SANDRA HUNYENYE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA & MUSAKWA JJ
HARARE, 18 January & 24 March 2017

Chamber Application for Leave to Appeal

T C Hungwe, for the applicant
R Chikosha, for the respondent

CHATUKUTA J: The applicant was convicted after contest of contravening s 89 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. She was sentenced to 10 months imprisonment. She appealed against sentence. The appeal was determined on 18 January 2017. The appellant was partially successful. Of the 10 months imprisonment, 3 months were suspended on condition of future good behavior. We gave *ex tempore* reasons for our decision. The applicant has now sought leave to appeal against the decision.

Before determining the application for leave to appeal, the following are our written reasons for dismissing the appeal.

The following facts were found by the trial magistrate to have been proven. The applicant and the complainant were both employed as teachers of Grade 5 pupils at David Livingstone Primary School, Harare. On 25 January 2016, the two were instructed by the head of the school to swap pupils between their respective classes. An altercation arose between the two when the appellant refused to accept from the complainant pupils that she considered being dull. The altercation degenerated into a fight with the appellant being the aggressor. The appellant assaulted the complainant with fists and hit her head against the wall. The complainant was adorning her hair with dangling hair extensions. The appellant pulled the extensions with such force that a sizeable chunk of the extensions came off together with the complainant's hair. The assault was meted out in front of the pupils. The

head of the school tried to restrain the appellant to no avail. He only succeeded with the assistance of a security guard at the school.

The complainant was medically examined on 29 January 2016 and the doctor confirmed the pulling off of the hair and concluded that the force used was moderate. He/she noted that the complainant would need further assessment whether or not the hair that was pulled out would grow again and consequently whether or not the complainant would suffer permanent injuries. The State also produced a copy of a picture of the complainant's scalp showing the extent of her injury.

In arriving at a sentence of 10 months, the trial magistrate took into account the mitigating factors and weighed them against the aggravating factors. The mitigating factors he considered were that the appellant was a female offender. She has a family. She had lost her employment as a result of her conduct. In aggravation, he noted that that the appellant was not a first offender, the state having produced a relevant record of a previous conviction of contravening s 89 (1) of the Code. The appellant was convicted in 2011 and was sentenced to 7 months imprisonment of which 3 months were suspended for a period of 5 years on condition of future good behavior. The remaining 4 months were suspended on condition the appellant performed community service. She had not benefited from the suspensions. She was a teacher entrusted with the responsibility to teach her pupils good morals. She had failed in her duty. The trial magistrate concluded that the aggravating factors tilted the scale against the appellant and an effective custodial sentence was warranted.

The concerns that the appellant had with the sentence as reflected in the grounds of appeal are that:

(a) The court imposed an effective custodial sentence on a female offender when the current sentencing trend is to impose such a sentence for serious offences and as a last option;
(b) The court relied on a previous conviction that had "lapsed for purposes of sentencing" because the sentence had been imposed in 2011 and five years had lapsed;
(c) The court did not give due cognizance to the medical report which reflected that only moderate force was used and the complainant did not suffer permanent injuries;
(d) The court did not give due regard to the mitigating factors; and
(e) The court a quo did not consider the other sentencing options that are less punitive.

The state conceded that the sentence was excessive considering the nature and the circumstances of the assault.

It is trite that an appeal court does not lightly interfere with the lower court's sentencing discretion. It will only do so where the discretion was not judicially exercised. (See *S* v *De Jager and Anor* 1965 (2) SA 616 at 628 H to 629 A-B. *S* v *Nhumwa* SG 40/88 at p 5, R*ambenu & Ors* v *The State* SC 25/93 at p 5 & *S* v *Gono* 2000 (2) ZLR 63 (HC) 67 C-F).

It is a general practice in our legal system that women are generally treated leniently and rarely sent to prison, the main reason being that female offenders rarely re-offend. However, female offenders do not have an automatic right to a non-custodial sentence. The appellant falls in the class of the rare females who re-offend. Not only did she re-offend, but she did so in a serious way. Although the medical report states that moderate force was used and there was no assessment of the permanency of the injuries sustained by the complainant, the picture of the injury produced in court by the State shows an unsettling injury. The appellant did not pull out just one or two strands of hair. She pulled out a chunk of hair. One can only imagine the pain suffered by the complainant. The assault can only be said to have been atrocious.

The court *a quo* rightly concluded that the conduct of the appellant was deplorable given her station at the school. She was a mature teacher of 42 years of age with 17 years teaching experience. She was bestowed by parents the responsibility to take care of their children and teach them not only the academics but extra-curriculum activities which would include interpersonal skills. These are children in their infancy. The conduct of the appellant did not exhibit acceptable standards of how people relate and resolve disputes. Her conduct was clearly not exemplary and befitting a person of her standing. She should have known better that disputes should not be resolved by assaulting others and should have approached the head of the school to resolve the dispute.

In the previous conviction, the appellant was sentenced to 7 months imprisonment. The assault for which she was convicted must have been also a serious one warranting a custodial sentence. She did not however benefit from the court's gesture of suspending the sentence on condition of future good behavior and on performance of community service. It would have been a travesty of justice under the circumstances to impose either a fine or community service as suggested by the appellant.

We were constrained to understand the submissions by the appellant that the previous conviction had lapsed for the purpose of sentencing because of the lapse of a period of 5 years. In terms of s 358 (2)(b) a court may after sentencing a convicted person to a term of imprisonment suspend the operation of the whole or any part of the sentence for a period not exceeding five years on such conditions as the court may specify in the order. The import of this section is that if the convicted person re-offends within the period specified in the order, the court sentencing him/her for the subsequent offence may consider bringing into effect the suspended term of imprisonment. The conviction does not lapse at the expiry of the period as suggested by the appellant. What lapses is the discretion of the sentencing court to bring into operation the suspended sentence. The trial magistrate was alive to the legal position. He observed at p18 of the record that:

> "The court noticed that the accused is not a visitor to these courts. She appeared in court facing similar charges of assault. She was sentenced to do community service. A prison term was suspended for 5 years on condition of good behaviour. It's a fact that the 5 years has lapsed and there is no way the suspended prison term is going to be brought into effect. The previous sentence only serves to show what kind of person accused is."

Although the record of previous conviction does not state the date of conviction, the CR Number appearing on the record of previous convictions is "CR 203/2/11". This means that the appellant was convicted sometime in or after February 2011. She committed the offence, the subject of this appeal, on 25 January 2016. She therefore re-offended within the 5 years as submitted in aggravation by the State's counsel. The period of suspension commences to run from the completion of service of a sentence and in that case from completion of community service. In *S* v *John* 1968 RLR 28, BEADLE CJ observed at F –I that:

> "A query has been raised as to the date from which the period during which a sentence is suspended commences to run. In the instant case the appellant was sentenced in October, 1964 to three years' imprisonment with hard labour of which 18 months was suspended for three years on condition that during that period he was not convicted of any offence involving dishonesty. The question now is from what date that period of suspension commenced to run. This Court has accepted the view of the Appellate Division of South Africa expressed in the case of Ex parte Minister of Justice: In re *R* v *Duze*, 1945 AD 102 (see *R* v *Temba* (Judgment No. G.D. 33/1967 (Byo)) that the period during which a sentence is suspended only commences to run after the accused has served any period of imprisonment which was imposed upon him at the time. In this case, therefore, the period of suspension would only have commenced to run after the appellant had served the 18 months imposed upon him in October, 1964. When he committed the instant offence, therefore, the period of suspension was still operative and the magistrate's order that the suspended sentence now be brought into

> operation was a perfectly valid one." (See also *S* v *Wakiki* 1981 at 55 D & *Regina* v *Chitengu* 1980 ZLR at 84 D.)

The court *a quo* therefore erroneously concluded that 5 years had lapsed, albeit to the benefit of the appellant. In any event, as alluded to earlier, the appellant misconstrued the relevance of the 5 years. The 5 years was relevant in so far as it relates to the bringing into operation of the suspended sentence.

Being a repeat offender is not a bar to the imposition of a fine or community service. However, the court must consider the totality of circumstances of the offence. In the present circumstances, the trial magistrate applied his mind to the most appropriate sentence. He discounted the imposition of a fine or community service contrary to the assertion by the appellant that he did not do so. He stated in his reasons for sentence, still at page 18 of the record, that:

> "The defence counsel proposed that the accused person be sentenced to do community service or pay a fine. It is clear that the non-custodial sentence failed to rehabilitate her hence the reason she is in court again facing the same offence. Accused is therefore going to be sentenced to a term of imprisonment."

The magistrate cannot therefore be faulted for ruling that a sentence of 10 months was warranted. An effective custodial sentence was also warranted. We therefore did not agree with both the appellant and the State that the sentence was excessive and induced a sense of shock.

However, we were of the view that the he erred by not explaining why he did not suspend a portion of the sentence of 10 months. In *S* v *Mahove & Ors* 2009 (2) ZLR 19 CHITAKUNYE J observed at 22 E- G that:

> "Another disconcerting aspect is that in all the above cases none of the accused had any portion of their sentences suspended on any condition. The trial magistrate did not consider suspending any portion of the sentences. No reason or explanation was given for such failure. Though it is not a rule that first offenders who are being imprisoned are entitled to have a portion of their sentence suspended, as was stated in *S* v *Gorogodo* 1988(2) ZLR 378, I am of the firm view that failure to consider or to give reasons for not suspending portions of the sentences on suitable conditions, where the sentences are not long, is a misdirection. These courts have time and again emphasized the need to give first offenders the chance to reform by not sending them to effective imprisonment. Where for good reasons, imprisonment cannot be avoided, then at least a portion of the sentence must be suspended so that they serve what is absolutely necessary. "

Although the appellant is not a first offender and had not benefitted from the suspension of the previous conviction, we were of the view that she would benefit from

another opportunity to redeem herself. As a result we suspended 3 months of the 10 months imprisonment imposed by the trial magistrate on condition of future good behavior to ensure that upon her release the threat of further imprisonment will still be handing over her head.

The appellant has since filed an application in terms of r 263 of the High Court Rules for leave to appeal against our decision to dismiss the appeal. In a very terse application for leave to appeal she stated that she had prospects of success on appeal citing proposed grounds of appeal which are a rehash of the grounds in the appeal before us. In essence she alleges that we fell into the same error as the court *a quo* where it failed to take into account the appellant's mitigating factors and consider alternative sentencing options. The respondent supported the application for the same reasons advanced by the appellant.

The decision whether or not to grant leave to appeal depends on the prospects of success on appeal. (See *S* v *Mutasa* 1988 (2) ZLR 4 (S) & *S* v *McGown* 1995 (2) ZLR 81 p 85 C-E.) In light of the fact that the proposed grounds of appeal against our decision are a rehash of the grounds against the court a quo's decision, I do not believe, for the same reasons advanced in our decision on the appeal, that the appellant has any prospects of success on appeal. The circumstances of the case are such that another court cannot arrive at a different decision from ours.

The application for leave to appeal is accordingly dismissed.

MUSAKWA J agrees ……

Venturas and Samkange, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners