

**SINANZWEYINKOSI NDLOVU**

**versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
KAMOCHA AND MAKONESE JJ  
BULAWAYO 12 MAY 2014 AND 24 JULY 2014

Mr *Z. Ncube* for the appellant  
Mr *T. Hove* for the respondent

Criminal Appeal

**MAKONESE J:** The Appellant who was jointly charged with Musa Masuku and Ndabezinhle Gumbo was convicted by a magistrate sitting at Western Commonage Magistrates Court, Bulawayo on two counts of fraud for contravening section 136 of the Criminal Law Codification and Reform Act [Chapter 9:23], that is to say fraud. The Appellant and the co-accused were each sentenced to 36 months imprisonment of which 12 months was suspended for 5 years on condition of good behaviour. A further 12 months was suspended on condition of restitution. The effective sentence was 12 months imprisonment.

The Appellant, who was the first accused in the court *a quo* noted an appeal against both conviction and sentence. At the hearing of this matter the Appellant's legal practitioner, Mr *Ncube* largely relied on his written heads of argument and argued that the conviction of the Appellant was unsafe and that the appeal should be upheld. The state represented by Mr *T. Hove* initially indicated that the conviction was proper but subsequently conceded that on the evidence on the record the appeal had merit and that the conviction and sentence could not be sustained. We allowed the appeal and quashed the conviction and sentence and indicated that our reasons would follow. These are our reasons.

Background

The Appellant is a maternal aunt to the complainant. On the 26<sup>th</sup> July 2009 complainant and her husband requested the Appellant to procure for them 6 beasts. The beasts were in respect

of lobola payment for the complainant. Appellant also acted as go-between in this marriage. Appellant agreed to source the beasts and have them delivered to the complainant's parents at Mtshabezi by not later than 31<sup>st</sup> August 2009. Appellant engaged the co-accused one Musa Masuku who said the beasts were available at Matopo. Appellant, was, however taken to the Zenka area of Nkayi where she was shown 6 beasts. Appellant informed the complainant that she had been shown the beasts in question. On the strength of that assurance the Appellant received the sum of R12 000 for 6 beasts and a further R3000 for transportation. Appellant then gave her co-accused a total of R8000 and she withheld R4000 as a "thank you" for her efforts in securing the beasts. It would seem that the facts clearly established that the Appellant was herself a victim of fraud perpetrated on her by her co-accused. She was made to believe that the cattle existed. She acted on that misrepresentation. Of the 6 beasts only 2 were delivered by the co-accused.

Mr *T. Hove*, appearing for the state argued that the court did not err by convicting the Appellant on two counts of fraud. It was contended that when the Appellant received the sum of R10000 for the cattle she indicated that they were available in the Matopo area. The cattle were to be delivered at Mtshabezi, at complainant's homestead. It was argued further that the Appellant later changed her story and indicated to complainant that she had found the cattle in the Inyathi area and that she physically saw the cattle in question.

After hearing argument from both counsels it became clear that there was inadequate evidence on the record to sustain the conviction and sentence. The learned trial magistrate erred in failing to realize that the evidence did not establish the guilt of the Appellant beyond reasonable doubt. This so because the mere fact that the conduct of the Appellant raised suspicion did not translate into proof of guilt. There is evidence on record to show the Appellant's valiant efforts to compel the delivery of the cattle. Appellant made frantic efforts to enforce the sale and in that regard she made a report at ZRP Nkayi and Magwegwe respectively against her co-accused. It cannot be that the reports she made to the police were attempts to cover up for her dishonesty. To the contrary these reports show that the Appellant had absolutely nothing to hide by submitting the matter to the law enforcement authorities. Her conduct is not consistent with a guilty mind. It is also important to observe that before the Appellant made payment to her co-accused, she insisted on being shown the six beasts and it was only upon being shown the beasts that she released the purchase price. When the Appellant's co-accused attempted

to persuade her to collect two beasts instead of six she flatly refused.

In convicting the Appellant, the trial magistrate reasoned that the Appellant's hands were not clean because she retained for herself the sum of R4000. The Appellant explained that the R4000 had been given to her by the "seller" as a token of appreciation for finding them a buyer. This had nothing to do with the complainant who had been charged and accepted the figure of R2000 per beast. It is my view that the payment of this "commission" to the Appellant was in itself not unlawful.

In all the circumstances, the Appellant raised a defence against the charges which was not controverted by the state. The evidence led during the trial was not sufficient to establish that the Appellant and the co-accused acted in common purpose and set out to defraud the complainant.

In his response to the Notice of Appeal the trial magistrate stood by his findings and indicated that in his view the accused persons were acting in common purpose hence the equal sharing of the "spoils". I cannot agree that the evidence established any common purpose at all. I am aware of what the approach is with regard to an appeal court's interference with a trial court's findings on credibility. In the case of *George Parkin v Guardian Security Services (Pvt) Ltd SC 130/99*, EBRAIN JA stated at page 10 of the cyclostyled judgment as follows:

"It is true that an appellate court is reluctant to interfere with the findings of credibility of a trial court unless the reasons given for accepting certain evidence may be unsatisfactory – Hoffman and Zeffert – The South African Law of Evidence 4<sup>th</sup> Edition page 484. The probabilities are important in assessing credibility."

In *casu*, the magistrate's reasons are not supported by both the law and the evidence. I have explained that the Appellant's defence remained uncontroverted and for that reason she was entitled to an acquittal.

In the result, we allowed the appeal and set aside the conviction and sentence.

Kamocha, J agrees.....

*Calderwood, Bryce, Hendrie and partners*, appellant's legal practitioners  
*Criminal Division, Prosecutor's General office*, respondent's legal practitioners