THE STATE

Versus

RODRICK DUBE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J AND CHEDA AJ
BULAWAYO 25 FEBRUARY 2013 AND 7 MARCH 2013

Mr G. Nyoni for the respondent
Mr T. Hove for the applicant

Criminal Appeal

MAKONESE J: The Appellant, a school headmaster was arraigned before a magistrate sitting at Lupane on the 2nd November 2010 on ten counts of fraud in contravention of section 136 of the Criminal Law (Codification and Reform Act) [Chapter 9:23]. The brief allegations are that during the period between March 2009 and October 2012, he misrepresented to the Ministry of Education and Culture that certain temporary teachers who had left the employment of the Ministry were still at Insika Primary School, Lupane, and as a result of such misrepresentation, appellant recruited other temporary teachers on his own without going through the Ministry. The Ministry continued to remit salaries in respect of teachers who had already left the Ministry and accused received a percentage of the salaries in respect of the teachers he illegally recruited without the Ministry's approval. The teachers recruited by the Appellant did not possess 5 'O' Level passes.

The Appellant was initially convicted on his own plea of guilty and sentenced to a total of 70 months imprisonment, 30 of which were suspended for five years leaving an effective custodial sentence of 50 months. Upon review the trial magistrate was ordered by a High Court Judge to re-sentence the appellant as the sentence was deemed to be inappropriate.

On the 9th May 2012 the learned magistrate re-sentenced the appellant to 30 months imprisonment and suspended 20 months leaving the appellant with an effective sentence of 10 months imprisonment. It is against this sentence that this appeal has been noted.

The appellant's grounds of appeal are that:

1. The sentence imposed by the magistrate is excessive and induces a sense of shock.
2. The appellant pleaded guilty to the offence and thus deserved a reformative sentence.
3. Appellant spent 2 months at Khami prison and it was desirable that on re-sentence as a first offender he be sentenced to a non-custodial sentence.
4. The learned magistrate failed to appreciate and deal with appellant's offer to reimburse the $350 he had benefited from the offence.
5. The learned magistrate paid lip service to the fact that appellant had suffered emotional torture whilst awaiting re-sentencing.
6. The learned magistrate did not give reasons why a sentence of a fine was not appropriate.

The State argued that a sentence of 10 months imprisonment for 10 counts of fraud cannot be regarded as excessive in the circumstances of the case. The State pointed out that the appellant had recruited people who were not qualified to teach pupils thereby destroying the education of the children, and further the appellant did not care that the pupils were being short changed in his endeavours to get money for himself. The State also highlighted that the court *a quo* had observed that the appellant had defrauded the pupils and the Government.

I have perused the record and note that in re-sentencing the appellant the court took into account the fact that the appellant is a first offender who pleaded guilty. The court also took into account that the appellant as Head of the School abused his position for his own selfish needs. In the circumstances the learned magistrate considered that a prison term was the most appropriate sentence.

I agree with Counsel for the State, Mr *T Hove* that there is no absolute rule that first offenders must not be sent to jail, see *S v Venganayi* HH 52/89.

I am aware that there is now a string of judgments which have emphasised that the courts must consider other alternative forms of punishment such as community service, especially where the sentence falls within the 24 months bracket of community service. I do not believe that the courts are strictly bound by the general principles and guidelines on community service to such an extent that they may not exercise their discretion, depending on the perculiar circumstances of each case. The sentence must still fit the offender. In exercising his discretion, the trial magistrate may decide that community service is not the appropriate sentence taking into consideration the circumstances of the case. In this case, the circumstances are unique in that, the appellant, the Headmaster of a school decided to misrepresent to the Ministry of Education, and hired unqualified teachers to fill vacant posts. He did not follow the laid down procedure for employing teachers. He became the recruiter and employer. He collected the salaries of the teachers who had left the service and "shared" such salaries with the unqualified teachers, who were not even in the records of the Ministry. His moral blameworthiness was of a high degree.

It is my considered view that this is a serious offence and a sentence of a fine or community service would trivialise the offence. In any event, the appellant has not been able to establish any misdirection on the part of the trial magistrate which calls for interference of the sentence on appeal. If a magistrate considers that community service is not appropriate and decides to impose a custodial sentence, and gives his reasons for imposing an effective prison term, the appeal court will only interfere with such sentence if the sentence imposed is a result of a misdirection or is so excessive as to induce a sense of shock. It is my view, that in this case the sentence of 10 months imprisonment is well within the penal jurisdiction of the court *a quo*. In the absence of any misdirection, the appeal court is slow to interfere with the sentencing which is the discretion of the trial court. See *S v Ramushu and other* SC 25/93 and *S v Sithole* 1992(2) ZLR 110.

In *S v Nhumwa* S 40/88, KORSAH J, at page 5 of the cyclostyled judgment said:

> *"It is not for the appeal court to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from*

that imposed. If the sentence complies with the relevant principles, even if it is severer than one that the court would have imposed, sitting as a court of first instance, this court will not interfere with the discretion of the sentencing court."

For the above reasons I decline to interfere with the sentence. The appeal against sentence is hereby dismissed.

Criminal Division, Attorney General's Office, appellant's legal practitioners
Moyo and Nyoni, respondent's legal practitioners

Makonese J.....

Cheda AJ agrees.....