

SAMUEL MATHABELA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND NDOU J J
BULAWAYO 24 JULY 2003

G Nyoni for appellant
Mrs M Moya-Matshanga for the respondent

Criminal Appeal

CHEDA J: Appellant appeals against a sentence of 9 months imprisonment of which 3 months imprisonment was suspended on the usual conditions only.

The salient facts of this matter which are common cause are that on 11 February 2001 appellant who was a senior prison officer broke into a store-room at Mlondolozhi Prison complex but did not take anything when he was found inside. Appellant had no right to be in the said store-room. After he was caught red handed he panicked, went to his house and brought property which apparently had been stolen before the present incident.

He pleaded not guilty, was tried and convicted of house breaking with intent to steal and theft and sentenced as stated above. Mr *Nyoni* his legal practitioner has argued that he should not have been convicted of house breaking with intent to steal and theft but rather of house breaking with intent to commit a crime unknown to the prosecutor. I agree with his submission. Appellant though found inside the premises had not taken anything at the time. The fact that he panicked and decided to surrender his previous spoils should not and cannot be directly linked to the present charge.

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Appellant should therefore have been convicted of housebreaking with intent to commit a crime unknown to the prosecutor and the conviction is altered to that effect.

It is further Mr *Nyoni*'s argument that the sentence imposed is on the harsher side and the court should have imposed a sentence of community service. He advanced the following reasons:-

1. that appellant stole nothing
2. appellant lost his employment and naturally his employment benefits
3. this matter took long to finalise.

Appellant was a senior officer in the prison service, a senior position indeed. He was in charge, not only of prisoners but other prison officials as well. Appellant carefully planned this offence and it is clear that he had taken some property from this store-room before, hence his attempt to return it after he had been caught. Mr *Nyoni* has argued that appellant asked for forgiveness and thus remorseful. Asking for forgiveness after being caught red handed is indeed proper as it demonstrates remorse, but this can not be over-stretched as appellant had no choice but to confess. He has been waiting for the finalisation of this matter for a very long period but such is the case for all appeals. It has not been shown that there was a special reason why his appeal was not heard in time. He indeed has lost his job and employment benefits. While this indeed is regrettable, but these are some of the consequences of indulging in such risks.

Taking into account his position and the careful planning this offence took I find that the sentence imposed is justified and if the trial court is to be criticised, it should be criticised for having imposed a lenient sentence. A person in the position of appellant whose job is to punish or deal with offenders on a daily basis is expected to

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draw a lesson from them so as to avoid being placed in a group of offenders. If he can not be deterred by what he observes on a daily basis then it is only proper to make him part and parcel of the offenders and as such he can not be heard to complain when he is ordered to join them in their corrective services as prisoners.

I have discussed this matter with my brother NDOU J who in addition to the above emphasised that, appellant's actions, that is, opening up the store-room after cutting duplicate keys in fact compromised the security of the prison and as such should be discouraged. I fully endorse this observation.

Accordingly, the appeal be and is hereby dismissed.

Ndou J I agree

James, Moyo-Majwabu & Nyoni appellant's legal practitioners
Attorney-General's Office respondent's legal practitioners