THE STATE
versus
ROVAN MACK

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 5 August 2014

Criminal Review

BERE J: The accused was properly charged and convicted of the offence of unlawful entry and theft as defined in s 131 (2) of the Criminal (Codification and Reform) Act [*Cap* 9:23]

The brief circumstances of the case are that on 18 March 2014 the accused used a pliers to open a closed door to the complainant's shop. While inside the shop the accused stole some clothing items whose value was given as US$667-00 all of which was subsequently recovered pursuant to the apprehension of the accused by some alert members of the public.

Upon convicting the accused on his own plea of guilty the trial Magistrate sentenced the accused to a straight term of 4 years imprisonment. It is this sentence that has caught my attention as the review Judge.

Concerned by the trial court's approach to sentence, on 9 June 2014 I wrote to the trial Magistrate as follows:

> "It is a long established practice in sentencing that first offenders must be allowed to enjoy the benefit of a suspended sentence.
>
> Why is it that there was a departure from this time honoured practice in sentencing the accused person?"

The most relevant part of the trial Magistrate's response was as follows:

> "...In imposing the sentence and departing from the practice of suspending a portion of the sentence I was of the humble opinion that the nature of and circumstances of the offence warranted the 4 years imprisonment viz that the offence was committed in aggravating circumstances mentioned in section 131(2)(e) and that he stole property

worth $677.He equipped himself with a pliers when he went to commit the offence and also considering that the crime itself is a violation of other people's rights...."

It is my well-considered view that the trial Magistrate clearly adopted a wrong approach in sentencing the accused person. It has been stated for times without number that before passing sentence the trial court must carry out a balanced assessment of both the mitigatory and aggravatory features of the case in order to come up with a fair sentence. The approach does not require paying lip service to the mitigating circumstances in order to justify the imposition of an unnecessarily harsh sentence.

What cannot be doubted in this case is that the trial Magistrate deliberately underplayed the very strong factors in mitigation and blew out of proportion those factors in aggravation in order to impose a sentence that was both unduly harsh and disproportionate to the offence committed.

It is apparent that the trial Magistrate clearly paid lip service to the fact that the accused was a first offender who offered an unequivocal plea of guilty thereby assisting in the quick disposal of this case. In addition the accused is a fairly young man who did not benefit from the crime in question. One needs not lose sight of the fact that the accused committed a very serious offence as highlighted by the trial court,

The firm view that I take is that in passing sentence the court was obliged to endeavour to strike a balance between the macro-societal interest and the interest of the accused and further to lean more towards a rehabilitative and restorative penal approach as opposed to blindly taking refuge in the orthodox approach to sentencing. In this regard I find the views echoed by UCHENA J in the case of *S* v *Nekuru* HH102/09 apposite. In that case the Learned Judge rightly espoused that a judicial officer must be dispassionate and avoid being propelled by emotion into passing ever increasing sentences.

I may add and say that it is only where an accused is a recidivist that the court may be tempted to consider depriving the accused the benefit of a suspended portion of a sentence of incarceration. See the case of *Attorney General* v *Makoni* S 42-88.

Everything said, in *casu* there was really no justification for the imposition of such a lengthy period of imprisonment and to further compound same by failure to suspend a portion thereof on flimsy grounds. Further guidance can be derived from the following cases; *S* v *Chihoko* AD 154/75, *S* v *Chirara and Ors* HH170/90, *S* v *Trute*HB47/91 and *S* v *Chera* and *Another* 2008(2) ZLR 58.

I am more than satisfied that the sentence imposed in this case was shockingly outrageous and I withhold my certificate.

The sentence imposed by the court a quo is set aside and substituted by the following:

24 months imprisonment of which10 month's imprisonment is suspended for 5 years on condition the accused does not within that period commit any offence involving unlawful entry and dishonesty for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

BERE J _____

MUSAKWA J agrees _____