ROBSON CHIKORE
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE AND BERE JJ
HARARE, 19 MARCH 2015

CRIMINAL APPEAL

H. Mutasa, for the appellant
E. Makoto, for the respondent

BERE J: On his own plea of guilty, the appellant was convicted of the offence of indecent assault as defined in s 67 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the code) for which he was sentenced to a undergo three months imprisonment.

Aggrieved by both the conviction and sentence the appellant has now lodged this appeal.

Though poorly crafted the sole ground of appeal against conviction is that the learned magistrate failed to appreciate that the appellant did not intent to commit the offence charged.

As against sentence the appellant's contention is that by imposing a straight term of imprisonment the learned magistrate failed to apply his mind to the provisions of s 67(2) of the code. The appellant has expressed the view that if his conviction is upheld this court considers setting aside the sentence imposed by the court *a quo* and substitute same with a fine coupled with a wholly suspended sentence of imprisonment.

The appeal is opposed by the respondent whose view is that there is nothing amiss with both the conviction and sentence of the court *a quo*.

A perusal of the court record shows that the appellant offered an unequivocal and unsolicited plea of guilty to the offence charged. All the relevant questions which the learned magistrate was expected to put across to the appellant were indeed put and the appellant responded by offering an unequivocal plea to the offence charged.

It is extremely difficult for us as the appellate court to comprehend what has motivated the appellant to challenge his conviction. We can only speculate that the appellant must have under estimated the gravity of this offence when he pleaded guilty. Record pages 10 and 11 shows beyond doubt that both the facts and elements constituting the offence were read to, put across and fully understood by the appellant. The appellant cemented his own conviction by categorically stating that he was trying his luck when he committed this offence. That cannot, by any stretch of imagination be regarded as a defence to the charge which the appellant was facing.

I am more than satisfied that the conviction in this case should not be interfered with. Consequently the appeal against conviction is dismissed.

I must now focus on the sentence of 3 months imprisonment imposed on the appellant. The respondent is of the view that the sentence imposed was proper and the appellant's view is that the sentence imposed induces a sense of shock and was therefore in appropriate.

It is trite that an appeal court can only interfere with a sentence of a lower court where it is felt that there has been misdirection by that court. See *S* v *Dullabh*[1] and *S* v *Mhondiwa*[2] where the approach is lucidly put as follows:

> "An appeal court does not have a general discretion to ameliorate the sentences of the trial court. It cannot interfere unless the discretion was not judicially exercised: that is unless the decision is vitiated by misdirection or unless the sentence is so severe that any reasonable court would not have imposed".

It has also become trite in this country that the approach to sentence must be guided by the Revised Guidelines for Magistrates, Prosecutors and other Court Officials as pronounced by the Zimbabwe National Committee on Community Service.

These guidelines were informed by the desperate and urgent need to decongest our ever ballooning prison population and the need to spare first offenders the rigors of imprisonment.

It will be noted that the guidelines implore Magistrates to seriously consider among other options the imposition of community service where the court desires to impose a sentence of 24 months imprisonment and below. These considerations require not lip service but serious thought. There is a misconception among many Magistrates in this country that the imposition of

[1] 1994(2) ZLR 129 H
[2] 1998 (2) ZLR 392

Community Service is indicative of trivialising the offence involved. That is clearly a wrong perception.

In *casu*, there is not the slightest indication that the learned Magistrate seriously considered the imposition of other sentences other than a straight prison term. For this reason this court is at large with regards to sentence.

The devastating impact of a prison sentence must not be lightly looked at. Prison life can take with itself the destruction of the accused's family as a unit particularly where the convicted person is the sole breadwinner.

Ebrahim JA, with the concurrence of other Supreme Court judges could not have put it in any better way when he observed in the case of *S* v *Magwenhe and Anor*[3] when he borrowed the instructive views of Viljoen A.R in *S* v *Scheepers*[4] where it was stated:

> "Apart from the fact that …… prisons are overcrowded and that the upkeep of prisons and the maintenance of prisoners place a tremendous economic burden on the State, there are also other disadvantages attaching to imprisonment. The convicted person is removed from society, he is deprived of all responsibility and opportunities of acting independently as a free member of the community, his life is disrupted, manpower is lost and the prisoner comes into contact with elements which are …… out of all proportion to that which he possibly disserves. If the same purposes in regard to the nature of the offence and interests of the public can be attained by means of an alternative punishment to imprisonment, preference should, in the interest of the convicted offender, be given to the alternative punishments…… imprisonment is only justified if it is necessary that the offender be removed from society …… if the objects striven for by the sentencing authority cannot be attained by any alternative punishment."

In *casu*, the court *a quo* ought to have accepted as a fact that the appellant and the complainant were not strangers, they had a long relationship which the appellant thought was still live as he put it mitigation. It would appear that until this matter was reported, the appellant was laboring under the impression that the fading love relationship could still be revived.

My view is that if all these factors had been seriously considered by the court *a quo*, the trial court would have been sufficiently dissuaded from sending the appellant to prison.

It is for these reasons that the sentence of the court *a quo* is set aside and substituted by the following:

> "Appellant is sentenced to pay a fire of $200-00 or in default of payment 2 months imprisonment. In addition, 3 months imprisonment is suspended for 5 years on condition the

[3] 1991(2) ZLR 66 (SC)
[4] 1977(2) SA 154 at 158 - 159

appellant does not within that period commit any offence for which indecent assault is an element and for which upon conviction he will be sentenced to a term of imprisonment without the option of a fine".

Hungwe J : agrees…….

Gill, Godlonton and Gerrans, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners