TUNGAMIRAI NYENGERA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAKONESE AND MOYO JJ
BULAWAYO 28 SEPTEMBER 2015 AND 18 FEBRUARY 2016

Criminal Appeal

G. Nyoni for the appellant
Ms *S Ndlovu* for the respondent

MOYO J: The appellant in this matter was convicted of fraud as defined in section 136 of the Criminal Law Codification and Reform Act [Chapter 9:23] by the provincial magistrate sitting in Bulawayo. He was sentenced to 48 months imprisonment with 12 months imprisonment suspended on the usual conditions. Dissatisfied with both conviction and sentence he then approached this court.

At the hearing of the appeal we dismissed the appeal against conviction and allowed the appeal against sentence with reasons to follow. Here are they:

In the notice of appeal which I will not reproduce herein the appellant is not satisfied with the manner with which the court *a quo* treated the evidence of the witnesses. The appellant avers that the evidence of Absolom Hlupho was inadmissible as against the appellant as it was accomplice evidence. That the court *a quo* erred in finding that the warrant of liberation was fake and that the court *a quo* erred in finding that the cellphone call history was admissible. Also that the learned magistrate erred in accepting Lilian Tapera's evidence and in finding that it had been adequately corroborated.

On the sentence, the appellant is of the view that the sentence imposed by the learned magistrate is unduly harsh and excessive.

The facts of this matter in a nutshell are that the appellant, a legal practitioner by profession, with the assistance of Absolom Hlupho a prison officer, sought to cause the release of a convicted and serving prisoner through a misrepresentation that the prisoner had been granted bail pending an appeal and a warrant had thus been issued for his liberation.

The state case hinged on the evidence of Lilian tapera, the sister to the serving prisoner whose release it is alleged appellant sought to clandestinely secure. She gave the court a detailed account of what transpired and how she paid the appellant $1500 for his services. The court rightfully found her as a credible witness in our view for there are no pointers to lack of credibility in her evidence.

As for Absolom Hlupo's evidence, this court does not find any issues with it. Absolom Hlupo expressly told the court that he realized that lies would not take him anywhere and he decided midway through his cross examination to tell the court the truth. He confirmed that the warrant of liberation came from appellant. The findings of the trial court with regard to these witnesses' testimony cannot be faulted.

On the authenticity or otherwise of the warrant of liberation the evidence of Lungile Moyo and that of Freedom Potera the clerk of the regional court amply covered that point to the satisfaction of the court.

On the constitutionality or otherwise of the cellphone history which appellant decided not to respond to on the merits, we find that there is absolutely no basis for the challenge being proffered for, the right to privacy enshrined in the Constitution is not absolute. As correctly held in the case of *Tendai Biti* v *Chief Superintendent Majuta* HH 156/11 BHUNU J held that where the police have reasonable cause to investigate crime the subject's rights to privacy must of necessity give way to common good and public interest to fight crime. There is therefore absolutely nothing wrong with the production and the acceptance of the cellphone history by the trial court.

Lilian Tapera could not be held to be an accomplice when in fact she told the court that she genuinely believed in the whole process that the appellant engaged in and she actually thought there was nothing amiss. On page 47 of the record she actually told the court that as she waited for the processing of his brother's release papers at Khami, the appellant phoned her and advised her to quickly leave the place (Khami prison), that she should run away. She said she decided to wait there. Surely if she had been part of the clandestine plan to release her brother she could have fled at that juncture. Her decision to wait shows that she did not appreciate that there was a serious problem with the whole plan.

In the case of *Chimbwanda* v *Chimbwanda* SC 28/02 it was held by ZIYAMBI JA as follows:

> "It is trite law that an appellate court will not interfere with the findings of fact made by a trial court and which are based on the credibility of witnesses. The reason for this is that the trial court is in a better position to assess the witnesses from its vantage point of having seen and heard them.----. The exception to this rule is where there has been a misdirection or a mistake of fact or where the basis upon which the court a quo reached its decision was wrong."

We have found no misdirection in the manner with which the trial court dealt with the evidence before it. We have already canvassed the evidential issues herein.

We found that in fact the evidence against the appellant was overwhelming and that the court *a quo* rightly convicted him.

On sentence, we noted that, accused 1 (the appellant's co-accused) was sentenced to 36 months imprisonment with 12 months imprisonment suspended on the usual conditions.

The appellant himself was sentenced to 48 months imprisonment with 12 months imprisonment suspended on the usual conditions.

We then considered the reasons for sentence and noted that the appellant is also a young lawyer who was at the inception of his career, we then held the view that he should have been given a sentence that considers his immaturity as a lawyer.

It is for that reason that we interfered with the sentence.

We thus made the following order:

a) The conviction is confirmed.
b) The sentence by trial court is set aside and substituted with the following:

   The accused person is sentenced to 36 months imprisonment of which 12 months imprisonment is suspended for 5 years on condition the accused person does not within that period commit an offence involving dishonesty for which upon conviction he shall be sentenced to imprisonment without the option of a fine.

Moyo and Nyoni appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners

Makonese J…….