THE STATE

Versus

FORGET NDLOVU

IN THE HIGH COURT OF ZIMBABWE
MUTEMA J
BULAWAYO 21 MARCH 2013

Criminal Review

MUTEMA J: *Ex facie* the summary jurisdiction form, the accused was charged with theft in contravention of section 113 of the Criminal Law (Codification and Reform) Act, Chapter 9:23. He pleaded guilty to that charge and was duly convicted as pleaded.

Accused is a 23 year old single first offender who is a commuter omnibus conductor. He stole $10 and 4 airtime juice cards valued at $4 from the juvenile vendor. The outline of the state case avers that accused was being charged with robbery in that on the day in question he approached the complainant who was selling fruits and juice cards and produced a knife and told complainant to give him some change quickly as he was in a hurry. Complainant took out some coins from her purse, placed the purse on top of the stand/stall and gave accused the R5 change whereupon accused left the place running. The complainant immediately realized that accused had also taken her purse with $10 and $4 worth of airtime juice cards. She ran after the accused to no avail. When he was later arrested accused paid back the $14,00.

The trial magistrate sentenced accused to 18 months imprisonment reasoning thus:

> "Accused is a first youthful offender who pleaded guilty and did not waste the court's time. It is a trite principle of sentencing to exercise leniency when dealing with first offenders. However, I took as aggravating the fact that accused produced a weapon before stealing from the complainant. The circumstances of the theft are disturbing. I found a custodial sentence appropriate".

When I queried with the trial magistrate how it escaped his notice that the charges in the two documents did not tally and which charge, on the facts should accused have been charged with, and whether the sentence did not induce a sense of shock, I got the following response: "I concede that the proper charge could have been that of robbery and not theft. I apologise as this was an oversight on my part. I also apologise for imposing a severe sentence. My sentence was influenced by the production of a knife which I found aggravating."

Judicial officers wield a lot of power and deal with one of the most fundamental rights of an individual, *viz* the right to liberty. It is on this basis that they are always enjoined to apply

their mind to their work with impeccable diligence. A slipshod and slapdash way of doing judicial work cannot be countenanced. It was the trial magistrate's duty to put the state to terms to disclose as regards what charge it had nailed its colours to the mast. It was a fallacy fatal to the severe sentence which smacks of barbarism *in casu* to say that the trial magistrate was influenced by the production of a knife when the facts are silent as regards the role that the knife played. It is most probable that had the knife played any role in committing whatever offence the trial magistrate imagined to be the correct one, the complainant would have had the audacity to run after the accused. The accused was charged with and convicted of theft as per his guilty plea, period. It goes without saying that after taking into account all relevant factors of the mitigation *exitant in casu* the magistrate did not apportion any cogency to any of those factors. The sentence was simply plucked from the air and it defies all known tenets of the process of sentencing.

In the event the sentence cannot be allowed to stand. A non-custodial sentence would have met the justice of the case. Accused has already served over two months imprisonment, having been sentenced on 13 February, 2013. The sentence imposed by the trial magistrate is hereby set aside and accused is entitled to his immediate release.

Makonese J …….. I agree