KUNDAI TSAURA
and
JOSEPH TSAURA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 16 October 2019 and 28 November 2019

Criminal Appeal

C Ndlovu, for the applicant
Mrs *J Matsikidze*, for the respondent

MWAYERA J: The appellants lodged the present appeal against sentence imposed by the court *a quo*. The appellants were both convicted of two counts of assault as defined in s 189 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and secondly convicted of indicating a witch or wizard as defined in s 99 of the Criminal Law (Codification and Reform) Act[*Chapter 9:23*]. For assault the accused were each sentenced to 12 months imprisonment of which 3 months were suspended on usual conditions of good behaviour.

The salient facts of the state case were that the appellants and other relatives at a funeral resisted the traditional way of passing condolences by shaking hands. The complainant stretched her hand to console the appellants at a funeral and was rebuffed. Following which appellants labelled the complainant a witch responsible for causing the death of their niece.

After indicating the complainant a witch the appellants went outside and retrieved a log with which to assault the complainant. The complainant escaped to a nearby bush but was followed by the appellants. The first appellant struck the complainant with an iron bar on the brow bone causing injuries and bleeding from the eye, nose and mouth. The second appellant also struck the complainant on the back collarbone. The two then dragged the appellant back to the yard where there was a crowd and they wanted to throw the complainant in the fire. The complainant was rescued by other women and made good her escape.

The appellants were further charged and convicted of assaulting. Christopher Magaya the husband of the complainant in count 1 and 2 when he sought to intervene and rescue his wife. For imputation as a wizard or witch in contravention of s 99 of the Criminal Law

(Codification and Reform) Act the appellants were each sentenced to pay a fine of $200-00 or in default of payment 30 days. They did not raise any qualms. For the two counts for which an effective prison term was imposed the appellants raised 2 grounds of appeal as follows:

> "1. The trial magistrate erred and misdirected herself in exercise of her sentencing discretion by failing to conduct an inquiry into the appropriateness of community service in circumstances where she settled for a prison term of less than 24 months.
>
> 2. The court *a quo* erred and misdirected itself in its approach to the issue of community service a real and substantial form of punishment. The trial court misdirected itself by sentencing the appellants to a custodial sentence."

A perusal of the record of proceedings from the court *a quo* reveal the trial court did consider community service but discarded it as inappropriate given the nature of assault. To the extent that community service and a fine were not viewed as appropriate the trial court cannot be said to have erred in not considering the other sentencing options. The first ground of appeal seems to suggest that the court had to carry out the community service placement enquiry because the sentence imposed is less than 24 months. That the sentences falls within the community service grid should not be misconstrued to take away the court's sentencing discretion. The trial court is however expected to judiciously exercise its sentencing discretion and come up with an appropriate sentence. It is not for the community service's officer to come up with the final decision of whether or not community service is appropriate in the circumstances. The community service officer may recommend the suitability or otherwise of a probationer but remains his opinion and it's not binding on the sentencing court. What is important though is that in the exercise of the sentencing discretion the trial court upon considering an appropriate sentence must and shall give reasons for discarding one form of sentence given the circumstances. The court *a quo* cannot be faulted for not requesting the carrying out a community service enquiry for it did not consider community service as appropriate given the nature of assault visited on an elderly woman by the two appellants who used an iron bar and log interchangeably. However the trial court's failure to outline reasons for not imposing community service is an anomaly which amounts to a misdirection.

The second ground of appeal speaks to improper exercise of sentencing discretion whereby the court *a quo* is said to have misdirected itself by imposing an effective prison custodial sentence where circumstances warranted imposition of other sentencing options like a fine and or community service. The penalty provisions for the offence of assault provides for the option of a fine. It is settled that where the penalty provisions provides for the option of a fine then imprisonment should only be considered as a last resort for the very bad cases. It

would be a misdirection to start off at the deep end and impose imprisonment without giving due weight to the sentencing option so provided by statute. There has to be clear compelling reasons justifying imprisonment. MATHONSI J in *S v Mulauzi* HB 159/16 emphasised that where a statute provides for a fine or imprisonment, it is a misdirection on the part of the sentencing court to impose imprisonment without giving serious consideration first and foremost to a fine. See also *S v Ncube* 1989 (2) ZLR 232 in which it was held that:

> "Whenever possible and more particularly where the imposition of a fine is a permissible penalty, a fine should be considered before imprisonment. Only when the facts are such that a fine is inappropriate should imprisonment be considered. First offenders in particular should be kept out of prison as much as possible …." See also *S v Dzotizei* HH 126/14.

In this case both accused are first offenders who pleaded guilty to an offence of assault in which according to the penalty provisions a fine is permissible. The complainant an old woman was seriously injured but the medical evidence is clear that there was no potential danger to life and there was no permanent injuries or disabilities occasioned. The nature of injuries occasioned when viewed together with the plea of guilty and the motive or reasons behind the commission of the offences in this case ought to have exercised the mind of the court *a quo* in considering the appropriate sentence. In this case the court *a quo* did not give regard to the circumstances surrounding the commission of the offence, whereas it is not a defence to have a strong belief in witchcraft the mitigatory nature of such deep rooted belief especially amongst the rural folk cannot be whisked away as it goes to the centre of the motive to commit the crime. The belief in witchcraft in the circumstances although not reducing criminal liability in that the belief is not a defence it certainly qualifies as mitigatory and as a factor reducing the moral blameworthiness of the appellants.

The belief in witchcraft is what motivated the appellants to commit the crime and given the rural set up such belief is not foreign and would appropriately weigh in as mitigatory. See *S v Techu and Others* HH 271/15 and *S v Misimo and Others* HH 358/17. Cultural beliefs can motivate commission of offences and where such is the case the sentencing court should not ignore the impact on reduction of the moral blameworthiness of the appellants. Such reduction of moral blameworthiness brought about by the belief in witchcraft ought to have been considered as mitigatory together with the plea of guilty and the fact that the appellants are first offenders cumulatively considered ought to have weighed heavily in favour of upholding the option of a fine as provided for by the penalty provision. On belief in witchcraft being

mitigatory s 101 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] is instructive. It states:

> "It shall not be a defence to murder, assault or any other crime that the accused was actuated by a genuine belief that the victim was a witch or wizard, but a court convicting such person may take such belief into account when imposing sentence upon him or her for the crime."

See also *S v Hamunakwadi* ZLR (1) 2015 392 and *S v Musimo and Others* HH 358/17. In my view the underpinning principle in considering the belief in witchcraft as mitigatory emanates from the general trend that witchcraft accusations are almost always preceded by tension and conflict within the family village and on community at large. Emotions and tempers flare in communities in which witchcraft beliefs are deep rooted. In my view it would not be proper to ignore the background while at the same time not condoning the criminal infringement. The belief tends to minimise the moral blameworthiness albeit not reducing the criminal liability. In the present case therefore the sentencing court in exercising its sentencing discretion misdirected itself by not giving regard to the sentencing provision which is clear. Section 189 (1) (a) reads:

> "Any person who commits an assault upon another person intends to cause that other person bodily harm or realising there is a real risk or possibility that bodily harm may result. Shall be guilty of assault and liable to a fine up to exceeding level fourteen (14) or imprisonment for a period not exceeding ten years or both."

That sentencing provision when considered together with the circumstances of the commission of the offence and all the other mitigatory factors speaks loudly of the need to explore other sentencing options and not imprisonment. The sentencing discretion was not properly exercised thus warranting interference by this court.

It is accordingly ordered that:

1. The appeal against sentence in respect of count 2 and 3 be and is hereby upheld.
2. The custodial sentence imposed by the court *a quo* is set aside and substituted as follows:

   Both counts as one for sentence. Each accused is to pay RTGS$500-00 or in default of payment 3 months imprisonment.

   In addition 6 months imprisonment wholly suspended for 5 years on condition accused does not within that period commit any offence involving the use of violence on the person of another for which he is sentenced to imprisonment without the option of a fine

MUZENDA J agrees _____

Gonese & Ndlovu, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners