AMANDA COHEN
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 5 July 2022

Criminal Appeal

T Chinyoka, for the applicant
L Chitanda, for the respondent

CHIKOWERO J:

1. This is an appeal against sentence only.
2. The appellant, a fifty year old woman, was charged with assault as defined in s 89(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code).
3. The alternative charge was Criminal insult as defined in s 95(1)(a) of the Criminal Law Code. The allegations were that on 22 and 28 September 2021 and at Waverley Blankets (Pvt) Ltd, Graniteside in Harare the appellant had, by words and conduct seriously impaired the dignity of the complainant with the intent to do so by burging into his office uninvited and, in the presence of customers and staff members, shouted at the complainant:

   "Gay gayboy, I hope your rectum is still intact"

   She had also gestured to the complainant (her nephew) to bend over for her (this was to suggest that he was used to anal intercourse) and made further gestures of masturbation. The complainant, aged 35 years old, was the Managing Director of Waverley Blankets (Pvt) Ltd.
4. She pleaded not guilty to both the main and alternative charges. She was acquitted of the former but convicted on the alternative charge.
5. The Magistrates Court sentenced her to 6 months imprisonment of which 3 months imprisonment was suspended for 3 years on condition that the appellant does not within that period commit an offence involving criminal insult for which she would be sentenced to a term of imprisonment without the option of a fine. The remaining 3

months imprisonment was suspended on condition the appellant performs 105 hours of community service at Highlands Police Station.

6. The grounds of appeal are:

> "1. The Court a quo erred in sentencing the appellant to community service for an offence which deserved the imposition of a fine.
> 2. The Court erred by over emphasising the issue of morality thereby imposing a penalty which is disproportionate to the offence committed by the appellant.
> 3. The Court erred in finding that the appellant could not afford the payment of a fine without doing enquiries having been made as to whether or not appellant could pay a fine."

7. The appellant prayed that the appeal be allowed, that we set aside the sentence imposed by the Magistrates Court and substitute it with a fine in the sum of ZW $20 000.

8. We dismissed the appeal at the hearing after listening to argument by both counsel. We gave oral reasons for our decision.

9. We have received a request for the written reasons.

10. These are the reasons.

11. The appeal turns on the second ground of appeal.

12. The first ground of appeal is misplaced. The appellant misconstrued the sentence. What was imposed was not a community service sentence. It was a custodial term the whole of which was suspended on two conditions. Part of the sentence was suspended on the usual conditions of good behaviour. The remainder was suspended on condition the appellant performed community service. Accordingly, the first ground of appeal merited no further attention. We dismissed it.

13. The same observations apply to the third ground of appeal. The remark by the learned magistrate that the appellant could not afford a fine was obiter. The Court a quo said in this regard:

> "I am of the view that you cannot afford a fine, even if you did, such a sentence would not capture this court's disapproval of your conduct."

It was unnecessary for the court *a quo* to conduct an enquiry into the appellant's capacity to pay a fine in view of the fact that it had found that a fine was not a suitable sentence in the circumstances. Against this backdrop, we dismiss the third ground of appeal.

14. We agree with Ms Chitanda that the sentence imposed is not manifestly excessive as to induce a sense of shock. The matter is governed by principle. Sentencing discretion reposed in the Court *a quo*. We think it necessary to refer to a number of authorities in this regard.

15. In *State* v *Nhumwa* S 40/88 KORSAH JA, writing for the Supreme Court, said at p 5:

> "It is not for the Court of appeal to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from that imposed. If the sentence complies with the relevant principles, even if it is severer than one that the court would have imposed, sitting as a court of first instance, this court will not interfere with the discretion of the sentencing court"

16. In *State* v *Ramushu and others* S 25/93 GUBBAY CJ said:

> "But in every appeal against sentence, save where it is vitiated by irregularity or misdirection, the guiding principle to be applied is that sentence is pre-eminently a matter for the discretion of the trial court, and that an appellate court should be carefully not to erode such discretion. The propriety of a sentence, attacked on the general ground of being excessive, should only be altered if it is viewed as being disturbingly inappropriate."

17. Finally, this court in *Stat*e v *Mundowa* 1998(2) ZLR 392, citing *State* v *Nhumwa* S 40/88 and *State* v *De Jager and Anr* 1965(2) 616(A) at 628-9 reiterated that an appeal court does not have a general discretion to ameliorate the sentences of the trial courts. It cannot interfere unless the discretion was not judicially exercised, that is, unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court would have imposed it.

18. The trial court considered that the appellant was a first offender, that she committed the offence out of anger and that there was a long outstanding shareholding dispute between the parties.

19. Even though the parties were related the trial court took the view that the appellant was not expected to use such vulgar language. The court a quo viewed the video clips capturing the two offending incidents and noted that the complainant persistently shouted at the complainant, calling him "gay boy" in the presence of several people in the shop and those sitting outside. In the hearing of all those people the appellant also shouted at the complainant:

> "I hope your rectum is still intact!"

In view of this, the court considered that the appellant was also morally liable for public indecency. In view of these factors of aggravation, the court found that a sentence of a fine was inappropriate. In other words, this was such a serious case of criminal insult as not to befit the penalty of a fine. At the same time, in view of the mitigation particularly that it was dealing with a first offender leniency had to be extended to the appellant. In striking the required balance the learned magistrate settled for a sentence of 6 months imprisonment half of which was suspended on the usual conditions of good

behaviour while the remainder was suspended on condition that the appellant performed 105 hours of community service.

20. Despite Mr Chinyoka's passionate submissions to the contrary, there simply is no basis for us to interfere with the sentencing discretion of the trial court. The court neither misdirected itself nor imposed a disturbingly inappropriate sentence.
21. The sentence imposed falls within the range of a fine up to level 6 or imprisonment not exceeding one year or both (section 95(1)(a) of the Criminal Law Code)
22. At the end of the day, the trial court did not send the appellant to prison.
23. These are the reasons why we dismissed the appeal against the sentence.

CHIKOWERO J:……..

ZHOU J: Agrees…….

Mutumbwa, Mugabe and Partners, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners