HB 198-17
HCA 42-17
XREF HCB 53-17
XREF ENT 173-17

WATSON BHEBHE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI AND TAKUVA JJ
BULAWAYO 3 JULY 2017 AND 6 JULY 2017

Criminal Appeal

Ms S V Podera for the appellant
K Ndlovu for the respondent

MATHONSI J: The appellant was charged before the magistrates court sitting at Western Commonage Bulawayo with three offences. In count one he was charged with physical abuse in breach of s 3 (1) (a) as read with s 4 (1) of the Domestic Violence Act [Chapter 5:16]. He had physically abused his wife by assaulting her with open hands several times all over the body and pulling her braids. In count two he was charged with malicious damage to property in breach of s 3(1) (h) of the same Act. He had smashed his wife's cellphone during that incident.

In count three he was charged with escaping from lawful custody in contravention of s 185 of the Criminal Law [Codification and Reform] Act [Chapter 9:23] in that once he had been arrested and detained at Luveve Police station facing charges on counts one and two, at about 0900 hours on 19 March 2017, he was taken out of police cells for a recording of his statement. After the statement was recorded he took advantage and escaped from custody. He was re-arrested a short distance away by police officers who were pursuing him.

When the appellant was brought before a magistrate he pleaded guilty to all three counts. Upon conviction he was sentenced, in count one to a fine of $200-00 or two months imprisonment; in count two he was sentenced to three months imprisonment which was wholly suspended on condition he restitutes his wife the sum of $250-00, being the value of the cellphone, on or before 28 April 2017. In count three the appellant was sentenced to a straight

prison term of 12 months. In arriving at that sentence in respect of count three the trial magistrate reasoned that;

> "Count three is of escaping from lawful custody this is a serious offence. There is need for a deterrent sentence that other would-be-offenders will not be tempted to commit the offence. An option of community service may send a wrong message to the community. An option of a fine in this case may trivialize this offence. An option of a custodial sentence will meet the justice of this case."

The appellant has appealed against the custodial sentence imposed in count three on the grounds that the court *a quo* erred in not considering community service as an option and in over-emphasising the issue of deterrence to would-be-offenders. The state has conceded that the appeal has merit and that the court *a quo* misdirected itself in imposing a custodial sentence. In my view that concession is proper. In fact there is a lot that is wrong with that sentence.

The appellant is gainfully employed as an army officer by the Zimbabwe National Army. He is married with one minor child and also looks after his three siblings who are attending school. He is 24 years old. What brought him to the police station where he escaped was a domestic altercation with his wife. The wife appeared in court and testified under oath that she had forgiven him and wanted him to go back to work. Clearly therefore the main offence for which the appellant escaped was no longer an issue. The escape itself therefore paled as well.

To begin with, the magistrate appeared inclined to punish the appellant not individually but for the benefit of society. He did not say anything about the appellant personally and what the sentence would do to him. He was pre-occupied with deterring "other would-be offenders" so that they are not tempted to do the same. To him community service "may send a wrong message to the community", and a fine "may trivialize the offence." One may ask, who was being sentenced in this matter between the appellant and the community? While deterrence is a factor for consideration in assessing sentence care must always be taken not to over-emphasise that aspect or indeed the aspect of making the accused person an example. It is often said that the sentence must fit both the offence and the offender. After all it is the offender who is being punished and not the community. Indeed, whatever the gravity of the offence and the interests of

society, the critical factors in determining an appropriate sentence are the person and the character and circumstances of the crime. See *S* v *Shariwa* HB-37-03.

It was stated in *S* v *Ngulube* HH-48-02 that while all other relevant factors should be taken into account, magistrates should always bear in mind that the reason why the accused committed the offence and the circumstances of the offence are of equal importance. I have already said that in this case the appellant was at Luveve Police Station because of domestic violence. His loving wife, the victim in the circumstances, came and openly forgave him. To then go on and incarcerate him against the wishes of the victim thereby depriving the family of a breadwinner to me does not make sense. In fact it does not serve any useful purpose and is clearly undesirable. Apart from that it was explained to the trial court before sentence that the reason why the appellant escaped was that he wanted to inform his superiors at work that he had a case involving his wife. That reason was not contested and should have been taken into account. All those factors were sacrificed at the alter of making the appellant an example.

The magistrate settled for a term of imprisonment of 12 months because to him the offence was serious. That cannot possibly be true and as correctly pointed out by *Mr Ndlovu* for the respondent, the offence was not committed in aggravating circumstances. Escaping from lawful custody is committed in aggravating circumstances, in terms of s 185 (4), if any weapon or violence was used by the person charged. In this particular case no violence or weapon was used. Therefore sentencing is governed by subsection (1) (a) (ii) of s 185 because the appellant had not yet been lodged in prison. That section provides for the sentence of a fine not exceeding level ten or imprisonment for a period not exceeding 5 years or both.

It is trite that where a statutory provisions allows for a sentence of a fine, or alternatively imprisonment the sentencing court must give serious consideration to the imposition of a fine first and leave imprisonment for the most serious offences to repeat offenders. See *S* v *Chawanda* 1996 (2) ZLR 8(H) 10 C-G; *S* v *Zuwa* 2014 (1) ZLR 15 (H) 18A-C. The court *a quo* should have considered the imposition of a fine. The failure to do so was itself a misdirection given that the appellant is a first offender who pleaded guilty.

That however is not the only misdirection. If the offence was serious as the magistrate claimed he would not have settled for 12 months imprisonment. The fact that he did means that it was not. Having settled for 12 months imprisonment, he was required to conduct an inquiry into the suitability of community service as an option. He had no discretion in that regard. See *S* v *Antonio and others* 1998 (2) ZLR 64 (H); *S* v *Chinzenze and Others* 1998 (1) ZLR 470 (H). Failure to conduct the inquiry and record it was another misdirection. See *S* v *Mutenha and another* HB-35-16.

In the result, it is ordered that:

1) The appeal against sentence in respect of count three is hereby upheld.

2) The sentence of the court *a quo* is set aside and substituted with the following sentence:

> "A fine of $100-00 or in default of payment 1 month imprisonment. In addition 3 months imprisonment wholly suspended for 3 years on condition the appellant does not, during that period commit any offence involving escaping from lawful custody for which upon conviction he is sentenced to imprisonment without the option of a fine."

Takuva J agrees……

Pundu and Company, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners