THE STATE
versus
LUCKMORE BINGA

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE 6 November 2002

Criminal Review

On 20 April 2002, the accused went to a house in Glen View, Harare and stole a 50kg bag of sweet potatoes, and a 20kg bag of ground nuts, all valued at $3950-00. As chance would have it, the complainant, a trader in potatoes and groundnuts, woke up around 3.20 a.m. to go to Mbare Musika to purchase more stock. He came upon the accused carrying a heavy load. He got suspicious and checked upon his stocks of potatoes and groundnuts which he found missing. He woke up the neighbours and together they gave chase. The accused eluded them but was subsequently arrested and some of the sweet potatoes valued at $300-00 were recovered.

When arraigned before the magistrates' court, the accused pleaded guilty to one count of theft. He was duly convicted and sentenced six months' imprisonment with labour, wholly suspended on three different conditions. Three months was suspended on condition the accused performed ninety hours of community service, two months on condition the accused paid compensation to complainant in the sum of $3 650 by 30 July 2002 and one month was suspended for five years on condition the accused did not within that period commit an offence for which he would be sentenced to a term of imprisonment.

The record of the proceedings was sent to a scrutinising magistrate in accordance with the provisions of s 58 of the Magistrates' Court Act, [*Chapter 7.10*], ("the Act"). The scrutinising magistrate then addressed a minute to the registrar of this court as follows:

> "Kindly place the attached record of proceedings before a reviewing Judge together with the following comments:

> The trial magistrate imposed 90 hours of community service as being equivalent to 3 months' imprisonment. He has conceded the mistake he made.
>
> The record is referred to his Lordships (*sic*) for correction".

I note that the scrutinising magistrate did not query why the record of proceedings was referred for scrutiny outside the time frame stipulated in the Act. The accused was sentenced on 9 May 2002 and the scrutinising magistrate only received the record of proceedings on 7 August 2002, almost three months later. Section 58 of the Act stipulates that the record must be submitted for scrutiny not later than one week next after the determination of the case.

It appears to me that the legislature did not stipulate a time frame for scrutiny and review for the sake of it. The time frame stipulated is part of the protection that is afforded the accused person by the review and scrutiny procedure, which, in my view, is a commendable feature of our criminal law system. The procedure will be rendered meaningless if records are submitted for scrutiny outside the stipulated time limit. In some cases, the sentence would have been served before it is certified as being in accordance with real and substantial justice. It is therefore imperative that clerks of court and the scrutinising magistrates strictly adhere to the time limit provided for in ss 55(1) and 58(1) of the Act in the interests of safeguarding the rights of an accused person. Failing to do so is failing in delivering justice.

The scrutinising magistrate and the trial magistrate are both of the view that the failure to compute the number of hours equivalent to a term of imprisonment in terms of the grid of hours supplied by the Zimbabwe National Committee on Community Service is such an error as needs rectification by a judge of the High Court.

The grid of hours is a guideline only. It does not supplant the discretion of the sentencing court to mete out a punishment that suits both the offence and the offender.

In the case *S* v *Tachiona*,[1] CHATIKOBO J had to deal with a situation where the sentencing court had imposed 180 hours of community service instead of 120 hours as laid down in the grid. The sentencing court was of the view that what it did was proper. At 409B CHATIKOBO J stated that:

> "The magistrate is undoubtedly correct. I never meant to suggest that a court must slavishly adhere to the guidelines, as indeed guidelines are not intended to supplant the discretion of a sentencing court."

He then proceeded to refer to an earlier decision of his where he had made similar remarks.[2] In that case he noted that there is no hard and fast rule about the guidelines a court is free to depart from them in appropriate cases but that does not mean that such a court is free to set community service hours arbitrarily. There must be a basis for doing so.

In my view, the point made by CHATIKOBO J in these two cases and made in the cases that have followed them is that the guidelines by the National Committee on Community Service must be adhered to but, a sentencing court may depart from the guidelines for a good reason. Thus where the sentencing court has cause for departing from the guidelines, it must give reasons for such departure. A failure to do so may amount to a misdirection as it gives rise to the inference that the court has acted arbitrarily. On this reasoning, I would venture to suggest that where in error, a sentencing court departs from the guidelines, it cannot be said to have acted arbitrarily. It has acted in error. In the matter before me, the sentencing court did not deliberately set out to depart from the guidelines. Thus no reasons were due from it. The departure was due to an error in calculation. The sentencing court, without realising it, used the hours set in the guidelines before the guidelines were revised. Thus the calculation was not arbitrary but was based on a grid since revised. I also note that the departure from the grid of hours was not substantial. Instead of using thirty-five hours for each month of imprisonment, the sentencing court used thirty hours.

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[1] 1994 (2) ZLR 402 (H).
[2] See S v Sabawo HH189/94.

The issue that arises is whether the error in the matter before me is such that the resultant sentence must be held not to be in accordance with real and substantial justice. I say so because a scrutinizing magistrate and a reviewing judge can only decline to certify a sentence if such is not in accordance with real and substantial justice. In my view, this cannot be. To hold that this error vitiates the sentence is to elevate the guidelines to an immutable rule of law. I have already indicated that I do not regard the departure from the grid of hours in the matter before to be so substantial as to constitute a misdirection. The sentence imposed upon the accused was in my view properly assessed even though it appears to me to be on the stiff side. The term of imprisonment was suspended on proper conditions.[3] In the premises, I would not hold that equating three months imprisonment to 90 hours of community service is such an error as renders the sentence not to be in accordance with real and substantial justice.

Although I am confirming the proceedings and sentence in this matter, I intend to briefly raise the issue of whether or not correcting an error such as the one in the matter before me amounts to increasing the punishment imposed upon the accused person.

The accused person was sentenced to a term of imprisonment. Part of that term of imprisonment was suspended on condition the accused performed community service. Thus the sentence imposed on the accused is primarily a term of imprisonment and not a direct community service order which is also permissible under the Criminal Procedure and Evidence Act [*Chapter 9.07*]. The term of imprisonment has since been incorrectly converted to hours of community service. The correction of the number of hours would not affect the primary sentence imposed upon the accused, which remains at 3 months' imprisonment. However, the accused person was actually ordered to perform 90 hours of community service in lieu of the prison term. The effective sentence on the accused is the performance of community service. It is the performance of community service that is his penance for the wrong he has done society.

[3] See S v Mugebe 2000 (1) ZLR 376 (H).

The accused should have been ordered to perform 105 hours. Were I to correct the judgment, I would have to order that the accused performs an additional 25 hours of community service.

Our law regards any alteration to the sentence that is more burdensome than the sentence imposed as an increase in the sentence.[4] Once it is accepted that the performance of community service is the effective sentence in this matter, then, in my view, any alteration to the community service hours is an increase in the sentence imposed upon the accused. It appears to me that an increase in the number of hours is clearly more burdensome, even if it is to correct a patent error. An increase in punishment is prohibited by statute.[5]

On the basis of the foregoing, I would have declined the invitation by the scrutinising magistrate to correct the error by the sentencing court, had I found that the error was one that rendered the sentence not to be in accordance with real and substantial justice.

In the result, the proceedings before the trial magistrate are hereby confirmed.

[4] See the comments of Gillespie J in S v Chikamba 2000 (2) ZLR 311 (H) at p 314G.
[5] S 29 (2) (b) of the High Court Act [*Chapter 7.06*].