MALVERN SIMON
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA & CHITAPI JJ
HARARE, 19 February 2018

Criminal Appeal

B. T. Munjere, for the appellant
F. I. Nyahunzvi, for the respondent

CHATUKUTA J: On 19 February 2018, we handed down an *ex- tempore* judgment in this appeal. The appellant noted an appeal against the judgment. We have been requested to avail written reasons and these are they.

The appellant was convicted of three counts of contravening s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to undergo 16 months imprisonment of which eight months were suspended on condition of future good behavior.

Aggrieved by the sentence, the appellant filed the present appeal contending that the sentence was excessive and induced a sense of shock given that:

a) he did not benefit from the commission of the offence;
b) he was a youthful first offender; and
c) the court did not take into account that he was a student and his future would therefore be ruined if he were to be incarcerated.

It was further contended that the *court a quo* did not consider community service.

The facts are that the appellant secured a placement on attachment with Boka Tobacco Auctions as part of the requirement for his degree studies. Boka Tobacco Auctions receives tobacco for sale from various farmers. It was a requirement that payment for tobacco sold on behalf of the farmers be deposited into bank accounts for the farmers. The appellant followed various transactions where three farmers had sold their tobacco. Two of the farmers could not receive payment because they did not have bank accounts. The third farmer had a bank account. The appellant then established some Ecocash accounts and diverted the proceeds which were due to the three farmers totaling $2 202.77 into the Ecocash account.

The matter was only discovered in respect of the first two farmers, when the two farmers opened accounts and requested that payments would be made into those accounts. Despite providing the banking details, money was not deposited into their respective accounts. At the time the offence was discovered, the appellant had not yet used the money. He remitted the money to Boka Tobacco Auctions for onward payment to the farmers.

It is trite that an appeal court will only interfere with the sentencing discretion of the lower court, if the lower court has misdirected itself and imposed a sentence that is not warranted under the circumstances.

In arriving at its sentence, the court *a quo* adopted the two tier approach to sentencing. It took into account the mitigating factors advanced by the appellant and the aggravating factors advanced by the state. It considered that the appellant was a youthful first offender who had pleaded guilty. In aggravation, it took into account that the offence was serious and premeditated. It further considered that the appellant stole money held by his employer although the money was due to the farmers.

The court finds no fault with the approach adopted by and the reasoning of the court *a quo.* The court takes note that the appellant will obviously be prejudiced in completing his degree if he is incarcerated. However the court is of the view that the aggravating circumstances in the present case outweigh the mitigating factors.

The appellant stole money which was due to farmers who are struggling to eke out a living farming tobacco. The amount that the appellant sought to deprive the farmers appear to be little. In one count it was just around $804. However, this was hard earned money by rural folk who did not even have accounts, because of the nature of their farming. It is also clear that the appellant instead of appreciating the gesture extended to him by Boka Tobacco Auctions to provide him an opportunity to realize his dream of obtaining a degree. He opted to spit at this gesture and in the process exposed Boka Tobacco Auctions to potential prejudice of having to compensate the farmers of the money in question. It is therefore clear that these factors are aggravating and called for an effective term of imprisonment.

The appellant submitted that the court *a quo* determined at page 7 of the record that under the circumstances of the commission of the offence, community service was warranted. The court however proceeded to impose a custodial sentence. This was a contradiction. The court, after determining that community service was a suitable punishment, erred by then imposing an effective custodial sentence. The record indeed shows an apparent contradiction. The explanation for the contradiction is on record when one reads the next sentence in which

the court indicated that a custodial sentence was warranted. The reference to a custodial sentence must mean an effective custodial penalty. The error is therefore clearly a typographical one. This is reinforced at the bottom of p 6 where the magistrate noted in point form his reasons for sentence that the aggravating factors disqualified the appellant from being a suitable candidate for community service. It is therefore not correct that the *court a quo* did not consider whether or not community service was an appropriate sentence. It did but discounted it as such.

We are however, of the view that in recognition of the mitigating factors, in particular the fact that the accused was a student who pleaded guilty and did not benefit from the offence a shorter custodial sentence ought to have been imposed.

Under the circumstances it is ordered as follows:

1. The appeal is partially successful.
2. The sentence imposed by the *court a quo* be and is hereby is set aside and substituted with the following

   "12 months imprisonment of which 6 months is suspended on condition of future good behavior."

CHITAPI J: agrees…….

Madanhi Mugadza & Co. Attorneys, legal practitioner for the appellants
National Prosecuting Authority, legal practitioner for the respondent