THEMBA MUTIZIRA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHITAPI JJ
HARARE, 29 & 31 March 2021

Criminal Appeal

T Mapiye, for the appellant
A Muziwi, for the respondent

ZHOU J: This is an appeal against the sentence imposed on the appellant following his conviction on a charge of fraud as defined in s 136 of the Criminal Law) Codification and Reform) Act [*Chapter 9:23*]. The appellant was sentenced to 12 months imprisonment of which 4 months imprisonment was suspended for 5 years on condition that the appellant does not within that period commit an offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine.

The material circumstances of the offence are as follows. The appellant, a 56-year-old school teacher, solicited for a donation from the complainant based on false information. The false information was contained in a form which bore the name of a non-existent Ruvimbo High School. Using that form the appellant pretended to be seeking donations to assist a non-existent student called Richard Mahuni who was said to have lost both legs in an accident. The complainant was induced to "donate" $500 which was sent by eco-cash to the appellant's mobile phone.

The appellant pleaded guilty to the charge.

The appellant challenges the sentence on the ground that a custodial sentence is excessive and induces a sense of shock. Further, it is contended that the court *a quo* misdirected itself by failing to consider ordering payment of a fine or community service in the circumstances. Appellant argues that the sentence does not reflect the sentencing trends in this jurisdiction.

In the reasons for sentence the court *a quo* suggests that the appellant had defrauded many people. This is incorrect as no evidence was led concerning those other victims. This is a misdirection which shows that the court *a quo* may have been influenced by the incorrect facts. Also, the statement that the "complainant lost his money" is not entirely accurate as the $500.00 was recovered from the appellant. The recovery of the money ought to have been considered as a factor favourable to the appellant's case.

There is very little consideration of the mitigating factors. The fact that the accused pleaded guilty, thereby showing contrition and saving the court from having to go into a full trial, was not considered at all. The fact that he was a first offender and the policy justifications for trying to keep first offenders out of jail were not considered. Instead, the court *a quo* was quick to classify the offence as the deep end of crime. But the seriousness of an offence must be weighed against the other factors. On its own it does not necessarily consign a convicted person to prison.

The court *a quo* held that community service "is not an option". This statement, when considered in light of the mitigating factors and the amount involved, is not supportable. Also, given that the court had considered a penalty of 12 months imprisonment it was enjoined to consider community service. The conclusion that it would send a wrong message to society is not based on any proved facts or legal authorities. It is not supportable.

The age of the appellant, 56 years, shows that he has lived a blameless life for the greater part of his life. He is a family man, his family stands to suffer as a result of his imprisonment. As a teacher, the appellant would likely lose his employment because of the conviction. These factors were not considered at all. Nothing is said about them in the reasons for sentence. The court *a quo* also failed to consider that the amount lost through the fraud was recovered in full.

The offence was indeed a serious one and was pre-planned and executed. It involved abusing a system which would ordinarily be used in genuine cases. The conduct of the appellant threatens to undermine the system of soliciting for donations because of mistrust which his case may promote.

The learned magistrate concluded that community service was not an option. That is a misdirection, especially given that the total term of imprisonment even before a portion of it was suspended, was less, than 24 months. It therefore fell within the period which qualifies for community service to be considered as has been held in many cases in this jurisdiction. Significantly, nothing is said by the magistrate to rule out the imposition of a deterrent fine.

Given the time that would be required to remit the matter for community service to be considered, it is just that the sentence imposed be substituted with payment of a fine in order to ensure the expeditions finalisation of the matter. A suspended term of imprisonment would also act as a deterrence to the appellant against committing further crimes.

In the result, it is ordered that:

1. The appeal against sentence succeeds. The sentenced impose by the court *a quo* is set aside and the following is substituted:

   "1. The accused is to pay a fine of $600.00, in default thereof to serve a period of 6 months imprisonment.

   2. In addition, accused is sentenced to 6 months imprisonment wholly suspended for 5 years on condition that within that period the accused does not commit an an offence involving dishonesty for which upon conviction he is sentenced to a period of imprisonment without the option of a fine."

CHITAPI J agrees .....

Kwenda & Chagwiza, appellant's legal practitioners