HB 163-17
HCA 155-16
XREF GWANDA 723-16

RAYMOND ZIKHALI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI AND MAKONESE JJ
BULAWAYO 12 JUNE 2017 AND 15 JUNE 2017

Criminal Appeal

S Mawere for the appellant
K Ndlovu for the respondent

MATHONSI J: The appellant was convicted by the Gwanda magistrates court on his own plea of guilty of theft of a cellular phone which was recovered. He was sentenced to 8 months imprisonment 3 months of which was suspended on condition of future good behaviour.

The appellant has appealed against that sentence saying it is excessive and that the court misdirected itself by failing to consider community service as an option. In arriving at that sentence the magistrate said a lot of things:

> "Accused is a first offender. He pleaded guilty. He is not a family man. The offence he stands convicted of, is a very prevalent offence. Theft of cellphones is on the increase and it is high time the court stamp authority by giving deterrent sentences. Cellphones provide a mode of communication that is of essence during this era. The inconvenience that the accused caused to the complainant is immeasurable. In as much as the cellphone was recovered, all because it had a tracker, the complainant stood to lose much considering the value of it. The conduct of the accused needs to be censured."

The facts are that on 9 October 2016 at 1900 hours the 19 year old appellant proceeded to the complainants Harvest butchery in Gwanda to buy electricity. While being served he beheld the complainant's cellphone lying on the table and stole it. He was caught on a Closed Circuit Television and the complainant activated the tracker on the cellphone the moment she discovered it had been stolen. The appellant was then tracked and promptly arrested leading to the recovery of the cellphone valued at R3399-00.

As I have stated, when he was brought before the court *a quo* on a theft charge in contravention of s113 of the Criminal Law [Codification and Reform] Act [Chapter 9:23] the appellant pleaded guilty and was, upon conviction, sentenced aforesaid. In response to the notice of appeal, the trial magistrate defended the sentence that he imposed on the grounds:

> "1. The sentence imposed by the court a quo was not excessive. It was a short and sharp custodial sentence.
> 2. The court concedes that it did not consider community service and opted for a custodial sentence against the appellant.
> 3. Theft of cellphones is indeed prevalent, despite the court not providing statistics."

Mr *Ndlovu* who appeared for the respondent conceded that the sentence imposed by the court *a quo* cannot be supported. He submitted that the mitigatory factors clearly far-outweighed the aggravatory features. Therefore the custodial sentence was not called for as it did not afford the appellant an opportunity to reform. I agree.

In my view, the concept of a short and sharp sentence must be condemned at all times because it does not accord with modern sentencing trends. It is an archaic phenomenon which has long been discarded in favour of other sentencing options. For instance it does not rhyme with the current trend in terms of which if the sentencing court settles for effective custodial sentence of 24 months or less, it is required to inquire into the suitability of community service as an option. Ordinarily a first offender would benefit from that option as the thrust in those circumstances is to reform that offender instead of throwing him or her to the deeper end where he or she is unlikely to return unscathed.

The current sentencing policy focuses on non-custodial sentences for less serious offences. See *S* v *Gumede* 2003 (1) ZLR 408 (H). Therefore magistrates are always advised to give serious consideration to the new concept of community service whose object is to benefit the community from less serious offenders who should be given the chance to keep out of prison by doing useful work for the benefit of the community. See *S* v *Gumbo* 1995 (1) ZLR 163.

To the extent that what the trial magistrate calls "a short and sharp" prison term would have been preferred because the offence is not serious, otherwise if it were serious the offence would attract a longer prison term, it means that such a sentence falls squarely within the community service grid. There would be no chance for such a sentence in modern society.

In any event, such a sentence does not serve any useful purpose. With our prisons over-flowing with inmates and the state struggling for resources to maintain the prisons it is undesirable to send small-time offenders to clog the system when there are other forms of punishment meeting the justice of such cases. Our sentencing policy has long shifted away from retribution to reformation. A sentencer who imposes a "short and sharp" prison term desires nothing more than to inflict pain on the offender just to teach him or her a lesson. It is undesirable and should not be resorted to at all. There was therefore a misdirection in the assessment of sentence which should be corrected.

This is a case in which the appellant should have been given community service. Mr *Mawere* for the appellant submitted that he was in custody for 13 days before being granted bail pending appeal. I agree that it is now undesirable for him to commence community service after spending that time in prison when he should not have.

In the result, it is ordered that;

1. The appeal against sentence is hereby upheld.

2. The sentence of the court *a quo* is set aside and substituted with the following sentence:

> "The appellant shall pay a fine of $100-00 or in default of payment 2 months imprisonment. In addition 3 months imprisonment is wholly suspended for 3 years on condition he is not during that period convicted of theft for which he is sentenced to imprisonment without the option of a fine."

Makonese J agrees……..

Morris-Davies and Company, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners