Judgment No. HB 124/06
Case No. HC 2191-2208/06

THE STATE

Versus

NQOBIZITHA DLODLO – VF 418/05
MARGRET SAKALA & 2 OTHERS – VF 539-41/05
MARIA MBEWE 7 ANOTHER – VF 130/05
DENNIS NDLOVU – VF 237/05
THULANI NKOMO – VF 592/05
VIVIAN MLAMBO – VF 651/05
TICHAONA NDEBELE & ANOTHER – 688-9/05
LIZWELIHLE Ncube – VF 738/05
CRYBERT MAGAYA – VF 176/05
ANOEL NYONI – VF 274/05
HANDRIETA NCUBE – F 348/05
WASHINGTON MOYO – VF 361/05
SIAMUNDA LOVEMORE – VF 1037/05
BRIGTH MOYO – VF 861/05
SENZENI MNYAKA – VF 780/05
TERERAYI WAKASEMWA – VF 781/05
BUKHOSI DUBE & ANOTHER – VF 1035-6/06
CLEVER DAIMON – VF 989/05

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 16 NOVEMBER 2006

Criminal Review

NDOU J: All these matters were dealt with by the same senior magistrate sitting in Victoria Falls. All the matters were dealt with separately, the learned scrutinising Hwange Regional Magistrate forwarded them to the High Court for review conveniently under cover of a single memorandum. I do not intend to deviate from that route of convenience so I will also deal with all these matters in one judgment. These matters were not submitted for scrutiny within the statutory period of a week, instead the average delay for submission is around a year. In fact, some were submitted when the learned trial magistrate was about to leave the service and others after he had left the service and the country. This delay is unacceptable and in

most cases defeats the whole purpose of automatic scrutiny or review. The reason given for the delay is that there was no typist to type review case covers. This problem is common to most stations in the Western and Central Division that we cover. It has been brought to the attention of the magistrates' stations that the completing of review case covers in long hand is acceptable in order to submit review records timeously for review or scrutiny. Indeed, most records reach the High and Regional Courts with review case covers completed in long hand. This lack of resources excuse is mere cover-up for dilatoriness.

Coming back to the matters on their merits, I propose to deal with the problem area in each matter in turn.

Nqobizitha Dlodlo – The accused was 15 years old and was charged with housebreaking with intent to steal and theft of property valued at $3 million (old currency). The property was recovered. He was sentenced to 6 months imprisonment. I agree with the learned scrutinising magistrate that in a case of this kind and where accused is aged 15 years, imprisonment is uncalled for as a result I decline to confirm the proceedings. This matter was submitted for scrutiny after 1 year and 2 months.

Margret Sakala and others – The issue raised by scrutinising Regional Magistrate was for the education of the trial magistrate. As the trial magistrate has left the service and the country I will simply confirm the proceedings as there is no prejudice occasioned to the accused by the mistake. The delay was one year and one month.

Maria Mbewe and Another – The query here relates to the improvement of the quality of the taking of the accuseds' plea. I agree with the learned scrutinising

Regional Magistrate that it is very important that the essential elements be properly canvassed. Notwithstanding the trial magistrate's failure to follow the standard question and answer, the accused admitted the facts and elements that can sustain the conviction. I therefore confirm the proceedings. The delay was one year and three months.

Dennis Ndlovu – In this one the accused cultivated 10 plants of dagga measuring between 15 and 75 centimetres at his homestead. The accused was sentenced to a fine of $100 000 (old currency) or in default of payment 6 months imprisonment. I agree with the learned scrutinising magistrate that the sentence is manifestly lenient. An addtional suspended prison sentence was called for. Accordingly I am unable to certify these proceedings as being in accordance with true and substantial justice. The delay was one year and one month.

Thulani Nkomo – In this one I agree with the learned scrutinising Regional Magistrate that the essential elements were canvassed in a rather clumsy fashion. But from the medical evidence and what the accused admitted I am satisfied that the conviction is sustainable and I confirm the proceedings. The delay was one year and one month.

Tichaona Ndebele and Another – What I stated in the Margret Mbewe case above is applicable here and I confirm the proceedings. The delay was eleven months.

Lizwelihle Ncube – What I stated in the Margret Mbewe case above also applies and I confirm the proceedings. The delay was eleven months.

Crybert Magaya – In this case the accused was convicted of two counts of fraud involving $329 200 and $650 000 respectively. He defrauded his employer using a *modus operandi* that was well planned and well executed. He was sentenced to a fine

of $200 000 or in default of payment 3 months imprisonment. It is not apparent from the record why the trial magistrate trivialised such a serious conduct. The accused abused a position of trust – *S* v *Mbewe* HB-89-95; *S* v *Venganayi* HH-52-89 and *S* v *Dube & Anor* S 169-89. It is trite that a sentence must fit the crime, be fair to the state and the accused and blended with mercy – *S* v *Sparks & Anor* 1972(3) SA 396 and *S* v *Mpofu* HB-89-03. The right balance was not struck in this case. A sentence that is too light is as wrong as a sentence that is too heavy, both can bring the criminal justice system into disrepute – *S* v *Holder* 1979 (2) SA 70 at 77 and *S* v *Matika* HB 17-06 at page 3-4. "True mercy has nothing in common with soft weakness or maudlin sympathy for the criminal or permissive tolerance. It is an element of justice itself" – *Graham* v *Odendaal* 1972(2) SA 611A at 614. "Mercy must not be allowed to lead to condonation or minimisation of serious offences" – *S* v *Van der Westhuizen* 1974 (4) SA 61 (C). In this case, the fine imposed is far below the value of prejudice occasioned to the complainant. It is settled that it is, generally, wrong to fine an offender an amount which is less than the money stolen – *S* v *Urayayi* HB-54-84; *S* v *Dhokweni* HH-2-82 and *S* v *Matika, supra*. A substantial fine coupled with a wholly suspended prison sentence would have been appropriate. Accordingly, in this matter I am unable to confirm the proceedings. The delay was one year fine months.

Anoel N yoni – The accused was employed as a security guard. He broke into and entered into a room at the premises he was guarding in the course of his duty. He stole property valued at $180 000,00. He was sentenced to a fine less than the value of stolen property. The conduct involved a serious abuse of position of trust. For the same reasons as the Crybert Magaya case, *supra*, I am unable to confirm the proceedings. The delay was one year and four months.

Hendrieta Ncube – Accused was charged under the Sexual Offences Act [Chapter 9:05]. The accused was aged 20 and he had sexual intercourse with a 14 year old form 2 student at Mosi-oa-Tunya High School. He was sentenced to perform community service at the same school. This type of placement has a potential of bringing the sentencing option of community service into disrepute. I am unable to certify these proceedings as being in accordance with true and substantial justice. The delay was one year and three months.

Washington Moyo – Besides the late submission for scrutiny, I do not see anything wrong with this one. It was submitted one year and three months late. I confirm the proceedings.

Siamunda Lovemore – The accused smuggled four mobile phones hand sets valued at $15 million. He was sentenced to a paltry fine of $200 000 (four months imprisonment). For the reasons stated in Crybert Magaya case, I am unable to certify the proceedings as being in accordance with true and substantial justice. The delay was eight months.

Bright Moyo – Besides the delay of ten months I have no problems with proceedings and I confirm them.

Senzeni Mnyaka – The accused was convicted of possession of 610 grammes of dagga with a street value of $3 050 000,00. She said she committed the offence because she needed money. She was fined $100 000,00 or in default of payment 60 days imprisonment. The fine is very much on the lenient side but is still with the magistrate's sentencing discretion, so I will confirm the proceedings. The delay here was ten months.

Tereraryi **Wakasemwa** – The accused was charged with two counts of theft. In the first charge the accused abused his host's kindness and stole property from the latter's flat. The value of the stolen property is $1 700 000,00. In the second charge the accused requested brief use of the complainant's mobile phone saying his own had run out of battery. He took the phone and sold it for $1 million. The stolen mobile phone is valued at $2 500 000,00. The accused's conduct is very serious but in his wisdom, the trial magistrate sentenced the accused to a paltry fine of $200 000 or 10 days imprisonment (i.e. both counts being treated as one). What I said in respect of the Crybert Magaya case, *supra*, applies here. The sentence is hopelessly out of proportion with the accused high moral blameworthiness. I am unable to certify the proceedings. The delay here was 10 months.

Bukhosi Dube and Another – In this case the accused persons smuggled a total of six mobile hand sets. They were each sentenced to $200 000,00 or in default of payment 4 months imprisonment. What is stated in Siamunda Lovemore case is applicable. I cannot certify these proceedings. The delay here was eight months.

Clever Daimon – The accused was convicted of negligent driving in contravention of section 52(2) Road Traffic Act [Chapter 13:11]. The accused was driving a MAN heavy vehicle. Section 52(4) (c) as amended by section 16 of the Road Traffic Amendment Act 3/2000 applies. This sub-section provides-

> "… in the case of an offence involving the driving of a commuter omnibus or a heavy vehicle, shall prohibit the person from driving for a period of not less than 2 years" (i.e. if no special circumstances do not exist) – *S* v *Mhone* HB-56-05 and *S* v *Ndlovu* HB-14-06.

If there was no delay in submitting this matter, I would have ordered the magistrate to cure the flaw by evoking the provisions of section 65(6) of the Road

Traffic Act, *supra*. But, unfortunately, this remedy is only available within six months of the date of sentence – section 65(8) of the Road Traffic Act, *supra*. The result is a gross miscarriage of justice.

I, accordingly, decline to confirm the proceedings as being in accordance with true and substantial justice.