

THE STATE

Versus

BEN CHITALU

HIGH COURT OF ZIMBABWE

MAWADZE J

MASVINGO, 6 DECEMBER, 2018

Criminal Review

MAWADZE J: The accused was convicted by the Magistrate sitting at Chiredzi of contravening section 113(2)(a) of the Criminal Law Codification and Reform Act [*Cap 9:23*] which relates to theft of trust property.

The facts proved during the trial are that the 34-year-old accused was left in custody of two 32-inch plasma television sets by his employer of seven to eight years valued at \$1 500. The accused disposed of the two television sets.

Despite the accused's spirited denial of the offence, the evidence adduced clearly proves that he committed the offence. The conviction is in order and is therefore confirmed.

It is the sentence imposed which has exercised my mind.

The accused who has two minor children, a pregnant wife and has lost his job in these difficult economic times was sentenced to 15 months imprisonment of which 3 months were suspended on the usual condition of good behaviour and a further 6 months on condition of restitution in the sum of \$1 500 through the Clerk of Court, Chiredzi by 1 April 2019. This means that the accused would serve an effective prison term of 6 months.

Theft from an employer is indeed a serious offence which entails breach of trust. Be that as it may my view is that not every case of theft from an employer warrants a prison term. *In casu* the accused is a first offender and has already lost his job.

It is important for magistrates to appreciate the current harsh and difficult conditions in our prisons. In the premises only deserving persons should be sent to prison. In the case of

State vs Mundondo Zava HMA 15/17 I bemoaned the failure by magistrates to properly consider the noble concept of Community Service. I also referred to a number of cases which clearly outline that failure to consider Community Service constitutes a reviewable irregularity and a misdirection.

I am not satisfied that after weighing both the mitigatory and aggravating features of this case the accused deserved to serve a prison term of 6 months. Instead the effective 6 months imprisonment should have been suspended on condition the accused performs the appropriate hours of Community Service.

In the result the sentence imposed by the Magistrate should be set aside as the overall sentence of 15 months is unduly harsh.

Consequently, the effective 6 months imprisonment is set aside. The matter is remitted to the trial Magistrate to carry out a proper inquiry into the suitability of Community Service in relation to the effective prison term of 6 months. Thereafter the record should be re submitted for review.

In the result I make the following order;

IT IS ORDERED THAT;

1. The conviction be and is hereby confirmed.
2. The sentence of the court *a quo* is set aside and substituted with the following;
 - (a) Accused is sentenced to 12 months imprisonment of which 3 months imprisonment is suspended for 5 years on condition accused does not commit within that period any offence involving dishonesty for which accused is sentenced to imprisonment without the option of a fine.
 - (b) Of the remaining 9 months imprisonment, 3 months imprisonment is suspended on condition the accused restitutes the complainant in the sum of \$1 500 on or before 1 March 2019 through the Clerk of Court Chiredzi.

- (c) The remainder of 6 months is suspended on condition the accused performs an equivalent hours of Community Service at a suitable institution on the usual conditions.
- (d) The matter is remitted to the trial magistrate to carry out a proper inquiry into Community Service and to impose the sentence of Community Service unless a finding is made that it is impossible to impose Community Service. Such reasons should be clearly articulated.
- (e) The record of proceedings should be resubmitted for review.
- (f) The accused should be urgently called from prison for purposes of advising him of the altered sentence and for carrying out the said inquiry.

MAFUSIRE J agrees