HB 153/17
HCA 112/16

MAXWELL DOUGLAS NYIKADZINO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
BERE & MATHONSI JJ
BULAWAYO 5 & 15 JUNE 2017

Criminal Appeal

E. Mandipa for the appellant
Ms S. Ndlovu for the respondent

BERE J: The appellant who was the headmaster of Mapiravane Secondary School in Chirumhanzu appeared before a magistrate in Mvuma and pleaded guilty to four counts of fraud and forgery in breach of section 137 (2) of the Criminal Law (Codification and Reform) Act [Chapter 9:23], involving $1 150,00 which he had fleeced the school of.

Upon conviction the appellant was sentenced to a total of 12 months imprisonment of which 2 months were suspended on condition of future good behaviour. A further 4 months was suspended on condition of restitution to the concerned institution leaving the appellant with an effective 6 months imprisonment.

This appeal before us is against that sentence and the grounds of appeal are that the sentence imposed by the court *a quo* was manifestly excessive so as to induce a sense of shock more particularly in that the court *a quo* misdirected itself in not considering the imposition of a fine or alternatively failed to consider the imposition of community service as an alternative to a straight term of imprisonment.

Before recasting her position in court the State Counsel had sought to support the sentence imposed by the lower court.

In its reasons for sentence the court *a quo* properly captured both the mitigating and aggravating factors of this case and also properly referred us to the basic sentencing guidelines as expounded in some decided cases from this court, *viz S* v *Shoniwa*[1] and *S* v *Pedzisai*[2].

Despite the lower court's commendable attempt to keep itself on rail it seems to me it made two fundamental errors in its endeavour to arrive at a just sentence which puts this court at large on the question of sentence.

A closer look at the sentencing provisions of the offences charged makes it clear that it speaks first to a fine not exceeding level fourteen. This court has stated on times without number that where the sentencer settles for such a short period of imprisonment, that sentencer must give serious thought to the imposition of either a fine or alternatively community service where the sentence falls within such a grid. See the position taken by MATHONSI J in *S* v *Ndabenkulu Mlilo*[3] and the position eloquently expressed by NDOU J in the much celebrated case of *S* v *Shariwa*[4]. It is wrong and it will forever remain a form of misdirection if the lower court continues to ignore or underplay such simple guidelines in sentencing.

It has also been stated in many decisions from this court that it is not sufficient for the lower court to gloss over the imposition of community service by merely singing such phrases like "I have considered the imposition of community service but I think it would be trivializing this offence". The record of proceedings must demonstrate beyond doubt that an enquiry into the possibility of placing the accused on community service would have been carried out. There is virtually nothing in this record to show that the curt *a quo* seriously considered any other form of penalty other than imprisonment.

1. HB-37-03
2. HB-184-02
3. HB-131-10
4. 2003 (1) ZLR 314 (H)

Sentencing is a delicate process that calls for a serious assessment of the individual convicted before the court against macro-societal interest. It calls for careful weighing of those factors in both mitigation and aggravation guided by a full appreciation of the devastating effects of imprisonment. Magistrates must not derive personal gratification by routinely throwing convicted persons into prison without a thorough assessment of the aforesaid competing interests. I cannot do better than borrow the views expressed by REYNOLDS J in the case of *S* v *Moyo* where the learned judge (as he then was) put it as follows:

> "As a matter of general comment, it is most important that the magistrates should equip themselves with sufficient information in any particular case to enable them to assess sentence humanely and meaningfully to reach decision based on fairness and proportion. The needs of the individual and the society should be balanced with care and understanding."[5]

There can be no question that the offences which the appellant was convicted of were serious in this case. These were four cases involving high levels of dishonesty which involved the appellant doctoring certain documents in an effort to conceal his fraudulent conduct whose total prejudice to the school was $1 150,00 which is not a small amount by rural standards. But against this the magistrate was dealing with the appellant who was aged 55 years (approaching the twilight of his career), and who up to this stage had lived a blameless life. The appellant had lost his employment as a result of this case and had unequivocally pleaded guilty to the offences charged. With respect to the court *a quo*, there was really no need to deal with the appellant in a high handed manner because of these compelling mitigating factors.

This case reminds me of the wise counsel by GUBBAY JA when he remarked as follows:

> "The dishonest appropriation of public moneys can never be viewed lightly, especially where the sum involved is enormous. Regrettably, despite warnings from the Courts, thefts by persons in positions of trust have not over the past few years significantly decreased, and factors of deterrence and public expectations regarding punishment must be taken as paramount considerations.

5. S v MOYO 1984 (1) ZLR 74 AT P 77 (E-F)

> Nonetheless, such factors must not be permitted to weigh so heavily as to negate others which go in some way to lessen the seriousness of the offence. What is to be guarded against is such an excessive devotion to the cause of deterrence as may so obscure other relevant considerations as to lead to a punishment which is disparate to the offender's deserts. I cannot conceive of any principle which can justify, for the sake of deterrence and public indignation, the imposition of a sentence grossly in excess of what, having regard to the crime and to the degree of the offender's moral reprehensibility, would be fair and just punishment".[6] (my emphasis)

Everything said, this is a matter where the appellant should have been spared the agony of a prison term and instead sentenced to pay a fine coupled with a wholly suspended prison term to compel him to disgorge what he had unlawfully taken.

In the result the sentence of the court *a quo* is hereby set aside. It is substituted by the following sentence:

> "The appellant is sentenced to pay a fine of $200 or in default of payment to serve 30 days imprisonment. In addition the appellant is sentenced to 12 months imprisonment of which 6 months is suspended for 5 years on condition the appellant does not within that period commit any offence in which dishonesty is an element and for which upon conviction he will be sentenced to a term of imprisonment without the option of a fine. The remaining 6 months is suspended on condition the appellant restitutes the complainant in the sum of $1 150,00 through the clerk of court Mvuma on or before 30 September 2017.

Mathonsi J …….. I agree

Gundu & Dube appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners

6. S v GOROGODO 1988 (2) ZLR 378 AT PP 382-383