

HH 21-03
Crb 14655/02
THE STATE
versus
YVONNE NYIKA

HIGH COURT OF ZIMBABWE
PARADZA J,
HARARE, 12 February, 2003

Criminal Review

PARADZA J: The accused, who is a fifteen year old girl, pleaded guilty to a charge of housebreaking with intent to steal and theft. She was found guilty by the magistrate, after due inquiry into the genuineness of her plea, and was sentenced to 24 months imprisonment which was suspended on the following conditions -

- (a) 12 months were suspended on condition that accused performs 420 hours of community service with effect from 20 December, 2002;
- (b) 8 months were suspended on condition accused paid restitution in the sum of \$50 000 to the complainant by 28 February, 2002;
- (c) the remaining 4 months were suspended on condition of good behaviour.

There is clearly a problem that arises with this sentence. Four hundred and twenty hours of community service requires that the accused works at a particular institution for a period of sixty working days. If my mathematics is correct, excluding weekends and holidays, and assuming she does not seek leave of any nature, the community service will be completed around 18 or 19 March 2003.

The other condition of suspension requires that she pays restitution to the complainant of \$50 000 by 29 February, 2003. If she fails to pay that restitution, she will have to serve the eight months imprisonment. Undoubtedly that would interfere with her community service programme.

The correct approach to avoid such a situation from arising is for the magistrate to take all steps to ensure that that does not happen. Therefore the magistrate should enquire fully as to the accused's ability to pay restitution. If the accused convinces the court that he or she indeed will be able to pay, then the sentence can be imposed as it is. If however, he or she fails to convince the court, it would be best for the court to impose the sentence without the condition of restitution.

It might appear that by so doing the court is being insensitive to the interests of the victim, but let it

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not be forgotten that the complainant does have other remedies in law to claim what he or she has lost. Most important is to ensure that the sentence imposed does not become absurd in that it will not serve the purpose it was intended to serve. I say so because once a court decides to impose community service, it has considered other interests of justice in reaching that conclusion. In imposing community service invariably the court is trying to keep the offender out of prison. For the offender to undergo community service and then, after failing to pay restitution, to be sent to prison for as long a period as 8 months would defeat the purpose that community service is supposed to achieve. It creates an absurdity in the sentence.

It is therefore important to remove that condition by suspending the balance of the sentence on other conditions such as good behaviour.

In this matter the accused stated in mitigation that she is a girl aged 15 years and, as expected, has no savings or assets. She is under the care of her mother with the assistance of her sister who was said to be working in Hillside, Harare, although at the time of the theft she had been employed as a domestic maid for a week. She stole quite a large amount of property which was valued at around \$200 000. Most of the property was recovered and the property which was not recovered had in turn been stolen from her when she went to her communal home. Generally she derived little or no benefit from her conduct. If she fails to pay the \$50 000 to the complainant by 28 February 2003, it means she will start to serve a prison sentence of 8 months. Where lies the justice in letting a girl child of 15 years of age serve an additional 8 months imprisonment after serving a substantial portion of community service? To me there is every reason for interfering with the sentence imposed by the magistrate. As stated above, I will remove that part of the sentence and combine it with the other part that relates to good behaviour. The conviction is confirmed but the sentence is set aside and the following is substituted -

"24 months imprisonment of which -

- (a) 12 months are suspended on condition the accused completes 420 hours community service at Mufakose High School with effect from 20 December 2002. Such community service will be performed from Monday to Friday, excluding public holidays, and between 8 a.m. and 1 p.m. and 2 p.m. and 4 p.m. until it is complete, subject to any leave of absence which may be

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granted at the discretion of the Headmaster;

- (b) 12 months is suspended for 5 years on condition the accused does not, within that period, commit any offence involving dishonesty for which on conviction she is sentenced to imprisonment without the option of a fine."

HUNGWE J, agrees.