HB 42/19
HCA 88/17

TAFADZWA CHINHENGO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & MABHIKWA JJ
BULAWAYO 18 MARCH 2019

Criminal Appeals

Z. Ncube for the appellant
K. Jaravaza for the respondent

MAKONESE J: This is an appeal against sentence only against the decision of a Magistrate sitting at Beitbridge on 21st July 2017. The appellant was convicted on his own plea of guilty for contravening section 40 (1) of the Criminal Law (Codification and Reform) Act (Chapter 9:23). On the 19th of July 2017 Detectives from the Zimbabwe Republic Police received information that the applicant was in possession of fake ZIMRA stamps. Upon arrival at the appellant's house, a search was conducted, leading to the recovery of two ZIMRA Bill of Entry stamps, two ZIMRA Export release stamps, one ZIMRA Private Imports stamp, one Third Party Insurance paid stamp, one date stamp, 2 x 30ml endorsing ink and two ink pads. The appellant was arrested and taken into custody. Appellant was subsequently convicted and sentenced to 12 months imprisonment of which 3 months was suspended on the usual conditions of future good conduct. Dissatisfied with the effective sentence 9 months imprisonment the appellant has filed this appeal against sentence.

In his grounds of appeal the appellant avers that:

(a) the sentence is not consistent with the general sentencing trends for offences of this nature for which the appellant was convicted, which offences ordinarily attract non-custodial sentences.

(b) the court *a quo* erred by settling for a custodial penalty when dealing with a first offender when a non-custodial sentence such as community service or both could have met the justice of the case.
(c) the court *a quo* erred in taking the view that the justice of the case could be met by imposing a short, sharp and retributive custodial sentence to deter would be offenders.

The appellant has argued that section 40 (1) of the Criminal Code provides for a penalty of a non-custodial sentence and imprisonment must only be imposed in grave circumstances. The appellant further contended that imprisonment should be resorted to as a last resort. In support of this assertion the appellant relied on the authority of *S* v *Makumbe* 2013 (1) ZLR 141 (H) and *S* v *Zulu* 2003 (1) ZLR 592 (H). In *S v Makumbe, (supra)* the appellant was convicted on a charge of negligent driving. He was driving a pickup truck. He failed to stop at an intersection, although the traffic lights were against him. His failure to stop resulted in a collision with another motor vehicle which was travelling through the intersection. The magistrate sentenced him to 9 months imprisonment, of which 3 months were suspended. In addition, the appellant was prohibited from driving class 2 motor vehicles for a period of 6 months. On appeal the court held that a fine was a permissible penalty and was appropriate in the circumstances. The appellant was ordered to pay a fine of $200 or, in default 3 months imprisonment. The court found that imprisonment was not appropriate. The circumstances in the *Makumbe* case are materially different from the facts of this matter. In *S v Zulu, (supra),* the appellant was convicted of indicent assault, it being alleged that he fondled the complainant's breasts and touched her legs (or lifted her skirt). The complainant was a young girl aged 10 years. He was sentenced to 24 months imprisonment with 6 months suspended on condition of good behavior. On appeal it was held that a fine coupled with a suspended custodial sentence was appropriate. Once again the circumstances in that case were totally different from the present case.

The state contends that the sentence imposed by the court *a quo* is appropriate and there was no misdirection on the part of the sentencing magistrate. The state argues that the sentencing discretion of the trial was exercised judiciously and that this court, sitting as an appeal

court, has no reason to interfere with the sentence. In support of its position the state relied on the case of *Ramushu* v *The State* SC-25-93 and *Shariwa* v *The State* HB-37-03.

In determining this appeal the court observes that that section 40 (1) of the Criminal Code provides as follows:

> "Any person, who without lawful excuse, knowingly has in his or her possession any article for use in unlawful entry into premises, theft, fraud or a contravention of section 51 of the Road Traffic Act (Chapter 13:11) shall be guilty of possessing an article for criminal use and liable to a fine not exceeding level ten or imprisonment for a period not exceeding one year or both."

There can be no doubt that the appellant was found with an assortment of items for the purposes of committing fraud. In essence the appellant's intention was to deprive the state of import duty. His intention was to deprive the state of revenue. That in itself is serious and calls for severe sanction.

In *Collins Dzireva* v *The State* HH-780-15 the appellant had been charged with contravening section 40 (1) of the Criminal Code, i.e. "possession of articles for criminal use". The appellant in that case had been found in possession of a T- bar, usually associated with unlawful entry into motor vehicles, and a drivers"s licence belonging to someone else. HUNGWE J held that 6 months imprisonment for possessing articles used in a criminal enterprise was not harsh and that the sentence was within the range set out in the Criminal Code, and accordingly the sentence was confirmed. In this case, the effective sentence of 9 months, does not in my view, induce a sense of shock. The court *a quo's* reasoning that the sentence of a custodial term was justified regard being had to the fact that the use of fake date stamps was on the increase at the border town, cannot possibly be faulted. The appellant was ready to use the articles for a criminal enterprise. A fine or community service would not meet the ends of justice. This offence calls for severe sanction. There was no misdirection on the part of the court *a quo.*

In the result, the appeal has no merit, and is hereby dismissed.

Mabhikwa J …….. I agree

Ncube & Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners