LEONARD SILUME
versus
THE STATE

HIGH COURT OF ZIMBABWE
BERE AND MATHONSI JJ
BUALWAYO 18 JANUARY AND 4 FEBRUARY 2016

Criminal Appeal

G. Nyoni for the appellant
Ms N. Ngwenya for the respondent

MATHONSI J: This is an appeal against sentence only following the conviction and sentence of the appellant by the magistrates court sitting at Lupane on three counts of theft in contravention of s113 of the Criminal Law Code [Chapter 9:23]. The appellant had initially pleaded not guilty to all the charges but midway through the trial after the state had led evidence from all its witnesses, closed its case and the appellant had testified in defence and closed his case, the appellant underwent some damascene experience. Seeing the light for the first time he changed his plea to that of guilty. Down on his knees he then pleaded for mercy.

The magistrate was not impressed as to him the appellant's plea for mercy was nothing more than the fuminations of a well and soundly beaten man, who, seeing no escape route ahead decides to capitulate after wasting the court's energy, time and resources on a trial whose outcome was as predictable as ABC. He came down hard on the appellant, sentencing him to 24 months imprisonment of which 8 months imprisonment was suspended for 5 years on the usual condition of future good behavior. A further 2 months was suspended on condition of restitution.

Left with an effective sentence of 14 months imprisonment the appellant was dissatisfied. He then lodged this appeal against sentence only on the basis that the sentence is so harsh as to induce a sense of shock. To him the magistrate did not consider the effect of compensation which he had offered, did not consider imposing a fine or community service, paid lip-service to

the mitigating factors set out and in the end came up with a sentence that was disproportionate to the crime.

At the hearing of the appeal *Mr Nyoni* who appeared for the appellant ill-prepared as the matter was being handled by a colleague at his firm who had been taken ill, abandoned the request for community service and instead urged of us a sentence of a fine. In my view, that was not a smart move at all especially as the sentencing court is not only at liberty to consider community service but is enjoined to do so where it comes up with an effective imprisonment sentence of less than 24 months.

Ms Ngwenya for the respondent conceded that in sentencing the appellant to a term of incarceration the court *a quo* misdirected itself especially as the offences occurred contemporaneously as to amount to one criminal transaction.

In arriving at the sentence that it imposed the court *a quo* reasoned as follows:

> "It is accused's first appearance in court facing a criminal charge. He is married and has some dependents to take care of. Due to this case, he is now on suspension from his workplace (In fact he was later dismissed). He has been given credit for having a change of heart. He pleaded guilty. His plea has hence save(d) much of the court's time. However what is aggravating is that he committed three counts of theft. Theft from a motor vehicle *per se* is a serious offence. Accused did not only cause unnecessary prejudice to the complaints in question but he greatly inconvenienced them. The motor vehicles in question were meant to take them to and from work but on that day in question they failed to do so as fuel had been drained. I did not lose sight of the value involved in this case. It however cannot be taken into (sic) isolation. Analysing the circumstances of this case, it is my view that a fine or community service would rather trivialize the case. I believe a custodial sentence would be in the interest of justice. The sentence which is not only meant to punish the accused but also to send a message to would be offenders as well."

The circumstances are that on the night of 23 June 2014 the appellant and his co-accused who pleaded not guilty decided to raid motor vehicles which were parked at the residences of the complainants. The appellant was a security guard at Chitkem Security Company. They proceeded to stand 178 Lupane where a Ford Ranger motor vehicle registration number ADI 0503 and a Landrover registration number ACJ 1135 were parked. They drained 35 litres of diesel from the Landrover and 65 litres of diesel from the Ford Ranger.

The appellant proceeded to stand 200 Lupane where a Nissan Hardbody registration number 790-047V was parked and drained 30 litres of diesel from it before making good his

escape. The total value of the 130 litres diesel was $144-00 and nothing was recovered. At the trial that value had probably increased to $288.

The sentencing court has a discretion in assessing an appropriate sentence. The appeal court will not just interfere with that sentencing discretion and will only do so where there is a misdirection or the sentence imposed is manifestly excessive; *S* v *Chiweshe* 1996 (1) ZLR 425 (H) 429 D; *R* v *Ramushu* S – 25/93; *S* v *Nhumwa* S – 40/88. Where it can be shown that the sentence imposed is vitiated by a misdirection the appeal court will step in to correct the misdirection. Where the sentence imposed falls within the sentencing discretion of the trial court and it has not been shown that there exists a misdirection, the appeal court will not interfere merely to substitute its own opinion regarding sentence; *S* v *Mundowa* 1998 (2) ZLR 392 (H) 395B-C; *S* v *De Jager and Another* 1965 (2) SA 616 (A) at 628-9.

However, this is a matter in which the trial magistrate settled for an effective sentence of 14 months imprisonment. He was therefore obliged to consider community service. In *S* v *Mabhena* 1996 (1) ZLR 134 (H) 140 E, ADAM J made the following pronouncement.

> "There is little doubt that the magistrate erred about community service. The sentence he imposed was 18 months' imprisonment with labour of which 8 months was suspended on condition of good behavior, leaving an effective sentence of 10 months imprisonment. This court has on a number of occasions indicated in the past that for first offenders in appropriate cases where a sentence a court imposes (is) 12 months effective imprisonment or less then community service should be considered and sound reasons given for not imposing it."

MAWADZE J took that point further in *S* v *Chireyi and Others* 2011 (1) ZLR 254 (H) 260D. The learned judge took the view that it was a misdirection for a trial magistrate not to inquire into the suitability of community service where he or she settles for effective imprisonment of 24 months or less. I must add that it is not enough to simply pay lip-service to the factor of community service by merely mumbling something to the effect that it is inappropriate without more or that it will trivialize the offence.

Where the trial magistrate is of the view, after making a real inquiry into it, that community service is inappropriate, cogent or sound reasons for arriving at that conclusion must be given. This is the point underscored by CHINHENGO J in *S* v *Antonio and Others* 1998 (2) ZLR 64 (H) that if a fine is a permissible sentence for the crime in question, the sentencer should consider first whether a fine with or without an alternative of community service should be imposed. If he considers that a fine is not appropriate, he should then consider whether a direct

sentence of community service is appropriate. If it is not, he should consider whether a term of imprisonment suspended on condition of performance of community service is appropriate. In the end if the sentencer decides that none of these options are appropriate but that an effective term of imprisonment should be imposed, he should give proper reasons for his decision. See also *S* v *Chinzenze and Others* 1998 (1) ZLR 470(H).

To my mind it is an injudicious exercise of the sentencing discretion for the sentencer to merely state that a fine or community service would trivialize the offence and end there. This is especially so where what is regarded as aggravation is nothing out of the ordinary but the usual incidence of theft like the convenience to the complainant.

The moment the trial magistrate settled for an effective 14 months imprisonment, he was obliged to inquire into the suitability of community service. To just divine that community service would be inappropriate without the requisite inquiry was a misdirection calling for interference with the sentence. I find it extremely difficult to understand why there is this visible readiness on the part of magistrates to send convicted persons to prison even where an alternative and indeed appropriate sentence exists. Petty crimes are being visited with imprisonment without due regard to existing guidelines. This occurs even when the penalty section of the infringed statute enjoins the sentencing court to first give regard to a fine.

It is a kind of attitude which defeats logic especially at a time when prisons are overcrowded and the state is reeling under the york of an economic crunch which incapacitates it leaving it scarcely able to sustain the upkeep and maintenance of prisoners. This is a matter in which the appellant should have been given a sentence of community service. *Mr Nyoni* submitted that he was in custody for one month before the trial and a further one month after conviction before being released on bail. The total of two months' imprisonment is enough punishment and he has learnt his lesson.

In the result, it is ordered that;

1. The sentence imposed by the court *a quo* is hereby set aside and in its place is substituted the following sentence:

   "24 months imprisonment of which 12 months imprisonment is suspended for 5 years on condition the accused does not, during that time commit any offence involving dishonesty for which, upon conviction, he is sentenced to imprisonment without the option of a fine. A further 10 months imprisonment is suspended on condition he

restitutes Sibongile Dube in the sum of US$50-00, Thomas Suga in the sum of US$94-00 and Gildert Dube in the sum of $44-00."

2. As the appellant was in custody before conviction for one month and after conviction for another one month, the total period of 60 days which he spent in custody is regarded as the remaining two months which he has served. He is therefore entitled to immediate release.

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

Bere J agrees……..