JOHN MUTIUMWE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA and MUZENDA JJ
MUTARE, 30 January and 20 June 2019

Criminal Appeal

M Mandingwa, for the appellant
Mrs *J Matsikidze*, for the respondent

MWAYERA J: On 30 January 2019 we upheld an appeal against sentence and set aside the sentence by the court *a quo*. We ordered as follows:

1. The appeal be and is hereby upheld.
2. The sentence by the court a quo is set aside and substituted as follows:
   (a) $100-00 or in default 20 days imprisonment.

We proposed to give written reasons for our disposition having realised on the same day we had 3 matters of a similar nature from the same Magistrate and thus detected need for guidance. These are our reasons for the disposition.

The appellant was properly convicted of driving without a driver's licence. The appellant was charged with contravening s 6 (1) as read with s 6 (5) of the Road Traffic Act. The allegations are that the appellant was driving a motor vehicle namely Honda Fit without a driver's licence. The appellant having pleaded guilty was sentenced to an effective 6 months imprisonment. Dissatisfied with the sentence, the appellant lodged the present appeal. The grounds of appeal were raised as follows:

"1. …… the sentence imposed by the learned Magistrate is too excessive and so severe as to induce a sense of shock regard being had to the factors in mitigation in favour of the appellant…..
2. ……. that the learned Magistrate erred in holding that only a prison sentence and more so an effective term was the most appropriate sentence under the circumstances when in fact there were other real options available as opposed to the one given by the court *a quo*."

The respondent agreed with appellant's counsel and conceded that the sentence imposed by the court *a quo* was outrageous as to induce a sense of shock.

The offence of driving without a driver's licence which the appellant was convicted and sentenced has penalty provisions clearly spelt out. The Road Traffic Act s 6 (5) provides for a "fine not exceeding level six or imprisonment for a period not exceeding one year or both such fine and imprisonment" for non-public service vehicles.

In the present case, the appellant was driving a Honda Fit, alone with no passengers on board. He was ordered to stop by the police officers and he complied. Thereafter it was revealed he was not a holder of a driver's licence. The appellant cooperated with the police and at court he did not waste time and resources by pleading guilty to the offence. In its reasons for sentence the court just mentioned the mitigatory factors but sentence imposed speaks volumes of the court not having placed any weight to the mitigatory factors. A plea of guilty although not reducing the criminal liability ought to be credited for what it is worth. The credit should be clearly reflected in the sentence. See *S v Makumbe* HH 39/18, *S v Mpofu* 1985 (1) ZLR 285.

The court *a quo* over emphasised the issue of prevalence of offences of driving without a driver's licence and imposed an effective custodial term in circumstances where it was unwarranted. In considering an appropriate sentence this court has repeatedly made pronouncements that the circumstances of each individual case have to be taken into consideration. Generalising and assuming that people who drive Honda Fit private cars do not have driver's licence and thus imposing an unduly harsh sentence on the appellant for deterrence is clearly an improper exercise of the sentencing discretion. The principle of sentencing of seeking to balance the offence to the offender in this case was totally ignored to the detriment of a just and appropriate sentence.

In the case of *S v Simon Ngulube* HH 48/02 NDOU J emphasised the need to strive to deliver a punishment which will fit both the crime and offence when he remarked:

> "Judgments in our jurisdiction have always emphasised that the sentencing court in deciding upon the appropriate punishment, must strive to find a punishment which will fit both the crime and offence. The sentence must be fair, and just instead of excessive savage and draconian…. the punishment must fit the criminal as well as the crime be fair to the state and to the accused and be blended with some measure of mercy."

In the present case the court seemed to have allowed extraneous factors to take over the interests of administration of justice. Given no accident occurred, the appellant is a first offender and it is settled that first offenders in befitting circumstances be spared the rigours of imprisonment. In *S v Gwarada* 1981 (1) ZLR 17 at p 19, it was held that:

> "It is accepted as settled law that the correct approach in sentencing a first offender is to consider the possibility of imposing a non-custodial sentence and only if that is inappropriate to then as a last resorts consider sending an accused to prison."

See also *S v Sidambi* HH 122/85, *S v Antonio and others* 1998 (2) ZLR (2) 64 and *S v Clver Chireyi and 2 others* HH 63/11. The common thread running in all the cases is that the proper approach is sentencing non-serious offences like the present infraction of the road rules not having a driver's licence is to consider the various sentencing options starting with a fine and giving reasons why the other options are not appropriate. The consideration of non-custodial sentence is more pronounced and imperative when the penalty provision clearly gives the option of a fine. This speaks volumes to imprisonment being a last resort and preserve for the very bad and serious cases.

In the case of *Collen Samhungu v the State* HH 465/13 the court held that:

> "It is trite law that where a statute provides for a sentence of a fine and imprisonment, the court must give consideration to the sentence of a fine in the first instance."

In exercising its sentencing discretion, the court ought to give cogent reason of why it discarded the non-custodial sentences. In the present case, the court did not allude to why a fine or community service were viewed as inappropriate but just over emphasised the prevalence of the offence. The court *a quo* did not even suspend a portion of the prison term imposed despite the undisputed fact that the appellant is a first offender who pleaded guilty. The need for deterrence was also over emphasised to the detriment of imposing an inappropriate sentence.

MAWADZE J in *S v Kingdon Hlahla* HMA 1/16 rang warming bells on the need to guard against going to extremes under the realm of deterrence. He stated that:

> "We are however mindful of the fact that we should guard against excessive devotion to deterrence which may lead to disproportionate sentence. As the saying goes, the accused should simply get his just desert. While it remains important to punish the accused in this matter for reasons already stated we are cognizant of the fact that retribution is no longer the underlying principle in our criminal justice system. An eye for an eye makes everybody blind, so they say… The trust should be to encourage reformation."

See also *S v Barogodo* 1988 (2) ZLR 379 (S). An appropriate sentence well matched to the offence and offender can serve the purpose of deterrence and even a suspended sentence can serve the purpose of deterrence depending with circumstances of the case. *In casu*, the trial court just imposed an effective 6 months prison term with no portion suspended despite the highly mitigatory factors inclusive of the plea of guilty and that appellant was a first offender. Further the penalty provision provides for the option of a fine. The heavy handedness in the circumstances was unwarranted and it tainted the exercise of the sentencing discretion as being

injudicious. It is settled where the statute provides for the option of a fine the court must consider imposition of a fine and leave imprisonment as a preserve for the bad cases.

See *S v Rutsvairo* SC 2/89, *S v Bonda* HH 67/10, *S v Majaya* HB 15/2003 and *S v Abundance Sibanda* HB 28/17. In the Sibanda case it was stated as follows:

> "Where there is a provision of a fine in a statute, it is wrong for a sentencing court to start by opting for a prison term without first seriously exploring the possibility of imposition of a fire."

In the present case the conviction of driving without a driver's licence cannot be considered as a very serious infraction of the traffic laws more so in light of the fact that appellant was driving a private vehicle. The offence was not committed in aggravatory circumstances warranting departure from the option of a fine as provided for in the relevant penalty provisions. In this case the trial court further improperly exercised its sentencing discretion by not considering community service despite imposing 6 months imprisonment sentence. The sentence imposed falls within the community service grid of up to 24 months. Our sentencing policy has evolved with emphasis being a rehabilitative and reformative sentence as opposed to retributive punishment.

The central purpose of punishment being more correctional and rehabilitative as opposed to being destructive. What this essentially means is that upon considering an appropriate sentence, judicial officers should firstly explore non-custodial forms of sentences before considering imprisonment which is a rigorous form of punishment and preserve for the bad and more serious offences committed in aggravatory circumstances. In the present case the trial court just imposed an effective prison term without first exploring the non-custodial options. In *S v Patience Usavi* HH 182/10 it was aptly stated that:

> "Even if one was to assume that imprisonment was appropriate in this case the trial Magistrate did not consider suitability of community service, more so as the sentence of 3 months imprisonment is within the general limit of effective sentence of 24 months imprisonment. This approach does not only fly in the face of guidelines by the national committee on community service but also of a plethora of case law…."

It is trite that when a trial court imposes a sentence of 24 months or less the suitability or otherwise of community service has to be considered. What is important is that the thorough process of consideration of other non-custodial sentence should be recorded showing how the court discarded the non-custodial sentence particularly for a non-serious offence like the present are. A reading of the record of proceedings from the court *a quo* reveals that the court *a quo* in unjustified circumstances, departed from the penalty provisions and discarded the option of a fine. The court *a quo* further failed to properly exercise its sentencing discretion by failing to consider the suitability of community service given that the appellant was sentenced

to 6 months imprisonment which falls within the general limit of effective sentence of 24 months imprisonment.

The infraction of the road traffic law by driving a private vehicle in the circumstances of this matter did not justify the imposition of an effective prison sentence. The offence was not committed in aggravatory circumstances and the appellant pleaded guilty to the charge. The sentence of imprisonment was too severe as to induce a sense of shock. The sentence of the option of a fine is appropriate.

Accordingly the appeal against sentence is upheld and the sentence imposed by the court a quo is set aside and substituted as follows:

$100-00 or in default of payment 20 days imprisonment.

MUZENDA J agrees _____

Mhungu & Associates, appellant's legal practitioners
National prosecuting Authority, respondent's legal practitioners