

THE STATE

vs

TAMBAOGA TATENDA DOVI

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 17th October 2019

CRIMINAL REVIEW

MAWADZE J: The 19-year-old accused who was a first offender was convicted of contravening section 113(1) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*] which relates to theft.

The agreed facts are that on 21 August 2019 at around 0300 hours the 41-year-old complainant was involved in a road traffic accident at the 37 km peg along the Chivu – Gutu road and got seriously injured. The accused and one Jonathan Chikoromondo witnessed the accident and rushed to the scene. The accused did not help any of the injured persons. Instead the accused and his colleague Jonathan Chikoromondo opened the driver's door and stole US\$ 200.00 which they later shared. Nothing was recovered.

The accused was sentenced to 24 months imprisonment of which 6 months imprisonment was suspended for 5 years on the usual conditions of good behaviour leaving an effective prison term of 18 months.

What pricked my judicial conscience is the fact that the 19-year-old accused is not only a youthful first offender but is currently in Form Four at Chiriga Secondary School. The implication of an effective prison term is that the accused is no longer attending school thus ruining his future. Currently other pupils are busy writing their examinations.

There is no doubt that the accused's moral blameworthiness is very high. The accused exhibited a very high degree of cruelty. He decided not to help the injured complainant but to steal the money. Such conduct is immoral and deserve censure.

Be that as it may some degree of leniency was required. The accused is a youthful first offender. He is no longer attending school as he was incarcerated. There was an element of sudden temptation when he saw the cash.

It was not probed as to where exactly the cash was in the motor vehicle. It is not clear how much the accused got as his share of the loot. The trial court did not inquire as to how accused used the money. It is not clear as to who is older between the accused and Jonathan Chikoromondo in order to exclude the possibility of peer pressure.

The trial Magistrate concedes that he did not carry out a proper inquiry into all these factors to enable him to properly assess the sentence. This constitutes a misdirection. Further, the sentence of 24 months imprisonment is rather severe in view of the accused's age, the amount involved and other mitigatory factors.

This matter calls for my immediate intervention to enable the accused to continue with his education.

I shall direct the trial Magistrate to immediately call the accused from prison and to carry out proper inquiry into community service and sentence the accused to a sentence of community service. The trial Magistrate should take into account the period the accused has already served in prison from 9 September 2019 and also that he is attending school and possibly writing examinations in couching the community service order especially the period he would be expected to perform community service. As he is still a school pupil it is unwise to order restitution.

In the result I make the following order;

1. The sentence of 24 months imposed by the trial court is set aside in its entirety and is substituted with the following; -

“6 months imprisonment of which 3 months imprisonment is suspended for 5 years on condition the accused does not commit within that period any offence involving dishonesty for which he is sentenced to a term of imprisonment without the option of a fine.

The remainder of 3 months is suspended on condition the accused performs the equivalent hours of community service work at an appropriate institution on the usual conditions.”

2. The matter is remitted to the trial Magistrate or in his absence to any other Magistrate to carry out an inquiry in compliance with paragraph (1) above. The period accused has already served should be taken into account in computing the hours of community service work to be performed for the 3 months.

The above order should be complied without delay to ensure the accused is not further prejudiced.

Wamambo J. agrees