

THE STATE  
versus  
VONGAI MUKONO

HIGH COURT OF ZIMBABWE  
DUBE J  
HARARE, 27 September 2017

### **Review Judgment**

DUBE J: This matter was placed before me as a review in terms of s 57 (1), as read with s 57 (4) of the Magistrates Court Act [*Chapter 7: 10*], as read with s 29 (1), and s 29 (5) of the High Court Act [*Chapter 7: 06*]. The accused was convicted 6 counts of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and another count of theft of trust property. The accused was employed by Be Forward as a sales agent. The brief facts of this case are that the accused during the period May 2016 and October 2016 misrepresented to Be Forward that six of its clients wanted refunds for vehicles they had contracted Be Forward to import into the country. Through this misrepresentation the accused induced the various complainants to part with various sums of money .which were transferred into accounts belonging to different people by the accused. In the 7<sup>th</sup> count, the allegations are that a client gave the accused \$2300.00 as a deposit for the purchase of a motor vehicle. The accused did not remit the money to Be Forward and instead converted the money to her own use. A total of \$18 186.00 was stolen and nothing was recovered. The complainant was being represented by Rumbidzai V. Tigere, its sales manager in the proceedings.

The accused was sentenced to 24 months imprisonment of which 3 months' imprisonment was suspended for 3 years on condition the accused does not within that period commit any offence involving dishonesty for which she is sentenced to imprisonment without the option of a fine. Of the remaining 21 months imprisonment, 10 months' imprisonment was suspended on condition the accused makes restitution to Rumbidzai V Tigere in the sum of \$18 186,00. The remaining 11 months imprisonment was suspended on condition the accused performs community service.

The conviction is proper. It is with the manner in which the proceedings were recorded and the actual sentence imposed that the court takes serious issue with. The accused's plea to the charge was not recorded at the back of the charge sheet as is the usual practice. The sentence imposed is also not endorsed at the back of the charge sheet as is the usual practice. In fact, the sentence imposed is not endorsed anywhere in the record of proceedings by the trial magistrate. It only appears on the cover attached to the record. Whenever a magistrate records a plea, such a plea ought to be recorded and endorsed at the back of the charge sheet. The court must also record whether he has found the accused guilty or not guilty. In the case of a plea to the charge, he must also indicate whether he has proceeded in terms of s (b) or (a). In the case of a conviction, the court must also endorse the sentence imposed at the back of the charge sheet.

Whilst the record reflects that the accused faced 7 charges the record does not reflect the individual sentences imposed for each particular count. The trial magistrate's approach to sentence is not known. The 7 counts appear to have been treated as one for purposes of sentence but this is not apparent from the record. The trial court imposed a global sentence. The magistrate's reasons for this approach are not stated in the magistrates' reasons for sentence. The court erred in not elucidating its reasons for sentence.

The trial court made an order for restitution of \$18 186. 00 in favour of the complainant's representative. The complainant in this case is Be Forward represented by Rumbidzai V, Tigere. The trial court erred when it made an order for restitution in favour of the complainant's representative and not the complainant itself. Where a court is required to make an order for restitution in favour of a complainant which is a company, the order for restitution is required to be made in favour of the company as it is the owner of the funds stolen. It is inappropriate to make an order for restitution in favour of the company's representative who is not a party to the proceedings. The danger of such an order is that a representative of a company may decide to claim the money and convert the money to his own use.

The sentence imposed is manifestly lenient. The court in sentencing the accused took into account the fact that the accused was a first female offender who pleaded guilty to the charges thereby showing contrition. Also considered in her favour was the fact that she lost her employment after this offence was discovered. The court also considered that accused breached her employer's trust. She breached the trust entrusted in her. The offence of which she stands convicted of is very prevalent and is of a serious nature. Even first offenders are sent to jail for serious offences. What is in favour of the accused is that she is a female first offender who pleaded guilty showing contrition. The accused stands convicted of very serious offences

involving dishonesty. She was convicted of 7 counts of fraud which were committed within a period of six months. All the money stolen was not recovered. What further aggravates this offence is that the accused stole from her employer and breached the trust reposed in her by her employers. The offences she stood convicted of are very serious and very prevalent. Even first female offenders are sent to jail for serious and prevalent offences. The sentence imposed does not meet the justice of the case. A court sentencing an accused should always ensure that the sentence imposed fits both the offence and the offender and be fair to the community concerned and have an element of mercy. The interests of the accused should be balanced against those of the society at large see *S v Sparks & Anor* 1972 (3) SA 396. The sentence imposed should be fair and proper in the circumstances of the case. A sentence of 24 months imprisonment for 6 fraud counts and a charge of theft of trust property involving \$18 186, 00 where nothing of the monies stolen was recovered induces a sense of shock. A global sentence in the region of 4 years would have met the justice of the case. A short stiff custodial sentence would have met the justice of the case even for a first female offender.

Community service as an option for sentencing is reserved for minor transgressions. Whilst the accused is a first female offender who is single and who ought to be treated leniently because of her gender, I find no justification for the sentence imposed. This case is not suited for community service. An effective custodial sentence with a portion suspended on given conditions would have met the justice of the case.

I am not satisfied that proceedings were conducted in accordance with real and substantial justice. In the result, I withhold my certificate.