the War Veterans Fund the amount of \$716 984,68 [or its equivalent revalued amount] on or before 30 November 2006, through the Clerk of Court, Nkayi Magistrates’ Court.”

Cheda J I agree

Maroneddze, Nyathi & Partners, applicant’s legal practitioners
Attorney General’s Office, respondent’s legal practitioners