STATE
versus
PROGRESS MUSONGANHANDE
and
TAPIWA MUTENHA

HIGH COURT OF ZIMBABWE
CHITAPI AND MUSITHU JJ
HARARE, 25 March 2022

Review Judgment

CHITAPI J: The proceedings in the above matter were subject to scrutiny by the learned Regional Magistrate Northern Division. The learned Regional Magistrate has forwarded the record of proceedings for review and requested that the proceedings be urgently reviewed to correct what she considers to be an unjustified prison term to which the accused were sentenced and are serving time in circumstances where a non-custodial sentence was the most appropriate sentence which ought to have been imposed by the trial magistrate.

The accused persons appeared before the learned Provincial Magistrate at Mbvare on 12 February 2022 on a charge of theft as defined in s 113(1)(a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. The 1st accused was an employee of Coca-Cola Company at its Graniteside branch, Harare. The 2nd accused is self-employed. The two connived to steal some coca-cola cans from the 1st accused's workplace on 20 February 2022 when the 1st accused was on night shift. The 1st accused loaded 3 crates of 24 cans per crate of coca-cola valued at ZWL$10 425.00 into the 2nd accused's truck. Unbeknown to the two accused their shenanigans were captured on CCTV leading to the accused's arrest. The crates were recovered. The accused person were subsequently charged with theft.

Upon the accused's appearance in court, they pleaded guilty and were duly convicted. The convictions followed upon the proper procedure for trial by guilty plea as provided for in terms of s 271(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as read with subs 3 thereof being followed. The conviction is therefore proper and is confirmed in respect of both accused.

In regard to sentence, the accused were each sentenced to 12 months imprisonment with 6 months suspended on conditions of future good behaviour, leaving the accused to each serve

an effective 6 months imprisonment. This is the sentence which the learned scrutinizing Regional Magistrate found to be disproportionate to the offence committed. The learned Regional Magistrate found the sentence not only too harsh but reasoned that the learned Provincial Magistrate had misdirected himself by not considering the option of a community service sentence given that the sentence which the learned Provincial Magistrate considered to be appropriate was less than 24 months.

It is a trite principle of sentencing that the fixing of sentence following a conviction is the sole prerogative of the convicting court. On review or on appeal, the review and/or appeal court will only interfere with the sentence if it should appear that the sentencing court has committed some error in the exercise of its discretion. The sentencing court must have committed a misdirection of a significant proportion such that it can objectively be held that the exercise of the court's discretion was affected by the misdirection. In the case of *Muhomba* v *S* SC 241/12, MALABA DCJ (as he then was) stated on p 9 of the cyclostyled judgment:

> "The position in our law is that in sentencing a convicted person, the sentencing court has discretion in assessing an appropriate sentence. That discretion must be exercised judiciously having regard to both the factors in mitigation and aggravation. For an appellate tribunal to interfere with the discretion, there should be a misdirection. See *S* v *Chiweshe* 1996(1) ZLR 425H at 429; *S* v *Ramushu and Others* S 25/93."

The test is the same on review. Since a review is concerned with the regularity of proceedings, where a serious misdirection is noted, and the misdirection is of such proportion that there has been a failure of justice, and hence a substantial miscarriage of justice, then the review judge or court is entitled to interfere with the exercise of the sentencing court's discretion.

The principle that the discretion as to sentence after conviction lies within the province of the trial court is recognized in jurisdictions of developed countries as well. In the English case of *House v R* (1936) 55 CLR 499, it is stated thus:

> "It is not enough that the judges composing the appellate court consider that, if they had been in the same position as the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him; if he mistakes the facts; if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the material for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that or in some way there has been a failure properly to exercise the discretion which the law reposes in court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

The common thread in the approach of the review or appeal court in relation to an impugned sentence is that the discretion of the trial court in fixing sentence will not be readily tempered with except on cognizable grounds which establish a misdirection committed in the process of assessing sentence on the part of the trial court.

As I have already made note, *in casu*, the learned Regional Magistrate in her minute referring the proceedings for review, *inter-alia* considered that the sentence was too harsh and disproportionate to the seriousness of the offence. To be specific, the minute of referral reads as follows:

> "RE: **STATE vs PROGRESS MUSONGANHENDE & ANOR MBR 6528/22**
>
> The above matter refers.
>
> May the record be urgently placed before a review judge with the following comments:
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> The 2 accused were convicted of theft. Both accused were first offenders. The stolen property was recovered so they did not benefit from the commission of the offence.
>
> It is my view that the sentence of 6 months imprisonment is too harsh such that it induces a sense of shock. The sentence meted out is disproportionate to the offence committed.
>
> The magistrate also misdirected himself when he did not consider community service as an option since he passed a sentence of less than 24 months.
>
> I did not seek the magistrate's comment since it will take longer while accused persons will be languishing in prison for an offence which a non-custodial sentence should have been passed.
>
> The record is accordingly referred."

If one has regard to the referral for review minute, it is noted that the learned Regional Magistrate considered that the sentence imposed was too harsh and induced a sense of shock because the accused were first offenders who did not benefit from the offence since the stolen crates were recovered. The learned Regional Magistrate also considered that the sentence was disproportionate to the offence. Had this been all that motivated the learned Regional Magistrate to seek a review of the sentence, I would not have found sufficient cause to review the sentence. This is so because the learned Regional Magistrate was of the view that the sentence was too harsh. In other words, had she been the one sitting as the primary court, she would have considered a different and more lenient sentence as appropriate. It has already been noted that in the absence of a cognizable ground to justify interference with the discretion exercised by that court the sentence imposed should not be interfered with either on appeal or review.

The learned Regional Magistrate in her minute alleged a misdirection in that the learned trial magistrate was required to consider community service and discount it as an appropriate

sentence. The guidelines on community service as an appropriate sentence are well documented. Every magistrate must be aware of the principle that the court has a duty to consider imposing community service where the offence merits a sentence of 24 months or less. See *S* v *Shariwa* HB 37/03*; S* v *Manyerere* HB 38/03; *S* v *Mabhena* 1996(1) ZLR 134(H).

In the case of *Silume* v S 2016(1) ZLR 12 MATHONSI J (as he then was) stated as follows at p 3 of the cyclostyled judgment in an appeal against sentence wherein BERE J concurred:

> "…. However, this is a matter in which the trial magistrate settled for an effective sentence of 14 months imprisonment. He was therefore obliged to consider community service. In *S* v *Mabhena* 1996(1) ZLR 134(H) 140E ADAM J made the following pronouncement:
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> > "There is little doubt that the magistrate erred about community service. The sentence he imposed was 18 months imprisonment with labour of which 8 months imprisonment with labour was suspended on condition of good behaviour leaving an effective 10 months imprisonment. This court has on a number of occasions indicated in the past that for first offenders in appropriate cases where a sentence a court imposes is 12 months effective imprisonment or less then community service should be considered and sound reasons given for not imposing it."

MAWADZE J took that point further in *S* v *Chireyi and Ors* 2011(1) ZLR 254(H) 260D. The learned judge took the view that it was a misdirection for a trial magistrate not to enquire into the suitability of community service where he or she settles for effective imprisonment of 24 months or less. He further stated that it was not enough to simply pay lip service to the factor of community service by merely mumbling something to the effect that community service is inappropriate without more or that it will trivialize the offence.

CHINHENGO J gave instructive guidelines on sentence for non-serious offences where a fine is provided for as a competent penalty in *S* v *Antonio & Ors* 1998(2) ZLR 64(H) wherein the learned judge stated at p 67.

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

From a reading of the authorities cited and indeed the guidelines on community service, it is evident that the learned Provincial Magistrate was grossly misdirected in not considering community service. The learned Provincial Magistrate's reasons for sentence were that the offence of theft from employer was prevalent in his area of jurisdiction. No further information or facts were put forward to support the dicta aforesaid. It is trite that prevalence and deterrence do not necessarily justify the imposition of an effective term. In respect to prevalence, it seems to me that there should at least be presented empirical evidence in the form of statistics of cases

which have been dealt with by the court in the recent past or present involving the offence said to be prevalent in the territorial jurisdiction of that court. The accessing of statistics should not really present a problem because such information is easily available for compilation from court records of completed matters. It is not proper to simply refer to the prevalence of a particular offence without supporting the finding with some sort of data or other reliable source of information. Sentencing must be a rational process in terms of which findings and conclusions made derive from proven facts.

The learned Provincial Magistrate also considered that a non-custodial sentence would send the wrong message. How such a sentence would send a wrong message is anyone's guess because nothing further was said to justify the conclusion on which the accused has been convicted. The starting point in the process of considering an appropriate sentence following a conviction for the offence should be to consider whether or not the Legislature has settled a sentence for the offence. The Criminal Law Codification and Reform Act creates the offence of Theft and further provides for the competent sentence which may be imposed upon conviction.

Section 113(1)(a) of the Criminal Law (Codification & Reform) Act provides that upon conviction for the offence of Theft, the convict will be:

> "….liable to either or both of the following –
>
> (i) a fine not exceeding level fourteen or twice the value of the stolen property whichever is the greater; or
> (ii) imprisonment for a period not exceeding twenty-five years;
> or both……"

The learned Provincial Magistrate was required to consider the imposition of a fine first and to have for reasons given discounted it as an appropriate sentence. This discounting process is a far cry from simply holding that a non-custodial sentence will trivialize the offence. The Legislature was not so minded. It provided for the imposition of a fine which could be said to be punitive because it can be up to the highest level which may be imposed by any court, being a level fourteen fine, or twice the value of the goods which value may surpass or exceed a level fourteen fine. A fine in this case of a conviction for Theft can therefore be severe enough as to be an appropriate sentence. In the case of *S* v *Mutenha & Anor* HB 35/16 a judgment on appeal against sentence, MATHONSI J (as he then was) with the concurrence of TAKUVA J, after referring to about ten decided cases of this court stated that in the process of sentencing the judicial officer must avoid allowing his or her emotions to cloud his or her good judgment. The learned judge reiterated that where an offence may attract a sentence of 24

months imprisonment and a fine is a permissible sentencer for the offence, the sentence must first consider the imposition of a fine and if inappropriate to consider community service. If the two options are inappropriate then an effective imprisonment term may be imposed and its suitability supported by cogent reasons.

The failure by the learned Provincial Magistrate to consider the suitability of a fine or community service following the conviction of the accused was, as noted by learned Regional Magistrate. a substantive and substantial misdirection which vitiates the sentence as it cannot be said that the learned Provincial Magistrate property exercised his or her mind taking into account the guidelines discussed herein. The failure to properly apply his or her mind to trite sentencing principles resulted in a gross miscarriage of justice. The sentence needs to be corrected.

There is in my view no need to refer the matter back to the trial Magistrate to sentence the accused afresh after taking into account the matters which are discussed herein on assessing sentence like community service. The accused submitted mitigation and the State submitted in aggravation. It is therefore possible for the review judge to substitute the sentence imposed for a different sentence which meets the justice of the case. The sentence imposed by the learned Provincial Magistrate was unduly severe because effective imprisonment ought to have been resorted to as a last resort. The modern sentencing trends promote focus on proportionate employment of the use of alternative sentences to effective imprisonment for non-serious offences and where the circumstances of the case and the offender allow for the imposition of such. Community service is provided for as a competent sentence by legislation in s 336(1)(d1)of the Criminal Procedure & Evidence Act. It must always be considered and imposed where merited.

A reading of decided authorities emphasize the seriousness of the offence of Theft from Employer because the offence involves a breach of trust. Invariably the trend has been to impose effective terms of imprisonment in such cases. Such approach in my view is inconsistent with what the Legislature has provided for in the Criminal Law (Codification & Reform) Act in that the differentiation which is drawn that Theft from Employer is to be viewed more seriously than a theft in other circumstances is not provided for in s 113 of the Criminal Law (Codification and Reform) Act which creates the offence of Theft. MAWADZE J wrote a review judgment in the case of *S* v *Ben Chitalu* HMA 57/2018. The accused had been entrusted with custody of two television sets by his employer. He sold them. They were valued at $1 500.00. He had been sentenced to 15 months imprisonment with 3 months suspended on

conditions of future good behaviour, 6 months on condition of restitution and the remaining 6 months were effective. The learned judge referred to the case of *S* v *Mundondo Zava* HMA 15/2017 which exhorts magistrates not to pay lip service to community service. The learned judge considered that the effective sentence of 6 months should have been further suspended on condition that the accused performs community. Significantly the learned judge stated as follows on p 1 of the cyclostyled judgment:

> "Theft from employer is indeed a serious offence which entails breach of trust. Be that as it may my view is that not every case of theft from employer warrants a person term. *In casu*, the accused is a first offender and has already lost his job.
>
> It is important for magistrates to appreciate the current harsh and difficult conditions in our prisons. In the premises only deserving person should be sent to prison."

I agree with the learned judge's well-expressed *dicta*. The proper approach to sentencing is to be guided by the trial which involve a balancing act that takes into account the offence, the offender and societal interests. Society does not countenance theft be it of trust property from employer or from an individual. When drawing distinctions in the circumstances of the commission of theft there should not be undue weight given to the consideration that the theft was from the employer. *In casu*, the learned Provincial Magistrate was heavily influenced by the consideration that the theft was from the employer and failed to appreciate that a non-custodial sentence still remained an available penalty for the offence of theft where the accused steals from the employer.

The sentence *in casu*, as observed by the learned Regional Magistrate was in the circumstances too harsh. In interfering with the sentence, it is noted that the accused have been in custody since 22 February 2022, a period of one mouth. I have considered the option of remitting the case to the trial Magistrate to consider the option of community service. No useful purpose will now be served by having the accused being resentenced because the facts of the matter show that the accused in addition to other factors of mitigation were the losers through and through as they did not benefit from the offence but instead invited upon themselves a criminal sanction by committing the offence. A sentence which will ensure their immediate release will now meet the justice of the case. The following order is made:

IT IS ORDERED THAT:

1. The convictions of the accused are confirmed.
2. The sentence imposed on each of them is set aside and the following sentence substituted in place thereof-

> "Each accused 6 months imprisonment of which 5 months imprisonment is suspended for 3 years on condition the accused does not within that period commit any offence involving dishonesty as an element for which upon conviction the accused is sentenced to imprisonment without the option of a fine."

3. The accused persons having served the substituted sentence, they must be liberated forthwith.

MUSITHU J, agrees……