

OWEN MUNODEYI

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA AND MAKONESE JJ
BULAWAYO9 AND 28 NOVEMBER 2013

G Nyoni, for appellant's counsel
T Hove, for state counsel

Criminal Appeal

KAMOCHA J: The appellant who was aged 33 years, was charged with contravening section 157 (1) (a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] "Possess 2 grammes of Cocaine". The allegation was that on 16 January 2012 and at house number 15 Beech Avenue, Sauerstown, Bulawayo appellant unlawfully possessed 2 grammes of cocaine. He pleaded not guilty but was convicted after a trial despite his protestations.

He was sentenced to 18 months imprisonment of which 4 months imprisonment was suspended for 5 years on condition that he does not within that period commit any offence involving the possession of cocaine upon which if convicted is sentenced to imprisonment without an option of a fine. His effective sentence was one of 14 months imprisonment.

The appellant was dissatisfied with the above sentence and filed an appeal with this court on the following grounds:-

"The sentence imposed upon the appellant by the learned Magistrate was and is excessive thereby inducing a sense of shock to the extent that this court will be justified to interfere with it in that:-

- (1) The learned Magistrate failed to consider community service as an option to sending appellant to serve an effective term of imprisonment.
- (2) The learned Magistrate failed to provide reasons be it verbally or in writing, before passing sentence.
- (3) The learned Magistrate basically paid no attention at all to all the submissions made in mitigation and imposed his sentence soon after submissions thereof were made.

Wherefore appellant prays that the sentence imposed by the learned Magistrate upon him on 12 June 2012 be set-aside and replaced with a sentence to the effect that he pays a fine coupled with a suspended sentence or such other sentence as the court, in the exercise of its discretion, may consider appropriate in the circumstances.”

The trial Magistrate’s reasons for sentence were these:-

Reasons for sentence

“In arriving at an appropriate sentence the court considered all that was said by the accused through his defence counsel in mitigation. The court also considered accused’s personal circumstances again through his legal counsel.

In aggravation the court considered that dealing in hard drugs is a very serious offence punishable with a prison term. The defence counsel’s submission in mitigation were very misplaced because accused as he stands was not a proper candidate for be it a wholly suspended sentence or community service.

The defence counsel was very much aware that the court was not going to consider either of the two sentences he mentioned above given that accused is not a first offender in so far as hard drugs are concerned. Accused has a previous conviction which forms part of this record marked (exhibit No. 2). Accused was lucky to have been handed a fine or 15 days imprisonment when he committed that offence previously. This time around it is very unfortunate that the court was on full guard and the court is aware of the effects of hard drugs.

The accused was also not contrite by pleading not guilty to the offence he knew he had committed and the court had to convict him after a full serving trial.

In a bid not to trivialise this charge of dealing in hard drugs because for one to deal in these hard drugs one has to be in possession first. The court saw it fit, proper and necessary to incarcerate the accused so as send a very crystal clear signal to the accused and would be offenders that this charge they tend to take for granted is a very serious offence.

Lastly as mentioned above accused is a repeated (sic) offender who does not /is not willing to reform. Truly and in fairness accused was not a proper candidate for community service let alone a wholly suspended sentence. Again like said before the defence counsel wanted to mislead the court or he was testing the waters, which waters were too deep this time around. Accordingly incarceration at the end of the day was fit, proper and necessary given that accused is someone who does not want to repent and lead a crime free life.”

The appellant complained that the trial court did not provide any reasons for sentence

when it pronounced the sentence. He alleged that immediately after mitigation the trial court just pronounced the sentence.

The trial court did not even give full reasons orally for the sentence imposed and undertake to provide written reasons as soon as reasonably possible. The court just pronounced the sentence. That was improper and unacceptable. The appellant was entitled to know why the court passed the sentence it did.

Appellant's legal practitioner wrote to the trial magistrate on 10 July 2012 pointing out to him /her that he /she did not give reasons for sentence at the trial. He alleged that after he had ended addressing the court in mitigation the court immediately pronounced the sentence without reciting any reasons for sentence. The legal practitioner went to the clerk of court the following day and perused the record only to find that there were no reasons for sentence in the record.

The trial Magistrate did not respond to the above allegations by the legal practitioner. Neither did he/she respond to the same complaint in the grounds of appeal wherein the appellant persisted that the learned Magistrate had failed to provide reasons for sentence be it verbally or in writing before passing sentence.

What is clear is that the reasons for sentence quoted in *extenso supra* were written much later after the sentence had been imposed. The appellant was sentenced on 12 June 2012 and the reasons for sentence were only found in the record on 27 June 2012. That was improper and irregular full reasons for sentence ought to have been given to the appellant before he was sentenced.

Counsel for the state did not address the issue in his heads of argument and had no meaningful submissions relating to the issue at the hearing of the appeal. His attitude was proper, in my view.

Having held that what the trial court did was irregular and improper the sentence cannot be allowed to stand and is hereby set aside and this court will proceed to substitute it with what follows below.

The appellant appears to be into hard drugs. On 3 July 2007 he was convicted of possessing 1.5 grams of cocaine for which he was sentenced to pay a fine \$50,000 Zimbabwe dollars or in default of payment 15 days imprisonment. He did not learn from that experience. He did it again 5 years later. He increased his quantity to 2 grams which has a street value of USD \$80-00 . Appellant cannot expect to be treated with kidgloves anymore. He should expect harsher sentences henceforth. This court noted that he has not been given the benefit of a suspended sentence.

Accordingly the trial court's sentence is substituted thus.

“\$300 or in default of payment 3 months imprisonment. In addition 3 months imprisonment which is wholly suspended for a period of 5 years on condition the accused is not convicted of acquiring, possessing, supplying or consuming cocaine committed within that period for which accused is sentenced to imprisonment without the option of paying a fine”.

Makonese J I agree.....

Messrs Moyo and Nyoni, appellant’s legal practitioners
Attorney-General’s office, respondent’s legal practitioners