PAULINE MOYO

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA AND CHEDA JJ
BULAWAYO 21 MAY 2012 AND 14 JUNE 2012

Mr. K. Lubimbi for appellant
Mr L Maunze for respondent

Criminal Appeal

CHEDA J: This is an appeal against sentence passed by a magistrate sitting at Esigodini on the 27th January 2010.

Appellant was aged 46 years at the time of the offence. She is married and has five (5) children. On the 20th January 2010 complainant, a boy aged 11 years, and appellant's neighbour was herding cattle which strayed into appellant's maize field. On noticing this, appellant went into her field and drove them away.

Out of anger she called the complainant and beat him on the head with a stick resulting in him sustaining injury in the form of a laceration on his head resulting in him receiving medical attention.

When arraigned before the court, she pleaded guilty, was convicted and sentenced to ninety (90) days imprisonment.

It is that sentence which she is appealing against on the basis that it is excessive in the circumstance, in particular, if the fact that she is a female first offender who has pleaded guilty and has family responsibilities is taken into consideration.

Respondent on the other hand contends that the sentence is proper and justifiable in the circumstances.

The question before us is whether or not the sentence imposed by the court *a quo* was excessive or not.

It is trite that sentencing is the most difficult aspect of a judicial officer's decision yet it is arguably most important as it seals the conclusion of a criminal trial. It is for that reason that serious thought should be given before sentence is passed on an individual. It is a legal operation which derives from both statute and case laws. The sentencer should, therefore, have the basic knowledge of the appropriate law.

However, sentencing becomes a more sophisticated business where there are alternative methods of punishment.

A judicial officer should always bear in mind the rigours of a prison term. It is trite law that sentence of a prison term should be the last resort which courts should be slow in arriving at. However, where the court prefers to impose a prison term it should proffer special reasons for doing so.

Infact these courts have since moved from the long held view that the only correction of one's misdemeanour is imprisonment. It has been explained by these courts that there is now a need to re-assess the case of monetary penalties as more and more people are now exposed to the cash economy. This principle was discussed over 30 years ago, see *S v Julius* GS 269/80 and *Gwarada v S* (AD) 8/81.

As a consequence of this reasoning, the courts should now more than before, in considering sentence, take into account the following amongst many factors:-

(1) the nature of the offence and the circumstances in which it was committed;

(2) the degree of deliberation shown by the offender;

(3) the provocation which he has received, if the crime is violently related; and

(4) the age and character of the accused.

In *casu* appellant was a 46 year old woman, who is a first offender and with a rural background. She is more certainly than not governed by customs and practices which prevail in her community. It is well known by Zimbabweans at large that the rural population is not exposed to the modern day lifestyles which have dramatically changed. In recent years the old English proverb that; "The command of custom is great" is very relevant in the present case.

This, is one of the reasons why laws relating to the legal age of majority and inheritance laws amongst others continue to be enacted and amended in a quest to bring them in line with those who are not yet exposed to the modern day social and political changes in our society.

In my considered view the court *a quo* should have considered that:

Accused is a female, aged 46, first offender with five children.

Most importantly the court should have borne in mind that while appellant had to be punished, the punishment should have been proportionate to the crime committed as failure to do so will tend to sway sympathy towards the appellant, resulting in the sting of the punishment being lost.

It is further my view that appellant being a rural based woman and governed by certain customs amongst which is the belief that a child in her community is everyone's child, chastisement in that manner would not attract a criminal offence. This of course is wrong. Regard should have been had of the provocation and the loss she incurred in the loss of her crops as a result of a herdboy who did not adhere to his expected chores in the community.

There was no meditation with regards to the commission of this offence. This was a spontaneous re-action by appellant which although punishable should have received a lenient sentence, having taken into serious consideration all the factors in this matter.

Sentencing of a family woman to prison for an offence which in her community is not generally frowned upon is in my view a miscarriage of justice. If the word mercy is to be applied, this to me is the case where its application should have comfortably found a home in the courts mind. The trial court should have borne in mind the unfathomable sorrow which befalls a home when a mother is taken away for an offence which in her society is a non-event.

I do not agree with respondent that the sentence was proper in the circumstances. It was in my opinion unnecessarily harsh. The appeal is upheld to the following extent:

The order is as follows:

(1) the conviction is confirmed, and

(2) the sentence is set aside and substituted by the following:

(2:1) US$20-00 or 5 days imprisonment.

In the event that she has already served the equivalent days there is no need for her to be called back to court.

Cheda J.....

Kamocha J agrees.....

Kenneth Lubimbi and partners, appellant's legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners