EDSON SIMBI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO & MANYANGADZE JJ
HARARE, 21 July & 7 November 2022

Criminal Appeal

G Macheyo, for the appellant
L Chitanda, for the respondent

MANYANGADZE J: The appellant was convicted on his own plea of guilty, of contravening s 157 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (unlawful possession or use of dangerous drugs). He was found in possession of 4.660 kg of dagga. He was sentenced to 36 months imprisonment of which 12 months imprisonment was suspended on conditions of good behaviour.

He has noted an appeal against sentence. The grounds of appeal are stated as follows:

"1. The Magistrate misdirected herself when she did not give specific and detailed reasons why community service was not imposed as the optional sentence given that she had decided that the effective sentence was 24 months imprisonment.
2. Since the Magistrate was of the view that a sentence of 24 months imprisonment was appropriate she ought to have opted for community service. In the circumstances a sentence of 36 months imprisonment of which 12 months imprisonment is suspended on conditions of good behaviour induces a sense of shock."

At the hearing of the matter, Mr *Macheyo,* for the appellant, conceded that the two grounds of appeal can be crystallised into one ground of appeal. The two grounds are essentially raising the same issue. The issue is that the trial magistrate should have considered the option of a non-custodial sentence, in the form of community service.

Both the State and appellant's counsel, in their submissions, correctly recognize the fundamental and well established principle that sentencing is largely within the discretion of the trial court. On the part of the appellant, this is reflected in para 3(1) of his heads of argument, in the following terms:

> "3(1) It is a well-established attitude of the court of appeal that it would not want to disturb the sentencing discretion of the trial court and that it would only interfere where the sentence is vitiated by irregularity or the misdirection is so severe that no reasonable court would have imposed it and where such a sentence would induce a sense of shock, see *S* v *Sidat* 1997 (1) ZLR 487."

On the part of the respondent, the remarks in para 4 of its heads of argument express the same principle:

> "4. It is trite that an appeal court will only interfere with the discretion of a trial court where the sentence is disturbingly inappropriate or where the discretion of the trial court in respect to the sentence has been exercised capriciously or upon a wrong principle, See *S* v *Ramushu & Others* SC 25/93."

What therefore needs to be determined is whether the trial magistrate misdirected herself or improperly exercised her discretion to an extent that warrants this court, sitting in an appellate capacity, to interfere with the sentence she imposed.

The appellant avers that since the magistrate settled for an effective sentence of 24 months imprisonment, she ought to have opted for community service. In her comments on the grounds of appeal, the magistrate remarked:

> "Community service is usually recommended for sentences of 24 months and below. It should be noted that the court did not impose a sentence of 24 months imprisonment but rather 36 months imprisonment which was subsequently reduced due to suspension on condition of good behaviour. It is therefore misleading to state that a sentence of 24 months imprisonment was imposed."

This approach clearly is a misdirection on the part of the magistrate. The threshold for considering community service is not the total sentence before any portion thereof is suspended. It is the effective sentence that remains after a portion of the total sentence is suspended. The magistrate's focus on the 36 months, instead of the effective 24 months, was flawed. It constitutes a misdirection on the application of the basic principle on when community service should be considered.

However, it is our considered view that the misdirection highlighted does not warrant interference with the sentence. The trial magistrate took into account other factors that militate against community service. In her reasons for sentence, she states *inter alia*:

> "However the accused person committed an offence viewed by the courts in a serious light as he was found in possession of a substantial amount of dagga weighing 4 kgs which he intended to use to supply others. Our courts have always imposed deterrent sentences in such instances.

> In the foregoing imposing a non-custodial sentence will be inappropriate considering sentencing precedent in such offences. The mitigatory factors will be considered to the extent that the court will not impose a longer custodial sentence than it would have, had the accused person not pleaded to the charge."

She noted that the dagga was of a substantial quantity, over 4 kg. She further noted that it was intended to supply others. This is borne out by the record of proceedings, in which the appellant admitted that he intended to sell the dagga. It is not clear why a charge of contravening s 157(1)(a) of the Criminal Law Code was preferred, instead of s 156(1)(a), if the appellant admitted the drug was for sale. It could be that the appellant did not make such an admission at the time of his arrest, but did so in court. Be that as it may, the magistrate properly took into account that aspect in aggravation when assessing sentence. The sentence imposed is within the range of sentencing provisions under s 157 of the Criminal Law Code.

A perusal of the appellant's heads of argument shows that most, if not all, the authorities relied upon have age as a significant factor in mitigation. The court in those cases took into account the advanced age of the accused. The cited cases include *S* v *Sithole* HH 436/86, where the accused was 63 years of age, *S* v *Andrew* 1983(1) ZLR 289 (H), where the accused was 85 years old, and *S* v *Chinake* HH 290/87, in which the accused was 71 years old.

These cases are clearly distinguishable from the instant case, where the accused is aged 40. He is much younger than the accused in the cases cited above. He is certainly not advanced in age. When the court drew the attention of appellant's counsel to this aspect, he conceded that the cases he referred to can no longer be taken into account, given that age was the most decisive factor in ameliorating the sentences imposed.

The situation is compounded by a fundamental error of fact in the appellant's submissions. The submissions highlight the fact that the appellant is 55 years old. On that basis, the court was urged to impose a less severe sentence, such as community service. It turned out this submission was erroneous, as appellant is aged 40, not 55. After conceding this error, counsel for the appellant had great difficulty in advancing an argument for his client's lenient treatment. It looked like the very foundation of the appeal had fallen off.

What remained in the appellant's argument was the misdirection of using 36 months instead of the effective 24 months imprisonment as a cut off point for considering community service. As already indicated, that misdirection does not vitiate the sentence imposed.

Other critical factors were considered that render a non-custodial unsuitable. The threshold of an effective sentence of 24 months imprisonment is a starting point for considering community service. It does not call for the automatic imposition of community service. Of course, where the effective sentence of imprisonment is within the 24 months range, then community service as a sentencing option must be seriously considered. In most cases, it presents itself as a suitable option.

There will however, be some cases where community service is not suitable even if the effective sentence is below 24 months imprisonment. In *Wellington Muchirahondo* v *The State* HMT 14/21 the appellant was convicted of assault as defined in s 89(1)(a) of the Criminal Law Code. He pinned down to the ground the complainant, an 18 year old mentally retarded nephew of his. He then poured out a bucket of boiling water all over the complainant, causing serious burns. The trial magistrate sentenced him to 12 months imprisonment of which 3 months imprisonment was suspended for 5 years on conditions of good behaviour, leaving an effective sentence of 9 months imprisonment. His appeal against sentence was dismissed.

MWAYERA J (as she then was) remarked, at pages 2 – 3 of the cyclostyled judgment:

> "However, it is settled that assessment of sentence is pre-eminently the discretion of the trial court. The question is clearly not whether or not the sentence is wrong both (sic) whether or not the sentencing discretion was properly and judiciously exercised. See *S* v *Mungwende* 1991 (2) ZLR 66 and also *Muhomba* v *S* SC 57/13, the Supreme Court once more commented on sentencing discretion and stresses the point as follows:
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> > '… it has been said time and time again that sentencing is a matter for the exercise of the discretion of the trial court…'
>
> The appellate court will not interfere with the exercise of that discretion merely on the ground that it would have imposed a different sentence had it been sitting as the trial court. There has to be evidence of serious misdirection in assessment of sentence by the trial court for the appellate court to interfere with sentence and assess it afresh. See also *S* v *Sidat* 1997 (1) ZLR 487……
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> It is correct the sentence of 12 months falls in the grid of community service but it does not follow that every case in which sentence falls within the community service grid, community service must be imposed. What is important is that the court considered community service and ruled it out as inappropriate as it would not only trivialize the offence but undermine any (sic) otherwise noble form of punishment meant for minor offences. Assault is minor if it is not grave in nature and if it does not cause severe and permanent injuries. In the present case the nature of assault and extend of injuries disqualified the matter to be considered for community service."

In casu, the court *a quo* took into account the fact that the appellant had a substantial quantity of dagga. By his own admission, it was intended for sale. At the age of 40, he cannot

plead advanced age as a mitigatory factor. The error on the age factor has been conceded, consequently inflicting a heavy dent on the appeal. Other important factors, such as the appellant being a first offender who pleaded guilty, were taken into account. Hence suspension of a portion of the sentence imposed.

In the circumstances, we find no basis for interfering with the discretion exercised by the learned trial magistrate. We are not persuaded that the sentence is disturbingly inappropriate and induces a sense of shock.

In the result, we are unable to uphold the appeal.

It is accordingly ordered that:

The appeal be and is hereby dismissed.

MANYANGADZE J:……...

CHIKOWERO J:…….Agrees

Macheyo Law Chambers, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners