HB 131-15
HCA 576-13

TINASHE KWASHIRA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & TAKUVA JJ
BULAWAYO 26 JANUARY & 25 JUNE 2015

Criminal Appeal

B. Ndove for the appellant
T. Makoni for the respondent

TAKUVA J: This is an appeal against sentence. The background facts are that the appellant was charged firstly with unlawful entry into premises as defined in section 131 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. In that on the date to the prosecutor unknown but during the month of May 2013 and at Killomat Engineering, Kelvin North, Bulawayo Tinashe Kwashira unlawfully, intentionally and without permission or authority from Tambudzai Tongofa the lawful occupier of the premises concerned entered the storeroom by force opening the door or realizing that there was a real risk or possibility that Tambudzai Tongofa had not authorized such entry.

Secondly, he was charged with theft in that on the date to the prosecutor unknown but during the month of May 2013 at Killomat Engineering, Kelvin North, Bulawayo, the accused unlawfully took one bus pump, 20 sockets, 22 M16 nuts, one vehicle axle and eleven pump rods the property of Tambudzai Tongofa intending to deprive him permanently of his possession, control or ownership or realizing that there was a real risk or possibility that Tambudzai Tongofa was going to be deprived permanently of his possession, control or ownership.

The appellant was convicted on his plea of guilty and sentenced to 36 months imprisonment of which twelve months were suspended for five years on condition that he does not commit within that period any offence of unlawful entry into premises or theft, and, for

which upon conviction accused is sentenced to imprisonment without the option of a fine or a fine in excess of US$100,00.

Dissatisfied with this sentence he appealed to this court on the following grounds:

"1. The learned magistrate misdirected himself in his failure to consider the views of the complainant on sentence, moreso in view of the apparent close relationship between appellant and complainant's representative.
2. The learned magistrate misdirected himself in over – emphasizing the issue of tariff sentences without paying particular attention to and without meaningfully having regard to mitigatory factors in the matter which are that:
    2.1 Appellant was a youthful first offender
    2.2 The stolen property had been recovered in full, hence reduction of prejudice to the complainant.
    2.3 Appellant pleaded guilty to the offence, hence did not waste the court's time."

Appellant prayed for an order that the sentence be set aside and be substituted by a non-custodial sentence on condition of community service or payment of a fine in terms of the law. He submitted that the sentence imposed by the court *a quo* is so severe as to induce a sense of shock.

The magistrate's reasons for sentence appear quite comprehensive. He considered all the relevant factors such as that the appellant was a first offender, that he pleaded guilty to the charge, that all the stolen property was recovered. The magistrate was also quite alive to the need to impose a custodial sentence in deserving cases. He justified the custodial sentence on the grounds that the offences were serious and that a custodial sentence would be an effective personal and general deterrent. Also it is apparent that the magistrate took the fact that appellant broke into his own brother's business premises and stole property as aggravating.

Before an appellant court can agree that a sentence imposed by a lower court is so severe as to induce a sense of shock it must satisfy itself that the sentence does not only appear to be severe but that it is disturbingly so – see *Fungai Mavhundura* v *S* HH-91-02.

In *Stanley Takawira Matanhire & Ors* v *The State* HH-18-02 CHINHENGO J at p 3 of the cyclostyled judgment said;

> "The assessment of sentence is a matter in the discretion of the sentencing judicial officer. There must be a miscarriage of justice occasioned by the exercise of that discretion or some error or misdirection on the part of the judicial officer exercising that discretion see *S* v *Ramushu* SC-25-93 and *S* v *Mundowa* 1998 (2) ZLR 392 (A). In addition the sentence must not only appear to e severe, but it must be disturbingly so (*Ramushu supra*). An appeal court does not interfere with the sentencing discretion of a lower court unless the criteria I have outlined are satisfied."

In the present case the magistrate over-emphasised certain aspects of the case to the prejudice of the appellant. For example one of the reasons he considered a custodial sentence as appropriate is the fact that appellant committed the offence against his brother. In my view, the magistrate should have *mero muto* called the brother of the appellant to give his views as to the appropriate punishment. I say so for the simple reason that where there is a close relationship between the victim of a crime and the perpetrator, the court must ordinarily incline towards reconciling the parties. Quite obviously, the imposition of a long custodial sentence as is in this case does not necessarily achieve this very desirable end. Naturally, the appellant *in casu* is likely to become quite irreconcilable to his brother because of the hardship he would have suffered as a result of a long custodial sentence.

As it turned out, the complainant filed an affidavit after sentence had been passed in which he did not support appellant's incarceration. This court is empowered to consider the contents of the affidavit, in terms of section 38 (4) (a) of the High Court Act [Chapter 7:06]

The section essentially states that this Court may have regard in criminal appeals to all the circumstances, including events which have occurred after the date of sentence – see *Aitken* 1995 (2) ZLR 395 (S).

Also, the court a quo failed to consider other sentencing options before it settled for a custodial sentence. It is trite that this is an error or a misdirection that entitles an appellate court to interfere with the sentencing discretion of a lower court. It appears that in casu, the court *a*

quo treated the issue of deterrence as an overriding factor while ignoring the appellant's own personal circumstances. This is a misdirection see *S* v *Mayberry* 1985 (1) ZLR 192 (H) at 1941.

In my view, the personal circumstances which weighed very heavily in favour of the appellant were that, he was a first offender who pleaded guilty, that he stole from his own blood brother who had expressed his desire or wish not to have appellant imprisoned. Further, all the stolen property was recovered. Also appellant is employed as an assistant mechanic.

The victim of the crime *i.e* the appellant's brother one Tambudzai Kwashira pleaded with the court in the following words in his affidavit in support of an application for bail pending appeal;

> "5. It was not my intention that he be sent to jail, moreso in view of the relationship we share and also the fact that the company had fully recovered the full value of the stolen goods. I would have recommended a non-custodial sentence. I am advised that the views of complainant are very important on issues of sentence.
> 6. I also hasten to state that this development has just caused strife in the family and has also unnecessarily added another load on my shoulders as I have to cater for the applicant's dependents …" (my emphasis)

I am satisfied that if the factors which I have mentioned had been properly and fully considered the result should have been a non-custodial sentence. I say so because in a case like this, a court should incline towards a less rigorous form of punishment.

In the result, the sentence imposed by the trial court is set aside and the following is substituted:

Both counts as one for sentence:

18 months imprisonment of which 6 months imprisonment is suspended for 5 years on condition the accused does not within that period commit any offence involving unlawful entry into premises or theft and for which upon conviction the accused is sentenced to imprisonment without an option of a fine or to a fine in excess of $100,00.

The remaining 12 months imprisonment are suspended on condition accused performs 420 hours of community service at Nkulumane Police Station. The community service starts on 1 July 2015 and shall be performed over the weekend and public holidays between 8.00 am to 1pm and 2pm to 4pm to the satisfaction of the person in charge of the said institution.

Makonese J …… I agree

Marondedze, Mukuku, Ndove & Partners, appellant's legal practitioners
Prosecutor General, respondent's legal practitioners