

WASHINGTON MAGIRIUSIKU**Versus****THE STATE**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI & MAKONESE JJ
BULAWAYO 12 & 15 JUNE 2017

Criminal Appeal

N. Hlabano for the appellant
K. Ndlovu for the respondent

MAKONESE J: The appellant appeared before a senior magistrate at Gokwe on a charge of contravening section 140 of the Criminal Law (Codification and Reform) Act (Chapter 9:23), that is malicious damage to property. The appellant pleaded guilty to the charge and was convicted and sentenced to undergo 18 months imprisonment of which 6 months was suspended on condition he restituted the sum of \$150 on or before 29 July 2016. Appellant has lodged an appeal against sentence only on the grounds that the sentence was unduly harsh and induced a sense of shock. The appellant argued that the court *a quo* erred in failing to consider a non-custodial sentence as an alternative to imprisonment.

The state concedes that the sentence of imprisonment is too harsh and excessive in all the circumstances of the case. We have carefully considered the matter and note that the background facts as set out in the state outline are essentially that complainant and the appellant are neighbours residing under headman Nembudziya, Chief Chireya, Gokwe. On 15 April 2016 complainant approached the appellant and demanded to know why he was proposing love to his wife. A misunderstanding ensued. Appellant proceeded to complainant's homestead and set his hut on fire. The matter was reported to the police leading to the apprehension of the appellant who readily admitted the offence. Appellant informed the trial magistrate that he had torched the complainant's hut because he had assaulted him. There is no evidence to suggest that there was any person inside the hut when it was set alight. The value of the property destroyed is not

substantial. The general principles and trends in the sentencing of persons convicted of malicious damage to property arising from cases of arson is that a custodial sentence is invariably imposed where the offence is committed in aggravating circumstances. The factors in aggravation includes inter alia, that the commission of the offence posed a danger to life, caused injury to persons or excessive damage to property to or loss of property was caused or committed in circumstances of defiance of authority. On the facts of this matter the value of the property destroyed is not excessive and the offence was committed in circumstances where the parties had a misunderstanding. There was no real danger to the life of any person (s).

In terms of section 140 (b) (i) (ii) of the Criminal Law (Codification and Reform) Act a persons who has been convicted of malicious damage to property shall be liable to a fine not exceeding level 14 or twice the value of the property damaged as a result of the crime, whichever is greater or to imprisonment for a period not exceeding 24 months. In sentencing the appellant to 18 months imprisonment without the option of a fine and without considering the imposition of community service, the learned magistrate, misdirected himself. The appellant is a first offender who pleaded guilty and evidently the offence was not committed in aggravating circumstances. Counsel for the appellant contends that the trial magistrate paid lip service to the fact that the appellant pleaded guilty and expressed remorse. It is generally accepted that a plea of guilty is an expression of contrition and should be taken as highly mitigatory. See the case of *S v Munechawo* 1998 (1) ZLR 129.

In the case at hand had the trial magistrate properly taken into account the mitigating circumstances he would have realised that this was not one of the worst cases of malicious damage to property. It is important for judicial officers to give due and sufficient weight to pleas of guilty. Imprisonment must always be resorted to where a non-custodial sentence would be inappropriate and tend to trivialize the offence. See *S v Katsaura* HH-127-97 and *S v Rex Maitera* HH-473/87.

I observe that counsel for the appellant has sought to argue that an order for the payment of a fine coupled with a wholly suspended term of imprisonment would meet the justice of the

case. The sentence imposed would, in my view trivialize the case and would not be in line with decided cases. The sentence that would meet the justice of this case would be a term of imprisonment wholly suspended on condition of the performance of community service. It has been pointed out that the appellant has already spent 5 months in prison and that for that reason, it would be appropriate to order that a wholly suspended prison sentence be imposed. I hold the view that for the sole reason that appellant has already spent time in prison, ordering appellant to perform community service would not be appropriate.

In the circumstances, the following order is made:

(a) The appeal against sentence succeeds.

(b) The sentence of the court a quo is set aside and substituted as follows:

“Accused is sentenced to 18 months imprisonment wholly suspended for 5 years on condition accused is not convicted of an offence of which malicious damage is an element and for which he is convicted to a term of imprisonment without the option of a fine.”

Mathonsi J I agree

Sachikonye-Ushe & Hlabano, appellant’s legal practitioners
The National Prosecuting Authority, respondent’s legal practitioners