Judgment No. HB 22/2002
Case No. HCA 150/2000
CRB NK 638/2000

THUBALABO NYONI

versus

THE STATE

HIGH COURT OF ZIMBABWE

SIBANDA & CHEDA JJ

BULAWAYO 25 FEBRUARY & 14 MARCH 2002

Criminal Appeal

T Moyo for the appellant
Mrs *M. Moya-Matshanga* for the respondent

CHEDA J: This is an appeal against sentence of the trial magistrate Bulawayo. The historical background of the case is that the appellant a 24 year old man was charged with two counts of contravening s 3(b)(i) of the Prevention of Corruption Act [*Chapter 9:16*].

The first count is that the appellant was a passenger in a bus in the rural areas whereupon he noticed that there was a policeman (Cst Tshuma) who was in the company of a suspect in handcuffs. Appellant was drinking alcohol and was drunk. Appellant was not amused by the sight of the suspect in handcuffs and questioned the policeman's mission of handcuffing the suspect. The policeman offered an explanation apparently pointing out that, it was his duty to do so. In response appellant insulted the policeman by referring to his private parts. This, obviously did not go down well with the policeman who threatened to arrest appellant for breach of peace. Instead of pleading with the policeman, appellant offered the policeman $100 to gain his freedom. The policeman could not have it but instead arrested appellant and took him to the police station.

On the second count appellant was taken to the police station where he was to be charged with bribery in the first count. He then offered $500 to Cst Mlilo the investigating officer in order to persuade him to drop the charge against him. The appellant pleaded guilty to both counts and was sentenced to the following:

Count 1 - 6 months imprisonment with labour
Count 2 - 12 months imprisonment with labour.

Of the total of 18 months imprisonment with labour, 6 months imprisonment with labour is suspended for 5 years.

The appellant noted an appeal against sentence and his grounds of appeal although laid down as six I find that they are basically two being that:

(1) the sentence is so excessive as to induce a sense of shock and
(2) the trial magistrate did not give sufficient weight to the mitigatory features of the case and thus erred in law as he should impose a non-custodial sentence, namely community service.

This was the argument by Mr *Moyo* his legal representative to whom the court is grateful for having gone to lengths in highlighting certain legal principles and case authorities in an attempt to persuade the court to uphold the appeal. Of particular note is that the introduction of community service into a sentencing system has reached such heights so much so that our courts should adopt a two tier approach being that, first and foremost our courts should consider community service if the sentence they are about to impose is anything between 1 month - 24 months, only if the circumstances of the case will not justify such a sentence, they should then move into the second stage of imposing a sentence other than community service. The court takes judicial notice that prisoners who serve short term imprisonment do not benefit much from such incarceration therefore by sentencing them to such terms of imprisonment is counter-productive and hence is not in the interest of justice.

Mrs *Moya-Matshanga* for the respondent argued that the sentence imposed does not in anyway induce a sense of shock as the moral blameworthiness of the appellant was too high in that he bribed a policeman on duty.

Mr *Moyo* further argued that in sentencing the appellant should have considered the mitigatory features of the appellant. He was of the view that it was not enough for the learned trial magistrate to merely say "I will take into account that which you have said in mitigation". It is his argument that he should have gone through all the factors in other words itemising them. This argument in my view has no merit as it is not legally desirable to do so. No case authority has been cited to back-up this argument. It is in my view enough for the court to acknowledge the existence of the said mitigatory features as they are in the record anyway. Therefore failure to go through them in a parrot fashion is not a misdirection.

Mr *Moyo* further argued that appellant should have been sentenced to a non-custodial sentence in view of the fact that he is a first offender and also that he acted stupidly and was drunk at the time. He was of the view that the appellant was a suitable candidate for community service.

Community service is a new concept of sentence in our legal system and indeed is a welcome alternative to imprisonment as it has more advantages than disadvantages to both the offender and society. It, therefore ought to be the first option as Mr *Moyo* ably argued. In an attempt to assist magistrates in consideration of appropriate sentence geared towards community service, the Government has set up a National Committee on Community Service which has laid down guidelines for assessing the suitability or otherwise of candidates for community service. The need for community service therefore cannot be over emphasised and where appropriate it should be no doubt be applied. It has therefore become an integral part of our sentencing system. BARTLETT J succinctly stated in *S* v *Gumbo* 1995(1) ZLR 162 (H) at 168:

> "While community service sentences will still need to be approached with caution in order to ensure that public confidence in the system is not eroded by inappropriate offenders being sentenced to community service, it is also necessary for magistrates to entirely take advantage of the new system whenever possible."

What I should consider is whether or not the offence of corruption by the appellant is of such a serious nature so as to remove him from the category of recipients of community service.

In the present case I find that there are more aggravating than mitigatory features namely:

In count 1

-the appellant was drunk and obviously disorderly in a bus, which is a public place.
-interfered with a policeman carrying out his lawful duty
-was remonstrated with but instead insulted the police officer in public, which conduct was likely to cause breach of the peace
-after he had been threatened with lawful arrest he bribed the arresting policeman with $100.

In count 2

-he further offers the detaining detail a bribe of $500 to buy his freedom.

In short any sentence up to 12 months imprisonment with labour, should as a general rule be considered for community service, the exception being serious offences.

As of now, the court can take judicial notice that corruption in our society is getting out of hand as it is now regarded as a general rule and public officials also accept it save for a very few upright officers. Appellant's conduct is a clear display of arrogance as indicated by his persistent unlawful and wrongful conduct towards police officers. This, in my view is a brazen abuse of laws of the country, which conduct deserves a harsh censure from the courts.

There has been of late, a high disregard of law and order in our society and it is the duty of these courts to whip offenders into the line and one of the ways of doing so is by sentences which will send a clear message to both the appellant and would-be offenders.

In light of the above, I am of the view that the sentence imposed by the trial magistrate cannot be faulted for doing so will result in shaking the confidence of society to the core.

The appeal is accordingly dismissed.

SIBANDA J: I agree.

Hwalima & Associates, appellant's legal practitioners
Criminal Division of the Attorney-General's Office, respondent's legal practitioners