THE STATE
vs
FORWARD ZUZE NDUMO

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE 31 March, 2004

Criminal Review

MAKARAU J: The accused, aged 23, was convicted of one count of malicious injury to property. He was sentenced to 2 ½ years imprisonment, of which 6 months was suspended on condition of good behaviour.

The accused was a passenger on a bus belonging to Tombs Bus Service, enroute to some rural destination outside Kwekwe. He was in the company of a friend. The accused's friend had loaded a bed onto the bus for which he had not paid. An argument ensued when the bus conductor demanded payment for the bed. During the argument, the accused first threatened to deflate the tyres of the bus after which he kicked and shattered a window to the bus. He was restrained from doing so and was taken into the bus for the purposes of handing him over to the police. He then shattered a second window to the bus. The two windowpanes were valued at $143 000-00.

The accused was properly convicted on the charge.

In assessing sentence, the trial magistrate correctly observed that the accused had behaved like a hooligan and that a deterrent sentence had to be imposed. The sentence imposed on the accused however, induces a sense of shock.

The approach that this court and magistrates courts have taken in sentencing persons convicted of the offence of malicious injury to property was spelt out in *S v Piwa* 1990 (2) ZLR 312 (HC), 316 B in the following terms:

> " It has hitherto been the practice of most magistrates to impose a fine in the majority of malicious injury to property cases. This approach has never been questioned, criticized or censured."

The lack of censure or criticism referred to by the learned judge seems to be borne out by the sentences meted out by this court or confirmed on review and appeal.

In *S v Padare* HH 215/86, the accused was convicted by a magistrate of malicious injury to property after he shattered a windowpane to a bus. The damage was then valued at $200-00. The magistrate sentenced the accused to 6 months imprisonment. On review, REYNOLDS J (as he then was) held that the sentence was excessive and induced a sense of shock. In reducing the sentence and substituting it with a fine, he held that a custodial sentence was not called for in the circumstances of the matter.

In *S v Piwa* 1990 9ZLR 312 (HC), the accused was a passenger on a bus. When she alighted, she found that her property had been damaged whilst on the bus. In a fit of anger, she picked up a stone and threw it at the departing bus, shattering a windowpane. She was sentenced to a fine of $700-00 or in default of payment, three months imprisonment. On review, the sentence was held to be too severe in the circumstances of the matter and was substituted by a sentence that allowed the accused to compensate the complainant by a stipulated date.

In *S v Chinzenze* 1998 (1) ZLR, 470, GARWE J (as he then was), reviewed the matter of *S v Robson Gabi & Marshall Gabi* CRB 9-10/98, among other matters. Robson and Marshall Gabi were convicted after pleading guilty to a count of malicious injury to property. They admitted that after an argument with a bus conductor, they took stones and damaged the front windscreen and five side windowpanes of a bus, causing damage estimated at $1 400-00. The trial magistrate considered a sentence of $450-00 for the first accused and of $ 1 200-00 for the second. He then converted these penalties into hours of community service in a manner that did not find favour with the reviewing Judge. The sentence was reviewed not because it was lenient but because it had been arrived at in a manner that was not in accordance with the criminal procedure on community service. The fine imposed on the accused following their conviction was neither criticized nor censured.

In the cases where a term of imprisonment has been imposed following a conviction on a charge of malicious injury to property, the offence would have been aggravated by premeditation, extensive damage to the property, if the damage to the property was caused by arson, the possibility of loss of life or injury to people and the

motive of the accused. Political and general defiance of authority have been held to be aggravating motives.

In *S v Tovakepi* 1972 (2) RLR 372, a term of imprisonment was justified on the basis that the commission of the offence was to demonstrate a general defiance of authority and was part of a general out break of lawlessness which was occurring in the area at that time. As such, the judge took a grave view of the offence.

In *S v Stanley Lameck* HH235/77, the accused was sentenced to 15 months imprisonment for piercing a water pipe belonging to Shamva Mines and causing damage worth $500-00. Imprisonment was justified on the basis that the extent of the damage was excessive. The same view was taken in *S v Matake* SC 158/82 where the accused was sentenced by the trial magistrate to 5 years imprisonment with labour for burning a motor vehicle that had been involved in an accident and had killed a pedestrian. The damage to the motor vehicle was estimated at $ 4 121-00, a considerable sum of money in 1982. On appeal, the sentence was reduced to an effective18 months imprisonment. In sentencing the accused to 36 months and suspending half the sentence, the learned Judge of Appeal had this to say:

> "I would accordingly vary the sentence to one of 3 years' imprisonment, marking the gravity of the offence particularly having regard to the damage caused…."

In *S v Matizanadzo* GS 179/81, the accused destroyed his employer's dairy equipment worth $500-00. He had been sentenced to 12 months, which was reduced to 8 months on review. The reviewing Judge was of the view that the offence was sufficiently serious to warrant imprisonment.

In the matter under review, the accused is a first offender who pleaded guilty to the charge. There was no premeditation on his part. His behaviour, though wanton, was not general defiance of authority nor was it motivated by anything other than misplaced loyalty to a friend. The damage to the bus cannot in today's terms be classified as extensive. There are no aggravating features in this matter that would warrant the imposition of a custodial sentence. Having ruled out the possibility of the accused paying compensation to the complainant, the trial magistrate should have seriously considered community service in this matter.

The accused was sentenced on 17 September and has already served a term of imprisonment in excess of 6 months. He should not be further burdened. He is entitled to his immediate release.

On the basis of the foregoing, I will set aside the sentence imposed on the accused and substitute it with the following:

"6 months imprisonment"

NDOU J agrees:……