REPORTABLE (9)

Judgment No SC 11/05

Crim Appeal No 57/05

THE ATTORNEY-GENERAL v JAAP NEIL STEYL AND SIXTY OTHERS

SUPREME COURT OF ZIMBABWE
HARARE MARCH 16, 2005

F. Chimbaru, for the applicant

J. Wood, for the respondents

Before: CHIDYAUSIKU CJ, in Chambers.

The applicant in this case is the Attorney-General who makes an application for leave to appeal against a judgment of the High Court in which OMERJEE J, with the concurrence of MAVANGIRA J, altered a sentence that had been imposed on the respondents by the Provincial Magistrate's Court.

He makes this application in terms of s 44(7) of the High Court Act [Chapter 7:06] which provides as follows:

> "44.(7)If the Attorney-General considers that the sentence imposed by the High Court in any case, whether in the exercise of its original or appellate jurisdiction

or on review, including a review pursuant to section 57 of the Magistrates Court Act [Chapter 7:10], is -

(a) incompetent in law, he may appeal to the Supreme Court against that sentence; or

(b) inadequate -

(i) in the light of the findings of fact relied on by the High Court and the nature of the charge; or

(ii) because it was based on findings of fact for which there was no evidence or on a view of the facts which could not reasonably be entertained;

he may, with the leave of a judge of the Supreme Court, appeal to the Supreme Court against the sentence."

The respondents contend that the Attorney-General has no right to make this application. I am satisfied that s 44(7) confers on the Attorney-General, such a right. The language of s 44(7) is very explicit in this regard.

The facts of the case are briefly as follows: The respondents were charged with contravening s 36(1)(a) of the Immigration Act [Chapter 4:2]. They pleaded guilty and were found guilty. The pilot and co-pilot of the aircraft that brought the respondents into Zimbabwe were sentenced to 16 months' imprisonment and the passengers to 12 months' imprisonment. The respondents were dissatisfied with the sentence imposed on them and appealed to the High Court.

The grounds of appeal are set out in the Notice of Appeal filed of record.

The following are the grounds of appeal set out therein:-

"1. The sentence was excessive in the circumstances and induced a sense of shock. The sentence was totally disproportionate to the nature of the offence especially when it is taken into account that all the appellants were arrested whilst sitting in the plane and that the plane had been directed by Aviation officials to the Manyame Airbase which is adjacent to the international airport and that the boundaries are not clearly visible especially at night.

2. The court erred in not taking into account that:

(i) The appellants pleaded guilty and were first offenders.

(ii) That the contravention was technical in that they had been given permission to land and purchase fuel and had been authorised to taxi to Manyame Airbase which is part of the international airport and that the appellants had remained on board and sat in the plane they were only arrested in the plane and were removed from the plane by force.

(3) The magistrate found as mitigation that they were in transit to another country that they had landed at an international airport with authority from the Civil Aviation officials, in other words the landing and taxiing was lawful and that the State was only relying on the issue of boundary. It was purely technical demarcating Manyame Airbase and Harare International Airport the appellants had not wasted the court's time by arguing this point of the demarcation of the boundary between Manyame Airbase and the International Airport by pleading guilty, thereby saving the court from time and money which would have cost the State if it would have gone into full trial as they would have needed to engage at least nine (9) interpreters.

(4) The court did not take into account the concession made by the State that the appellants were merely employees who were simply following their employer's orders.

(5) The court did not take into account that the appellants had been in custody for over six (6) months and that they had waited for a month for sentence after pleading guilty. The delay had not been occasioned by the appellants but by the State. The court did not give reasons for imposing the maximum custodial penalty in the absence of aggravating features from the State and it did not take into account the concessions made by the State.

(6) The court erred in not considering the penalty section, which calls for a fine or in the alternative, a period of imprisonment not exceeding two (2) years and since the contravention was purely technical there was no justification for imposing a custodial sentence especially when the appellants had spent six (6) months in maximum prison where they were being treated worse than convicted criminals facing a death penalty.

(7) The appellants pray that the appeal be allowed and the sentence imposed by the magistrate on the 10th of September 2004 be set aside and that each be sentenced to one month imprisonment which they have already served and that they be released from custody."

The above grounds of appeal boil down to one ground of appeal, namely, that the sentence imposed on each of the respondents is manifestly excessive. The enumerated grounds of appeal are mitigating factors that, according to the respondents,

make the sentence manifestly excessive. There is no suggestion in the grounds of appeal that the learned trial magistrate had misdirected himself, either by taking into account for the purposes of sentence factors he should not have taken into account, or, failing to take into account factors that he should have taken into account. The court *a quo* however altered the sentence of the respondents on the basis that the trial magistrate had misdirected himself. There is no allegation of misdirection in the Notice of Appeal. It is not clear from the judgment why the court *a quo* set aside the sentence on a ground not set out in the Notice of Appeal.

When the matter was heard on appeal the Attorney-General submitted that part of the sentence should have been suspended. The court *a quo* accepted that, that concession was properly made. The court *a quo* thereafter altered the sentence on the respondents by suspending a portion of the period of imprisonment. The Attorney-General now contends that the concession he made in the court *a* quo was improperly made because it is not competent for a court to suspend a sentence or portion of a sentence imposed on a convicted foreigner. In altering the sentence of the trial court the court *a quo* reasoned as follows:-

> "The Attorney-General's Office is therefore conceding that a portion of the sentence imposed upon the appellants ought to be suspended. In amplification of this stance, Mr *Phiri*, in his verbal submissions stated that in regard to all the appellants it was not in issue that it was not envisaged that any of them would disembark from the aircraft for the duration of its stay on Zimbabwean territory. Steyl and Hamman, apart (from) the remaining appellants were not in control of the aircraft and did not determine what was to happen when the aircraft landed in Zimbabwe. For those reasons, it was submitted that, the offence committed by the appellants excluding Steyl and Hamman, was of a technical nature. In the considered view of this court, this concession by the State is a fair and proper concession. It is also important to bear in mind that the offence with which these appellants were charged was that of contravening section 36(1)(e) of the Immigration Act. <u>It is that offence with which these proceedings are concerned. We consider that the omission by the trial magistrate to suspend a portion of the sentence imposed upon the appellants, on the basis that they were foreigners, was a misdirection on his part</u>. This view is fortified by the concession made by the State that a portion of the sentences imposed upon the appellants ought to be suspended. <u>This court is therefore at large to consider an appropriate punishment in view of the misdirection</u>." (my emphasis)

Thus the court *a quo* concluded that the learned trial magistrate had misdirected himself and consequently it was at large on the question of sentence.

The learned trial magistrate, in sentencing the respondents, had approached the issue thus:-

> "In my view there is no point suspending any portion of the sentence since all the accused persons are foreigners and this is the sentence imposed."

The approach of the learned trial magistrate has support from decisions of this Court. In the case of *The State v Kanyamula* 1983 (2) ZLR 222 a Malawian national was convicted of possession of dagga in Zimbabwe whilst in transit at the Harare International Airport. He was sentenced to a custodial sentence, a portion of which was suspended on condition of good behaviour. This Court altered the sentence by deleting the suspended term of imprisonment. GEORGES CJ, at p 222, had this to say:-

> "The appellant is neither a citizen nor a resident of Zimbabwe and I see no reason for imposing a suspended sentence of imprisonment as well. The appellant will undoubtedly be returned to Malawi at the end of his sentence. Thereafter, if need be, he can be denied entry into Zimbabwe. Accordingly I would vary the sentence by quashing the suspended sentence of 2 years' imprisonment with labour."

The learned CHIEF JUSTICE'S view that it is inappropriate to suspend a sentence of a foreigner finds support in the case of *Averi v S,* SC4-86. Counsel for the respondent cited the cases of *S v* Ponder 1989 (1) ZLR 235; *S v* Cassim 1976 (4) SA 29 (RA) as authorities for the proposition that a suspended sentence of imprisonment on a foreigner can be appropriate in certain circumstances. This apparent conflict of

authorities can best be resolved by the Court and not by a judge in a Chamber Application. For the purpose of granting leave to appeal to the applicant I only need to be satisfied that the applicant has prospects of success on appeal.

For the foregoing reasons the applicant does have prospects of success on appeal. The probabilities are that an appeal court will conclude that the court *a* quo misdirected itself by holding itself at large on the question of sentence. It is trite that an appellate court can only interfere with a sentence imposed by a lower court on two grounds. Firstly, when the sentence imposed is manifestly excessive and, secondly, when the lower court misdirects itself leaving the appellate court at large to consider an appropriate sentence.

As I have already stated the court *a quo* did not interfere with the sentence of the learned trial magistrate on the basis that the sentence was manifestly excessive but on the basis that there had been a misdirection the existence of which I have grave doubts.

It is on this basis that I am satisfied that the applicant has prospects of success and leave to appeal should be granted.

I, accordingly, grant the application and the applicant is hereby granted leave to appeal against the judgment of the court *a quo* in terms of s 44(7) of the High Court Act [Chapter 7:06]. The Attorney-General contributed to his own predicament by making a concession which he now contends he should not have made. This should disentitle him to costs. There will be no order as to costs.

Civil Division of the Attorney-General's Office, applicant's legal practitioners
Byron Venturas & Travlos, respondents' legal practitioners