TATENDA GWINJI
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & MHURI JJ
HARARE, 27 September 2021

Criminal appeal

M.D. Hungwe, for the appellant
A. Muziwi, for the respondent

ZHOU J: This is an appeal against the sentence imposed upon the appellant following his conviction on a charge of extortion as defined in s 134 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The appellant was sentenced to 24 months imprisonment of which 6 months imprisonment was suspended for 5 years on condition that during that period the appellant does not commit any offence of which dishonesty is an element for which upon conviction he is sentenced to imprisonment without the option of a fine. This left an effective sentence of 18 months imprisonment.

The appeal is opposed by the respondent.

There are four grounds of appeal. The first ground of appeal is that the sentence imposed is not in line with similar decided cases. The second ground, which is essentially the same as the fourth ground of appeal is that the court *a quo* ought to have considered non-custodial sentences, particularly that the magistrate ought to have considered community service given that an effective sentence of 18 months imprisonment had been considered appropriate. The third ground is that the learned Magistrate gave undue weight to the aggravating factors but did not consider the mitigating factors.

The law in regard to the approach to sentence on appeal is settled. The appellate court has no discretion in relation to an appropriate sentence. It is the trial court which has a discretion. The appellate court will not readily interfere with a sentence imposed by the trial court unless the discretion was not exercised judicially in the sense of there being a misdirection regarding how that sentence was imposed or the sentence is so excessive as to induce a sense of shock.

As to whether the court *a quo* did not give weight to the mitigating factors, it is not a requirement that in the reasons for sentence the court must make an explicit reference to each and every factor mentioned in mitigation. It is sufficient if it is clear to the appellate court that the trial court is sensitive to and did consider the mitigating factors. In this case the mitigating factors are on record and were clearly considered by the court which had invited the appellant to make submissions in mitigation. The court *a quo* clearly noted the serious aggravating features of the offence and how they outweighed the mitigating factors. These aggravating factors include that the appellant was a repeat offender in respect of a case involving dishonesty, the offence itself was serious, and was carefully planned and executed. The commission of the offence exposed some state institutions to disrepute because of the greed and dishonesty of the appellant. Clearly, therefore, we find no misdirection in this respect.

We have not been referred to any case in which a serious case of extortion such as the one involved received a lesser penalty than that imposed by the learned magistrate. For this reason, and given the features of the offence, the suggestion that the sentence is not in line with decided cases is not supportable.

Regarding the consideration of community service, it is clear that the court *a quo* did consider it or a fine, and ruled these out as inappropriate. Once he considered that this was not an offence in which non-custodial sentences would meet the justice of the case, there was no need for the court to conduct an inquiry into where and how the appellant could perform community service. Such an exercise would be superflous. In this case, we find no injudicious exercise of discretion. The offence itself is a very serious one. It was well-planned and executed. The facts that the appellant did not benefit or that the complainant was not prejudiced are not to the credit of the appellant. These only arose because of the trap which was set leading to the arrest of the appellant. He was clearly determined to benefit. Further, the suspended penalty imposed on the appellant previously was clearly insufficient to deter him from committing further offences. The learned

Magistrate correctly concluded that this was an accused person who deserved nothing less than a custodial sentence.

In the result the appeal against sentence is dismissed.

MHURI J Agrees ……

Kadzere, Hungwe and Mandevere, appellant's legal practitioners
Prosecutor General's Office, respondent's legal practitioners