CATHERINE GONAMOMBE
and
MELODY NYIKA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 10 & 12 January 2023

Criminal Appeal

S Murambasvina, for the appellants
K H Kunaka, for the respondent

CHIKOWERO J:

1. The appeal against conviction having been abandoned at the hearing, this judgment disposes of the appeal against the sentence imposed on each appellant.
2. The appellants were convicted after a protracted trial on a charge of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Each was sentenced to 48 months imprisonment of which 12 months were suspended for 5 years on the usual conditions of good behavior, to leave an effective sentence of 36 months imprisonment.
3. At the material time the first appellant was employed in the Department of Social Welfare as the District Welfare officer for Chegutu while the second appellant was a Social Welfare officer.
4. Acting in connivance, the former instructed the latter to fill in a Grain Withdrawal Slip wherein they misrepresented to the Manager at the Grain Marketing Board, Chegutu, that the 29 369 kilogrammes of maize for release reflected in the Slip was earmarked for delivery under the drought relief programme to vulnerable families in Wards 22 and 23,

Chegutu District. In fact, the maize was intended by them for sale, which they did, whose proceeds they pocketed. The maize grain landed at Zindoga, Waterfalls in Harare where 22 100 kilogrammes, worth US$9 834, was recovered. The balance, valued at US$3 231, was recovered in cash through retention of the appellants' terminal benefits.

5. Precious Mushongandebvu, who took delivery of the stolen maize from the appellants, was jointly charged with them. She was similarly convicted and sentenced.
6. The appellants contended that the sentence is manifestly harsh and excessive as to induce a sense of shock. They argued that the aggravation was outweighed by the mitigation. The factors of mitigation were that full restitution had been effected in the manner already indicated, that no benefit had accrued to the appellants at the end of day, that both are female first offenders, single mothers, earned paltry salaries and had lost their employment as a direct consequence of the conviction.
7. The appellants also argued that the sentencer misdirected himself in failing to consider the imposition of a non-custodial sentence in the form of either a fine coupled with a wholly suspended prison term or community service
8. At the hearing, Mr *Murambasvina* highlighted that the trial court erred and misdirected itself in over-emphasizing the aggravation at the expense of the mitigation. He submitted that the result was the imposition of a disturbingly inappropriate sentence where a non-custodial sentence was merited.
9. Counsel cited a plethora of cases in urging us to interfere with the sentence. These include *State* v *Homela* HB 214/15, *State* v *Malunga* 1990 (1) ZLR 124 (H) and *Stat*e v *Gwatidzo* HH 271/90. The point there made is that the courts normally treat female first offenders more leniently than their male counterparts on the basis that the former are less likely to re-offend and usually have young children to look after. He argued that the trial court did not consider this.
10. Counsel argued also that the personal circumstances of the appellants and the circumstances of the commission of the offence should have been seriously taken into account. If this had been done, so the argument goes, a non-custodial sentence would have been imposed particularly in view of the fact that the lawmaker provides the option of a

fine. We were referred to *State* v *Chawanda* HB 45/96 and *Van Jaarveld* v *The State* HB 110/90

11. Citing *State* v *Rutsvara* SC 2/90, Mr *Murambasvina* submitted that the present is not a bad case of fraud, rendering the custodial sentence imposed inappropriate.
12. At the hearing, counsel correctly conceded that the trial court gave reasons why it found that community service was inappropriate. However, Mr *Murambatsvina* maintained that the sentence was shocking in light of the personal circumstances of the appellants, that they ultimately benefitted nothing from the commission of the offence and that the conviction rendered them jobless.
13. The guiding principle in an appeal against sentence is that where the sentence is not vitiated by irregularity or misdirection, an appellate court only interferes with the sentencing discretion of a trial court where the sentence is not only severe but is so excessive as to be disturbingly inappropriate. The test is whether the sentence is shocking, in other words, whether there is a striking disparity between the sentence passed and that which the appellate court would have imposed had it been in the position of the trial court. See *State* v *Ramushu and Others* S 25/93; *State* v *de Jager and Another* 1965 (2) SA 616(A).
14. We agree with Ms *Kunaka* that the learned magistrate did not misdirect himself. He considered both the aggravating and mitigating factors but concluded that the mitigation was outweighed by the aggravation, hence the justification for a custodial sentence.
15. Sound reasons were given for discounting the options of either a fine coupled with a wholly suspended prison term or the imposition of community service. Had we been in the place of the trial court we would not have passed a sentence markedly different from that imposed on the appellants. Indeed, the appellants jumped into crime at the deeper end of the pool. Fraud is a serious offence, hence the penalty ranges from a fine not exceeding level 14 to imprisonment not exceeding thirty-five years. This particular offence was premeditated, complex, well-planned and expertly executed. The appellants, who were public officers, stole a staggering 29 360 kg of maize grain meant for vulnerable members of the society under the drought relief programme. They stole from their employer. They breached their duty of trust. As rightly observed by the trial court, recovery of the stolen property could not be elevated so highly, together with the other mitigating factors, as to result in the

passing of a non-custodial sentence. Such recovery was due to police intelligence. It was never the intention of the appellants that the well-orchestrated offence be detected in the first place. The offence was the work of an organized criminal gang, among whom the appellants, who were insiders, were counted. The loss of employment, even though it was still considered as a mitigating factor, was the inevitable consequence of the commission of the offence. No employer, let alone the Government, is expected to retain dishonest employees on its payroll. We are satisfied that the moral blameworthiness of the appellants was very high. Far from the sentence imposed being excessive, we would instead have been shocked if anything but a custodial sentence, approximating that passed on the appellants, had been imposed.

16. The appeal is without merit
17. In respect of both appellants, the appeal against the sentence be and is dismissed.

CHIKOWERO J……..

ZHOU J…….. I agree

Jarvis Palframan, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners