

MUNYARADZI HATINAHAMA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIWESHE JP & HUNGWE J
HARARE, 10 February 2015

Criminal Appeal

R Chavi, for the appellant
E Mavuto, for the respondent

HUNGWE J: At the hearing the appellant's counsel indicated that the appellant had abandoned the appeal against conviction. In adopting this approach, counsel was well advised. I say so because there were no valid grounds of appeal on the face of the Notice and Grounds of Appeal which he had himself drawn in anticipation of the hearing. Out of the five grounds, two were directed against conviction. Those two grounds do not make sense. The grounds of appeal seem to suggest that the conviction was based on hearsay evidence yet the record reflects that documentary evidence was relied upon by the State to prove the amounts converted to own use by the appellant. Thus there was no hope of succeeding on the papers in that state.

Only the appeal against sentence was persisted in. Three grounds of appeal against sentence were raised. At the end of the hearing we dismissed the appeal against sentence on the turn. These then are the reasons for that decision.

The appellant was correctly and properly convicted for theft of trust property. The facts found proved showed that the appellant was employed by a Housing Co-operative as its Chiredzi branch representative. His duties included collecting subscriptions and other contributions made by members who hoped to eventually become home-owners after meeting certain terms and conditions. They paid in instalments of between US\$20-00 and US\$30-00 every month. During the period from January to September 2010, the appellant had converted to his own use an amount of US\$2 150-00. He was sentenced to 18 months imprisonment of

which 8 months were suspended on condition that he makes full restitution of the money he had stolen.

In his reasons for sentence the learned trial magistrate expressed the view that this was a serious offence in light of the fact that he committed a breach of trust, not just against his employer on whose behalf he received the contributions, but also against the subscribers to the housing co-operative. Among the factors he considered and weighed into the scale are the following; although the appellant was a first offender, the appellant did not offer to refund the money he stole therefore he showed no remorse. He considered that imposing an order of community service would send an inappropriate message that the courts did not view the crime committed with the seriousness it deserved. Similarly, he held the view that imposing a fine would trivialise an otherwise serious matter.

Out of the three grounds of appeal against sentence, the first two were in the appropriate form, although in substance they missed the point. I say this because the first ground of appeal states that the magistrate erred in that he did not consider community service in his assessment of sentence. He did. What he did not do was to settle for that form of punishment as an appropriate one in the case before him. The second ground raised was that the learned trial magistrate erred in not giving weight to the fact that the appellant was a first offender who was gainfully employed. Again he specifically took this factor into account. The third ground of appeal relates to a complaint that the magistrate decided to proceed to hear mitigation in counsel's absence thereby denying the appellant a right to legal representation. It is not clear what effect this decision had on the assessment of sentence. Upon enquiry as to whether appellant had made part-payment of the order of restitution, we were advised that he did not do so because the matter was on appeal.

Clearly, the appellant who wishes to appeal to the court to reduce his sentence could demonstrate his willingness to make good the damage he has caused before his appeal is heard. That demonstrates good will towards the complainant in particular and to society in general. The attitude displayed by the appellant in this case amounts to trying his luck with this court. An appeal is not there just for the asking. Legal practitioners are expected to know that before they can begin to entertain any hope for success in this court, they ought to show that in its approach to the assessment of sentence, the trial court committed some recognised form of misdirection. Sentencing discretion reposes in the trial court. An appeal court will not interfere with that discretion simply because it would have imposed a different sentence in that matter. That is not all. If some misdirection has been identified, the misdirection must be

so substantial and material as to lead to a conclusion that a miscarriage of justice has occurred as a result of the misdirection. *S v Sidat* 1997 (1) 487 (SC).

Thus it will be seen that it is not every misdirection that would entitle an appeal court to interfere. The misdirection must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. *S v Gono* 2000 (2) ZLR 63 (SC). Where there has been no misdirection and community service was not an appropriate sentence, there would be no basis for interference with the sentence imposed by the trial court. *S v Dullabh* 1994 (2) ZLR 129 (HC). In my view the court a quo did take into account the relevant factors that it was supposed to consider and settled for a sentence which cannot be said to be excessively harsh as to induce a sense of shock.

It is correct that the courts will, as a matter of course, suspend a portion of a custodial term imposed on a first offender as a salutary measure aimed at ameliorating the net effect of his otherwise long custodial sentence. However, in certain cases, where the court departs from this practice it may amount to a misdirection so material and substantial as to lead to the conclusion that the court did not exercise its discretion judiciously. In that event the appeal court would be “at large” with sentence and therefore interfere with it. I do not think this is such a case. I say so because the appellant committed this offence over a period of close to nine months. He had enough opportunity to desist but did not do so. He had made it his habit to help himself to his employers’ trust funds. Although another court may have imposed a different sentence that is not a basis upon which this court may interfere with a sentence where it has not been shown that a misdirection had occurred.

For the above reasons, we dismissed the appeal against sentence.

CHIWESHE JP: agrees.....

Kwirira & Magwaliba, appellant’s legal practitioners
National Prosecuting Authority, respondent’s legal practitioners