

LUKE CHASWEKA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA & MUSAKWA JJ
HARARE, 11 July 2016 & 23 January 2017

Chamber Application

T Manashe, for the appellant
E Makoto, for the respondent

CHATUKUTA J: The appellant was convicted of contravening s 180 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to six months imprisonment of which 3 months were suspended for a period of 5 years on condition of future good behaviour.

The facts giving rise to the conviction were that the appellant, who admitted to be an illegal gold dealer was approached by three men who sold him fake gold. He paid the men \$410-00. Upon discovery that the gold was fake, he proceeded to ZRP Chakari and made a false report that he had been robbed by the three men at gunpoint.

The police acted on the report and arrested the suspects on allegations of armed robbery. Upon interviewing them, it became apparent that it was a deal that had gone bad and the appellant had lied to the police. The appellant was arrested and confessed that he had made a false report.

The appellant pleaded guilty to the charge. He explained to the court that he made a false report because he feared that if he disclosed the true nature of the transaction, he would be arrested for illegally dealing in gold.

In arriving at an appropriate sentence, the court *a quo* weighed the mitigating factors against the aggravating factors. It noted that the appellant was a first offender who had pleaded

guilty. It took into account that the plea of guilty was a sign of remorse. However, the court considered that it was aggravating that the appellant had not only lied to the court but had placed the liberty of the suspects at great risk. The magistrate concluded that an effective custodial sentence of 3 months was warranted and thereby impliedly discounted any alternative non-custodial sentence or community service.

Aggrieved by the sentence, the appellant launched this appeal. The grounds of appeal were that the court did not give due regard to the mitigating factors and in particular that the appellant:

- (a) was a first offender;
- (b) had pleaded guilty
- (c) had not benefited from the commission of the offence
- (d) was a family man.

It was also submitted that the court had misdirected itself by not taking into account that the Criminal Law Code provides an alternative sentence of a fine.

The respondent conceded that the court *a quo* had misdirected itself by imposing a sentence that was excessive and induced a sense of shock.

We were not persuaded that the court *a quo* had misdirected itself and we dismissed the appeal. We gave *ex-tempore* reasons for our decision. The appellant has filed this application for leave to appeal against our decision. It is therefore necessary in determining the application to first give reasons for our decision to dismiss the appeal. In order to avoid any confusion, the applicant shall be referred to as the appellant as the application for leave to appeal should ordinarily have been made orally in terms of r 262 as read with r 269 of the High Court Rules immediately after the dismissal of the appeal.

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 & *Rambenu & Ors v The State* SC 25/93 at p 5).

In arriving at the appropriate sentence, the court weighed the mitigating factor against the aggravating factor. It found the aggravating factors to be weighty. In particular, it took into account the nature and effect of the false information supplied to the police. Allegations of armed

robbery, and particularly where the weapon allegedly used during the commission of the robbery is a firearm, are viewed by these courts as very serious. The false information supplied by the appellant to the police was therefore very serious and could have resulted in the incarceration of the persons against whom a report of armed robbery had been made. The trial magistrate properly considered this to be a serious aggravating factor. It should be further taken into account that the appellant was himself not blameless. He was a self-confessed illegal gold dealer. He had procured the fake gold in circumstances he could not have had the protection of the law even if the gold was not fake. He was willing to place the three men in a precarious position solely because he had lost money to the three in an illegal deal. He indicated during the inquiry into essential elements that he gave the false information because he was afraid that had he disclosed the truth he would have been arrested himself for illegally dealing in gold. Apart from putting the liberty of the three men at stake, he in essence was using the police as debt collectors and public resources to recover the money he had lost during an illegal activity. Such conduct is clearly deplorable and should attract an effective custodial sentence. Given the shortness of the sentence, the court *a quo* should in fact not have suspended a portion of the sentence

The decision of the court *a quo* cannot therefore be said to amount to a misdirection. If at all it is a misdirection, it was made in favour of the appellant as the sentence imposed is manifestly lenient. It is trite that a sentence that is manifestly lenient is wrong as much as is a sentence that is too heavy. Both can bring the criminal justice into disrepute. (See *S v Holder* 1979 (2) SA 70 & *S v Matika* HB 17/06.) The appellant therefore, by being asked to undergo a very short term of imprisonment, benefitted from the manifestly lenient sentence. There was no basis under the circumstances to interfere with the sentence.

The appeal was accordingly dismissed.

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. The appellant alleges that this court fell into the same error as the court *a quo* when it failed to take into account the appellant's mitigating factors and that there were 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.)

Given the reasons for dismissing the appeal, and more particularly the decision that sentence imposed by the court a quo was manifestly lenient, I do not believe that the appellant has any prospects of success on appeal.

The application for leave to appeal is accordingly dismissed.

MUSAKWA J agrees:

Mugiya and Macharaga Law Chambers, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners