CHRISPEN CHIDEREWENDE
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHITAPI JJ
HARARE, 29 & 31 March 2021

Criminal appeal

N. Chikomo, for the appellant
A Muziwi, for the respondent

ZHOU J: This is an appeal against the sentence imposed upon the appellant following his conviction on a charge of malicious damage to property as defined in s 3 (1) (h) as read with s 4 (1) of the Domestic Violence Act [*Chapter 5:16*]. The appellant was convicted on his own plea of guilt. He was sentenced to 14 months imprisonment of which 2 months imprisonment was suspended for 5 years on condition that he does not commit an offence involving damage to property as an element for which he is sentenced to imprisonment without the option of a fine. A further 5 months imprisonment was suspended on the condition that the appellant restituted the complainant in the sum of $4 386.00 on or before 17 December 2019. This left him with an effective imprisonment term of 7 months.

The appellant is the complainant's husband. On the day in question a misunderstanding arose between the two. The appellant became violent and damaged household property. The value of the damaged property, though not put to the appellant, was given as $4 386.00. The appellant is a first offender, a family man with two children. He is employed.

The sentence imposed is not accompanied by any comprehensive reasons. It consists of two sentences which read as follows:

> "A custodial sentence is too harsh, but the fine trivialize (sic) the offence. A sentence of community service coupled with restitution would be just and fair but accused was not recommended for it by community service officer."

The first serious misdirection is that the court *a quo* imposed a penalty which it considered inappropriate for being "too harsh" and ignored the alternative less severe penalty

which it believed was appropriate. The only reason which is given for embracing such an approach is that the community service officer did not recommend community service for the appellant. The learned magistrate clearly misdirected himself by proceeding on the basis that the court was a mere rubber stamp of the community service officer's recommendations. Such a recommendation, while important and deserving to be given weight, is not necessarily binding on the court. In the present case, the reasons advanced by the community service officer for not recommending community service are not stated. They were not even interrogated by the learned magistrate, as should have happened. The report does not even form part of the record. The failure to engage with the report of the community service officer makes it impossible for this court to assess the soundness of the recommendations.

Further, other than merely listing the mitigating factors and the aggravating factors, there is no discussion to show how these were weighed. It is a misdirection for the court to merely recite those factors without addressing them. In any event, other than that the appellant pleaded guilty and that he is a first offender the court a quo ignored the other factors. The fact that the appellant is a family man means that his incarceration would deprive the family, particularly the children, of a father. The interests of these children in having their father around to fend for them is a weighty factor. No consideration was given to the likelihood of the appellant losing his employment as a result of the incarceration. This no doubt impacts adversely on the family and ought to have been given due weight. By tendering a plea of guilt the appellant did not only show contrition, but also served the court its time because it did not have to go through a full trial. He ought to have been rewarded for that. Equally, it is the policy of the law to avoid sending first offenders to jail where this can be done without prejudicing the ends of justice. The reasons for this preferred approach are documented in a welter of cases. Especially where there are alternative forms of punishment prescribed by statute, the court should only impose a custodial sentence upon being satisfied that these other forms of punishment are unsuitable. In this case after rejecting community service based on the recommendation of the community service officer, the learned magistrate glossed over the possibility of imposing a fine. It is not enough to merely state that a fine will trivialize the offence without giving reasons for that conclusion. This was a misdirection, especially when regard is had to the value of the property involved and the fact that it was co-owned, by the complainant and appellant.

In this case a fine coupled with a suspended term of imprisonment would be justified. This is so given the conclusion, which is proper, that a custodial sentence in the circumstances would be excessive. The fine would enable the appellant to continue to work and look after his family while the suspended term of imprisonment would act as a deterrence against the commission of similar offences. The order of restitution is unjustified given that the allegation was that the property was co-owned. If the complainant was to be restituted then she would be receiving exclusive ownership of the value of the property in the absence of evidence as to how much of that property represented here share.

In the result, the appeal succeeds and the following order is made;

1. The sentence imposed on the appellant is set aside, and the following is substituted:
   "1. The accused is sentenced to a fine of $500.00, in default thereof to a period of 5 months imprisonment.
2. In addition, the accused is sentenced to 9 months imprisonment wholly suspended for 5 years on condition that the accused does not, within that period, commit an offence involving malicious damage to property for which upon conviction he is sentenced to a term of imprisonment without the option of a fine."

CHITAPI J agrees …….

Ngarava, Moyo & Chikomo, appellant's legal practitioners
National Prosecuting authority of Zimbabwe, respondent's legal practitioners