

THE STATE

Versus

GRESHAM DUBE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 20 SEPTEMBER 2011

Criminal Review

KAMOCHA J: The 27 year old accused was charged with theft from a motor vehicle in contravention of section 113 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. In that on 15 August 2011 at around 0100 hours he stole a Nokia cell phone from a car parked at number 22 Phakamani, Plumtree. The car was locked but the accused used some unknown object to unlock it and remove the mobile phone which had been left on the dashboard of the car.

The complainant who is a magistrate at Plumtree Magistrates Court disturbed the accused who then ran away but was eventually arrested. The mobile phone which was valued at \$70 was recovered.

The accused was arraigned at the Plumtree Magistrate Court where he pleaded guilty and was found guilty as pleaded. He was then sentenced to undergo 4 years imprisonment. While the conviction was proper the sentence imposed is a cause for concern.

When the court asked the accused why he had committed the offence his response was that he had sometime worked for the magistrate on a part time basis and had just got tempted.

The court then said the following before sentencing the accused:-

“You are a first offender. You pleaded guilty to the offence. Therefore you did not waste the court’s time. You showed contrition and the court interpreted this as a genuine sign of remorse.

The phone you stole was recovered, therefore, you did not benefit at all from your criminal enterprise. However, the offence you committed is very prevalent, therefore, there is need to deter you and likeminded members of our society.

You betrayed the trust that has been bestowed upon you as an employee, albeit a temporary employee by stealing from your employer. You showed utter disregard for

Judgment No. HB 132/11

Case No. HC 1473/11

CRB PT 553/11

the law by stealing from a magistrate. There is need to show all and sundry that the law has to be respected at all costs.

In view of the foregoing, a custodial sentence would suffice.”

The court clearly paid lip service to the mitigating features which it outlined. It just repeated the mitigating factors without applying its mind to them otherwise how could it have arrived at a sentence of 4 years imprisonment for the theft of a mobile phone valued at \$70 all recovered. The accused is a first offender who pleaded guilty.

The court exaggerated the aggravating features. The trial magistrate seems to have imposed such a grossly excessive sentence because the accuse stole from a fellow magistrate. The sentence is completely out of step. It induces a sense of shock.

When something like this happens at a small station like Plumtree Magistrates Court a magistrate from another station should be called to deal with the matter for justice not only to be done but to be seen to be done. A magistrate from another station would not have imposed such an outrageous sentence in the circumstances. Even if the accused deserved to be sent to prison the sentence should not have been disturbingly excessive. It should have matched the offence and tempered with mercy.

What the accused did cannot be taken lightly. He went to his former employer under cover of darkness and broke into the car in order to steal a mobile phone. He used his prior knowledge of the area. The trial court was correct in holding that he deserved to be sent to prison. The sentence should have been sharp and short.

In the result the sentence imposed by the trial court is set aside and substituted with the following:

“5 months imprisonment of which 2 months imprisonment is suspended for a period of 4 years on condition that the accused is not convicted of any offence of which theft or dishonesty forms an element committed within that period for which accused is sentenced to imprisonment without the option of paying a fine”.

A warrant reflecting the new sentence is hereby issued.

Ndou J I agree