HH 144-03
CRB B 195/99
ELLISON MUREMBWE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAKARAU and MAKONI JJ
HARARE, 2 September, 2002 and 3 September, 2003

Criminal Appeal

Appellant in person
*Ms Ziyambi* for the respondent

MAKONI J: The appellant was convicted of theft in the Magistrates Court and was sentenced to 12 months imprisonment with 4 months imprisonment suspended on the usual conditions of good behavior. The appellant appeals against both conviction and sentence.

The appellant and his co-accused, one Edward Hove, were both members of the Zimbabwe Republic Police based at Marondera Police Station. The appellant was of the rank of a Sergeant whilst his co-accused was an Inspector. On the 10th October, 1998, they proceeded to Nyamapanda Police Station. The co-accused obtained keys to the Exhibit Room and they gained access to it. They stole five kilograms of dagga, a bag containing 38 'T' shirts and 36 cans of Castle beer and locked them in the motor vehicle they were using. On their way back, the co-accused who was driving, hit a pedestrian and had to remain behind attending to the accident. The appellant proceeded with the journey with the loot which he took to his house. Appellant later received information that Nyamapanda Police were looking for his co-accused in connection with the stolen property. He then removed the property from his house, in the Police Camp, and took it to his friend's house in Dombotombo township. His co-accused later collected the property, using a taxi, to Musami Cross with the intention of taking it back to Nyamapanda. He was arrested in a Police trap and the Appellant was later arrested. On the basis of these facts they were charged and convicted of theft.

The value of the stolen property is $1 000,00 and property worth $965,00 was recovered. The street value of the dagga is $10 000 and only 3.620 kgs were recovered.

The appellant's main grounds of appeal are that the magistrate misdirected himself in convicting him when firstly the evidence showed that the theft was committed by his senior and

that whatever part he played he was following instructions. Secondly that the evidence showed that he did not participate in loading the goods in the truck. Thirdly that he was convicted on the basis that he took the goods to his friend's house and yet he was following instructions. As regards sentence his grounds of appeal were that the magistrate misdirected himself in sentencing him to the same sentence with his co-accused and yet their levels of participation were different.

Secondly he did not take into account all the mitigatory features such as the fact that he was a first offender, he was the sole breadwinner in the family and that he was going to loose his job.

The respondent in its Heads of Argument supported both the conviction and sentence. Ms *Ziyambi* submitted on behalf of the respondent that the conduct of the appellant throughout the period of the commission of the offence up to the time of arrest is consistent with a person acting in common purpose with his co-accused. The appellant was rightly found guilty of the offence on the basis of the doctrine of common purpose and that theft is a continuing offence. Appellant participated in the theft by keeping the property at his house and later hiding it well knowing it to be stolen.

I agree with the submissions by the respondent. The appellant was present when his co-accused removed property from the Exhibit Room in the absence of officers from Nyamapanda and without signing for the goods. He did not question his co-accused and his explanation is that he was his senior. After leaving his co-accused at the scene of an accident, he took the property to his house. When he was fully aware that Naymapanda Police were looking for his co-accused in connection with the stolen property, he removed the property from his house, in a police camp, and took it to his friend's house in Dombotombo Township. When the property was removed some of it was missing.

In my view from the above factors, the only reasonable inference there can be drawn from the conduct of the appellant is that he acted in common purpose with his co-accused. The magistrate's reasoning cannot be faulted and there was no misdirection on her part in convicting the appellant.

In her reasons for sentence the trial magistrate took into account the personal circumstances of the appellant and that he was a first offender. She also took into account that the appellant was a Police Officer and that his moral blameworthiness was high. She commented about cases reported in the press involving dishonesty by Police Officers. She felt that imposing a non-custodial sentence would be to trivialize the gravity of the offence.

The State in its Heads of Argument and in its initial

submissions on the day of the hearing supported the sentence on

the same reasons that the appellant was a Police Officer who stole property in Police custody. On being asked whether the sentence was appropriate even taking into account appellant's position as a Police Officer, in view of the total value stolen, the respondent conceded that it was not appropriate. This concession was properly made. The total value of the property stolen is $1 000,00 and property worth $968,00 was recovered. The State further conceded that the same sentence should be passed on appellant's co-accused.

In passing sentence the magistrate reasoned that those who are engaged to enforce and uphold the law and decide to breach it should not expect to be treated leniently. She went on to say the following -

> "Whilst it is trite to help first offenders out of jail by either imposing community service or a monetary remedy on them, the Court is of the view that those types of sentences are not appropriate in this case. To impose a non-custodial sentence would be to trivialise the gravity of the offence. See *S* v *Mberi* HH 250-90".

In that case a Police Officer converted $20,00 for a fine to his own use. He was convicted and sentenced to 6 months imprisonment of which 3 months imprisonment was suspended. The record was submitted to this Honourable court with the comment that the sentence of imprisonment having regard to the value stolen, was too severe, despite the breach of trust involved. He submitted, a substantial fine coupled with a wholly suspended sentence of imprisonment would meet the justice of the case. The record was placed before SMITH J who disagreed with the views of the Regional Magistrate and confirmed the sentence. He stated -

> "Policemen who are appointed to uphold the law must perform their duties in an exemplary manner and should not themselves resort to criminal acts. Ordinarily the theft of $20,00 by a first offender would not attract a custodial sentence. But, when a policeman turns to theft then he must expect to be sent to prison, unless there are special mitigatory factors".

I associate myself fully with this reasoning but this case was decided before community service as a desirable alternative punishment to imprisonment had been adopted. It is my view that community service could be imposed if regard is had to the numerous mitigatory factors in the matter which are the total value of the property stolen and that the bulk of the property was recovered, the fact that the appellant is a first offender and the effective sentence of imprisonment. Such a sentence would not trivialize the offence.

I will also consider reducing the prison term as there was a misdirection in not having regard to the value of the goods stolen and putting emphasis on the appellant's status as a Policeman. In view of the concession by the respondent, the sentence in respect of Edward Hove will also be reduced.

Accordingly the appeal is allowed. The sentence is set aside and is substituted with the following -

> "Each accused is sentenced to 8 months imprisonment of which 4 months imprisonment is suspended for 3 years on condition that during that period the accused does not commit any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine. The remaining 4 months imprisonment are suspended on condition that the accused perform 140 hours of community service at such institution and on such other conditions as the trial magistrate may determine. The matter is remitted to the Magistrate's court for the attention of the appellant's suitability to perform community service and if they are found not to be suitable the sentence above shall be imposed otherwise the sentence of imprisonment will stand".

MAKARAU J, agrees.

*Appellant in person*
*Office of the Attorney-General*, respondent's legal practitioners