THE STATE
versus
DONALD MUSHANINGA

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 29 November 2017

Criminal Review

MUSAKWA J: This matter came before me by way of automatic review. The accused person pleaded guilty to culpable homicide. He was sentenced to pay a fine of $400 or in default to undergo 5 months' imprisonment. In addition, 4 months' imprisonment was wholly suspended for 3 years on condition of good behavior. The trial court also ordered that the accused person's driver's licence be endorsed with particulars of conviction.

My concern is the alternative sentence of imprisonment. On the face of it, one can tell that it is on the excessive side. An alternative prison term entails that in the event of failing to pay the fine that is the sentence the accused has to serve.

In the course of addressing a similar issue in *S* v *Chirai* 1992 (1) ZLR 24 (HC) the following observations were made by SMITH J at 25-26:

"Furthermore, I consider that the alternative period of imprisonment is much too severe. In *S* v *Tsatsinyana* 1986 (2) SA 504 (T) VAN DIJKHORST J considered the question of imposing a prison sentence as an alternative to payment of a fine. The judgment is in Afrikaans but I have obtained a translation from a duly qualified person of what the learned judge said at p 508-9 which reads as follows:

> "The alternative of imprisonment has a twofold goal. First, it serves as a sanction to ensure payment of the fine. Second, it serves as punishment for the offence in the event of non-payment of the fine. To attain the first goal the term must be such as to enforce payment. For the second goal the period of the imprisonment must pass the test that would be applied if imprisonment was the only punishment being imposed. Here, the nature of the offence, the personal circumstances of the offender and the interests of the community will merit consideration. It follows from the above that in respect of the same act two offenders can be sentenced to different fines with the same alternative imprisonment."

This statement was quoted with approval by Howard DJP in *S* v *Ncobo*; *S* v *Zwelibhangile*; *S* v *Dlamini* 1988 (3) SA 954 (N).

The matter was also considered in *S* v *Juta* 1988 (4) SA 926 (TS). VAN REENEN CJ stated the well-known precept that sentence is pre-eminently a matter for the trial court and that it is, within the limits of statutory provisions, in the discretion of the presiding officer, but that is not an ordinary discretion but a judicial discretion. When deciding on sentence, the court should first consider whether the case is one which calls for a prison sentence or not. If it decides that a fine is appropriate it must determine the magnitude of the fine, having regard to the usual factors. At p 927-8 he continued:

> "Having decided on the amount of the fine, the court has to consider what should happen if it appears that the accused is unable or unwilling to pay the fine. The court has two options: firstly, he can abide by the fine, in which case the fine can be recovered, if needs be, by civil execution against the accused, or, and this is the usual course, he can decide to impose a prison sentence which is to be enforced if the fine is not paid."

But, and this is where magistrates often go wrong, in the deciding on the term of imprisonment, the court is now not concerned with a punishment for the crime. Decision on that punishment has already been made. What the court must decide is what sanction is to be applied should the punishment which has been determined fails.

When deciding upon the amount of the fine, the court has regard to the financial circumstances of the accused and whether the impact of the fine in these circumstances would be an adequate censure for the accused's misdemeanour.

The same considerations also apply when considering the alternate prison sentence. In addition, regard should be had to the special impact which a prison sentence would probably have upon the accused, having regard to his personal circumstances, employment, social status and so on.

Obviously, the whole matter is beset with great difficulty. Conflicting considerations abound, such as the effect upon the accused, his family and dependants, the requirements of the law, the interests of society and so on Care should also be taken not to stress too much the peculiar circumstances of the individual accused. It would appear to be safer to regard him as an average representative of a class and consider the various factors in that light.

He concluded by giving a rule-of-thumb guide which, he said, would have to be revised if the value of the rand changed markedly."

In the present case, in mitigation the accused person submitted that he is an agricultural extension worker who earns $480 per month. He had $30 on his person and $70 at the bank. In addition he had one bovine valued at $250 as well as a house valued at $12 000.

There is nothing to indicate whether the accused person was able to pay the fine on the very day. The record of proceedings does not reflect so; neither does it reflect that the trial court granted the accused time to pay the fine. In the review matter of *S* v *Nyirenda* 1988 (1) ZLR 160 (H) GREENLAND J held that a fine should afford a real option to an accused person. In support of this proposition reference was made to the cases of *S* v *Mutendwa* HH-35-88 (unreported), *S* v *Gwarada* 1981 ZLR 17 (AD) and also reported in 1981 (2) SA 531 (ZAD). The learned judge further held that as such, every effort must be made to ensure that the accused is given time to pay. In the absence of an application by the accused, the court should make an effort to establish the accused's ability to pay the fine. Hopefully the accused in the present matter did not have to serve the alternative sentence.

Accordingly, part of the sentence is altered to read as follows:

"To pay a fine of $400 or in default of payment to undergo one month's imprisonment."

The rest of the sentence remains as pronounced by the trial court.

MWAYERA J agrees…….