NKULULEKO SIBANDA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & DUBE-BANDA JJ
BULAWAYO 24 JANUARY 2022

Criminal Appeal

T. Katenaure, for the appellant
T. Maduna, for the respondent

MAKONESE J: The appellant appeared before a Provincial Magistrate at Plumtree on the 7th of August 2020, facing allegations of smuggling in contravention of section 182 (2) of the Customs and Excise Act (Chapter 23:02). The appellant pleaded guilty and was sentenced to 3 years imprisonment with 1 year suspended for 5 years on condition of good behaviour.

Dissatisfied with the sentence, the appellant noted an appeal with this court.

Factual background

On the 25th of July 2020 at Nxele area, the appellant unlawfully smuggled 168 television sets, 50 sets television stands, 1 350 radios, 100 amplifiers, 36 speakers, 50 solar batteries, 19 boxed portable speakers, 10 018 pairs of footwear from Botswana into Zimbabwe. The appellant who was driving a Mercedes Benz truck registration number AFB 6413 entered the country using an undesignated point of entry near Plumtree border post did not declare the goods and failed to pay any duty for goods imported into the country. The appellant was arrested at Syringa near Plumtree driving towards Bulawayo. The goods were taken to taken to Zimbabwe Revenue Authorities (ZIMRA) at Plumtree Border post. The

goods were seized under ZIMRA notice of seizure number 000734L and the vehicle used in the transportation of the goods was impounded. The value of the smuggled goods was ZWL$4 106 238, 40 and the prejudice to the state in revenue was ZWL$3 520 176,62 in unpaid duty.

In his reasons for sentence the court considered that the appellant pleaded guilty and did not waste the court's time. The appellant exhibited remorse and contrition. The appellant apologised to the court for what he did. For that reason the court credited the appellant and suspended a portion of the prison sentence. The court took into consideration the fact that the appellant was a first offender who needed to be treated less harshly than repeat offenders. As against that the court *a quo* found that the appellant used an undesignated point of entry to smuggle a huge quantity of goods into the country. The appellant had succeeded in evading border authorities. The high value of the smuggled goods deprived the state of substantial revenue in unpaid duty. The court a quo determined that a non-custodial sentence would trivialize the offence. The learned magistrate in the court *a quo* cited the case of *S* v *Mukwinya Phiri* HB-86-17 where an accused had smuggled a motor vehicle. He was sentenced to 3 years imprisonment with one year suspended on the usual conditions. Effectively the accused served 2 years imprisonment. The learned magistrate reasoned that the value of the smuggled goods could very well exceed the value of a motor vehicle, and hence imprisonment was appropriate.

Submissions on behalf of the appellant

The appellant submitted that the court *a quo* did not exercise its sentencing discretion properly. It was argued on behalf of the appellant that the discretionary powers espoused in section 182 (1) of the Act empowered the court to impose a sentence of a fine on level 14 or 3

times the duty payable on the goods whichever is greater, or 5 years imprisonment or both. The appellant contends that the imposition of a custodial sentence in an instance were a statute provides for a fine was improper. The appellant contends that the approach towards sentencing should be that aid down in *S* v *Shariwa* 2003 (1) ZLR 314 (H). Further, the appellant argued that the case of *S* v *Austin Mukwinya Phiri* HB-86-17 was distinguishable and the facts of this matter and are not on all fours with the *Mukwinya* case (*supra).* It was further argued that the learned magistrate misdirected himself in the exercise of his sentencing discretion when he concluded that the imposition of a fine would trivialize the offence. It was submitted that the forfeiture of the goods meant that a sentence of a fine would not trivialise the offence. The appellant contends that the failure to consider the imposition of community service was a misdirection warranting interference by this court. For this proposition, the appellant relied on the case of *Square Zondo* v *The State* HB-210-19

Submission by the respondent

The state argued that in our jurisdiction when considering an appeal against sentence, the appeal court will be slow to intervene with the sentencing discretion of the trial court, even if it does not agree with the sentence. The appeal court must only intervene when there has been a misdirection or where the sentencing discretion has been unjudiciously exercised. On the facts of this case, the state argues that the sentence imposed by the court *a quo* was justified for the reasons advanced by the trial court. The state cites the case of *S* v *Mpofu* HB-73-03 where the court held that in sentencing an accused person it was necessary for the court to give reasons which ultimately would justify the imposition of either a custodial or non-custodial sentence. In this case, the state contends that the trial magistrate did not misdirect himself in his approach to sentence.

Whether the sentence imposed in the court *a quo* was appropriate

In this matter, and in any appeal, the appeal court must not seek to substitute its own sentence in place of that of the court *a quo* without proper justification for doing so. An appeal court must confine itself to the record of proceedings in the court *a quo* and assess whether:

(a) the sentence is unduly harsh and excessive;

(b) the sentence suffers from a misdirection on the part of the sentencing court;

(c) the sentence is not in line with similar cases of a similar nature;

(d) the court *a quo* did not judiciously exercise its sentencing discretion;

(e) the court *a quo* failed to take into proper consideration other sentencing options such as community service where this is appropriate;

(f) the sentence is totally irrational considering all the circumstances of the case;

Whilst the above list is not exhaustive, these are some of the important considerations the appeal court must consider in considering whether or not to substitute the sentence imposed by the court *a quo*. Above all these considerations, the overriding principle is that the sentence must be fair, just and equitable.

In this case, the appellant used an undesignated entry point to smuggle goods with a high value. From the quantities listed in the charge sheet, the goods were smuggled for commercial purposes and were not items for personal use. The appellant intended to prejudice the fiscus of a considerable sum of revenue and had succeeded in avoiding detection at the border post by using an unlawful entry point. It is important to observe that the appellant smuggled goods for commercial purposes. The sentences imposed in such cases must reflect the seriousness of the case. This case is distinguishable from the ordinary cases

where goods are smuggled in small quantities, possibly for personal use Smuggling is a serious offence and with porous borders, offenders should expect custodial sentences in serious cases. This is one of such serious cases. Imprisonment was called for. A non-custodial sentence would send a wrong message to the appellant and would be offenders. Courts must impose custodial sentences in serious cases of smuggling.

In *Ncube and Anor* v *The State* HB-205-12, the court held that the treatment of first offenders to non-custodial sentences is not automatic, but depends on the seriousness of the offence and the circumstances which surround the commission of the offence.

For these reasons, and accordingly, there was no misdirection on the part of the trial court in its approach to sentence.

In the result, the appeal be and is hereby dismissed.

Dube-Banda J …… I concur

Ncube & Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners