Judgment No. HB 17/06
Case No. HC 4246/04
CRB FIL 352/04

THE STATE

Versus

SOLOMON MATIKA

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

Criminal Review

NDOU J: The accused person was properly convicted by a Filabusi Magistrate of house breaking with intent to steal and theft. Nothing turns on the conviction.

I am concerned by the propriety of the sentence. The salient facts are that the accused was employed as a security guard by Cobra Security. Cobra Security was providing contractual security services to the Grain Marketing Board, Filabusi at the time and on the day in question the accused was on guard there. The accused was guarding the compound which include Insiza Council offices. He had no access to the Council storeroom. During the night of 24 June 2004 he broke one of the windows to the council storeroom in the same compound where he was guarding. He inserted his hands inside and fished out twelve (12) spirit levels through the broken window. He concealed the stolen property in a nearby bush.

He later approached a workmate and tasked him to get him a buyer for the stolen property. The latter trapped the accused resulting in his arrest. As a result of this intervention by an honest

workmate, the stolen property was recovered. It was not recovered as a result of change of

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heart on the part of the accused. The stolen property was valued at $3 600 000,00. The accused pleaded guilty and was duly convicted. He was sentenced to $100 000,00 or in default of payment 2 months imprisonment. The sentence trivialises a very serious crime. I sought the views of the Attorney General on the propriety of the sentence. I am indebted to Mr T Mkhwananzi who responded on behalf of the former in the following terms:

> "2. …Theft from the employer is a very serious offence. However it is apparent that the magistrate failed to note that in his judgment. By stealing from his employer the accused person breached the trust bestowed in him by his employer. Further, the magistrate should have noted that the theft was preceded by a break-in, which to me, shows that the accused person had pre-conceived committing the offence.
> 3. In arriving at his sentence the magistrate only took into account two mitigatory factors i.e.
> (a) Accused is a first offender;
> (b) Accused did not benefit from the commission of the offence.
> 4. What is disturbing, I submit, is that the magistrate failed to take into account the aggravating factors which were clearly apparent in the circumstances some of which are-
> (a) Gravity of the offence. As already stated above the seriousness of the offence is shown on the background that accused bluntly abused the trust placed in him by the employer.
> (b) Accused's moral blameworthiness is high especially when taking into account that accused was employed as a guard. The basic qualities of a guard are that he has to be trustworthy and responsible.
> (c) Although accused did not benefit from the commission of the offence the magistrate should

have taken into account that the accused person was arrested trying to sell the property which clearly shows that he intended to permanently deprive the employer of his property.

(d) There is no evidence whatsoever that recovery of the stolen property was a result of change of heart. It was fortuitous.

(e) The value of stolen property is quite substantial, hence the potential prejudice was colossal. Had he succeeded in

selling the property the employer would have incurred substantial losses as a result.

(f) The property the accused was guarding (the GMB) is strategic public entity. The magistrate should have noted the alarming rate at which the government is losing its equipment worth millions of dollars annually to irresponsible and untrustworthy employees like the accused person resulting in poor service delivery …

5. …
6. …
7. …
8. It is therefore submitted that a sentence to a fine of $100 000 or 2 months is abnormally lenient. It defies logic how one can get away with a fine of $100 000 for an offence whose potential prejudice is about $3 600 000 and especially when taking into account the aggravating factors mentioned above."

I agree with these observations[even though accused was not directly employed by the owner he was guarding the premises]. This is a case of misplaced sympathy. The accused seriously abused a position of trust – *S* v *Mbewe* HB-89-95; *S* v *Munyoro* HH-28-89; *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 and Anor* 1972(3) SA 396 and *S* v *Mpofu* HB-89-03. The right balance

was not struck in this case. As sentence that is too light is as wrong as sentence too heavy. Both can bring the criminal justice system into disrepute – *S* v *Holder* 1979(2)SA 70 at 77H.

> "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) and *A guide to Sentencing in Zimbabwe* by G feltoe at pages 2-3.

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Even if it is conceded that a fine is appropriate (this concession is not made here) the issue of imposing a paltry fine of $100 000 for house breaking with intent to steal and theft of property valued over three and half million dollars would arise.

In *S* v *Urayayi* HB-54-84 it was stated – "… it is settled that it is wrong to fine an offender an amount which is less than the money stolen" – see also *S* v *Dhokwani* HH-2-82. If the fine imposed is less than the value of the property stolen the crime would seem to pay.

From the foregoing I find myself unable to certify these proceedings as being in accordance with true and substantial justice. I, accordingly, withhold my certificate.