

ROBERT KABVUNZA
and
ITAI KABVUNZA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUSAKWA & MWAYERA JJ
MUTARE, 21 November 2018 and 11 July 2019

Reasons for judgment

B Majamanda, for the appellants
J Chingwinyiso, for the respondent

MWAYERA J: On 21 November 2018 we outlined reasons for dismissal of the appeal. The written reasons are captured herein.

Both appellants were convicted of assault as defined in s 89 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. They were convicted on their own plea of guilty for having assaulted the complainant with fists and booted feet several times all over the body for having worn a ZANU PF T-shirt. The facts informing the charge as discerned from the outline are that on 4 July 2018 at 1600 hours at Sedze Bottle Store, Chief Mutasa, Mutasa the complainant who was wearing a ZANU PF T-shirt was approached by both appellants who questioned why he was wearing a ZANU PF T-shirt. There after the appellants teamed up and subjected the complainant to assaults till he fell to the ground and they persisted with the assault, kicking him with booted feet before complainant made good his escape. The complainant sustained injuries as follows: painful chest, painful teeth and swollen face. The appellants were each sentenced to 12 months' imprisonment of which 4 months' imprisonment was suspended for five years on the usual conditions of good behaviour.

Dissatisfied with the sentence imposed on them, both appellants lodged an appeal against sentence. The 4 grounds of appeal are as follows:

- “1. The learned magistrate in the court *a quo* erred in not considering community service or the payment of a fine as competent sentence.
2. The court *a quo* erred in holding imprisonment as the only deterrent punishment and failing to consider other forms of punishment considering that both appellants were first offenders who pleaded guilty to the offence.

3. Further the learned magistrate erred by ignoring the general principle of keeping first offenders out of prison especially if there are no compelling reasons for the imposition of a custodial sentence.
4. The court *a quo* erred by failing to accord a plea of guilty sufficient weight it must be accorded.”

The respondent opposed the appeal arguing that the sentence imposed was appropriate in the circumstances of a politically motivated assault.

From the grounds of appeal what falls for determination in this case is whether or not that court *a quo* in sentencing the appellants judiciously applied its mind to the general sentencing principles in the exercise of its sentencing discretion. It is trite law that the determination of sentence in criminal matters is pre-eminently a matter for the discretion of the trial court. See *S v Mungwenhe and Another* 1991 (2) ZLR 66, *S v Matanhire and Others* HH 18/03 and *S v Mundowa* 1998 (2) ZLR 395. In the *Mundowa* case it was held that a superior court will not lightly interfere with a court’s sentence unless the discretion was not judiciously exercised, that is unless sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court would have imposed it.

In the present case the sentencing court reasoned that any other form of sentence would trivialise an otherwise serious politically motivated assault which occasioned serious injuries on the complainant as per the medical evidence. The sentencing court took into account that the nation was in an election mode and that there was need to pass a deterrent sentence so as to promote peace and political tolerance. The court took note that the appellants were first offenders who pleaded guilty and gave credit for that by suspending a portion of the prison term. The question that begs for an answer is given the circumstances of the matter and the assessment of sentence was there an error committed by the sentencing court in determining and or applying facts and sentencing principles in a bid to come up with an appropriate sentence. If there was an error then it amounts to a misdirection warranting interference but if there was no error then there is no basis and justification for interfering with the sentencing discretion of the court.

It is important to bear in mind that in an appeal against sentence the question for the appeal court is not what sentence it would have imposed but whether or not the sentencing discretion was improperly exercised and whether the sentence imposed is so outrageous as to induce a sense of shock. In the case of *S v Berliner* 1967 (2) SA 193 AD at 200 the court explained elaborately what falls for consideration in appeal against sentence when it held that:

“As the essential inquiry in an appeal against sentence, however, is not whether the sentence is right or wrong, but whether the court imposing it exercised its discretion properly and judiciously. A mere misdirection is not by itself sufficient to entitle the appeal court to interfere with the sentence; it must be of such a nature, degree or serious that it shows directly or indirectly that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually termed one that vitiates the court’s decision on sentence. That is the type of misdirection that the dictates of justice clearly entitle the appeal court to consider the sentence afresh.

The enunciated stance clearly shows that an appeal court does not lightly interfere with the sentencing discretion and only does so when the sentence so imposed shows an improper exercise of discretion and sentencing discretion which is contrary to the interests of administration of justice. CHINHENGO J in *S v Mutemi* 1999 (2) ZLR 290 H at 298 E adopted this approach albeit in a review when he had this to say:

“I will therefore despite the failure by the magistrate in principle to adopt the correct approach to sentence in this matter, confirm proceedings as having been in accordance with real and substantial justice.”

Also on point is s 38 (2) of the High Court Act [*Chapter 7:06*]. It provides:

“Notwithstanding that the High Court is of the opinion that any point raised might be decided in favour of the appellant no conviction or sentence shall be set aside or altered unless (my emphasis) the High Court considers that a substantial miscarriage of justice has actually occurred.”

In the present case the fact that the court *a quo* did not give detail on discarding the option of a fine and community service cannot be said to vitiate the proper exercise of sentencing discretion moreso given the reasoning that the court took it other forms of sentence would trivialise an otherwise serious offence. The court did not take that assault as an ordinary assault but a politically motivated assault which involved violation of the constitutional rights of freedom of participation and aligning one to a party of their own choice. The court in its reasoning considered the politically motivated assault as a serious offence for which community service was not appropriate. In the case of *S v Chiweshe* 1996 (1) ZLR 425 it was held that it is not every case where an accused is sentenced to a short sentence of imprisonment that community service is imposed. See also *S v Chikomo* HH 107/94 in which the court remarked that there is need for caution in imposing community service on offenders lest there be risk of adverse public reaction. In this case the sentencing court was mindful of the fact that the politically motivated assault occurred at the backdrop of a politically charged environment with a clarion call for need to maintain political maturity tolerance and so as to conduct the national election in peace.

I am alive to the fact that the sentencing provisions for assault as provided for in s 89 provide for the option of a fine up to level fourteen or imprisonment for a period not exceeding 10 years or both. It is also settled that where the penalty provision provides for the option of a fine that should be starting point before resorting to the rigorous sentence of imprisonment. In the case of *State v Matanhire* 1982 (1) ZLR 139 MACNALLY J (as he then was) had this to say:

“When sentencing first offenders, the court should consider very carefully whether to send them to prison. The courts should resort more frequently to fines than they have done in the past, if the circumstances of the case allow it (my emphasis). This does not mean a blanket rule that criminals only lose their amateur status after their second offence. The court should in each case ask itself “is it necessary to send this man to prison for the offence?” Only if the answer is “yes” should a term of imprisonment be imposed.”

See also *S v Ngombe* HH 04/87 and *S v Mugande* HB 132/17. In the *Mugande* case the court had this to say in respect of a prison sentence.

“It is trite a principle of our law that prison sentences are reserved for serious offence. The principle is well established that custodial sentences are only to be imposed as a last resort where a non-custodial sentence would tend to trivialise the case. The guiding principle is however that the sentencing court must exercise its discretion and where such discretion is not used judiciously a higher court has untethered right to interfere with such sentence in the interests of justice.” (underlining my emphasis)

What is clear in all these cases is that the sentencing court has to properly exercise its sentencing discretion. The circumstances of each case come into consideration holistically. The thought process and reasoning ought to be visible in the reasons for sentence. In this case the sentencing court did not consider the assault as an ordinary assault but a politically motivated one which called for deterrence. The trial magistrate reasoned that other forms of sentence would trivialise the matter and imposed a prison term with a portion suspended. The failure to record details of the thought process given the reasons for sentence in my view does not vitiate the exercise of the sentencing discretion to the detriment of the interest of administration of justice. The circumstances of the case warranted imposition of imprisonment. The sentencing court sought to match the offence to the offender and decided on an appropriate sentence which cannot be described as outrageous. In *S v Mark Tekwane* HH 204/01 and *S v David Pedzisa* HH 184/02 effective prison terms were imposed for politically motivated assaults. The sentencing court in this case was mindful of other sentencing options which it discounted and gave reasons for imposing a custodial term. The sentence of 12 months with 4 months suspended on usual conditions of good behaviour for a politically motivated assault in the circumstances was befitting. The sentencing discretion

was properly and judiciously exercised such that there is no basis for interference with the findings of the court *a quo*.

Consequently the appeal against sentence is dismissed.

MUSAKWA J agrees _____

Khupe & Chijara Law Chambers, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners