MPHOKUHLE NCUBE

VERSUS

THE STATE

HIGH COURT OF ZIMBABWE
NDOU &CHEDA J J
BULAWAYO 14 FEBRUARY 2011 AND 10 MARCH 2011

S. Mguni, for the appellant
K. Ndlovu, for the respondent

APPEAL AGAINST SENTENCE

CHEDA J: This appeal was heard on 14 February 2011 and the following order was granted:

> ''The appeal succeeds to the extent that the sentence of 5 years imprisonment of which 1½ years imprisonment was suspended on the usual conditions imposed on the 18/5/10 be and is hereby set aside and is substituted by the following:
> 2 years imprisonment of which 1 year imprisonment is suspended for 5 years on condition appellant does not during that period commit any offence of which unlawful entry and/or dishonesty is an element for which upon conviction is sentenced to imprisonment without option of a fine''.
> Effective: 1 year imprisonment

We undertook to give full reasons for the said decision. This judgment contains the said reasons. Appellant aged 19 at the time, together with his three co-accused were charged with one count of unlawful entry and another of theft. They pleaded guilty, were duly convicted and sentenced as follows:

> ''Each accused persons count (i) 2 years imprisonment. Count (ii) 3 years imprisonment, of the 5 years 1½ years is suspended for each accused person for 3 years on condition that each within that period does not commit any offence involving unlawful entry into premises/ dishonesty as an element for which upon conviction. He is sentenced to imprisonment without the option of a fine''.

The allegations against them is that on the 16 May 2010 they broke into Eagle supermarket and stole an assortment of groceries, R5 250 and $375 cash. Of the total goods stolen, $200, R4 213-00 and all groceries were recovered.

It is appellant's argument through his legal representative, Mr Khumalo that there was a misdirection by the court *a quo* by its failure to impose a non-custodial sentence in this matter.

His argument is premised on the ground that the trial magistrate should have imposed a fine or community service.

It is a settled principle of our law that the appeal court will not normally interfere with the sentence of a court *a-quo* unless the sentence imposed is manifestly excessive so as to induce a sense of shock or is vitiated by irregularity or misdirection, s*ee S v Ramushu SC* 25/93. The fact that the appeal court would have passed a different sentence is not good enough reason to justify the substitution of a trial court's sentence. The first question the court will ask is, whether or not the sentence was in compliance with the general principles regarding sentence. To demonstrate that the court's approach is not light, even if it is viewed as severe than that which would have been imposed by the appeal court sitting as a court of first instance, the appeal court will not interfere with it in the absence of it being manifestly excessive, irregular or misdirected.

It, therefore, stands to reason that the sentence must be such that it shakes the conscience of a reasonable man. Count 2 is actually the continuation of section 131 (1) of the Act, that is, the unlawful entry, of which sub-section reads:

(2) For the purposes of paragraph (a) of sub-section (1) the crime of unlawful entry into premises is committed in aggravating circumstances if, on the circumstances on which the crime is committed, the convicted person-

(a) ---
(b) ---
(c) ---
(d) ---
(e) committed or intended to commit some other crime.

Appellant committed this offence in aggravated circumstances as premised under subsection 2 of the said act.

Appellant, though young was in gainful employment, therefore, this offence was out of greed than need. Further, despite his age he engaged himself in an enterprise which is generally of adult domain and / practice. He has been sailing too close to the wind. His conduct therefore, removes him from the non-custodial sentence category.

It is for that those reasons that the appeal succeeded.

Ndou J ..... I agree