

ELPHAS NCUBE

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 5 SEPTEMBER 2011 AND 15 SEPTEMBER 2011

Mr Mushangwe for applicant
Mr Mungoni for respondent

Bail pending Appeal

CHEDA J: This is an application for bail pending appeal against both conviction and sentence.

Applicant was charged with fraud as defined in section 136(a) of the Criminal Law Codification Reform) Act [Chapter 9:23]. The background of this case is that applicant defrauded Dorris Dewa of an amount of R40 000-00 while operating accompany called Defiant properties.

Applicant carefully crafted a plan wherein one Mpilo Nyathi masqueraded as one Magadelenne Sibanda, the owner/seller of a house. It is through that scheme that Dorris Dewa was duped into parting with the said amount on the belief that she was buying a house from the owner yet infact and in truth the person who was dealing with her was Mpilo Nyathi who is not the owner of the said house. Mpilo Nyathi appeared in court, pleaded guilty to the charge, was convicted and sentenced to 30 months imprisonment, part of which was suspended. Appellant pleaded not guilty but was convicted and was referred to this court for sentence. He was subsequently sentenced to 8 years imprisonment of which 1 year was suspended on the usual conditions of future good behaviour.

Appellant's contention is that this appeal has bright prospects of success on appeal. His belief is based on his view that the trial court did not sufficiently warn itself of the status of Mpilo Nyathi as an accomplice witness. These courts are indeed alive to the need for the application of this cautionary rule. One of the reasons for this rule is to eliminate the

temptation by an accomplice who would as a self-preservation measure falsely implicate his/her accomplice.

The factors to be taken into account in determining the possibility of falsely implicating the other party is the perceived benefit which will flow to the accomplice if he/she lies against the accused. If there is no benefit accruing on the witness (accomplice) the court will be persuaded to believe his/her story. In casu Mpilo Nyathi had already received her just dessert and therefore there was no other expected benefit on her way.

Mpilo Nyathi was given Magdalene Sibanda's Identity card in order to mislead the complainant. This deceit was orchestrated by appellant and jointly executed by both, appellant and Mpilo Nyathi, hence her plea of guilty as there was no way she could have pleaded otherwise.

For that reason alone, the trial court was aware that having applied the cautionary rule the need to falsely implicate appellant was not present in view of the overwhelming evidence presented by Mpilo Nyathi.

In my opinion appellant's conviction was proved beyond reasonable doubt and as such applicant's prospects of success on appeal are not bright.

With regards to sentence, the court took into account that applicant's personal circumstances and weighed them against the seriousness of the offence, namely:

- (1) the amount involved,
- (2) that nothing was recovered, and
- (3) the modus operandi applied by the applicant, that is, the careful planning and execution of his plan.

The sentence in my opinion is not manifestly excessive in the circumstances bearing in mind that sentencing is at the discretion of the court. In addition thereto, this type of offence is on the increase, the need for deterrence is paramount.

The application is dismissed.

Mushange and company, applicant's legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners