

JOSEPH TAKAWIRA ZAWAIRA
versus
STATE

HIGH COURT OF ZIMBABWE
TAGU, MUREMBA JJ
HARARE, 19&27 November2013

Criminal appeal

J. Mutonono, for the appellant
I. Chingarande, for the respondent

MUREMBA J: Having received information that the appellant was moving around in possession of a firearm the police went to the appellant's house to conduct a search. They recovered a 12 bore shot gun and 4 rounds of ammunition from his bedroom. It is common cause that the firearm in question had been fired once.

The appellant was charged with contravening s 4 (1) of the Firearms Act [*Cap 9:23*] for possessing a firearm and ammunition without certificates thereof. He pleaded guilty to the charge when he appeared before a provincial magistrate sitting at Masvingo magistrates' court. Nothing turns on the conviction and it is hereby confirmed. The appellant was sentenced to 2 ½ years imprisonment. The firearm and the ammunition were forfeited to the State.

In arriving at the sentence the trial magistrate said,

“I have considered that you are a young first offender who pleaded guilty showing contrition. However such unlicensed weapons have littered this country and now pose a security threat to life, limb and property. Such weapons are being used in numerous unexplained robberies and unlawful entry and theft. In our case the weapon was once fired but no one knows what it was used for. I feel a deterrent penalty is called for.”

The appellant who is on bail pending appeal appeals against sentence on the grounds that the trial court erred by imposing a custodial sentence without considering a fine yet the penalty provision provides for a fine. The appellant's counsel submitted that the sentence of 2 ½ years imprisonment induces a sense of shock considering that the firearm was never used in the commission of an offence. It was further submitted that the appellant, a 28 year old

first offender who had pleaded guilty to the charge ought to have been spared a custodial sentence.

The respondent's counsel is not opposed to the appeal. He agrees with the appellant's counsel that the trial magistrate ought to have considered a fine or community service.

The penalty provision in this case calls for a fine not exceeding level ten or imprisonment not exceeding 5 years or both such fine and such imprisonment. The proper sentencing approach where a statute provides for a sentence of a fine and imprisonment is to give consideration to the sentence of a fine first and imprisonment lastly. See *S v Antonio & others* 1998 (2) ZLR 64. What it means is that, in cases of unlawful possession of a firearm imprisonment should be reserved for the extremely bad cases.

Obviously the origin of this firearm is of importance in arriving at the appropriate sentence. In mitigation the appellant explained that this firearm used to belong to his late brother. The appellant said he took the firearm for his own personal use after the death of his brother. The appellant said although the firearm was fired once he did not know who had fired it. It was not established who had fired the firearm. It is not known whether or not it was the appellant's late brother who fired it before he died. It is also not known when the firearm was fired. It is not known when the appellant took the firearm for his own personal use. In the absence of such vital information it was a misdirection for the trial magistrate to assume that the firearm had been fired by the appellant.

The origin of this firearm, the absence of evidence that the firearm was fired by the appellant and that it was fired for the purpose of committing an offence should have worked in favour of the appellant. The firearm was not linked to any offence. As correctly submitted by both counsels, this makes this case a non-serious case of unlawful possession of a firearm. The present case does not fall in the category of bad cases at all. The trial magistrate placed undue weight on the need for deterrence and the need to protect society from robberies, unlawful entries and theft yet there was no evidence to show that the firearm was once used in the commission of a crime. This resulted in the magistrate imposing an unduly harsh sentence which induces a sense of shock. In cases where there is misdirection or the sentence imposed is unduly excessive as to induce a sense of shock, an appeal court is at liberty to interfere with the sentence. See *S v Munday* 1998(2) ZLR 392 H.

In view of the foregoing, we will interfere with the sentence of the trial court. The circumstances of the case and the fact that the appellant is a first offender who admitted to the

charge call for the imposition of a fine. The sentence of the trial court is set aside and substituted with the following sentence:

\$300-00 in default of payment 30 days imprisonment.

The firearm and the 4 rounds of ammunition are forfeited to the state.

TAGU J agrees-----

Mutendi & Shumba , appellant's legal practitioners
The Attorney General's Office, respondent's legal practitioners