THE STATE
versus
DISMASS NGWENYENI
and
BRIAN CHARI
and
PATRICK MAZORODZE
and
FORTUNE ZVAREVASHE

HIGH COURT OF ZIMBABWE
MAKARAU JP and MAVANGIRA J.
HARARE, 5 and 7 February, 2007

Criminal Appeal

Mr *L. Mungeni*, for the appellants
Mr *R. Chikosha*, for the respondent

MAVANGIRA J: The appellants were on their own pleas of guilty, each convicted of theft as defined in s 113(1)(b) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. They were sentenced each to 36 months imprisonment of which 6 months imprisonment was suspended for 5 years on condition of good behaviour. They now appeal against sentence only.

The facts before the lower court were that accused 1 is employed as a barber at a hair salon. Accused 2 is employed by the complainant, Edgars Stores, as a general hand. Accused 3 is security guard performing his functions at the complainant's shop premises. Accused 4 is a former employee of the complainant. The four allegedly connived to steal from the complainant. On 18 August, 2006, accused 1 proceeded to the complainant's premises where he selected merchandise which he took to the till manned by accused 2. Accused 2 then packed the merchandise and sealed it with a non-printed receipt. Accused 1 handed the package of stolen merchandise to accused 2 who proceeded to leave the shop without paying for the merchandise. Accused 1 passed through the door that was being manned by accused 3. He was not searched. Outside the shop accused 1 handed the merchandise to accused 4 for selling.

The shop manager had in the meantime become suspicious of accused 1's movements. He decided to follow him and caught up with him at the bus terminus where he confronted him. The manager then made a report to the police. Police detectives recovered part of the

stolen merchandise in a parked vehicle opposite the said bus terminus after interviewing accuseds 1 and 2. They recovered more of the stolen items at accused 3's house. On his arrest accused 4 also led to the recovery of other items that he had sold. All the recovered property was identified by the manager as belonging to the complainant.

The total value of the stolen property was $187 000 and it was all recovered.

The appeal against the sentence imposed on each of them is premised on the following grounds;

Firstly, that the lower court erred in not considering the option of a fine or wholly suspended prison term or community service. Secondly, that the lower court erred in not giving due weight to fact that all the stolen property was recovered and that there was therefore no prejudice to the complainant. Furthermore, that the accused persons had been deprived of any benefit from their criminal acts. Thirdly, that the lower court erred in treating the appellants' case differently from other similar matters that come before it. Fourthly, that the lower court erred in not giving due weight to the mitigatory factors which were said to be as follows:

(i) the appellants' pleas of guilty
(ii) with the exception of one appellant, the appellants' lack of sophistication and their modest savings
(iii) the pre-trial incarceration of two weeks constituting a form of punishment
(iv) the personal circumstances of each appellant
(v) the small amount involved in the offence.

The fifth ground of appeal is that the lower court grossly misdirected itself in failing to follow principles of sentencing laid down in similar cases; these being

(i) the effect of inflation on the value of money
(ii) that the prevalence of an offence is no justification for the imposition of ever increasingly severe sentences by the court
(iii) that deterrence should not cloud the sentencing process
(iv) that sentences imposed for similar offences in the past provide useful guidelines
(v) the need to take judicial notice of the economic circumstances prevailing in the country
(vi) that imprisonment is a severe form of punishment which should only be resorted to as a last resort and only where no other form of punishment will meet the justice of the case.

Mr *Chikosha* for the respondent supported the sentence imposed by the lower court and opposed the appeal on the ground that the trial magistrate did not misdirect himself and that his approach to sentence could not be faulted.

In *S v Mundowa* 1998 (2) ZLR 392 (H), SMITH J, stated:

"… In S v Nhumwa S-40-88 KORSAH JA, at p5 of the cyclostyled judgment, said:

"it is not for the court of appeal to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from that imposed. If the sentence complies with the relevant principles, even if it is severer than one that the court would have imposed, sitting as a court of first instance, this court will not interfere with the discretion of the sentencing court."

He referred with approval to S v de Jager & Anor 1965 (2) SA 616 at 628-9 where HOLMES JA said:

"It would not appear to be sufficiently realized that a court of appeal does not have a general discretion to ameliorate the sentences of the trial courts. The matter is governed by principle. It is the trial court which had the discretion, and a court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say, unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it in this latter regard, an accepted test is whether the sentence induces a sense of shock, that is to say, if there is a striking disparity between the sentence passed and that which the court of appeal would have imposed. It should therefore be recognized that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited."

De Jager's case was cited with approval in *S v Berliner* 1967 (2) SA 193 at 200 and in *S v Nhumwa* SC 40/88 of p6 of the cyclostyled judgment. The said approach was reiterated in *S v Ramushu & Ors* SC25/93 where at p5 of the cyclostyled judgment GUBBAY CJ, as he then was, stated:

"… in every appeal against sentence, save where it is vitiated by irregularity or misdirection, the guiding principle to be applied is that sentence is pre-eminently a matter for the discretion of the trial court, and that an appellate court should be careful not to erode such discretion. The propriety of a sentence, attacked on the general ground of being excessive, should only be altered if it is viewed as being disturbingly inappropriate."

It is in my view, necessary to visit the trial magistrate's reasons for sentence. He stated:

"The four accused persons are first offenders. They pleaded guilty to the charge and have shown contrition.

> *However, the manner in which the offence was committed shows a high level of dishonesty. They were a well-orchestrated syndicate and the prejudice to the complainant was quite substantial.*
> *The moral blameworthiness of the accused persons is quite high and their level of conspiracy showed an element of sophistication. The second, third and fourth accused persons owed the complainant some level of trust. They breached the trust that the complainant had in them. Accused two is a student on attachment who should have been grateful to the complainant for the opportunity given to him, to perform work related learning at the complainant's institution. (sic). Instead he bites the hand that fed him.*
> *The third accused person was employed as a security guard he was supposed to protect the complainant's property from theft instead he is the one who facilitated the theft of the complainant's property.*
> *Accused four was an ex-employee of the complainant. He is the one who played a major role in theft. He is the one who facilitated the disposal of the property.*
> *Accused one, also had a major role to play he is the one who committed the actual theft in that he selected the merchandise and he is the one who removed from the store for onward submission to accused four for disposal of the merchandise."*

The trial magistrate clearly addressed his mind to the circumstances of each accused person and the role that each one had played in the commission of the offence. A perusal of his reasons for sentence as quoted above evidently shows this. It is also clear that he weighed the mitigatory factors against the aggravating features and the result was an outweighing of the mitigatory factors. He appears to be supported in this weighing of the factors when consideration is had to these courts' approach in matters involving theft from employers and breach of trust. In *S v Munyoro* HH 28/89 REYNOLDS J stated at p2 of the cyclostyled judgment:

> *"It must be made clear, however, that in normal circumstances, even where first offenders are involved, persons in the position of the appellant will not be dealt with leniently if they steal their employers' property. To steal from an employer is an abuse of trust that flows from the special relationship of employer and employee."*

The trial magistrate was alive to the fact that he was dealing with first offenders who had pleaded guilty, but he proceeded to highlight the factors that removed the appellants from the usual run of first offenders who plead guilty. Specifically, and in addition to the factors pertinent and peculiar to each offender, the manner in which the offence was committed raised the appellants' moral blameworthiness to a high level. Whilst each played a distinct role in the theft, their connivance was well orchestrated and clearly pre-meditated for definite success, to the prejudice of the complainant. Fortuitously the complainant's manager's vigilance saved the

day for the complainant. In the circumstances, the accused cannot expect the leniency usually accorded to first offenders and those offenders who plead guilty.

These courts have always viewed in very serious light cases of theft from employers as these involve breach of trust. Custodial sentences have been found appropriate. These courts have also always viewed in very serious light cases of theft by security guards particularly, but not only from the premises they guard. Custodial sentences have also been found appropriate. The trial magistrate thus did not stray from the usual sentencing trend in such matters. In *S v Masvosva* HB 83/90 at p2 of the cyclostyled judgment BLACKIE J stated:

> *"Where possible, first offenders should be kept out of prison. This is particularly true where only one crime or count is involved and where the appellant has heavy family responsibilities. However, notwithstanding this general rule, it is accepted that in certain circumstances even first offenders are sent to gaol either because of the type or gravity of the offence.*
>
> *This was theft from an employer. It involves a breach of trust. The crime has become very common because of these factors, even first offenders are frequently sent to gaol for this crime.*
>
> *A number of cases involving sentences for first offenders in cases of theft from employers have been put before us. It is not possible to extract from these cases any general principle to distinguish why, in some of them, the accused have been sent to gaol and in others not. These cases have been dealt with in an ad hoc fashion and it is possible to argue either way from them.*
>
> *In this case the appellant has heavy family responsibilities and only one act of theft was involved. However, the amount stolen by him was not inconsiderable. He stole for his own convenience and not for need. The theft involved planning and determination to get hold of the goods and to get them through the security check at the gate.*
>
> *All the stolen property has been returned to the appellant's employer. However, not much credit can be given to the appellant for that. The plates were discovered at the appellant's house when the ZISCO security checked that house. It does not appear from the record that the appellant voluntarily confessed to the crime before being caught out or that he voluntarily advised the security officials of where the plates could be found when they would not otherwise have been found.*
>
> *There is a clear distinction, for the purposes of sentence, between a thief who merely accepts the inevitable once he has been caught and the one who makes restitution in circumstances where it could not otherwise be obtained or points out property which could not otherwise have been found.*
>
> *However, giving the appellant such credit as is due to him for the fact that all the stolen property has been returned to his employer and the other mitigating features mentioned on his behalf, I am not satisfied that the magistrate was unduly severe in sentencing the appellant to an effective term of imprisonment. Once it is accepted that the appellant should have been sent to prison, it is difficult to see any reason to interfere with the sentence actually imposed. The magistrate has made no error in principle and the sentence actually imposed is not out of line with some of the sentences imposed on first offenders for thefts of this sort."*

The learned judge in stating the above might well have been commenting on this case.

In *S v Paul Jera & Ors* HH242/90, SANDURA JP, as he then was, stated:

> *"In assessing the appropriate sentence, the Regional Magistrate took into account all the personal circumstances of the appellants and the fact that they were first offenders who pleaded guilty. He also took into account the fact that the thefts resulted from careful planning by the six men. The thefts represented persistent and deliberate dishonesty on the part of the appellants and show a series of breaches of trust. In the circumstances, bearing in mind that this type of offence involving a breach of trust is very prevalent, I agree with the view that a deterrent sentence was called for."*

In that case the appellants had, for theft of property valued at $6211-54 from their employer, to which they had all pleaded guilty and were convicted, been sentenced each to 4 years imprisonment of which 14 months imprisonment was conditionally suspended for 5 years and a further 6 months imprisonment suspended on condition that the appellant paid the sum of $426 to the complainant through the clerk of the Regional Court by a specified date.

In casu, the appellants stand convicted of a very serious offence. The trial magistrate clearly highlighted the gravity of it and it is not intended herein to repeat the pertinent facts and factors. The amount involved *in casu* is not minimal and must be viewed in light of the fact that this was immediately after the revaluation of the Zimbabwe dollar. Before the valuation the amount would have been $187 000 000, not an insubstantial amount. Clearly, taking into account all the relevant factors, a prison term was called for and justified in respect of each appellant. There is no doubt that the sentence imposed by the trial magistrate is severe, but it is trite, as already stated above that that in itself is no ground to justify interference by an appellate court. Appellants' counsel was unable to bring to this court's attention cases where, for a similar amount, the offender was sentenced to a non-custodial penalty, citing the prevailing inflationary environment as a factor making such a comparison impossible. The gravamen of the matter however, is that this is a very serious offence in which the appellants showed a high level of dishonesty. The trial magistrate took into account all relevant factors in assessing an appropriate sentence. He did not misdirect himself in any way and the sentence imposed whilst undoubtedly harsh, is not so severe as to induce a sense of shock such as to warrant interference by this court. The appeal cannot therefore succeed in the circumstances.

In the result and for the above reasons the appeal against sentence in respect of each appellant is hereby dismissed.

MAKARAU JP: agrees, …….

Kanoti and Associates, appellants' legal practitioners
The Attorney General's office, for the respondent.