IN THE HIGH COURT OF ZAMBIA

HOLDEN AT NDOLA

(Criminal Jurisdiction)

CHRISTINE MISOZI SOKO

V

THE PEOPLE

CORAM: SIAVWAPA J.

FOR THE STATE: MISS MUMBA, ACTING SENIOR STATE ADVOCATE

FOR THE DEFENCE: MISS MUKULWAMUTIYO, LEGAL AID COUNSEL

J U D G M E N T

AUTHORITIES REFERRED TO:

A. CASES

1. **Isaac Simutowe & others V the People**
2. **Kaposa Muke & another V the People**
3. **Chomba V the People**

STATUTE

1. **Penal Code chapter 87 of the Laws of Zambia**

This is an appeal against sentence only imposed by the subordinate court of the first class for the Ndola District of the Copperbelt Province of the Republic of Zambia. The Appellant was convicted on three out of the five counts of obtaining money by false pretences he was charged with. In passing sentence on the three counts, the learned trial magistrate stated the three sentences to run consecutively. It is this mode of sentencing that the Appellant is attacking in her appeal.

In his written heads of argument and oral submissions, Mr. Mulenga has argued, on behalf of the Appellant that it was wrong for the learned trial magistrate to order the sentences to run consecutively as that was contrary to the directive of the Supreme Court in the case of **Isaac Simutowe & others V the People**[1]. In that case, the Supreme Court was merely restating its earlier principle in the case of **Muke V the People**[2] in which it held as follows;

> ***"Where the facts of the case disclose a series of offences forming a course of conduct, the proper procedure is for the sentences imposed to run concurrently."***

In the Simutowe case (supra), another limb to the principle in Muke was added to the effect that;

> ***"Where an accused person has committed many offences, the court should asses the proper sentence which is appropriate for the whole course of conduct."***

There is no doubt from the record of proceedings in the subordinate court that the Appellant had engaged herself in a

[1] (2004) ZR 91
[2] (1983) ZR 94

series of conduct aimed at defrauding different people at different times by purporting to offer a house for either rent or sale. In the process she obtained various amounts of money from the unsuspecting clients.

In holding the consecutive sentences wrong in principle in the Muke case, the Supreme Court had this to say at page 94;

> ***"The learned trial judge imposed the sentences consecutively on the grounds that they were two different complaints. He did not take into account that there was a course of conduct disclosed by the facts of this case in which the second offence followed the first."***

In an even much earlier case of **Chomba V the People**[3] the Supreme Court had this to say;

> ***"When dealing with a series of offences comprising a course of conduct, although there are anomalies inherent in both the "consecutive" and "concurrent" methods of sentencing the better course is to impose concurrent sentence in respect of all the charges the length of each sentence being that which the court considers appropriate for the total course of conduct."***

What is significant about this case, which emanated from the subordinate court, is that the Appellant had a record of five previous convictions which the trial magistrate took into consideration in ordering that the two year sentences on each count should run consecutively. The other dimension this case adds is the fact that for the offences to be considered as one course of conduct, they must have all been committed within a short period of time. In this case, the five counts of burglary and theft were all committed between 26th December 1974 and 7th

[3] (1975) ZR 245

January 1975, a period of 12 days. To that effect, the Supreme Court made the following statement;

> ***"This was a series of offences committed over a short period and should have been treated as one course of conduct for the purposes of sentence."***

In the case before me, it appears that over a period of one year between July 2006 and June 2007, the Appellant committed the offences she was convicted of. According to the charge sheet, the Appellant committed the offence in the second count on 27th July 2006, the offence in the third count on 18th June 2007 and the offence in the fifth count on 28th May 2007. It is noted that a period of close to one year passed between the commission of the offence in the second count and that in the third count which, going by the principle of time, cannot be said to have been committed within a short period. There is however, reasonable proximity of 21 days between the third and fifth offences.

In view of the above, I would take the liberty to stretch the principle of proximity as laid down in the above cited case of **Chomba V the People** to include the similarity in the offences committed. It is my considered view that if a person defrauded a bank in 2008 and does the same in 2011 and gets arrested and charged with two counts of fraud relating to the two offences, on conviction, the two offences will be deemed to disclose a course of conduct for the purposes of sentence even though separated by a period of more than two years. The situation would however, be different if the second offence was totally different from the first one.

The conduct of the Appellant in this case reveals a fraudulent disposition of mind that led to the commission of a series of offences involving either the sale or renting out of a house to different people over a period of one year. Ultimately, she was convicted on three counts of the same offence of ***obtaining money by false pretences*** contrary to section 309(a) of the Penal Code chapter 87 of the Laws of Zambia, a misdemeanour carrying a maximum custodial sentence of three years.

It is clear that this case falls within the principles laid down in the above cited cases and had the learned trial magistrate properly directed himself, he would not have ordered the sentences to run consecutively as doing so was clearly wrong in principle.

The result is that the appeal succeeds. I set aside the order for the sentences to run consecutively and instead order them to run concurrently. The Appellant will therefore, serve a total of 24 months simple imprisonment with effect from the date of the sentence being the 23rd day of May 2008. This effectively means that unless the sentence was interrupted by bail pending appeal, the appellant would have served the full sentence on 22nd May 2010 and entitled to be at liberty from that date.

DATED THE 18TH DAY OF AUGUST 2011

J.M. SIAVWAPA

JUDGE