ZAINE BABBAGE

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA AND CHEDA JJ
BULAWAYO 4 JUNE 2012 AND 2 AUGUST 2012

C. P. Moyo for applicant
L. Maunze for respondent

Appeal

CHEDA J: This is an appeal against sentence only.

Appellant is 27 years of age, and is employed as a Manager in Morningside, Bulawayo. On the 23rd January 2011 whilst driving along R-Mugabe road Bulawayo he was stopped by a Police officer who arrested him for using a mobile phone. He was issued with a ticket notifying him to appear in court for the said offence.

He indeed appeared in court on the 9th February 2011 wherein, he was charged with the said offence. He pleaded guilty and was sentenced to 14 days imprisonment.

Before sentence was passed a community service officer compiled a pre-sentence report and submitted it to the court wherein he recommended a sentence of community service in light of the fact that appellant is employed. Despite this recommendation, the trial court in its wisdom imposed a prison term.

There are three issues which fall for determination in this matter.

Firstly it is trite that where a court is of the view that a person should be sentenced to imprisonment for a non-serious offence, it should seriously consider a non-custodial sentence.

These courts have for a longtime urged the trial courts to seriously consider community service for minor offences. The pronouncement of a prison term should not be arrived at lightly by the courts as its consequences are very dire. It is not enough for the court to merely state that the said factor has been considered. The said consideration must clearly manifest itself in the sentence the court passes thereafter. In this jurisdiction the courts have held that

failure to consider community service for a minor offence constitutes a serious misdirection on the part of a judicial officer and will no doubt call for interference by the appeal court; see *S v Khumalo* HB 39/03; *S v Majaya* HB 15/03; and *S v Shariwa* HB 37/03. This court has emphasized this point for time without number, see S *v Julius* GS 269/80; *Gwarada v S* (AD) 8/81 and *Pauline Moyo v S* HB 132/12. Our jurisdiction has now moved away from viewing imprisonment as the first port of call, as such, non-custodial sentences are now the general rule as opposed to being an exception.

The sacrosanct approach of these courts is that the appeal court is slow in interfering with the sentences of lower courts unless such sentences are so harsh to an extent of unreasonableness or appear to have been arrived at as a result of irregularity of the proceedings. Therefore sentencing remains the province and domain of the trial court.

However in as much as sentencing remains the discretional and onerous responsibility it should be exercised judiciously, failing which the offender can suffer serious prejudice. In *Pauline Moyo's* case *(supra)* at page 2 of the cyclostyled judgment, I remarked:

> "It is trite that sentencing is the most difficult aspect of a judicial officer's decision yet it is arguably most important as it seals the conclusion of a criminal trial. It is for that reason that serious thought should be given before sentence is passed on an individual. It is a legal operation which derives from both statute and case laws. The sentencer should, therefore, have the basic knowledge of the appropriate law.
> However, sentencing becomes a more sophisticated business where there are alternative methods of punishment.
> A judicial officer should always bear in mind the rigours of a prison term. It is trite law that sentence of a prison term should be the last resort which our courts should be slow in arriving at. However, where the court prefers to impose a prison term it should proffer special reasons for doing so." I still hold that view.

The second issue is that of a community service report. Judicial officers are urged and encouraged to consider opinions and recommendations of other professionals whose objectives are to assist them in arriving at suitable sentences. Where they have reason to differ with these recommendations they should proffer reasons for their departure, see *S v Mgemezulu* HB 123/12.

The third issue and most important is the reason for the appeal itself. The thrust of the appeal is that the sentence passed by the court *a quo* is excessive in the circumstances and induces a sense of shock. Respondent also conceded that indeed it was unduly harsh.

Of late quite a number of these cases have come before the courts. In my assessment of a suitable sentence, I perused Statutory Instrument 299/2002 for a penalty, but, I could not find it. I then sought guidance from the Attorney General's Office, Bulawayo to which Mr *Mabhaudi* responded and I am indeed grateful for his research and confession of an anomaly which for a longtime has been hidden from the courts and members of the public in general and motorists in particular. In his response he agreed with me that there is no specific penalty for contravening section 16B (1)(a) of statutory Instrument 299/2002, (use of a mobile telephone while driving) but, that such penalty is found in the proviso of section 81(5) of the Road Traffic Act [Chapter 13:11] which states that an infringement by the said section is punishable under section 81(5)(i) which states:

> "Subject to proviso (ii); no such penalty shall exceed a fine of level 5 or imprisonment for a period of six months or both such fine and such imprisonment."

Level five limits the fine to $200.

A fine of US$200-00 is the maximum and should obviously be reserved for more serious and aggravated cases only.

In my considered opinion the Police are empowered and authorised to impose a fine not exceeding $200-00 depending on their Regulations. In my reading of this piece of legislation I have failed to find reference to the section which authorises the police to refer offenders of section 16B (1)(a) of Statutory Instrument 299/2002 to court for trial. The Attorney General's Office has advised me that indeed there is no such section.

The next unavoidable question which follows is, what authority were the police relying on by referring mobile/cellular phone motorists' offenders to court for the contravention of the section under discussion. Again, the Attorney General's Office advised me that the practice was adopted after a meeting was held between the Provincial Police Command and Provincial Judicial committee upon realisation of the continued escalation of these particular offences by

motorists. This indeed is commendable as they are relevant stake holders in the delivery of justice.

However, in my view this practice despite its good intentions is unlawful as a Provincial Judicial committee or the Provincial Police Command has no legal authority to alter or amend the provisions of an existing legislation. Such duty is the domain of the Legislature or the designated Minister. The provincial structure, can not arrogate themselves administrative or legislative powers they do not have. To my knowledge Zimbabwe presently has a National Assembly and not a provincial one. Therefore, all acts of Parliament are enacted in Parliament and not anywhere else.

These two bodies being public bodies can only validly exercise powers within the limits conferred on them by either common law or statute. The existence of such powers have not been submitted to us, therefore, I can only conclude that there are none. Since the decision which culminated in the reference of the offending motorists to the courts, was outside the powers conferred to them by the Statute or common law, that decision is, therefore, *ultra vires* and accordingly unlawful. As a result of its unlawfulness, by the very nature of the judicial functions of the courts, this court is therefore empowered to interfere with the trial court's decision.

The acts of any competent authority must fall within the four corners of the powers given to it by the Legislature. This is our correct legal position and so is the English Legal position, see *Carltona v Commissioner of Works* [1943] 2 All E-R 560.

Therefore, this stands to reason that the Zimbabwe Republic Police has authority to assess fines on motorists if the said fines are in accordance with their regulations. This should be in line with level five (5) which stipulates the said fine.

There is no legal reason why the contravention of the section under discussion should be referred to court for sentence for an offender under this section unless the offender is a repeat offender or the circumstances under which the offence is committed is aggravated.

For the avoidance of doubt the following is the correct legal position which should be followed by the relevant authorities;

(1) where a motorist is caught using a mobile or cellular phone, he should be issued with a ticket to pay a fine as stipulated in level 5;

(2) the said ticket should give the motorist a reasonable time within which to pay the fine in accordance with their regulations unless the said offender elects to pay the fine on the spot;

(3) the police are however, empowered to use their powers as they deem fit depending on the motorist e.g. if he/she is a foreigner, if he/she has no acceptable identification which will in turn make it difficult for him/her to be traced in the event of a default in paying the fine.

(4) a police officer can not and should not insist on a spot fine on the basis that he is not in possession of a ticket book which ticket book is a necessary administrative tool for executing his duties.

A police officer's failure to carry relevant stationery can not be used to curb and/or infringe people's rights

In *casu,* this offence should have been adequately handled by the Police. In addition it was improper for the learned trial magistrate to impose a custodial sentence without giving reasons for his decision as this is a legal requirement, see *S v Ndebele* 1988 (2) ZLR 249. The emphasis is that all courts of record are required to keep and maintain full and comprehensive records of all proceedings.

In addition, thereto, this offence is by any civilised standards not serious and at any rate attracts a fine as the appellant was a young, employed first offender. The appellant should not have been sentenced to either community service or imprisonment in the circumstances. In *S v Antonio* and others 1998 (2) ZLR 64(H) CHINHENGO J stated:

> "In a non-serious case if a fine is a permissible sentence for the crime in question, the court should consider first whether a fine with or without an alternative of community service should be imposed."

There was, therefore, a clear misdirection on the part of the learned magistrate in this case as this matter clearly falls within the jurisdiction of the police and not the court.

Appellant indeed committed the offence and his guilt is therefore beyond doubt. What remains is the question of sentence.

In light of the above the following order is made:

Order

(1) the conviction is confirmed.

(2) the sentence is set aside and is substituted by the following:

(2:1) US$20-00/5 days imprisonment.

Kamocha J agrees.....

Moyo and Nyoni, appellant's legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners