

MISHECK ZULU  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
CHINHENGO and MAVANGIRA JJ  
HARARE 30 October 2003 and 25 February 2004

### **Criminal Appeal**

Mr *Kabote*, for the appellant  
Mr *Mushangwe*, for the respondent

MAVANGIRA J: The appellant was charged with the crime of fraud. He pleaded guilty and was duly convicted and sentenced to 5 years imprisonment of which 1 year imprisonment was suspended for 5 years on the usual condition of future good conduct. A further 2 years imprisonment was suspended on condition that the appellant effects restitution.

The appeal is against sentence only.

The offence for which the appellant was convicted and sentenced involved goods valued at \$812 191-60 of which goods valued at \$721 948-09 were recovered leaving a balance of \$90 243-51 representing unrecovered goods.

The appellant appeals against sentence mainly on the ground that the court *a quo* misdirected itself in imposing a custodial sentence instead of a non-custodial sentence on the basis that the appellant is a first offender who pleaded guilty; a non-custodial sentence would afford the appellant an opportunity to be able to work and make restitution whilst maintaining the fabric of his life and family; present sentencing trends regarding economic crimes would indicate either a fine or community service; only a fraction of the property remained outstanding; the appellant caused the recovery of the bulk of the property thereby indicating that he is not a recidivist and merely ended on the deep end of crime out of need rather than greed; the trial court failed to appreciate that a short sharp custodial sentence does not achieve much but on the contrary only hardens the appellant by throwing him amongst repeat offenders in prison thereby defeating the purpose of reforming him; and that the trial court failed to appreciate that as the appellant is a first offender who ended up "worse off" after the commission of the crime, a sentence aimed at reforming the appellant was called for.

The respondent supports the sentence imposed by the trial court contending that the trial court exercised its sentencing discretion judicially having considered all the relevant factors. The respondent however contends that as the trial court noted and accepted that the appellant committed the offence in concert with another, he ought to have ensured that the amount he was ordered to pay back was equivalent to the spoils derived from the joint crime. This would have necessitated an inquiry into the question of the proportions in which the spoils were shared among the co-offenders. This was not done and the appellant was ordered to pay the full amount of restitution. The respondent submits that in the circumstances, the relevant portion of the trial court's sentence must be set aside and the appellant ordered to pay half of what the trial court ordered him to pay by way of restitution. The respondent submits that this court is otherwise not at liberty to interfere with the custodial penalty imposed by the trial court.

In his reasons for sentence the trial magistrate considered the following factors:

- that appellant was convicted of a serious and prevalent offence;
- that the circumstances surrounding the conviction of the offence clearly indicate that this was a well calculated and planned fraud which the appellant committed in concert with another;
- after making misrepresentations to the employees of Clan Transport and managing to have released to them the goods in question, the appellant and his accomplice started selling the goods to other people;
- That the consignment was valued at \$812 191-60 of which property valued at \$721 948-09 was recovered;
- That the property recovered, was so recovered due to indications made by the appellant to persons to whom they had sold it;
- That the value of the property defrauded was quite substantial although a large portion was later recovered;

The trial court also considered that -

- the appellant is a first offender;
- he assisted the police in the recovery of most of the property;
- he pleaded guilty;
- he was then 30 years old, married and his wife was expecting;

- he is a self-employed clothes hawker whose other dependants were his aged parents and 2 young brothers.

Taking into account the current prevailing inflationary economic environment, which the trial magistrate appears not to have taken into account, it does appear that an overall sentence of 5 years imprisonment for fraud involving property valued at \$812 191-60 is unduly harsh. More so when regard is had to the numerous and weighty mitigating factors in this case for which trial courts are expected to quantify a discount. In this regard, I refer to *Felix Madembo and Anor v The State* HH 17/2003. The mitigating factors in this case, that is, that the appellant is a first offender who pleaded guilty, that the bulk of the property in question was recovered, with particular note being taken of the fact that this was due to the appellant's co-operation with the authorities and the indications that he then made, in my view warrant a quantifiable discount of sentence of in the region of one year. A sizeable portion of his sentence should be suspended on the usual condition of future good conduct and another on condition of restitution.

I am not persuaded however that the trial magistrate erred in suspending a portion of the sentence on condition of payment of full restitution. It is clear from the record that whatever property was recovered, it was so recovered on the indications or due to the assistance of the appellant. He advised the trial court that the property that was not recovered was, he believed, still with the alleged accomplice. The so-called accomplice was not charged with this offence. The charge was preferred only against the appellant. There is no basis for a finding that another person was involved in commission of the offence. In my view the appellant's *ipse dixit* is not sufficient to establish as a matter of fact that another person was involved. The evidence that property valued at \$721 948,09 was recovered on the appellant's indications suggests that the appellant may have alone benefited from this offence. I think the trial court was correct to order him to pay full restitution. The facts in *S v Moyo* 1996 (1) ZLR 5 (H) were different from the present case. In that case the two accused persons were found to have committed the offence together. That is not the case here.

In the result whilst the conviction is confirmed, the appeal against sentence is allowed. The sentence imposed by the trial court is set aside

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and substituted with the following:

“4 years imprisonment of which 1 year is suspended for 5 years on condition that the accused does not during that period commit a crime involving dishonesty and for which he is sentenced to imprisonment without the option of a fine. A further 24 months is suspended on condition that the accused restitutes Clan Transport in the sum \$80 143-51, Anvan Khan \$143 000 and David Makore \$50 000 payable through the Clerk of Court, Harare on or before 30 April 2004.”

**Chinhengo J, agrees.**