

SIKHUMBUZO MHENE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 29 NOVEMBER 2007

S S Mazibisa for the accused
W B Dube for the state

Criminal Review

NDOU J: The accused was convicted of forty-one (41) counts of theft by a Bulawayo Magistrate. The accused, who was represented by a legal practitioner pleaded guilty to all the charges and nothing turns on the convictions. The issue for determination here is in connection with the sentence. Instead of appealing against sentence, this application was filed. The state does not oppose the application. This approach is sanctioned by the provisions of section 29 of High Court Act [Chapter 7:06] and sections 57(1)(b)(ii) and 57(2) of the Magistrates' Court Act [Chapter 7:10] – see also *R v Pio & Anor* 1967(1) RLR (G) 106 (G) at 107H; *R v Chidongo* 1939 SR 210; *S v Runganga* 1995 (2) ZLR 303 (H); *S v Nyathi* HB-90-03; *S v Class* HB-43-04; *S v Stockie* 1980 ZLR 280 (G) at 282F-H; *S v Hulley* HB-60-95 and *S v Nkata & Ors* HB-1106.

The pith and marrow of the case are that after his pleas of guilty the accused was duly convicted. According to applicant's legal practitioner the sentence pronounced in court by the learned trial magistrate is the following:

“Counts 1-31 taken as one: 24 months imprisonment
Counts 32 –41 taken as one: 12 months imprisonment
Both sentences (of 24 months and 12 months) imprisonment to run concurrently” [A period of six months was suspended on the usual conditions]

The state does not dispute this. The warrant of committal signed by the trial magistrate reflects a sentence of 36 months imprisonment [with six (6) months suspended]. The parties approached the learned trial magistrate for rectification of the sentence. Although she conceded the error, she felt that she was at that stage *functus officio* and referred the parties to the High Court for review.

As the parties are in agreement I will exercise my wide powers of review without necessarily deciding whether or not the magistrate was right in stating that she was *functus officio*. I would, however, urge trial magistrates to be careful in pronouncing their sentences. A sentence is a very important final stage of the criminal trial. Magistrates should read the sentences as they have recorded in the charge sheet and ensure that the warrants of committal [which are usually completed by prison officers] are a true and correct reflection of the sentence imposed.

Errors of this kind traumatise prisoners who are uncertain of the sentence imposed.

Accordingly, the convictions are confirmed and the sentence reflected on the warrant of committal or the record is set aside and substituted by the following:

“Counts 1-31 are taken as one for the purpose of sentence: 24 months imprisonment.

Counts 32-41 are taken as one for the purpose of sentence: 12 months imprisonment.

The sentence of 24 months and 12 months are ordered to run concurrently. Of the total effective sentence, 6 months is suspended on the following conditions:

- (a) 3 months is suspended for five years on condition the accused in that period does not commit and offence of theft or dishonesty and for which he is convicted and sentenced to imprisonment without the option of a fine; and,
- (b) 3 months on condition the accused pays restitution to the complainant of \$125 969 498,48 (old currency) through the Clerk of Court Bulawayo by not later than 30 November 2007.

The Officer-In-Charge of the Prison where the accused is serving his sentence to be immediately informed by the Registrar of this Court of the correct sentence”.

Judgment No. HB 120/07
Case No. HC 1316/07
X Ref CRB 1869/06

Cheda J I agree

Cheda & Partners, applicant's legal practitioners
Criminal Division of the Attorney-General's Office, state's legal practitioners