

THE STATE

Versus

GILBERT TSHUMA

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 13 FEBRUARY 2020

Review Judgment

KABASA J: The accused pleaded guilty to contravening section 140 of the Criminal Law (Codification and Reform) Act Chapter 9:23.

The brief facts are that accused was assaulting his ex-wife and the complainant tried to restrain him. This angered the accused who went on to burn the complainant's 3 huts destroying property worth RTGS39 400. He pleaded guilty and is a first offender.

Accused was sentenced to 7 years imprisonment of which 1 year was suspended on condition of good behaviour and a further 3 years on condition he pays restitution.

The learned Provincial Magistrate correctly observed in his reasons for sentence that a fine or community service would trivialize "this reprehensible offence."

In *S v Machingura* SC-233-88 the Supreme Court stated that arson is not uncommon in rural areas and should be seriously regarded when it involves burning of huts at night.

This offence occurred around 1800 hours and whilst one may not describe this as "night time", that does not detract from the seriousness of the offence.

However given that the learned Provincial Magistrate ordered restitution, the sentence of 7 years is manifestly excessive.

In *S v Mpofo* 1985 (1) ZLR 235 at 293 the court had this to say:-

“It is, in my view, desirable for the courts to encourage any person convicted of having committed an offence against property, such as theft or arson, to restitute to the victim of the crime the value of the property in question. Such an approach is consistent with the greater emphasis which is increasingly being placed on reconciliation, restitution and rehabilitation as a means of crime prevention and remedial control.”

The penalty of 7 years is mostly retributive and lost the reconciliation, restitution and rehabilitation aspects.

Granted the learned Provincial Magistrate considered that the offence of setting huts on fire was prevalent in that area. That notwithstanding, the court should not permit the aspect of prevalence to shackle its discretion to impose an appropriate and constructive penalty. (*R v Makaza* 1969 (1) RLR 100; *S v Sibanda* HCH-87-86)

Restitution is a factor which palliates the sentence (*S v Zindoga* HC-H-124-88) and this ought to be reflected in the overall sentence imposed where restitution has been ordered.

The court suspended a total of 4 years, leaving the accused with 3 years imprisonment to serve. It is not so much the effective term of imprisonment that one looks at to determine whether the sentence is not excessive, but the sentence as a whole. The question therefore is whether considering all the mitigatory factors weighed against the aggravating ones, 7 years imprisonment is not unduly harsh?

In *S v Tsibo Ndlovu* HC-B-46-96 MALABA J (as he then was) said;

“It is also well to remember that too harsh a sentence is as ineffective and unjust as is a sentence that is too lenient. In arriving at a just and fair sentence the court should never assume a vengeful attitude.”

The accused’s actions were reprehensible but in sentencing him there is need to approach sentence in a rational manner for it to make sense to him as the offender and to society at large.

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Given the value of the property damaged, the plea of guilty, the accused’s age and the parties’ relationship, a sentence of 4 years with part suspended on condition of good behaviour and restitution will fit both the offence and the offender.

The sentence of 7 years imprisonment is accordingly set aside and substituted with the following:

“The accused is sentenced to 4 years imprisonment of which 1 year imprisonment is suspended for 5 years on condition accused does not within that period commit any offence involving malicious damage to property for which if convicted, he is sentenced to imprisonment without the option of a fine.

A further 1 year imprisonment is suspended on condition accused restitutes Mandla Cheni in the sum of RTGS39 400 to be paid through the Clerk of Court, Gokwe by 30 January 2020.”

The accused will therefore serve an effective 2 years imprisonment.

The trial magistrate is directed to recall the accused person and explain the sentence that has been substituted by this court.

Makonese J I agree