

THE STATE
versus
W HAKURERWI CRB NY626/08
and
THE STATE
versus
P SHARARA CRB NY657/08

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
Harare, 2 July 2009

Criminal Review Minute

CHITAKUNYE J: The two accused persons were charged and convicted by the same magistrate in separate trials and on different charges.

In case number CRB NY626/08, the accused was an eighteen year old female first offender. In August 2008 she stole \$900-00 (re-valued) from her employer's bedroom. The money was all recovered. She was convicted on her own plea of guilty and was sentenced to six months imprisonment which was wholly suspended on condition that she performed 210 hours of community service at a rate of eight hours per day.

In case number CRB NY657/08 the accused was a thirty-two year old male adult employed as a security guard by the complainant. On a date in September 2008 he stole a pocket of potatoes which had fallen off a moving tractor. He was arrested and arraigned before the courts. He readily pleaded guilty and was duly convicted. The potatoes were valued at \$3000-00. He was a first offender. He was sentenced to twelve months imprisonment of which six months were suspended for five years on conditions of good behavior and the remaining six months were suspended on condition that he completed 210 hrs of community service at a rate of eight hours per day.

As is the norm in each case the magistrate indicated that the supervisor may on good cause grant leave of absence which shall not count as part of the service to be performed. The community service in each case had to be completed within six weeks.

The regional magistrate before whom the proceedings were placed for scrutiny queried the short period within which the community service had to be completed as it tallied with a

mathematical calculation of the time it would take the accused to complete 210 hours at eight hours per day without any leave of absence. He thus asked the trial magistrate whether he should not have given more time than the actual period mathematically required in order to accommodate the unforeseen eventualities where the probationer may need to get leave of absence from the supervisor.

The trial magistrate responded by defending his manner of calculating the period. He contended that to grant more time within which the probationer must complete community service would tend to encourage requests for time off. The trial magistrate's response showed a clear misunderstanding of the query raised and the provisions of the guidelines on this aspect.

In terms of the guidelines on community service supervisors are empowered to use their discretion and grant time off to probationers on good cause shown. The guide lines go on to state that where a probationer is given time off "he must be made to understand that the time lost will have to be made up. Remember too that the privilege of time off cannot be abused because the total number of community service hours must always be completed within the period stipulated by the court."

This entails that the supervisor can only grant time off where the probationer will be able to still complete the hours of community service within the period given by court. If therefore the time stipulated by court is so mathematically calculated as to end at the time the 210 hours end at eight hours per day without any break, it means the supervisor has been denied the discretion and the probationer can in fact not be granted time off. Any time off granted in these circumstances would require the probationer to apply to court for an extension of the stipulated period within which to complete the community service. The granting of the discretion to grant time off to supervisors was meant to, among other things, deal with the need to approach court whenever a probationer needed time off.

It is therefore imperative that the period within which a probationer must complete community service must not be mathematically calculated to tally with the period the hours come to an end if the probationer worked non stop at eight hours per day. Courts must as of principle always stipulate a period that takes into account public holidays, weekends and leave of absence that the supervisor may grant on good cause shown.

The trial magistrate was wrong in his approach on the calculation of the period within which the community service had to be completed in each of the above cases.

See *S v Sithole & Anor* HH 101-2003.

Accordingly the latter part of the community service order in each case is hereby amended to read:

“The community service must be completed within eight weeks.”

CHTAKUNYE J:

KUDYA J, agrees