

CRIM.APPEALCASE NO.26/2000

In the matter between:

VELAPHI COMFORT MAGAGULA
Appellant

And

REX
Respondent

CORAM: MATSEBULA, MASUKU J.J.

For the Appellant: No appearance
For the Respondent: Mr P.K.L. Ng'arua

JUDGEMENT
21/2/01

MASUKU J.

Preface

This is an unfortunate case, in which it appears that the accused has served his sentence. The appeal was lodged during his imprisonment and has only been enrolled after he has served his sentence. It is imperative that the appeals are processed with great promptitude in order to ensure that such incidences do not recur.

Since the appeal, which was lodged on the appellant's behalf by Lindiwe Khumalo-Matse & Co., has not been withdrawn, we found it appropriate to dispose of it in the manner that follows herein below. I should however mention at the least, the offices of Lindiwe Khumalo-Matse, should have been courteous to advise the Court of the developments in this matter. Attorneys should always uphold their duty to the Court unflinchingly.

JUDGEMENT

This is an appeal against a decision Mr. N. Nkonyane, Senior Magistrate, then sitting at Mbabane, Hhohho District. The appellant, to whom I shall continue to refer to as the accused appeared before the learned Senior Magistrate, charged with two counts of fraud. The charge sheet reads as follows:

Count 1.

The accused is guilty of the crime of Fraud.

In that upon or about the 6th May, 1998, and at the Swaziland Royal Insurance Corporation in Mbabane in the district of Hhohho, the said accused did unlawfully and with intent to defraud misrepresent to the Swaziland Royal Insurance Corporation wherein he submitted a letter claiming that one Thandi Bonisile Magagula, his wife and Felix Zakhele Magagula his son were deceased, whereas they were not, and that he was entitled to money from the Swaziland Royal Insurance Corporation from his policy No. AB509274 as funeral benefits due to him in respect of the death of his wife Thandi Bonisile Magagula and his son Zakhele Felix Magagula, who were covered in his policy as dependants.

The accused did by means of the said misrepresentation induce the Swaziland Royal Insurance Corporation to its prejudice, to issue a cheque dated 7th May, 1999, for the amount of E7,500.00, and was drawn from the Swaziland Royal Insurance Corporation account, held at First National Bank West Street Branch, as money due to the said accused as benefits for the death of his wife Thandie Bonisile Magagula and his son Zakhele Felix Magagula.

The said accused when he made the aforesaid misrepresentation well knew that the said Thandie Bonisile Magagula his wife and Zakhele Felix Magagula his son were not dead, and that he was not entitled to claim money as funeral benefits from the Swaziland Royal Insurance Corporation.

Count 2

The accused is guilty of the crime of Fraud.

In that upon or about the 22nd September, 1998, and at the Swaziland Royal Insurance Corporation in Mbabane in the district of Hhohho, the said accused person did unlawfully and with intent to defraud misrepresent to the Swaziland Royal Insurance Corporation wherein he submitted a letter claiming that one Nontobeko Magagula his child was deceased whereas she was not and that he was entitled to money from the Swaziland Insurance Corporation as funeral benefits due to him in respect of the death of his daughter Nontobeko Magagula who was covered in his policy as a dependant.

The accused when he made the aforesaid misrepresentation well knew that the said Nontobeko Magagula was not dead, and that he was not entitled to money from the Swaziland Royal Insurance Corporation as funeral benefits due to him, and as such the accused did by means of misrepresentation induce the Swaziland Insurance Corporation to a potential loss of E2, 500.00.

The accused, who was duly represented throughout the trial pleaded guilty to both counts and his plea was confirmed by his legal representative. Evidence of eight witnesses was led in support of the charge. There was very little cross-examination of these witnesses and the cross-examination of the witnesses did nothing to improve the accused's position. The learned Magistrate accordingly found him guilty as charged and having listened to evidence in mitigation of sentence, sentenced the accused to two years imprisonment without the option of a fine on the first count and to a fine of E1.000.00 on the second. An amount of E1,000.00, which the accused had paid as bail was then used to pay the fine on the second count.

The accused has appealed only against the sentence imposed by the Magistrate. The grounds for appeal are as follows:

1. This sentence passed by the learned Magistrate is excessive and induces a serve (sic) of shock.
2. The accused person had pleaded guilty and was remorseful
3. The learned Magistrate failed to take into account the personal circumstances of the accused.
4. The sentence is not supported by the authorities.

The proper approach to be adopted by this Court, as it sits as a Court of Appeal was set out with absolute clarity and devastating candour by the late Mahomed C.J. in *S V SHIKUNGA* 2000 (1) SA 616 NmSC at page 631, in the following language:

“ It is trite law that the issue of sentencing is one which vests a discretion in the trial Court. An appeal Court will only interfere with the exercise of this discretion where it is felt that the sentence imposed is not a reasonable one or where the discretion has not been judiciously exercised. The circumstances in which a Court of appeal will interfere with sentence imposed by the trial Court are where the trial Court has misdirected itself on the facts or the law (SVRABIE 1975 (4) 855(A)); or where the sentence that is imposed is one which is manifestly inappropriate and induces a sense of shock (S V SNYDERS 1982 (2) SA 694 (A)); or is such that a patent disparity exists between the sentence that was imposed and that the Court of appeal would have imposed (S VABT 1975 (3) SA 214 (A); S V HLAPEZULA AND ORS 1965 (4) SA 439 (A); S V VAN WYK 1992 (1) SACR 147 (Nm) at 165 D-G; S V DE JAGER AND ANO. 1965 (2) SA 616(A) at 629 A-B; RV ZULU AND ORS 1951 (1) SA 489 (N) 497 C-D; SV BOLUS AND ANO 1966 (4) SA 575 (A) at 581 E-H; SV PETKAR 1988 (3) SA 571 (A) at 574 C; or where there is an overemphasis of the gravity of the particular crime or an under-emphasis of the accused’s personal circumstances (S V MASEKO 1982 (1) AS 99 at 102; S V COLLETT 1990 SACR 465 (A)). ”

In our view, it cannot be said that the learned Magistrate erred in any of the manners captured in the above excerpt. We are of the view that even if the matter had come before this Court, a similar or even a more severe sentence would have been handed down. It is also clear that the Magistrate considered that the accused was a first offender and proceeded to consider the accused’s personal circumstances, particularly that he had dependants. The Magistrate also considered the nature of the crime committed against a national institution. He also proceeded to treat the sentence differently in respect of the two counts, regard being had to the evidence led in respect of each.

He proceeded to reason as follows at page 16 of the record:

“The Court views in a very serious light situations whereby accused persons commit crimes and enjoy the fruits of their unlawful conduct.... Fraud is not a crime that can be committed by mistake. One has to take his time and think how he is going to go about committing it. The accused proved to be a person who is callous. He told a lie and said his wife and two kids had died when they had not died. The accused is employed. It is not clear what prompted him to commit the crime. The Court can only arrive at a conclusion that he was just being mischievous. This is the type of mischief that the Court has to deal with harshly in order to discourage others from thinking that life has some short cuts.”

This is reflective of the fact that the *triad* was fully considered by the learned Magistrate in imposing the sentence. I can find no reason why this sentence should be interfered with as the learned Magistrate judiciously exercised the discretion vested in him. One can only add that the crime of which you were convicted is serious and visits unpleasant consequences to many people. Some companies have closed down because of fraudsters like you and as a result, many innocent people lost their means of livelihood. Institutions like the one that you defrauded operate largely on trust, expecting you to give truthful information relating to any claim that you lodge. If this trust is misplaced or abused, then surely, the Courts must send a clear message that such behavior will not be tolerated. In this case, not only did you misrepresent facts before the Corporation, but you also must have misrepresented facts to the Registrar-General's office that your wife and children had died and on the basis of that information, the Registrar-General issued you with death certificates for people who are alive. It has been said that a thorn of experience is worth a wilderness of warning. It is in this case necessary that you learn the hard way from your mistakes.

The appeal against sentence be and is hereby dismissed.

**T.S. MASUKU
JUDGE**

I agree.

**J.S. MATSEBULA
JUDGE.**