Judgment No. HB 123/2003
Case No. HCA 77/02

SHEPERD MELUSI NCUBE

Versus

THE STATE

IN THE HIFH COURT OF ZIMBABWE
CHEDA & NDOU JJ
BULAWAYO 23 OCTOBER & 20 NOVEMBER 2003

N Mazibuko for the appellant
H M S Ushewokunze III for respondent

Criminal Appeal

CHEDA J: Appellant appeals against sentence imposed by the Regional Magistrate in Bulawayo.

The facts of the matter which are largely common cause are that appellant a 30 year old man is unemployed, unmarried, has no children, no savings and no assets. He stole a mobile telephone commonly referred to as a "cellphone" belonging to his father. The appellant sold it for $4 000 and has not been recovered.

He pleaded guilty to the charge and was sentenced to 36 months imprisonment of which 18 months imprisonment was suspended for 5 years on the usual conditions. He now appeals against that sentence. Mr *Mazibuko* for appellant attacked the learned trial magistrate's decision in that there was a misdirection on her part, namely that the court *a quo* should have fully explained the charge and the facts to the accused, most importantly, that he should have sought appellant's concurrence with regards to the value of the cellphone. It is pertinent to note that the value of the cellphone as per the agreed facts is $60 000. But when an appeal was noted, appellant now disputed the value of the cellphone as he contends that it was valued at $16 500.

It is Mr *Mazibuko*'s argument that the court *a quo* misdirected itself in the following manner:-

1. by failing to explain fully the charge and facts of the case to the appellant;
2. by failing to establish the true value of the cellphone;
3. by failing to establish why the cellphone was said not to have been recovered when it was known to whom it was sold.
4. By failing to establish from complainant whether he wanted his son sent to prison, in view of the contents of his affidavit filed with the notice of appeal.

I will deal with each of the above alleged mis-directions below:

1. Need to explain the charge and facts to the accused

It is important and essential that an accused be fully informed of the nature of the charge and the facts that give rise to the charge. It is indeed more important when the accused is unrepresented. (In *R* v *Muchena* 1966 RLR 731 at 731H-I BEADLE CJ had this to say,

> "This court has repeatedly stated that where the accused is undefended and particularly when the accused person is not practically intelligent there is an obligation on the court to see that the accused's case is fairly put before the court and also assist the accused in his defence, where that is required." See also *S* v *Mutimhoyo* 1973(1) RLR 76 at 80A-C. (emphasis added)

Mr *Mazibuko* argued that the appellant who was unrepresented was deprived of the opportunity of a full explanation of the proceedings more particularly the issue pertaining to the value of the cellphone. The value of the cellphone was submitted to

the court by the state. I do not see how this information could have been provided for, by anyone other than by the complainant himself. I find that the complaint of theft was made by the complainant and so was the type of cellphone and the value thereof. The fact that he now comes up with a lesser value, well after the sentence has been passed is in my view, a sign of dishonest. This value has come in as an after thought after realising that it is the value of the cellphone which attracted what he and appellant now considers harsh. This type of behaviour must be discouraged and legal practitioners have a duty to assist their clients by advising them to tell the truth always.

We have been referred to the case of *S* v *Chikerwa* HH-97-96 whose principle is that there is a need for judicial officers to encourage complainants to have a say in crimes involving members of their families. The brief facts of that case were that accused a son to complainant (his mother) was charged with stock theft. Upon conviction she pleaded with the court to pass a lenient sentence. On review the court emphasised the need to seriously take into account what the complainant had said. Again in *S* v *J* HH-33-93 the court took issue with the trial court for passing sentence on a juvenile without a probation officer's report. This approach has therefore become part of our law. *In casu* there is no evidence that complainant was denied that opportunity at all. His expression that appellant should be spared a prison term only came after sentence had been passed. Unlike in *S* v *J supra* appellant is a man of 30 years, surely he is not a child. If he had luck he would have been married and possibly been blessed with a child. The long and short of it is that he fully understood the charge and the facts attendant thereto.

In the present case appellant stole from his father and he was given a chance to mitigate and a sentence was passed. There was no evidence before the trial court that appellant was the type of person who is unsophisticated and hence requiring a further explanation about the charge and the facts of the case or even if mitigation. It is clear that he mitigated hence the mention of his personal circumstances. Had the father (complainant) indicated at that stage, I am sure the trial magistrate would have allowed him to do so. I do not think that the court is required to specifically ask an accused whether or not he wants to call a relative in mitigation. If the complainant wishes the court to temper justice with mercy, it is him who must ask the court to consider his feelings with regards to punishment.

In my view, for such a claim to succeed the following factors must be taken into consideration:-

1. the nature of the charge;
2. the circumstances surrounding the commission of the offence;
3. his level of education;
4. the age of the accused;
5. the sex of the accused; and
6. his social status, that is whether he is a rural or urban person.

(The list if exhaustive)

The issue of the value of the cellphone was not raised at the trial, but only on appeal. This means that the court *a quo* was not given the opportunity to consider it and to ask that this court consider that failure as a misdirection is to say the least ridiculous.

The introduction of quotations and complainant's affidavits at this late stage is clearly an after thought on the part of the appellant and with great respect can not and should not be allowed.

It is the judicial officer's roll in my view to give a full explanation to the accused regarding the charge and the facts of the case. I do not think that a judicial officer is expected to do more than is reasonably expected of him. What is meant by a full explanation depends on the circumstances of each case. I am convinced that appellant understood fairly well what the allegations against him were, hence his indication of the person whom he had sold it to. It is clear that appellant does not attack the conviction but mitigation. That cannot be allowed bearing in mind that he did not query the value during the trial.

No suggestion has been made that the value of the cellphone was dreamt up by the respondent at the trial, for that reason it is clear that it came from complainant. As is the normal procedure, all the facts are presented by the complainant anyway.

It has been argued that appellant should have been given an opportunity to compensate complainant. A perusal of his mitigation indicates clearly that he stole because he wanted to sell the cellphone and pay for the drivers' licence, obtain employment and thereafter compensate complainant. While the idea of restitution is indeed a noble one, the courts must examine the genuineness of an accused who asks for time to compensate when it is clear that on the surface he has no means to do so. The operation of a compensation where there is no statutory requirement to do so should be both genuine and practically possible as such should be taken seriously as it raises complainant's hope of recovery of his lost property. It therefore should be made where an accused himself or his relatives are in a position to do so.

The appeal is accordingly dismissed.

Ndou J ………………………… I agree

Calderwood, Bryce Hendrie & Partners appellant's legal practitioners
Attorney-General's Office respondent's legal practitioners