

CRB 1469-70/02

THE STATE
versus
FUNGAI SITHOLE
and
LOVEMORE MAKUYANA

HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE 2 July 2003

Review Judgement

GUVAVA J: The accused persons pleaded guilty and were convicted of housebreaking with intent to steal and theft. They were sentenced as follows:

“Each:- 18 months imprisonment of which 9 months imprisonment are suspended for 5 years on condition accused does not within that period commit an offence involving dishonesty and for which accused is sentenced to imprisonment without the option of a fine. The remaining 9 months imprisonment are suspended on condition accused completes 300 hours of community service at Gwenzi Secondary School with effect from 26/02/03 as from 0800-1300 and 1400-1600 hours excluding weekends and holidays. To report to the Headmaster of Gwenzi Secondary School.”

The facts which gave rise to this matter are that on the night of 6 December, 2002 the two accused persons broke and entered the complainant's house and stole various items of household property valued at \$93 000. On 17 December 2002 the accused were arrested and property valued at \$61 000 was recovered.

The conviction is proper and is hereby confirmed.

In respect to the sentence imposed, whilst I had no difficulty with the term of the sentence, I had some misgivings with regard to the conditions set out in the Community Service Order. The accused persons, in mitigation had told the court that they were students and attending school at a nearby secondary school. One of the accused persons was writing his “O” level examinations at the end of the year.

I queried the learned trial magistrate on why he had ordered the accused persons to perform community service during weekdays when it was apparent from the record that the accused were students and attending school. I also pointed out that the community service officer who had recommended community service for the accused persons had also

suggested that they perform their sentence during weekends so that it would not interfere with their attendance at school.

The learned trial magistrate responded to my query as follows:

“Kindly place the above matter before his Lordship with the following comments:

1. During interview by the community service officer, scholars are informed in full that during school days they have to do their community service on weekends and holidays.
2. In fact they liaise even with Heads of institutions who can allow them time off on good grounds shown.
3. It is therefore not expected that a Head of an institution can refuse accused persons who are scholars to attend to their sentence on weekends and holidays.
4. I stand guided.”

In my view the response by the trial magistrate indicates that there is a general lack of understanding of the purpose of orders imposed for community service and the role of the magistrate when imposing such orders as a number of cases which have been submitted on review present similar problems.

Where a trial court decides to impose a sentence of community service on an accused person, the court must be guided by the Criminal Procedure and Evidence (Community Service) Regulations 1998, published in SI 12/98 (“the Community Service Regulations”). The trial court must inquire into the full circumstances of the accused person so that an appropriate order befitting the circumstances of the accused may be made. Section 12 of the Community Service Regulations makes it mandatory for the court to conduct such an inquiry. In this case the trial magistrate properly conducted the inquiry and obtained the relevant information pertaining to the accused persons.

The trial court however, did not utilize the information gathered to impose an appropriate order. Where a trial court, during the course of inquiry, ascertains that the accused person is employed or is a student it becomes incumbent upon the trial magistrate to take guidance from the case of *S v Gumbo* 1995 (1) ZLR 162 where BARTLETT J said at page 168E:

“It is important for magistrates to be innovative and, where a person is in employment, to allow community service to be carried out over week-ends or after working hours, by arrangement with the institution concerned.”

The sentiments expressed in this case, whilst relating to accused

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persons who are in employment, are in my view, particularly apt for students who will be attending school. It is pointless to order that they perform the community service during normal working hours as this will obviously result in them being thrown out of school.

Where the trial court has decided to order that the community service be performed after hours or at weekends he must reduce the number of hours ordered otherwise the sentence will be excessive. (See *S v Adam Mumbamarwo* HH 161-97, *S v Gambiza* HH 81-2000)

Thus in my view it is the duty of the trial magistrate when imposing the community service order to state the hours which the accused must work and the times when the service should be commenced and completed. This is in accordance with section 14 of Community Service Regulations 1998 which provides as follows:

- “14. A community service order shall specify –
- (a) the total number of hours the offender is required to render community service;
 - (b) the days on which work is to be performed;
 - (c) the hours of work per day;
 - (d) the place where the work is to be performed;
 - (e)
 - (f)”

The learned trial magistrate in his response appears to place the responsibility of deciding the times when the offenders should attend to community service work on the head of the institution concerned. This approach is clearly misguided.

As the trial magistrate in this case intended that the accused persons should continue to attend school, then he was wrong to take the view that he can order community service to be performed every day for a full day and that it is for the offender to then liaise with the Head of the Institution for time off on good grounds shown. The Community Service Guidelines clearly stipulate that the Head of the Institution may only grant time off for matters which come up unexpectedly, for example when an accused has to attend a funeral or when he is sick. Where the hours fixed by the court have become inconvenient either to the institution or to the accused then the court must be approached to vary the conditions imposed in the order (see section 15 of the Community Service Regulations). This provision presupposes that there has been a change in the accused's situation which was not present at the time of sentence which calls for an amendment to the order. In any event section 15 of the Community Service Regulations does not grant the Head of the Institution the authority to amend the order of the court but he must seek an

amendment of the order from the court. Clearly therefore it is incumbent upon the trial magistrate, when making the community service order, to impose conditions which are appropriate to the offender after due inquiry. In this case the trial court accepted the recommendation by the community service officer that the accused persons being scholars should perform the community service during weekends. The sentence imposed by the trial court should have therefore taken this into account and specifically excluded work during the school days.

The sentence was imposed on 24 February 2003 and was to take effect from 26 February 2003. The accused have in all probability completed their sentence by now and any amendment to the conditions of the order would be purely academic.

I therefore decline to certify the proceedings as being in accordance with real and substantial justice.

Chinhengo J, agrees.