WITNESS KULEKANI NDLOVU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND NDOU J J
BULAWAYO 20 OCTOBER 2008 AND 12 FEBRUARY 2009

R Mahachi, for appellant
E Moyo, for respondent

Criminal Appeal

NDOU J: The appellant was convicted on his own plea by a Gwanda Magistrate on 26 October 2006 for receiving stolen property knowing it to be stolen as defined in section 124(1)(a) of the Criminal law (Codification and Reform) Act, [Chapter 9:23]. He was sentenced to an effective 24 months imprisonment. He is appealing against the sentence only. The background facts are that appellant, who was at the time employed as an Arex Officer, received stolen medicines, X Ray films, surgical blades. The property was stolen from Maphisa District Hospital. Three employees of the Hospital stole the property and passed it on to the appellant. He knew the nefarious source of the property. In particular, he was aware that the property was being stolen from a rural public hospital. As a local resident, he obviously appreciated the impact of theft of drugs and equipment from such a rural hospital. The stolen items were valued at $2 725 700,00. This was a substantial amount at the time of the conviction of the appellant. So what appellant did was very serious. In his favour the appellant is a first offender. He pleaded guilty and has shown some measure of contrition, all the stolen property was recovered. He was suffering from Tuberculosis at the time of his trial and did not enjoy good health. He stated that his wife was bed ridden and she was also suffering from Tuberculosis. He is the sole bread winner. As the sentence imposed was 24 months, the learned magistrate should have considered the option of community service. In his response to the notice of appeal the magistrate states he did consider the option of community service.

We are, however, not convinced that he did so because under mitigation he did not explain this option to the appellant. In his own reasons for sentence there is also

no mention of community service. The respondent has conceded that the trial magistrate misdirected himself by not considering the question of community service. The concession is properly made in view of our case law – *S* v *Majaya* HB-15-03; *S* v *Shariwa* HB-37-03; *S* v *Mpofu* HB-73-03; *S* v *Khumalo* HB-39-03 and *S* v *Manyevere* HB-38-03. The appellant was unrepresented during the trial so there was a need for the trial magistrate to canvass the possibility of performing community service. It is not sufficient for the trial magistrate to think about it when assessing sentence. Before he starts thinking about its appropriateness he must invite (after explanation to the accused) representations and thereafter consider. All this must be apparent from the record of proceedings and not from assurance by the trial magistrate at a later stage. In view of the above misdirection, we are at large as far as sentence is concerned. Both counsel have submitted that community service is appropriate. We are in agreement. We also take into account that the appellant served four (4) months before being granted bail pending appeal.

Accordingly, the conviction is confirmed. The sentence imposed by trial court is set aside and substituted as follows:

"20 months imprisonment of which –

(a) 12 months imprisonment is suspended for 5 years on condition the accused is not convicted of any offence of which dishonesty is an element committed within that period for which he is sentenced to imprisonment without the option of a fine.

The remaining 8 months imprisonment is suspended on condition the accused completes 310 hours of community service at Kezi Police Station at Kezi on the following terms –

(i) the community service starts within ten(10) days of the handing of this judgment and must be completed within 12 weeks of that date;

the community service must be performed between the hours of 8am to 1pm and 2pm to 4pm each Monday to Friday which is not a public holiday to the satisfaction of the person in charge at the said institution who may, for good cause grant the accused leave to be absent on a particular day or days or during certain hours. Any such leave of absence shall not count as part of the community service to be completed."

Cheda J ……. I agree

T Hara & Partners, appellant's legal practitioners
Criminal Division, Attorney General's Officer, respondent's legal practitioners