

THE STATE
versus
INNOCENT NHONGO

HIGH COURT OF ZIMBABWE
MAWADZE & ZISENGWE J J.
MASVINGO, 10 OCTOBER, 2023

Criminal Review

ZISENGWE J: This review addresses the often vexed question on the propriety of the imposition of sentence of both a fine and a term of imprisonment generally and the imposition of a fine and an order of community service in particular.

The background

The accused was convicted in the Regional court sitting at Masvingo of the offence of assault in contravention of Section 89 of the Criminal Law [Codification and Reform] Act, [Chapter 9:23] (“*the Criminal Law Code*”). He was initially charged with the crime of attempted murder the allegations being that he had stabbed the complainant with a knife on the left side of the chest with the mouth of killing him. Although he denied the charge, accused nevertheless tendered a limited plea wherein he admitted criminal liability to the lesser charge of assault. The limited plea was accepted by the state resulting in his conviction of that charge as aforesaid.

Following his conviction the accused was sentenced as follows:

To pay a fine of \$250 or 3 months imprisonment. In addition 18 months imprisonment is suspended on condition accused completes 525 hours of community service at Ngomahuru Psychiatrists hospital, Masvingo on the following terms.

[The terms for the performance of the community service order where then spelled out]

The accused was legally represented during the proceedings. It would however appear that the legal practitioner exited the picture in the wake of the sentencing of the accused.

No sooner had accused been sentenced did he file a statement in terms of Section 57(3) of the Magistrates Court Act, [Chapter 7:10] requesting a review of the sentence imposed on him.

Section 57(3) of the Magistrates Court Act permits an accused to submit such a statement requesting a review of the proceedings. The said provision reads:

“57 Review

(1).....

(2).....

(3).....*The accused persminany criminal case in which the court has imposed a sentence which is not subject to review in the ordinary course in terms of subsection(1) may, if he considers that such sentence is not an accordance with real and substantial justice, within three days after the date of such sentence, in writing, request the clerk of court to forward the regard of proceedings in terms of subsection(1) and the clerk of court shall thereupon deal with the matter in terms of subsection (1) as if the case were subject to review in the ordinary course.*”

It is common cause that the present matter was exempt from “automatic” review, i.e., review in the ordinary course as prided for in subsection(1) of Section 57 by virtue of him having been legally represented during the proceedings.

In his statement the accused expressed the new that the sentence amounted to some “double jeopardy” on his part. He averred that the sentence imposed on him left him with a sense that he had between punished him for the same offence because if he failed to pay the fine he ran the risk of being imprisoned yet in the same breath he was still obliged to perform 525 hours of community service.

When the accused’s request for review was placed before me, I directed a minute to the learned Regional Magistrate who had sentenced accused eliciting his response thereto. He wrote back justifying the sentence chiefly on the basis that the sentencing provision permitted the court to impose a fine (not exceeding level 14) and imprisonment(not exceeding 10 years) to both. He also pointed out that imprisonment may be suspended on condition of community service. He therefore concluded by expressing the new therefore that the sentence he imposed did not amount. It is quite apparent that the dichotomous news expressed by the accused on the one hand and the

learned Regional Magistrate on the other stems from the nature of the inquiry, whereas the latter justified his sentence solely on the basis of its competence, the accused's discontent stems from its appropriateness. The two concepts are separate and distinct. A sentence may be competent yet in appropriate. By way of illustration, a heavy custodial sentence for trifling offence may (subject to the relevant sentencing provision) be competent but inappropriate for its harshness and vice-versa. Unfortunately regrettably the accused conflated the competence of the sentence with its appropriateness. Be that as it may I will proceed to deal with both.

Whether the sentence is competent

Broadly speaking, the imposition of a sentence of both a term of imprisonment and a fine is permissible. The sentencing provision provides as much expressly. In the same vein, S358 (3) (d) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] (the CPE&A) provides expressly that a sentence of imprisonment may be suspended on condition accused.....service for the benefit of the community as a section thereof, i.e., community service. An extrapolation of the two principles above, shows that the learned Regional Magistrate's reasoning that the sentence imposed was competent in the same that it was permissible in terms of the applicable provisions cannot be faulted. As a matter of fact the imposition of a fine compiled with a term of imprisonment is done as a matter of routine, the usual trend being to suspend the prison term thereby imposed on condition the accused does not re-offend. What sets this apart is

Whether the sentence is appropriate substantial justice

Here the inquiry is different. The inquiry shifts to whether the overall sentence meets the litmus test of being "*in accordance with real and substantial justice*"

Here the inquiry is different. The inquiry must be assessed against the trite principle that matters of sentence are pre-eminently in the discretion of the trial court and that the appeal court is not at liberty to underfere with the exercise of the trial courts exercise of discretion unless same is vitiating by some gross irregularity. In *Sv Munday* 1998 (2) ZLR 392 (HC), the court referred with approval to the passage in *Sv de Jager & Anor* 1965 (2) SA 616 (A) at 628-9 where *Holmes JA* said the following,

The above sentiments

"It would appear to be sufficiently realised that a court of appeal does not have a general discretion to avelliate the sentences of the trial courts. The matter is governed by principle it is the trial court which had the discretion, and a court of

appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated by irregularly as misdirection or is so severe that no reasonable court could have imposed. In this latter regard, an accepted test is whether the sentence induces a sense of shock, that is to say, when there is striking disparity between the sentence passed and that which the court of appeal would have imposed. It should therefore be recognised that appellate jurisdiction to interfere with punishments is not discretionary but, on the contrary, is very limited.”

The above sentiments though expressed in the context of appeals against sentence find equal application to reviews brought in terms of Section 57(3) of the Magistrates Court Act. The imposition of a sentence of both a fine and an effective custodial sentence, though legally permissible is only resorted to in rare situations. One situation which springs to mind relates to fraud cases where such a sentence serves to both disgorge the offender of his/her ill-gotten gains by means of the fine and to incarcerate him to achieve the retributive object of the punishment. A few illustrative cases will suffice. In *Sv Tawengwa S-28-90*, a businessman imported goods worth \$323 619 using a forged permit. He sold the goods for an undisclosed profit and it was not possible to order forfeiture of any of the goods. He was sentenced by the High Court to a fine of \$400 000 AND to an effective sentence of imprisonment ensuring not only that the accused was deprived of his unlawful profit but was also punished for the offence. Somewhat similar facts played out in *S v Gujral HH 73-90* where the accused fraudulently imported a class of goods using a permit meant for a different type of goods. He sold those goods for a profit. He was sentenced to both a heavy fine and an effective term of imprisonment of 4 years. That sentence was upheld by the High Court on appeal.

The imposition of both a fine and an effective term of imprisonment even if one is suspended on condition that the accused renders unpaid community service work must be an unusual form of punishment. It must be justified on some rational basis, the disgorgement of ill-gotten gains being one. It is not a form of punishment which can be imposed capriciously or whimsically.

No justification was given for the imposition of both a fine and an “effective” term of imprisonment, albeit one suspended on condition of performance of community service leaving everyone to second-guess the reason thereof. The sentence thereof lends itself to being interfered with, which decision has not been arrived at lightly.

We are aware that the accused that the accused in case No. HCMSCR 1249/23 has since sought and obtained an order for the suspension of the community service order pending the determination of this review. Unfortunately we have not been informed whether or not if the accused has in the interim paid the fine component of the sentence.

We however wish to stress that the offence committed by the accused is inherently serious. He should count himself lucky with getting away with a non-custodial sentence. The injuries sustained by the complainant were described in the medical report as

“a stab wound approximately 2cm in length with depth of approximately 3cm over one left loin region [and] Bruised iliac region”

The injuries were described as moderate and that the force applied was considered by the doctor who performed the examination as serious. The possibility of permanent injury was however discounted.

Gratuitous violence particularly one where the use of dangerous weapons such as..... is always frowned upon. The need to respect the bodily integrity of fellow beings can never be overemphasized, In the present case we believe the fine imposed coupled with a term of imprisonment wholly suspended on condition of good behaviour is sufficient punishment as it meets both the retributive and deterrent objects of punishment. Implicit on this is that the order for community service naturally falls away.

Accordingly the following order is hereby made

- a) The conviction is hereby confirmed
- b) The sentence imposed by the trial court is hereby set aside and substituted with the following

“Accused to pay a fine of US\$250 (or its equivalent in Zimbabwe dollars calculated at the official bank rate) or in default of payment 3 months imprisonment. In addition 18 months’ imprisonment which is wholly suspended for 5 years on condition accused does not within that period commit any offence involving violence upon the person of another and for which upon conviction accused is sentenced to imprisonment without the option of a fine.

- c) The accused to be brought before the court without undue delay to be informed of the outcome of this review.

ZISENGWE J.....

MAWADZE J agrees.....