RUNGIRE MUDZONGACHISO
and
CLEVER MUDZONGACHISO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUZOFA AND CHIKOWERO JJ
HARARE, 22 March 2021 & 17 May 2021

Criminal Appeal

U. Saizi, for the appellant
R. Nyamombe, for the respondent

CHIKOWERO J: This is an appeal against sentence only. On 3 July 2020 the appellants appeared before the Magistrates Court sitting at Kariba whereupon they were convicted on their own pleas of guilty on a charge of contravening s 4(1) as read with s 4(2) of the Firearms Act [*Chapter 10:09*], that is, possession of a firearm without a certificate. Both were sentenced to 36 months imprisonment of which 12 months imprisonment was suspended for 5 years on the usual condition of good behaviour. In addition the 303 rifle was forfeited to the State. The effective custodial term in respect of each appellant was 24 months.

Three grounds of appeal were raised in the notice of appeal. First, both took issue with the failure to consider the suitability or otherwise of a sentence of community service regard being had to the fact that the effective custodial sentence fell within the 24 months threshold for which community service ought to be considered. Second, the sentence passed was attacked on the basis that there was no justification for not fining the appellants as the lawmaker had provided for a penalty of a fine not exceeding level ten as an alternative to imprisonment not exceeding five years. Finally, the Court below was criticised for clouding the sentencing process with the aggravating factors while paying lip service to the mitigatory circumstances the result of which misdirection was to impose a sentence so manifestly excessive as to induce a sense of shock.

Despite initially presenting oral argument on the first and second grounds of appeal counsel for the appellant thereafter abandoned those grounds, leaving the appeal predicated on the third, henceforth remaining, ground of appeal. Our view is that Mr *Saizi* was wise to do so.

The brief facts of the matter are these. The appellants are father and son. At the time of their appearance a quo, they were aged 45 years and 28 years old respectively. Unemployed, they resided in Hurungwe. The first appellant bought a 303 rifle which he kept at his house. On 1 July 2020 detectives from the Criminal Investigations Department received information to the effect that the appellants and Watson Mafuta (who was also convicted on a plea of guilty and similarly sentenced) possessed a rifle which they had planned to use in hunting. Having teamed up with members of the International Anti-Poaching Foundation, Hurungwe Safaris, the detectives arrested the trio, recovered the rifle and two sacks with food stuffs and cooking utensils packed in readiness for the hunt. There was also one empty magazine in the rifle's magazine chamber.

To set the framework for a clear determination of the appeal, it is necessary to reproduce the learned magistrate's reasons for sentence. This is what he said, at page 5 of the record:

> "The accused were found with a rifle 303 they were intending to use for hunting. The accused had no permit or licence to use the firearm. What aggravates this offence is that they also wanted to commit other offences using the firearm. It was only after the members of the Anti-Poaching Foundation Hurungwe Safaris intercepted them, that their plan was oiled (sic). The Court will therefore consider a higher sentence for these accused persons. With the rising cases of wildlife poaching, a custodial sentence is the proper sentence. Part of the sentence will be suspended considering that all the 3 accused have pleaded guilty to the offence, they have shown remorse and contrition. The 3 accused persons are also first offenders who must be given a chance to reform. Accused 1 is aged 52 years old, thus he is also of age. The Court will thus impose a deterrent sentence.
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> A custodial sentence will meet the justice of the case"

THERE IS NEED FOR A BALANCED APPROACH TO SENTENCING

In coming up with an appropriate sentence, a Court should balance the aggravatory and mitigatory circumstances. Overemphasising the one side at the expense of the other results in an unjust sentence. In practical terms lending too much weight to the factors of aggravation while giving insufficient regard to the mitigation leads to the imposition of manifestly excessive sentences. The converse manifests in the imposition of sentences too lenient as to fail to contribute towards the curbing of crime.

In reducing a sentence of twenty-five years' imprisonment with labour to one of twelve years' imprisonment with labour imposed at first instance for communicating information to an enemy for any purpose prejudicial to the interests of Zimbabwe in contravention of s 3 (c)

(ii) of the Official Secrets Act [*Chapter 97*] DUMBUTSHENA CJ, in *S* v *Harington* 1988 (2) ZLR 344 (SC), writing for the court, said at 361F-362B:

> "I agree that courts should pass deterrent and severe sentences on such people. However, the courts have a duty which is to do justice to all manner of people. This includes the protection of the interests of society and the accused. It is the clear and balanced weighing in the scales of justice of the facts of the case that results in the punishments that fit the crime as well as the criminal and are at the same time fair to society. Severe sentences of a harsh nature should be resorted to in exceptionally serious cases. I need not emphasise that a fair sentence need not be lenient. It may justifiably be harsh, but it must fit, the crime committed.
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> What went wrong in this case? It is this: The learned JUDGE PRESIDENT pitched his sights too high and scanned sights far beyond the ambit of s 3. He believed that the death sentence was the appropriate sentence. It was therefore not surprising that the sentence that was imposed was twenty-five years' imprisonment, which the learned JUDGE PRESIDENT had categorised as 'not the most appropriate sentence.' He felt his hands were tied. He could not go above the maximum set down by the Legislature. In this approach there was no room for taking into account factors of mitigation, although the learned JUDGE PRESIDENT said he had taken them into account. No account was taken of the unchallenged evidence of torture adduced by the appellant in mitigation of sentence.
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> Failure to take into account mitigatory factors, including evidence of torture, was a misdirection. That evidence, as I have said, stood unchallenged..."

In reducing a custodial sentence on appeal the Supreme Court eschewed excessive devotion to the factors of deterrence and public indignation in sentencing with GUBBAY JA (as he then was), with the concurrence of MANYARARA and KORSAH JJA, in *S* v *Gorogodo* 1988 (2) ZLR 378 (SC) saying at 38 H – 383A:

> "Nonetheless, such factors must not be permitted to weigh so heavily as to negate others which go in some way to lessen the seriousness of the offence. What is to be guarded against is such an excessive devotion to the cause of deterrence as may so obscure other relevant considerations as to lead to a punishment which is disparate to the offender's deserts. I cannot conceive of any principle which can justify, for the sake of deterrence and public indignation, the imposition of a sentence grossly in excess of what, having regard to the crime and to the degree of the offender's moral reprehensibility, would be a fair and just punishment."

See also *S* v *Bhero* 1994 (2) ZLR 66 (S) at 69 H – 70 G

This court has had occasion to apply the same principle. In *S* v *Mukome* 2008 (2) ZLR 83 (H) MAKARAU JP, with the concurrence of HUNGWE J (as they then were) expressed herself, at 85 F – J, in these words:

> "It has been accepted over the years that assessing sentence is one of the most difficult tasks that faces a judicial officer convicting an accused person. Except where the law has laid out a minimum mandatory sentence, the judicial officer convicting an accused person is called upon to exercise their discretion and punish the accused on behalf of society. As with most judicial functions, a number of competing interests come into play and have to be delicately balanced. On one hand is the need to punish and, on the other, are the interests of the accused being

> punished. Reaching the correct balance is always a taxing exercise and one that must be approached humanely and rationally. The same punishment does not weigh the same with all people. A sentence that is heavily weighed in favour of the needs of society, without paying adequate attention to the interests of the offender, is invariably harsh and appears draconian; while a sentence that underplays the interests of society, while over emphasizing the interests of the offender, is invariably lenient and ineffectual in curbing crime."

It is with these principles in mind that I proceed to determine this appeal.

The first issue that arises for consideration is whether the learned magistrate misdirected himself by over emphasizing the aggravating factors. In my view he did. A reading of the reasons for sentence discloses that the court below settled for an exemplary sentence. This was to deter not only the appellants but like minded members of the public in view of the prevalence of cases of wildlife poaching. The court below found it aggravatory that the appellants intended to use the forearm in question for poaching wildlife. While it was a relevant consideration that the appellants intended to use the firearm, possessed without holding a certificate, to hunt and thereby commit another offence in the process, the fact is the appellants were not convicted for contravening any provision of the Parks and Wildlife Act [*Chapter 20:14*] and were not being sentenced under that statute. I consider that the learned magistrate overemphasized the purpose for which the appellants intended to use the firearm, the prevalence of an offence which the appellants had not committed, had not been convicted of and were not being sentenced for in assessing an appropriate sentence. The result was that it pitched the appellants' moral blameworthiness too high, beyond the parameters of the facts of the case before it. It is unjust for the appellants as well as not being in the interests of the society that the former were punished also for an offence which they neither committed, were not charged and not convicted of. That is the net effect of the learned magistrate's overemphasis of the appellant's admission that they intended to use the rifle in question for hunting. My view is that if prevalence were to be properly taken into account it had to be in relation to the offence of possession of firearm without certificates, for that is the offence in respect of which the appellants were being sentenced for. Nothing is on record on the prevalence of the offence of possessing firearms without a certificate.

Mr *Saizi* also submitted that the court below paid lip service to the factors of aggravation. I agree. The sentence is 3 years imprisonment of which 1 year imprisonment was suspended for 5 years on the usual condition of good behaviour. The rifle in question was also forfeited to the state, apparently in line with s 62(2) of the Criminal Procedure and Evidence

Act [*Chapter 9:07*]. There is nothing in the sentences imposed to reflect that both appellants are contrite first offenders.

In my view the suspension of the 1 year imprisonment still leaves the sentence susceptible to interference because the overall sentence was in any event disturbingly inappropriate and shocking for first offenders who pleaded guilty. Indeed, citing *Sithole and Vengai* v *The State* HH 54/15 Ms Nyamombe conceded that the sentence imposed was excessive. She suggested an effective sentence of 12 months imprisonment. I observe that the appellants in *Sithole* (*supra*) failed, on appeal, to move this court to overturn sentences of 18 months imprisonment of which 6 months imprisonment was suspended for 5 years on the usual conditions of future good conduct. Although both had also appealed against conviction, it was only the appeals against sentence which were persisted with.

Although both counsel also referred us to the review judgment in *The State* v *Mupemelelo Moyo* HB 9/11 I note that count 1 in that matter was a conviction for unlawful possession of a firearm in breach of s 4(4)(b) of the Firearms Act [*Chapter 9:23*] and not s 4 (1) as read with s 4(2) of the same Act. However, the sentence imposed on *Moyo* on that count was reduced on review from 24 months imprisonment to one of twelve months imprisonment.

I consider also that insufficient regard was had to other factors of mitigation. Apart from them being first offenders, their pleas of guilty and that the first appellant was 52years old at the time of sentencing no other mitigatory factors were considered in passing sentence. The first appellant's uncontroverted statements in mitigation also revealed the following. He was married, had 8 children, was unemployed, had neither savings nor money on his person, owned a scotch cart and 6 donkeys. The second appellant was 28 years old, married, had a child, was a self-employed gardener, had neither savings nor money on his person and owned 6 pigs. The picture that emerges from the mitigatory factors which were ignored by the learned magistrate appears to be that both appellants are poor unsophisticated rural dwellers. I do not think that it was desirable to incarcerate them for longer than was necessary.

At the end of the day, I agree with Mr *Saizi* that the court below misdirected itself in assessing sentence by overemphasizing the aggravatory circumstances. I take the view that this misdirection resulted in the imposition of a disturbingly inappropriate sentence. I share the view of both counsel that the sentence imposed *a quo* ought therefore to be interfered with.

In the result, the following order shall issue:

1. The appeal be and is allowed.

2. The sentence imposed on each appellant by the magistrates court sitting at Kariba in CRB KBA 308/20 and CRB KBA 310/20 be and is set aside and is substituted with the following:

   "Accused one and three are each sentenced to twenty-four months imprisonment of which 1 year imprisonment is suspended for 5years on condition the accused does not within that period commit any offence involving possession of a firearm without a certificate for which upon conviction the accused is sentenced to a term of imprisonment without the option of a fine. Effective sentence: 12 months imprisonment."

For the avoidance of doubt the forfeiture of the 303 rifle not having been appealed against, remains undisturbed.

MUZOFA J agrees ……

Saizi Law Chambers, appellants' legal practitioners
The National Prosecuting Authority, respondent's legal practitioners