ANGELINE KANHUKAMWE .
and
SONGE JUMA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAKARAU JP & UCHENA J
HARARE, 3 and 11 July 2007

Criminal Appeal

Mr *L Mungeni*, for the Appellants
Mr *J Murombedzi*, for the Respondents

Uchena J: The appellants and Linceman Usaihwevhu were jointly charged with one count of bribery. They pleaded not guilty. Linceman was acquitted at the end of the state case. The appellants were put on their defence and were subsequently convicted and each sentenced to 12 months imprisonment of which 2 months were suspended on conditions of good behaviour. The $1500.00 they had offered to the Police officer was forfeited to the state.

The appellants noted an appeal against sentence only. Their grounds of appeal are;

1. The court *a quo* erred in not considering the option of a fine and/or a wholly suspended prison and/or community service under the circumstances.
2. The court *a quo* erred in treating the appellants' case differently from other similar matters that come before it.
3. The court *a quo* did not give due weight and consideration to the personal circumstances of the appellants and in particular that both are unsophisticated first offenders.
4. The court did not give due weight and consideration to the fact of the small amount involved.

5. Further, the court *a quo* grossly misdirected itself in failing to follow well-laid down principles of sentencing in similar cases as follows;

    i. Prevalence of an offence is not mandate for the imposition of ever increasingly severe sentence by the court.
    ii. Deterrence should not cloud the sentencing process
    iii. Reference to sentences imposed for the same offence in the past provides useful guidelines.
    iv. The need and importance of the fact that first offenders should be kept out of prison.
    v. Imprisonment is a severe form of punishment which should only be resorted to as a last resort and only where no other form of punishment will meet the justice of the case.

The facts on which the appellants were convicted are that they connived to offer and subsequently offered a bribe of $1500000.00 (old currency) to Detective Constable Kachese to induce him to release Linceman Usaihwevhu whom he had arrested and placed in custody. The first appellant was Linceman's wife. The second appellant was employed by the Zimbabwe Republic Police as a general hand and stayed in its Mvurwi camp. He is Linceman's uncle. He sent his uncle to the first appellant inviting her to go and collect the money used for the bribery from his house.

Though this was an appeal against sentence only Mr Murombedzi the respondent's counsel in his Heads of Argument, which he adhered to at the hearing conceded that the second appellants' conviction can not be supported. The concession was properly made because the first witness for the state Constable Kachese said he does not know how the second appellant was involved. Kudakwashe Usaihwevhu the state's second wittiness told the court that he gave the second appellant $2000000.00 (old currency) when he was proceeding on holiday with specific instructions to second appellant to use the money to

buy food for Linceman who was in custody and some for paying a court fine at court. Sgt Magagani who witnessed the commission of the offence also said he does not know how the second appellant got involved. In view of the above it cannot be said that there was common purpose between the first and the second appellant. The evidence lead for the state exonerates the second appellant as it explains his involvement as that of a custodian of the money for purposes other than the commission of this offence.

Mr *Mungeni* for the appellants agreed with Mr *Murombedzi*'s submissions. In view of the concession on the second appellant's conviction he agreed that the appeal be converted to a review.

It is for this reason that we at the hearing of the appeal decided to convert the second appellant's appeal to a chamber appeal or a review in terms of sections 35 and 29 (4) of the High Court Act (*Chapter 7;06*) respectively. Section 35 reads.

> "When an appeal in a criminal case, other than an appeal against sentence only, has been noted to the High Court , the Attorney-General may, at any time before the hearing of the appeal, give notice to the registrar of the High Court that he does not for the reasons stated by him support the conviction, whereupon a judge of the High Court in chambers may allow the appeal and quash the conviction without hearing argument from the parties or their legal representatives and without their appearing before him".

I am aware that the procedure provided by s 35 does not apply to appeals against sentence only but in this case both parties agree that the appeal should have been against conviction and sentence for the second appellant which brings these proceedings within the provisions of s 35. A distinction must therefore be made between the first appellant's appeal which remains one against sentence only and the second appellant's which has by both parties' consent been turned into a chamber appeal. The s 35 procedure would therefore apply to the later and not to the former. The use of this procedure which is rarely resorted to by the Attorney-General's office saves time for the court and the parties. It reduces appeal expenses for the appellant. Most importantly it ensures the early release

from prison of an appellant whose conviction is not being supported by the respondent in the case of an appellant who has not been granted bail pending appeal.

The correct use of this procedure should be as follows;

a) The Attorney-General or his representative reads the appeal record and decides whether or not he supports the conviction.

b) If he does not support the conviction he then gives notice to the Registrar of his decision not to support the conviction together with his reasons for arriving at that decision.

c) The Registrar will place the Attorney-General's notice and the reasons thereof, plus the appeal record before a judge in chambers.
d) The judge will consider the documents placed before him.

e) If he agrees with the Attorney-General he will allow the appeal and quash the conviction without hearing argument from the parties or their legal representatives and without their appearing before him.

Most concessions by the respondents are being made in Heads of Argument instead of through notices to the Registrar. This leads to the unnecessary sitting of an appeal court and the unnecessary appearance of counsels for both parties before it. The appellant if in prison will not benefit from the intended early release or the saving of unnecessary further expenses in pursuing an appeal which is not being contested. On a strict interpretation of s 35 that procedure would not be applicable in this case because no notice was given to the Registrar but that would in my view be an insistence on an immaterial procedural detail in circumstances where it is clear to this court that the appeal should have been against conviction and sentence and the respondent is conceding it. This court's review powers in respect of the second appellant can however also be exercised in terms of s 29 (4) of the High Court Act.

Section 29 (4) of the High Court Act reads:

> "Subject to rules of court, the powers conferred by subsections (1) and (2) may be exercised whenever it comes to the notice of the High Court or a judge of the High Court that any criminal proceedings of any inferior court or tribunal are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review."

It is common cause that the second appellant was incorrectly convicted. The proceedings are therefore not in accordance with real and substantial justice. The injustice has been brought to our attention, entitling us to review the proceedings.

In the result the second appellant's conviction and sentence will be set aside.

Mr *Murombedzi* for the respondent also conceded that the trial Magistrate misdirected himself in determining the appropriate sentence, and that the sentence imposed on the first appellant induces a sense of shock. That concession was properly made.

The trial Magistrate gave very brief reasons for imposing the sentence already referred to above. He said:

> "Bribery is a very serious offence. Justice must be left to prevail. The Government is in an ant-corruption drive that all now must be aware that the offence is being viewed seriously by the law. Public servants who have been caught in corrupt practices have been jailed".
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> So there is no reason therefore to treat those who instigate corruption lightly.
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> It is this (sic) view that the court feels community service and or fine is not appropriate."

The mitigation recorded from the appellants is equally brief. In respect of the first appellant he recorded

> "I am 35 years old. I am not married with 3 children. I am a vendor at the market. I am sorry. I have a child who is in grade 5 and 1 pupil left by my brother. He died."

It is apparent as conceded by Mr *Murombedzi* for the respondent that the trial Magistrate did not fully canvas the appellant's mitigation even though he had a duty to do

so as they were not legally represented. In the case of *S v Ngulube* 2002 (1) ZLR 316 at 318B to 319A NDOU J commenting on a Magistrate's failure to fully canvas the circumstances under which an unrepresented accused committed an offence said,

> "The accused was not legally represented during the trial. The trial Magistrate should have fully enquired into the circumstances under which the accused, a member of the Army, came into possession of the tear smoke canister. Since the accused is based in Harare it was necessary to investigate how he ended up in Chivhu with the canister. It is clear that the learned trial magistrate imposed an unusually heavy fine of $100000 based on very scant information about the accused and the circumstances and nature of the offence. The decision on sentence must be made on a rational and informed basis. This is an example of an intuitive approach to sentencing----------
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> There is certainly no room for such instinctive sentencing in our jurisdiction. It is trite that our courts have over the years followed the rational approach to sentencing. In this approach the sentencing judicial officer determines the limits set by the legislature as far as type and quantum of punishment is concerned and then, within this the limits set by the culpability of the offender. He then carefully considers the differing purposes of punishment and if they conflict, rationally balances them against each other, according to each its due in the final sentence he imposes----------
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> Judgments in our jurisdiction have always emphasized that the sentencing court, in deciding upon the appropriate punishment, must strive to find a punishment which will fit both the crime and the offender. The sentence must be fair and just instead of excessive, savage and draconian- see G Feltoe A Guide to sentencing in Zimbabwe at p 1. The punishment must fit the criminal as well as the crime, be fair to the State and to the accused and be blended with a measure of mercy- see *S v Sparks & Anor* 1972 (3) SA 396 (A)
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> In light of the above sentencing principles, it is essential that magistrates should equip themselves with sufficient information in any particular case to enable them to asses sentence humanely and meaningfully, and to reach a decision based on fairness and proportion. "The needs of the individual and the interests of society should be balanced with care and understanding".

I am in entire agreement with the views and sentencing principles discussed by NDOU J above and would like to add that after the careful balancing act the correct sentence must be arrived at without ignoring precedents set by decided cases of the same nature. The facts of each case must find for it its appropriate sentence regard being had to its aggravating and mitigating features as compared to those of decided cases. This will ensure that cases of lesser culpability will not be punished more severely than cas

es of greater culpability. If sentences are imposed in a haphazard manner the smooth flow of justice will be disturbed and the integrity of the courts will be compromised.

However the appeal court cannot lightly interfere with the trial court's discretion on sentence. It can only do so if the trial court misdirected itself in arriving at the sentence imposed or if the sentence is one which induces a sense of shock. In the case of *S v Ramushu and Ors* SC 25/93 GUBBAY CJ said

> "But in every appeal against sentence, save where it is vitiated by irregularity or misdirection, the guiding principle to be applied is that sentence is pre-eminently a matter for the discretion of the trial court, and that an appellate court should be careful not to erode such discretion. The propriety of a sentence, attacked on the general ground of being excessive, should only be altered if it is viewed as being disturbingly inappropriate."

As already indicated the trial magistrate did not fully inform himself before passing sentence. He did not carefully balance the interests of the state and the appellant. He passed sentence on the basis of the scant information given by the appellant in mitigation of sentence. His reasons for sentence are inadequate. They do not show how he balanced the interests of society against those of the appellant. He did not refer to any particular precedent apart from a bare reference to the sentencing of public officials to imprisonment. This court is left without information as to what those public officials had done and what values were involved. The trial magistrate therefore misdirected himself when he sentenced the appellant without canvassing the circumstances under which the offence was committed. He clearly shot in the dark. Mr *Murombedzi* for the respondent conceded

that the Magistrate misdirected himself when he passed sentence on the basis of the scant mitigation he had canvassed from the appellant.

I must consider if he also misdirected himself in the other respects referred to in the appellant's grounds of appeal and Heads of Arguments. It is apparent that the magistrate glossed over the appropriateness of community service in this case. He merely mentioned it in passing in his reasons for sentence .He did not inform the appellant's of that option. In his reasons for sentence he did not explain why he considered it inappropriate. In the cases of *S v Khumalo* HB 39-03 and *S v Majaya* HB 15-03 failure to consider community service was held to be a misdirection. I am satisfied that the magistrate misdirected himself in that respect.

The appellant's counsel also submitted that the sentence imposed induces a sense of shock in view of the amount involved. Mr *Murombedzi* for the respondent conceded. The propriety of his concession can be verified, by examining decided cases involving comparable values. In the case of *S v Mudawari* HH 270-90 GIBSON J said

> "bribery and corruption are regarded with thorough disapproval since they undermine the fabric and orderly function of the country's institutions. In such cases the proper punishment should be imprisonment unless there are circumstances which indicate that this would be inappropriate."

It is true that bribery and corruption continue to be viewed with abhorrence. They continue to be offences which undermine society's fabric and should be deterred. However as was correctly observed by GIBSON J there are in some cases circumstances in which imprisonment would be inappropriate.

In the case of *S v Sithole* 1992 (2) ZLR 110 (HC) SMITH J at page 110 said;

> "In an appeal against sentence this court must decide whether, in assessing the sentence the magistrate misdirected himself or whether the sentence is so high as to induce a sense of shock-see *S v Chirisa* 1989 (2) ZLR 102 (S). As Mtambanengwe expressed it in *S v Nyakatawa* HH 288-91 @ p 4 of the cyclostyled judgment-
> It is trite that a sentence will be interfered with if the court comes to the conclusion that it is so, excessive as to induce a sense of shock and also if it is so out of conformity with sentences usually passed for offences in similar circumstances."

This case involved a bribe of $20 offered to a police constable by a motorist he had arrested for riding a motor cycle without a headlight and while drunk. He was convicted and sentenced to 7 months imprisonment of which 2 months were suspended on conditions of good behaviour. On appeal the sentence was set aside and substituted with that of a fine of $ 400 idp 2 months imprisonment plus 3 months wholly suspended on conditions of good behaviour. This confirms that in appropriate circumstances bribery can be punished by the imposition of a fine.

In the case of S v Adolfo 1991 (2) ZLR 325 (HC) @ 330 Smith J said;

> "The sentence to be imposed in a case of bribery depends, of course, on the circumstances, of the case. In some cases, it is the official who accepts the bribe whose conduct is more blameworthy whereas in others it is the conduct of the person offering the bribe."

The accused in that case had offered a bribe of $5000 to a Regional Magistrate. He was fined $2000 idp 6 months imprisonment In addition 6 months suspended on conditions of good behaviour. The $5000 was forfeited to the state. This again demonstrates that sentences other than imprisonment can be imposed in bribery cases.

When the facts of this case are compared to those of Adollfo's case it becomes clear that the offence committed by Adolfo was more serious in terms of the amount involved and the seniority and sensitivity of the office of the bribed officer. It would not be just to punish the appellants more severely than Adolfo when their offence is far less culpable than his. I am therefore satisfied that the sentence imposed on the 1st appellant induces a sense of shock. Her sentence must be set aside and be substituted with one which fits both the offender and the crime she committed. In my view a sentence of community service or a fine can meet the justice of this case.

In this case the first appellant spend two weeks in prison before she was granted bail pending appeal. She has therefore tested the sting of imprisonment. That experience

will not be easily forgotten. I am satisfied that it will for a long time dissuade her from committing crimes of this nature. There is in my view no reason to subject her to another effective punishment. I am however of the view that a wholly suspended sentence will reinforce the deterrent effect of the experience she had when she served two weeks in prison before she was released on bail.

In the result, the second appellant's conviction and sentence are set aside, he is found not guilty and is acquitted.

The first appellant's appeal against sentence is allowed. The sentence imposed by the magistrate is therefore set aside and is substituted by the following:

> 6 months imprisonment wholly suspended for 5 years on condition she does not during that period commit any offence involving bribery for which she will be sentenced to imprisonment without the option of a fine.

MAKARAU JP, agrees----------

Kanoti & Associates, appellant's legal practitioners
Attorney-General Criminal Division, respondent's legal practitioners