

THE STATE

Versus

RICHARD NCUBE

And

JETHRO CHIGUMBU

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 18 DECEMBER 2003

Criminal Review

NDOU J: The two accused persons were jointly charged before an acting Regional Magistrate, Western Division, sitting in Bulawayo. They pleaded guilty to the charge of theft from their employer and were properly convicted and nothing turns on their convictions. The salient facts are that both were employed by Asphalt Products, Bulawayo. The first accused person was employed as a supervisor and the second accused person as a driver. Sometime towards the end of September 2002 the two were carrying out their duties patching potholes along Old Esigodini road when they were approached by one Mundandi who wanted his driveway to be tarred. The two agreed to pave Mundandi's driveway in a private capacity. They fraudulently ordered tar and allied materials from their company and pretended the materials would be used in the scope of their business in patching Old Esigodini Road. They instead stole the said material and went to construct Mundandi's driveway at his homestead in Waterford. The property stolen is valued at \$209 750,00. Although the materials were traced to Mundandi's driveway they were not recovered in a true sense.

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The accused persons were each sentenced to a paltry fine of \$5 000 or in default of payment 12 months wholly suspended on the usual conditions of good behaviour. The learned acting Regional Magistrate, with the benefit of hindsight agrees that the sentence is very lenient. The first accused is aged 49, married with six children and was in receipt of a salary of \$14 000,00 per month. It is not clear whether this is gross or net salary. The learned trial magistrate did not establish his service with the complainant company. The second accused is married with two children. His salary was not established during the trial.

The pre-sentencing information is disturbingly scant for a matter dealt with at regional court level. The learned trial magistrate did not meaningfully canvass all the mitigatory and aggravating factors. The accused persons were unrepresented by a lawyer and the trial magistrate had a duty to obtain these factors in order to come up with a suitable sentence. One expects proper and meaningful assessment of sentence from regional magistrates.

I say so because by their scrutiny powers they sit in judgment of the work of their subordinate colleagues. Such review or scrutinising powers that they enjoy enjoin them to be exemplary. The scrutiny powers vested in them by virtue of section 58 of the Magistrates Court Act [Chapter 7:10] are aimed at providing a curb on any misdirected or arbitrary exercise of power by their fellow magistrates. The scrutinising Regional Magistrate is there to assist, as far as he or she is able, in the administration of justice and ensure that accused persons receive fair treatment. From the scant information in the record I am unable to glean why such a disturbingly lenient sentence was imposed. It seems that this is a serious case of misplaced sympathy which resulted in miscarriage of justice. In the circumstances, I am unable

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to certify these proceedings as being in accordance with true and substantial justice. I, therefore, withholding my certificate.