SUNDAY WILSON
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA AND MUSAKWA JJ
HARARE, 21 November 2016

Criminal Appeal

S. Kachere, for the appellant
F.I. Nyahunzvi, for the respondent

MUSAKWA J: The appellant was convicted of assault. He was sentenced to 12 months' imprisonment of which 4 months were suspended for 5 years on condition of good behaviour. He noted appeal against sentence.

The first ground of appeal is that the trial court erred in emphasising the appellant's previous conviction at the expense of mitigating factors. The second ground is that the trial court erred in not giving reasons for excluding community service. The third ground is that the trial court erred in opting for imprisonment as the only deterrent sentence. The last ground is that the trial court erred in imposing a sentence which is manifestly so excessive as to induce a sense of shock. Despite their multiplicity, the grounds of appeal effectively amount to one (the last ground).

Having pleaded guilty the agreed facts are that the appellant and the complainant are neighbours. The appellant confronted the complainant whilst wielding a knife and threatened him with death. He grabbed the High Court papers the complainant had and tore them. The complainant told the appellant that he was going to report him to Police. Undeterred, the appellant pursued the complainant to Dzivaresekwa Police Base. In the presence of Police officers the appellant proceeded to assault the complainant.

Despite acknowledging the existence of two aggravating features, Mr *Kachere* maintained that these were outweighed by the mitigating factors. As such, he further submitted that the trial court ought to have imposed a non-custodial sentence. On the other hand, Mr *Nyahunzvi* supported the sentence as he found no misdirection on the part of the trial court.

It is trite that generally a trial court has unfettered sentencing discretion. Such discretion can only be interfered with where it is tainted with some irregularity or where the sentence is manifestly excessive. In this respect see *S* v *Ramushu* SC-25-93. A trial court is enjoined to take into account a proven previous conviction for purposes of imposing an appropriate sentence. In this respect s 327 (4) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides that-

> "If on any trial any previous conviction is lawfully proved against the accused or if he confesses or has admitted such previous conviction, the court shall take it into consideration in determining sentence for the offence to which he has pleaded or of which he has been found guilty."

On the non-imposition of community service, it has been held that the mere fact that a court has omitted to give reasons for not imposing such a sentence does not necessarily amount to a misdirection. (See *S* v *Gono* 2000 (2) ZLR 63 (HC)). Reasons for such exclusion can be implicit. Part of the reasons advanced by the trial court which were expressed as follows:

> "The accused person does not respect the Police as well as the court. He does not take hid (*sic*) of the earlier sentence which was imposed on him.
>
> A custodial sentence is called for and will deter the accused from committing similar offences."

From the above excerpt it can be inferred that the trial court did consider other forms of punishment and excluded them on account of the manner of commission of the present offence and the record of previous conviction. The trial court need not have expressly stated community service was being excluded.

Three aspects stand out in this case. Firstly the appellant threatened the complainant with death as he wielded a knife. Secondly he pursued the complainant and assaulted him in the presence of Police officers at a Police Base. Thirdly, the appellant is a repeat offender. In 2014 he was convicted of assault and he was ordered to pay a fine. It turns out that the victim of the assault in the 2014 matter was the same complainant.

It is a recognised principle of sentencing that it is usually desirable to impose the minimal sentence permissible. (See *S* v *Katsaura* 1997 (2) ZLR 102 (H) and *S* v *Hwemba* 1999 (1) ZLR 235 (H)). In the present case, taking into account the facts and the admitted previous conviction it cannot be said that 12 months' imprisonment of which 4 months were suspended is excessive. The effrontery displayed by the appellant deserved the punishment

meted out by the trial court. Taking into account the absence of any irregularity, the appeal against sentence lacks merit.

In the result, the appeal against sentence is hereby dismissed.

CHATUKUTA J: agrees

Kachere Legal Practitioners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners