

INNOCENT CHIVERE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE

CHEDA AND NDOU J J

BULAWAYO 10 MAY AND 2 SEPTEMBER 2010

Ms J Gororo for the appellant

K Ndlovu for the respondent

Criminal Appeal

NDOU J: The appellant pleaded guilty to a charge of unlawful entry into premises as defined in section 131 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. He was duly convicted by a Bulawayo magistrate and nothing turns on the conviction as he only appeals against the sentence imposed on him. The brief facts of the case are the following. The appellant and the complainant were both employees of the National Railways of Zimbabwe (“NRZ”) at the time of the offence. They were both housed in their employer’s residential quarters. On 7 September 2008, the appellant used duplicate keys to gain entry into the complainant’s place of abode. Whilst inside the house, the appellant stole 750 millilitres of cooking oil, 4 kilograms of sugar, 20 kilograms of mealie-meal and a portable radio. The appellant took the property and concealed it in his room. When the complainant detected the breaking and the theft he enquired from other workmates. He was informed that the appellant was seen carrying something in a sack. With the assistance of NRZ security officers, the appellant’s residence was searched and the stolen property was recovered. The value of the stolen property was Z\$40 590,00 and all the stolen property was recovered. The appellant was sentenced to 24 months imprisonment of which 3 months were suspended on the usual conditions of future good behavior. The pith and marrow of the appeal is that appellant should have been considered for a sentence of community service. It is trite that the trial magistrate did not consider whether or not the appellant was a suitable candidate for community service. The appellant was not represented by a legal practitioner during the summary trial. The learned trial magistrate did not canvass the issue of community service with the appellant. Not surprisingly, the appellant did not address the court *a quo* on issue. This court has previously emphasized the need for magistrates to canvass the possibility of performing community service with unrepresented accused persons in cases which did not merit imprisonment for more than 24 months. Failure to do so would amount to a misdirection – *S v Manyevere* HB-38-03; *Ndlovu v S* HB-22-09 and *S v Khumalo* HB-39-03. There is such misdirection *in casu*. This is a

case which deserved serious consideration of community service by the trial magistrate. The appellant pleaded guilty and showed some form of contrition. He did not benefit from the crime. He lost his employment as a result of the conviction.

In light of the above, the appeal against sentence should succeed. Accordingly, the conviction is confirmed. The sentence imposed by the trial court is set aside and substituted as follows:

24 months imprisonment of which:

1. 12 months imprisonment is suspended for 3 years on condition that accused is not convicted of any offence of unlawful entry or an offence of which dishonesty is an element committed within that period for which he is sentenced to imprisonment without the option of a fine.
2. The remaining 12 months is suspended on condition that accused completes 420 hours of community service at the Provincial Magistrates Court at Bulawayo on the following terms:
 - (i) The community service starts within ten (10) days of the handing down of this judgment and must be completed within twelve (12) weeks of that dated;
 - (ii) The community service must be performed between the hours of 8am and 1pm and 2pm and 4pm each Monday to Friday which is not a public holiday to the satisfaction of the person in charge of 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

Maronedze, Mukuku, Ndove and Partners, appellant's legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners