QHUBANI NCUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KABASA & DUBE-BANDA JJ
BULAWAYO 4 OCTOBER 2021

Criminal appeal - *Ex tempore* judgment

Ms. M. Nyika, for the appellant
K. Jaravaza, for the respondent

DUBE-BANDA J: This is an appeal against sentence only. Appellant appeared before the trial court charged with the crime of assault as defined in section 89(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on the 17th December 2019, he unlawfully assaulted the complainant by biting him once on the right index finger, intending to cause bodily harm or realizing that there was a real risk or possibility that bodily harm may occur.

He pleaded guilty and was consequently found guilty as charged. He was sentenced to eighteen months imprisonment of which six months were suspended on condition of good conduct. Aggrieved by the sentence, appellant noted an appeal to this court. The grounds of appeal, in summary are these: that the sentence imposed on the appellant is disturbingly inappropriate, and that the court *a quo* misdirected itself in failing to consider community service.

It is trite law that in every appeal against sentence the court hearing the appeal should be guided by the principle that punishment is eminently a matter of the discretion of the trial court. The appeal court should be careful not to erode such discretion, hence the further principle that the sentence should be altered only if the discretion had not been judicially or properly exercised. The appeal court is not permitted to usurp the sentencing discretion of the trial court.

However even in the absence of a material misdirection, an appeal court may be justified to interfere with the sentence. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court

is so marked that it can properly be described as "shocking" "startling" or "disturbingly inappropriate." See: *S v Rabie* 1975 (4) SA 855 (A) at 857; *Nndateni v S* [2014] ZASCA 122; *S v Malgas* 2001 (1) SACR 469 (SCA).

The ground of appeal that the trial court did not consider community service has no merit. The trial court did consider community service, and it found that such a sentence would trivialise the offence. It mischaracterised the facts when it found that appellant used an axe. He did not. He had an axe but did not use it in the fight. In the circumstances of this case, a careful balance of both mitigatory and aggravating circumstances will swing the pendulum in favour of a non-custodial sentence. In his favour appellant is a family man, sole provider of his family, two minor children, first offender, who pleaded guilty. He did not use an axe. He used his teeth to bite the complainant. The complainant had beat up his two children. The complainant's conduct amounted to provocation, this qualifies as a mitigatory factor in terms of section 238 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. These are weighty mitigatory circumstances. On the other hand, the injury suffered by the complainant was serious. The medical report shows that the injuries are serious and that he might not be able to properly hold objects. Notwithstanding these aggravating features my view is that a sentence of 18 months imprisonment is clearly too severe a sentence for what the appellant did.

In the circumstances of this case, I take the view that the sentence meted out to the appellant is disturbingly inappropriate. It is on this basis that this court is at large to interfere with the sentence of the trial court. In imposing the appropriate sentence the court should always balance the nature and circumstances of the offence, the personal circumstances of the offender and the impact of the crime on the community, its welfare and concern. See: *S v Banda and Others* 1991(2) SA 352 BGD) at page 355.

In the result, the appeal is allowed. The sentence of the trial court be and is hereby set-aside and substituted with the following:

1. 12 months imprisonment of which 6 months is suspended for 5 years on condition accused does not within that period commit an offence of which an assault on the person of another is an element and for which upon conviction he is sentenced to a term of imprisonment without an option of a fine.

2. The remaining 6 months imprisonment is suspended on condition accused performs 210 hours of community service at the Lupane Magistrate Court. Community service to commence on the 11 October 2021.

KABASA J …… I agree

Ndove & Partners, appellants's legal practitioners
National Prosecuting Authority, respondent's legal practitioners