TICHATONGA CHIUREKI
versus
THE STATE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA AND GOWORA JJ
HARARE, 29 June and 7 July 2004

Criminal Appeal

Mr *B. Chikowero*, for the appellant
Mr *V. Shava*, for the respondent

GOWORA J: This appeal is against a sentence of 8 months imprisonment which was imposed by the magistrate sitting at Chivhu on a single conviction under section 27(b) of the Firearms Act [*Chapter 10:09*]. There is no appeal against conviction as the appellant tendered a plea of guilty to the charge.

The allegations against the appellant are that he and the complainant were both at the time of the offence were employed at Chivhu Prison camp as guards. At about 15.30 hours on 27 August 2003, both of them were on duty, with the complainant being the guard in charge of that day's detail. The complainant then ordered all the prisoners to stop work for the day. There was amongst them a prisoner who was in the process of mending the appellant's shoes. He too stopped working. The appellant was irritated by this as his shoes had not been completed. He then approached the complainant and demanded to be told why he, (complainant) had stopped the prisoners from work before his shoes had been completed. The appellant who was armed then approached the complainant and advised him that he was going to shoot him. He pointed the firearm at the complainant. The appellant's colleagues then interposed themselves between the appellant and the complainant. He was thereafter disarmed and the firearm removed from him.

In passing sentence, the trial magistrate said he had taken into account everything that had been said on his behalf in mitigation. He stated that nevertheless the offence of contravening s 27(b) of the Act was a very serious offence. He also stated that what was aggravating was that the appellant had pointed a firearm at a fellow officer. He also found that the appellant had betrayed the trust that had been reposed in him by his employer in

entrusting him with the firearm. He said that the offence was a serious one warranting a term of imprisonment which would act as a general deterrence not only to the appellant but to other like minded offenders.

Mr *Chikowero*, on behalf of the appellant, both in his heads of argument and before us, submitted that the magistrate in the court a quo had misdirected himself in not suspending part of the sentence of 8 months imprisonment which he had imposed on the appellant. He stated that the misdirection itself lay in the refusal by the magistrate to provide reasons as to why he was not suspending a portion of the sentence imposed upon the appellant. Counsel for the appellant did not proffer any authority for this proposition. In my view it is not a rule of law that the sentence of every first offender who is sent to prison ought to be suspended. The failure by the magistrate to state why he is not suspending a portion of the sentence in question does not to my mind amount to a misdirection. The magistrate was of the view that the offence was serious and he then passed a sentence which in his view reflected the moral blameworthiness of the appellant. I do not accept that there was a misdirection in his failure to suspend a portion of the sentence of 8 months.

The act prescribes that any person who is guilty of contravening s 27(2) (b) of the act shall be liable to a fine not exceeding $400 000.00(see S.I. 192/03) or to imprisonment for a period not exceeding two years or to both such fine and imprisonment. The trial court sentenced the appellant to serve 8 months imprison for the offence. The discretion as to what sentence to give for an offence is left to the judicial officer before whom the accused appears. I am therefore not swayed by the proposition advanced on behalf of the appellant that in view of the provision of a fine as an option, the failure by the magistrate to consider a fine amounts to a misdirection. In my view to hold accordingly would be fettering the discretion of the magistrate who has in this instance decided on a term of imprisonment which is within the limits provided for in the statute concerned.. I find no misdirection. I am fortified in this view by the remarks of CHINENGUNDU J in the matter of *Mazarire v S* HH212/92 at page 3 of the cyclostyled judgment stated as follows:

> "In general however there is no rule of law that every first offender who is to be imprisoned is entitled to have a portion of the period suspended. It must be left to the individual presiding officer. See *Gorogodo v The State* SC 192/88 page 6. It can therefore not be regarded as a misdirection in this case when the trial magistrate did not suspend a portion of the 7 years prison term on condition of future good behaviour. I am of the view however that the learned trial magistrate should have considered the question of suspending a portion of the 7 year term on conditions of

> restitution. Failure to this in my view was a misdirection justifying this court in interfering with the sentence to the extent that the appellant should be given a chance to make restitution if he so wishes."

The appellant was indeed a first offender as was submitted by his counsel. It is trite that these courts tend to treat first offenders with a measure of leniency and are therefore as a general rule less inclined to sentence a youthful first offender to a term of imprisonment. Failure however to sentence a first offender to a fine or other sentence instead of a term of imprisonment does not amount to a misdirection. The Act prescribes a fine not exceeding $400 000.00 or two years imprisonment or both such fine and such imprisonment. The eight months that were imposed on the appellant are not the maximum sentence allowable under the statute. The level of the fine that the legislature has seen fit to prescribe for the offence, demonstrates to my mind the gravity with which the offence as a whole is regarded.

In *Rutsvara v S* SC 2/90 McNALLY JA stated at page 3 of the judgment:

> "It is trite that where the State lays down a monetary penalty as well as a period of imprisonment, the court must give consideration first to the imposition of a fine. It will normally reserve imprisonment for bad cases".

In *casu*, the appellant, who was subordinate to the complainant, approached him, pointed his firearm at the complainant and threatened to shoot him. According to the state outline, the appellant had to be blocked by his colleagues and they are the ones who disarmed him. Although the appellant denied to the magistrate that he had cocked the rifle he did not deny the threat to shoot neither did he deny that he had his finger on the trigger when he was disarmed. It is my view that this is a bad case as mentioned by the learned judge of appeal in *Rutsvara's case* (supra) and the approach of the magistrate cannot in my view be faulted.

In aggravation the trial magistrate, found that the appellant pointed the firearm at his colleague who had apparently not harmed him any way. Although the appellant is aged 21 he was sufficiently mature to be given employment as a prison guard and in that capacity to be entrusted with a firearm. The other aggravating feature is that the appellant was angered, unjustifiably, by the complainant's proficiency at doing his job. The appellant had no reason for feeling aggrieved in the circumstances as there was nothing wrong in the complainant making the prisoners stop working when it became necessary. In fact it is somewhat reprehensible for the appellant to have his shoes mended by the prisoners free of charge.

I cannot accept that the appellant acted in a fit of uncontrolled passion as is submitted in his heads of argument, what did he have to be passionate about. I accept the submission by appellant's counsel that he was young, a mere 21 at the time that sentence was passed on him, yet consider that the sentence meted out by the court *a quo* is not out of line with the circumstances of the case. A fine would, in my view, tend to trivialise the seriousness of the conduct of the appellant. There was no misdirection on the part of the magistrate in imposing a prison term as opposed to a fine even in light of the age of the appellant.

Although there are mitigatory features in this matter such as, that the appellant is a first offender, who pleaded guilty to the charge and co-operated fully with the police, nevertheless it is the view of this court that the magistrate did not misdirect himself in any manner. The appellant had to be disarmed by his colleagues after pointing the firearm at the complainant. As to whether or not the firearm had ammunition, the appellant had been issued with the firearm to guard prisoners and one would expect that in those circumstances the firearm would have been loaded. Irrespective of whether or not the firearm was loaded, the appellant threatened to shoot the complainant, in a situation where there had been no provocation, and where the complainant as the guard in charge was doing his job, which did not interfere in any manner with any rights of the appellant. This is conduct that is most reprehensible and in my view the sentence of imprisonment was warranted. Although the appellant's counsel speaks of the appellant having been provoked, I am unable to see how a senior officer in a position of some responsibility provokes his junior by making a correct decision which is not to the liking of the latter. Granted, the appellant lost his employment as a result of the offence, which in my view is a natural consequence after the commission of an offence of a serious nature such as this. Too much emphasis however should not be placed on the fact that the appellant has lost his employment. This is a feature of mitigation which should be considered in the light of all the circumstances of the case including the aggravating features.

The reasons for sentence by the trial magistrate are somewhat sketchy, but it is the view of this court that there is sufficient detail therein for this court to be able to discern the reasons why the sentence that he imposed was imposed. The lack of detail does not to my mind point to a misdirection, but rather to the fact that he did not explain why he did not consider the imposition of a fine as opposed to a prison term. I am not convinced that his failure to mention a fine amounts to a misdirection. He was clearly, as his reasons show, of

the view that the matter before was so serious that only a prison term would meet the justice of the case. This is the 'bad case' referred to in *Rutsvara's case*(*supra*).

In the absence of a misdirection on the part of the trial magistrate, this court as an appeal court cannot interfere with the sentence passed upon the appellant. In my view the appeal is without merit and it is accordingly dismissed.

Gutu & Chikowero Attorneys-at-law, appellant's legal practitioners
Civil Division of the Attorney-General's Office, respondent's legal practitioners

KAMOCHA J I agree……