NATALIE ALICE FENN PEACOCK

And

TRISTAN JOHN PEACOCK

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU & BERE JJ
BULAWAYO 30 OCTOBER 2006 AND 15 MAY 2008

N Mazibuko for the appellants
Ms B Wozhele, for the respondent

Criminal Appeal

NDOU J: The appellants were jointly charged together with one Samson Murozvi, before a Beitbridge Provincial Magistrate**,** of contravening section 36(1)(a)(ii) of the Immigration Act [chapter 4:02] as read with section 36(1)(j) of the aforesaid Act. The allegations were that the three connived and forged an Emergency Travel Document and supporting documents in the form of a referral letter and a payslip suggesting that 2nd applicant was a teacher at Victoria High School, Masvingo, when he was not. At the close of the state case the state withdrew charges after plea against Samson Murozvi whilst the two appellants were put on their defence.

At the close of the case on 12 May 2006 the two appellants were found guilty as charged and sentenced each to 12 months imprisonment, of which 6 months imprisonment were suspended on conditions of good behaviour. The appellants now appeal against both conviction and sentence. A concession was made on behalf of the 2nd appellant during the trial [and during his application for bail pending appeal] that he would not escape being convicted on the basis that he used forged documents, *viz* the

payslip and the referral letter, on appeal, it seems that this concession is now being withdrawn.

The background facts of this matter are the following. The appellants are wife and husband. Sometime towards the end of January 2005 the 2nd appellant intended to travel to South Africa. His passport had, however, expired on 25 January 2005. The 2nd appellant used a forged Emergency Travel document and some supporting documents in the form of a forged letter and a forged payslip. The supporting documents suggested that the 2nd appellant was a teacher at Victoria High School, Masvingo, when, in fact, he was not. The purpose of the forged documents was to facilitate the issuance of a Temporary Visitors permit to enter South Africa. The 2nd appellant presented the said forged documents to an immigration officer at the Beitbridge border post in an attempt to exit the country. The immigration officer discovered the forgery leading to the 2nd appellant's arrest. From the credible testimony of an employee of the Bulawayo Passport Office, one Sibusisiwe Sibanda and Terrence Tandavarai, a Senior Immigration Officer at Beitbridge Border Post, it is beyond dispute that documents were forged. The appellants do not suggest otherwise in their grounds of appeal. All they say is that there is no evidence to show that they themselves forged the documents and, further that they were aware of the forgery. All they seem to suggest is that they got the forged documents from Samson Murozvi *(supra)* without realising that these documents were forged. I propose to deal with the evidence against each appellant in turn.

2nd appellant

The credible evidence of Terence Tandavarai evinced that he was using a forged Emergency Travel Document in his names. It bore his photograph and

signature and shows on the face of it that it was issued by the Provincial Registry, Bulawayo. His case is that he obtained this forged document through Samson Murozvi. Even if one accepts the involvement of the latter, still how would he obtain the travel document without even presenting himself to the issuing officer. He has obtained a passport before. He said he left his application with his wife (1st appellant). He said his wife told him she was arranging for the travel document with Samson Murozvi, whom she knew as an ex-employee of Zimbabwe Revenue Authority [and not the Passport office]. The only reasonable inference to be drawn is that the 1st appellant must have realised the travel document was forged and knowingly accepted it and used it. After all official travel documents are applied for at the passport office and not at some parking lot where this transaction was conducted. Further, according to Terrence Tandavarai, from his 26 years experience in the Immigration Department he observed that the 2nd appellant was quite nervous and uncomfortable when he asked him for his travel document at exit counter that he was manning. Upon checking the travel document produced he noticed that it had no security features. He asked 2nd appellant where he was employed. The 2nd appellant told him that he worked for the Ministry of Education as a teacher at Victoria High School. He then produced a payslip and a letter from the school. He observed that these were forged. He informed the 2nd appellant that the documents were forged. It was at that stage that the 2nd appellant revealed that they were sourced by 1st appellant. Towards the end of trial the 2nd appellant tendered a limited plea of guilty to using forged payslip and letter from the school well knowing the same to be forged. In the circumstances it is evident that the 2nd appellant used the forged travel document and supporting documents well knowing that they were forged.

1st appellant

It is common cause that she is the one who approached Samson Murozvi to facilitate the issuance of the forged travel document and supporting documents. She made this arrangement when her husband was away. This was done at a parking lot and not at the passport office. She had been to the passport office previously and from her testimony she is reasonably familiar with how passports are applied for and issued, but sourced a forged travel document and supporting documents in her husband's name in his absence she clearly knew the documents were forged. She knew her husband was not employed by the Ministry of Education as a teacher at Victoria High School. She is merely playing ignorance of the forgery that she co-authored. In the circumstances there is no merit at all in the appellant's appeal against conviction. The trial magistrate's finding cannot be faulted.

Sentence

In this regard the trial court erroneously relied on a repealed provision to hold the view that there is a mandatory sentence of imprisonment for forging of travel document. The offence was committed in 2005 and the penalty clause. Section 36(1)(j) [as amended by section 8 of Act 8 of 2000 and by Act 22 of 2001] provides:

> "any person who …
>
> (j) contravenes any provision of this Act for the contravention of which no penalty is specifically provided:
> shall be guilty of an offence and liable to a fine not exceeding level twelve or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment."

In its wisdom the legislature saw it fit to remove a mandatory prison term from section 36 and restore wide discretion to the sentencing court. On account of this misdirection we are at large as far as sentence is concerned. It is trite that every effort

should be made to keep first offender out of prison – *S* v *Sikunyane* 1994(1) SACR (TL); *S* v *Gumbo* 1995(1) ZLR 163(H); *S* v *Kashiri* HH-174-94; *S* v *Sithole* HH-50-95; *S* v *Sibanda* HB-49-83; *Ndlovu* v *S* 1994(1) ZLR 290(H) and *Sibanda* v *S* HB-102-06.

Further, it is undesirable to imprison two young parents leaving behind their three young children on their own. At the time of the original sentence, the appellants were aged 21 and 30 years of age respectively. As far as the 1st appellant is concerned, she was pregnant at time of the conviction and sentence. Her pregnant status is a very important mitigatory factor. In *S* v *Samuel* 1976(1) RLR 222 (G); GOLDIN J held that it is highly undesirable to imprison a pregnant woman and were a term of imprisonment is justified, it should be suspended on appropriate conditions. In *S* v *Mpofu* 1992(2) ZLR 68(H) at 70B-C, BLACKIE J, held:

> "It is not desireable to imprison a pregnant woman even where a term of imprisonment might otherwise be imposed. Because of the woman's condition, the suspension of any otherwise justifiable sentence of imprisonment is usually rendered just and necessary" – see also *S* v *Ncube* 1996(1) ZLR 577(H) at 582C-G and *Mativenga* v *S* HB-117-06.

From the records that come before us this type of conduct was prevalent at time of this offence. Because it is difficult to obtain passports the forgery of emergency travel document was a growth industry. The magistrates usually impose fines for this type of conduct. As alluded to above, the trial magistrate only imposed prison sentences because he was under the mistaken belief that a custodial sentence was mandatory.

Accordingly, the appeal against convictions be and is hereby dismissed. The appeal against sentence succeeds in that the sentences imposed by the trial courts are set aside and substituted by the following:

> "Each: - $100 000 000 or in default of payment 6 months imprisonment. In addition 6 months imprisonment wholly suspended for 3 years on condition the accused in that period does not commit any offence involving a contravention of section 36(1) of the Immigration Act [chapter 4:02] and for which he or she is convicted and sentenced to imprisonment without the option of a fine."

Bere J …….. I agree

Calderwood, Bryce Hendrie & Partners appellants' legal practitioners
Criminal Division, Attorney-General's Office respondent's legal practitioners