Judgment No. HB 93/2004
Case No. HCA 130-131/2003

OWEN HONYE

And

LEORNARD MWENYABABU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA & NDOU JJ
BULAWAYO 12 MAY & 3 SEPTEMBER 2004

J Nyarota for the appellants
Mrs M Moya-Matshanga for the respondent

Criminal Appeal

CHEDA J: This is an appeal against sentence only imposed by the magistrate sitting at Kwekwe on 27 August 2003.

The facts of the matter are common cause. First appellant was employed as a security guard and was attached to O K Bazaars, Kwekwe while Rutendo Nyika and Leonard Mwenyababu who were jointly charged with him were fruit vendors also attached to O K Bazaars Kwekwe. On 21 August 2003 the three hatched a plan to steal goods from O K Bazaars, which they did, on 2 occasions. First appellant was the security guard and his duty was to arrest those who stole from the place he was guarding but did not do so. On the 1st occasion they stole property worth $45 540 and was recovered. On the second occasion they stole property worth $156 035 the total value of property stolen is $201 575,00 and property worth $156 035 was recovered.

They were initially charged together with Leonard Mwenyababu who pleaded not guilty which led to the separation of trials. The two appellants pleaded guilty,

and were duly convicted and sentenced to two and a half years each of which 6 months imprisonment was suspended for 5 years on the usual conditions.

Appellants have argued that the trial court should have sentenced them to a non-custodial term in view of the fact that there are:

(1) first offenders;

(2) that they pleaded guilty;

(3) that out of the total of $201 575,00 worth of property stolen, property worth $156 035 was recovered; and

(4) that the sentence of two and a half years imprisonment with 6 months imprisonment suspended induces a sense of shock in the circumstances.

While it is the court's stance that first offenders and moreso youths should be kept out of prison, this practice is not a rule of thumb and must therefore be exercised with great caution. The circumstances of the case must no doubt play a determinant role. Appellants were indeed relatively young, being 22 and 25 years. However, the way they planned and executed their plan in committing these offences is in line with actions and behaviour normally associated with adults and therefore in my view, should be treated like adults.

Second appellant was employed as a security guard who was trusted with the duty of preventing thefts at his work place. Instead, he connived with others to breach a trust bestowed on him by his employers.

Those in position of trust should bear in mind that those employing them in that capacity bestow all their trust in them, their failure to live up to those expectations is a great betrayal which can easily result in untold pecuniary loss to the

employers. It is for this reason that custodial sentences should be imposed for such offences, even for first offenders and is therefore a justification for departing from the practice of keeping youthful first offenders out of custody. In *S* v *Tshuma* HB-22-93 MUCHECHETERE J (as he then was) with CHEDA J (as he then was) concurring stated-

> "Theft by security officers falls into special category. Where theft was premeditated sentences are invariably custodial."

Again in *S* v *Marko Arnold Sibanda* HH-164-99. Accused was a security guard minding the main gate, connived with the stores man and stole property from the premises, OMERJEE J stated-

> "The aggravating features which are not mentioned by the trial magistrate are that the accused was employed as a security guard to guard the very premises from which he stole the property and that he acted in concert with another."

In *Charles Ngwenya and 2 Others* v *S* SC-143-93 security guards stole fertiliser from their employer. They were sentenced to 15 months imprisonment of which 6 months was suspended for 5 years. The fertiliser was not recovered and was valued at $9 000. SANDURA JA said-

> "This was a very serious breach of trust by the first two appellants which in my view calls for a deterrent sentence. I cannot see any reason for interfering with the sentence imposed by the trial magistrate."

I agree with Mrs *Moya-Matshanga* for respondent that custodial sentence is the most befitting sentence in the circumstances. I certainly do not believe that a fine and an order for restitution will meet the justice of this case. Employers can not personally guard their own properties, hence the need to employ security guards. Having employed them, they are entitled to rest assured that they will get value for

their money, otherwise, it would be pointless to employ security guards if they can not be trusted . Deterrence in this matter is certainly called for.

I find no merit in this appeal and accordingly dismiss it.

Ndou J …….. I agree

Messrs Wilmot & Bennet appellants' legal practitioners
Criminal Division – Attorney-General's Office, respondent's legal practitioners