

THE STATE  
**versus**  
ZIBUSISO SIKHOSANA  
and  
BRIAN MBEWE  
and  
MARVELLOUS NDLOVU

IN THE HIGH COURT OF ZIMBABWE  
MATHONSI J  
BULAWAYO 16 FEBRAURY 2017

### **Criminal Review**

**MATHONSI J:** The three youthful accused persons were arraigned before a provincial magistrate at Western Commonage on two counts of extortion in contravention of s134 (1) (a) and (b) of the Criminal Law Code [Chapter 9:23]. They pleaded guilty to the charge and upon conviction they were each sentenced to 5 years imprisonment of which 1 year imprisonment was suspended for 5 years on condition of future good behaviour. Of the remaining 4 years imprisonment, 1 year was suspended on condition they jointly and severally, the one paying the others to be absolved, restituted the complainants the sums of \$50-00 and \$20-00 respectively on or before 31 January 2017. There is nothing wrong with the conviction which will be confirmed. It is the sentence which induces a sense of shock and should be interfered with.

The facts are that on 2 November 2016 the three had masqueraded as police officers at the intersection of Masiyephambili Road and Nketa Drive in Bulawayo and extorted \$50-00 from the complainant in count one and \$20-00 from the complainant in count two, while threatening to impound their motor vehicles.

In arriving at the sentence the court accepted that all three of them were first offenders, they were drunk and had pleaded guilty. In my view the learned trial magistrate however misdirected himself in reasoning that:

“This is a clear act of dragging the Zimbabwe Republic Police through mud as the nation will lose confidence in the force.”

These were not police officers but criminally minded civilians. The nation cannot possibly lose confidence in the police force because of their conduct. In reasoning that way the court unwittingly sentenced the accused persons as police officers and not as ordinary civilians which explains the unduly harsh sentence that it settled for.

In terms of s134 (1);

“Any person who—

- (a) intentionally exerts illegitimate pressure on another person with the purpose of extracting an advantage, whether for himself or herself or for some other person, and whether or not it is due to him or her, from that other person, or causing that other person loss; and
- (b) by means of the illegitimate pressure, obtains the advantage, or causes the loss; shall be guilty of extortion and liable to—
  - (i) a fine not exceeding level thirteen or not exceeding twice the value of any property obtained by him or her as a result of the crime, whichever is the greater; or
  - (ii) imprisonment for a period not exceeding fifteen years or both.”

It is now settled in this jurisdiction that where the statute provides for a sentence of a fine or alternatively imprisonment, the court must give serious consideration to the option of a fine and reserve imprisonment for the most serious of such an offence or repeat offenders. See *S v Zuva* 2014(1) ZLR 15 (H) 18A – C; *S v Tshuma* HB 302/16. That point is succinctly stated by MALABA J (as he then was) in *S v Chawanda* 1996 (2) ZLR 8(H) 10 C-G where the learned judge said:

“The authority for the proposition that where a statute provided for a penalty of a fine or imprisonment, it is a misdirection on the part of the sentencing court to impose imprisonment without giving serious consideration to the imposition of a fine, particularly on a first offender, is found in the case of *S v Muhenyere* HB 3-92 cited by the accused’s legal practitioner. At page 3 of the judgment in *Muhenyere’s* case *supra* BLACKIE J, with the concurrence of CHEDA J, quoted with approval from the decisions in the cases of *S v Rutsvara* S-2-89 and *S v Van Jaarsveld* HC - 110-90.

The learned judge said:

‘It is trite that where the statute lays down a monetary penalty as well as a period of imprisonment the court must give consideration to the imposition of a fine. It would normally reserve imprisonment for bad cases ---. In statutory offences permitting the imposition of a fine, the normal sentence for a first offender is a fine unless the offence is particularly serious or prevalent or there would be serious consequences if the deterrent of imprisonment is not used.’”

I completely associate myself with the foregoing pronouncements. I must also add that the economic realities of this country at the moment demand that there should be strict adherence to those sentencing guidelines especially where first offenders are concerned. This is because it is a fact that prisons are overcrowded, prisoners are afflicted by disease and the state is struggling not only to maintain the prisoners but also feed inmates as it has no money. For that reason it only makes sense in cases involving first offenders convicted of minor offences to lean in favour of other sentencing options. Sentencing courts should not approach sentencing with a closed mind.

This is a case in which the penal provision being applied allowed the sentencer to impose a fine. The offenders were youthful first offenders who committed the offence under the influence of intoxicating liquor. They only extorted a total of \$70-00 which is no doubt a very small amount. Of that amount \$50-00 had already been repaid to the complainant at the time of their conviction. Taking into account the totality of those factors the accused persons should have been sentenced to a fine or community service. The sentence imposed by the trial court does not fit the offence neither does it fit the offenders. It is unduly harsh and uncalled for and in arriving at it, the trial court misdirected itself as already stated.

Considering that the accused persons have already served almost 3 months which they should not have been subjected to, and with the gracious concurrence of my brother TAKUVA J, the sentence will be altered in order for them to be released immediately.

In the result, it is ordered that;

1. The conviction of the three accused persons is hereby confirmed.
2. The sentence is hereby set aside and in its place is substituted the following sentence:

“Each of the 3 accused persons is sentenced to 12 months imprisonment of which 6 months imprisonment is suspended for 5 years on condition they do not, during that period, commit any offence involving dishonesty for which upon conviction they are sentenced to imprisonment without the option of a fine. Of the remaining 6 months imprisonment, 3 ½ months is suspended on condition they jointly and

severally retribute the two complainants of the total sum of \$70-00 on or before 28 February 2017.”

3. As the three accused persons have already served 2 ½ months, they are entitled to their immediate release.

Takuva J agrees.....