THEMBELANI NDLOVU

And

FLOTT NDLOVU

And

DIVIOUS DUBE

And

LUNGISANI NDLOVU

And

MCASISI SONGO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & TAKUVA JJ
BULAWAYO 31 JANUARY 2022

Criminal Appeal

P. Butshe, for the applicants
K. M. Guvheya for the state

MAKONESE J: Appellants appeared before a Magistrate sitting at Kezi on the 14th December 2019 facing one count of assault as defined in section 89 (1) of the Criminal Law (Codification and Reform) Act (Chapter 9:23). Appellants pleaded guilty to the charge and were sentenced to 12 months imprisonment of which 2 months was suspended for 5 years on the usual conditions of future good conduct.

Dissatisfied with the sentence, the appellants have noted an appeal against sentence only with this court.

Factual background

The appellants and the complainant were at Penny 3 Mine in Maphisa extracting gold ore on the 4th of November 2019. At around 0800 hours the appellant approached the complainant over some misunderstanding. The appellants assaulted the complainant with stones and booted feet. Complainant sustained bruises and abrasions all over the body. He suffered a 3cm scalp laceration. The injuries were serious.

Submissions by the appellants

The appellants submit that the sentence imposed by the court *a quo* is so severe as to induce a sense of shock for first offenders who pleaded guilty. Appellants argue that the court *a quo* erred in failing to consider community service for first time offenders when the effective custodial sentence fell within the threshold for consideration of community service. The appellants further contend that the court *a quo* erred in failing to adequately explore or consider other non-custodial forms of punishment such as the imposition of a fine. Appellants submit that a custodial sentence is a rigorous form of imprisonment which should be resorted to as a last resort.

Submissions by the state

The state concedes the court *a quo* grossly erred by not considering and giving cogent reasons why the appellants were not good candidates to be sentenced to community service. The state contends that failure to adhere to guiding principles for community service as an appropriate sentence amounts to an irregularity which warrants the appeal court's interference where an accused person has been sentenced to 24 months imprisonment or less. It is submitted by the state that there was no reasonable explanation given as to why community service was not an appropriate sentence.

Whether the sentence of the court *a quo* is vitiated by misdirection and should be set aside with a non-custodial sentence

We agree with the state's concession that a custodial sentence is a harsh and wholly inappropriate in the circumstances of the case. The appellants are first offenders. They expressed remorse and contrition. This should count in their favour. The court *a quo* paid lip service to the strong mitigating factors in the case. In *S* v *Mugande* HB 132/17 this court held that:

> *"It is a trite principle of our law that prison sentences are reserved for serious offences. The principle is well established that custodial sentences are only to be imposed as last resort where a non-custodial sentence would tend to trivialize the case. The guiding principle is however that the sentencing court must exercise its discretion and where such discretion is not used judiciously, a higher court has the unfettered right to interfere with such sentence in the interests of justice."*

There can be no doubt that the assault against the complainant was serious. The record does not indicate what led to the misunderstanding that led to this assault. Judicial offences must endeavour to ascertain from accused persons who tender pleas of guilty the reason for the commission of the offence. The court should go further, where necessary, to establish the cause for the dispute, in mitigation, and ascertain why the offence was committed. The sentencing discretion of a trial court can only be exercised judiciously where all relevant factors are placed before the court. This approach is all the more required where accused persons appear before the court without legal representation.

Taking into account the circumstances of the case, and particularly that community service was not considered at all by the court *a quo,* and that no reasons were given why it was not appropriate, this court finds that there was a misdirection. The court is therefore at large as regards sentence. The gravity and nature of this case requires a deterrent sentence, but one that is fair to the appellants.

In the circumstances, the court makes the following order:

1. The appeal succeeds in part.
2. The sentence of the court *a quo* is set aside and substituted with the following:

> "Accused are each ordered to pay RTGS$10 000 in default of payment 3 months imprisonment. A further 12 months imprisonment is wholly suspended for 5 years on condition accused persons are within that period not convicted and sentenced to an offence involving violence and for which upon conviction they are sentenced to a term of imprisonment without the option of a fine."

TAKUVA J……agrees

Mathonsi Ncube Law Chambers, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners