HB 90/19
HCA 21/18

LEEMAN MBANO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & MABHIKWA JJ
BULAWAYO 3 JUNE 2019

Criminal Appeal

K. Ngwenya for the appellant
N. Ndlovu for the respondent

MAKONESE J: The 21 year old appellant appeared before a Magistrates' Court, at Kwekwe on the 13th February 2017 facing two counts of assault and threats of violence in contravention of section 89 (1) and section 186 (1) of the Criminal Law Codification and Reform Act (Chapter 9:23), respectively. He was convicted and sentenced to 12 months imprisonment of which 2 months was suspended for 4 years on condition of future good conduct. Aggrieved by the sentence, the appellant has noted an appeal to this court.

The state concedes that the sentence imposed against the appellant in the court *a quo* is unduly harsh and excessive.

In his grounds of appeal the appellant argued that the sentence was manifestly excessive and glaringly inappropriate. Further it is argued that the magistrate in the court *a quo* misdirected himself by imposing a custodial sentence without considering other forms of punishment. It was argued that the trial court failed to consider the mitigatory factors of the offence whilst emphasizing the aggravating factors.

The brief background to this case is gleaned from the outline of the state case. On the 30th September 2017 and around 1800 hours at Venture Business Centre, Torwood, Redcliff, the appellant together with Honest Dube, (who at the time of the trial was still at large) approached the complainant together with his friends armed with an axe and an okapi knife. The appellant

threatened to stab the complainants if he tried to escape, whilst Honest Dube was striking the complainant with an axe. The complainant sustained severe injuries and lost two front teeth. In deciding to impose a custodial sentence, the learned magistrate had this to say;

> "Although he is a first offender who tendered a guilty plea, a sentence of imprisonment is called for. The sentence is aimed at impeding accused's violent behaviour in future and deter like-minded persons."

What is glaring appeared from the reasons for sentence is the court's failure to consider an alternative form of punishment in the form of a non-custodial sentence such as a fine or community service. The courts have established the principle that imprisonment should only be resorted to as a last resort and usually in circumstances where the imposition of non-custodial sentence would tend to trivialise the offence and not serve the interests of justice. See *S* v *Mugande* HB-132-17. Further, and in any event where the court imposes a sentence of 24 months or less, then the record must indicate that the court did carry out an inquiry on the suitability or otherwise of community service. A failure to consider community service under those circumstances amounts to a misdirection. See *S* v *Shariwa* HB-37-03.

It is clear that the court *a quo* did not carefully consider the imposition of community service as an alternative punishment. Such an enquiry must appear *ex facie,* the record of proceedings. The court must give reasons why community service would not be an appropriate sentence. See *Chinzenze* v *State* 1998 (1) ZLR 479 (H). On the facts of the present case where it is common cause that the applicant was present during the assault, it is evident that he played a subsidiary role in the assault. It is our view that accused was youthful and immature. In the end the appellant seemed to have been punished for the deeds of Honest Dube. See *S* v *Moses Ncube & Anor* HB-55-19 and *Moyo v S* HB-144-17.

In the result and for the foregoing reasons the sentence of the lower court cannot be allowed to stand. The learned magistrate over emphasised the prevalence of the cases of assault. In his response to the notice of appeal the learned magistrate commented as follows:

"…violence is on the sharp increase in Kwekwe. There is need to pass deterrent sentences …"

It is necessary to remind sentencing magistrates that while the issue of sentence is the domain of the trial court, sentences that are passed on offenders must fit both the offender and be just and fair in all the circumstances. It is absolutely essential for trial magistrates to ensure that they impose custodial sentences as a last resort and when any other less rigorous sentence would not meet the ends of justice.

We are satisfied that the learned magistrate erred in his approach to sentence. There is therefore need to interfere with the sentence and this court is at large in that regard.

Accordingly, the following order is made:

1. The conviction is confirmed.
2. The appeal against sentence succeeds.
3. The sentence of the court *a quo* is set aside and substituted with the following:

"Accused is sentenced to 12 months imprisonment of which 2 months is suspended for 5 years on condition the appellant does not within that period commit an offence involving violence for which he is convicted and sentenced to imprisonment without the option of a fine. In addition the remaining 10 months is suspended on condition accused performs 280 hours community service at Drake Secondary School, Kwekwe, as prescribed by a Probation Officer."

Mabhikwa J …… I agree

Magodora & Partners c/o T. J Mabhikwa & Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners