Judgment No. HB 120/06
Case No. HC 3640/06

THE STATE

VERSUS

ALFRED MPOFU

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 9 NOVEMBER 2006

NDOU J: The accused was properly convicted by a Gwanda Magistrate and nothing turns on the conviction.

He was sentenced to $4000-00 or in default of payment 30 days imprisonment.

The learned trial magistrate, with the benefit of hindsight no longer supports the sentence that she or he imposed and addressed a memorandum for the setting aside of the sentence in the following terms: -

> "I want to apologise. I was misguided by imposing a penalty of a fine of $4000-00 or in default of payment 30 days imprisonment. The circumstances are that the accused had stolen from his work place, that is, Maphisa Government Hospital and he stole medical consumables mainly x-ray films valued at $484000-00. I have realised after passing sentence that this is a serious offence which calls for a harsher penalty and the sentence which I have already passed is not in accordance with real and substantial justice and by imposing a fine in this case I realised that I have trivialised the offence. The accused by stealing the property although it was all recovered was not only causing prejudice to his employer but also putting the whole community at great risk.
>
> I therefore appeal that his record be placed before you so that, if possible, the sentence be a quashed and the accused be sentenced afresh".

I agree with the learned trial magistrate's belated vote of no confidence in his/her own sentence.

A sentence must fit the crime, be fair to the State and the accused and be blended

with mercy – *S v Sparks and another* 1972(3) SA 396; *S v Mpofu* HB 89-03; *S v Matika* HB 17-06 and *S v Tavarwisa and another* HB 38-06. A sentence that is too light is as wrong as a sentence too heavy, both can bring the criminal justice system into disrepute – *S v Holder* 1979(2) SA 77. In *Graham v Odendaal* 1972(2) SA 611 (A) at 614 it was rightly observed: -

> "true mercy has nothing in common with soft weakness, or maudlin sympathy for the criminal or permissive tolerance. It is an element of justice itself…."
>
> In *S v Van der Westhuizen* 1974(4) SA 61(c) it was stated: -
>
> "Mercy must not be allowed to lead to condonation or minimisation of serious offences"

In this case the accused stolen from his employer. The accused's conduct involves a serious abuse of a position of trust – *S v Mbewe* HB 89-95; *S v Munyoro* HH 28-89; *S v Venganayi* HH 52-89; *S v Dube and another* SC 169-89; and *S v Sibanda* HB 37-86.

Further, this is theft by a public servant from a public hospital. There is, therefore, a need for deterrent sentences – *S v Pfidzai* HH 80-83*; S v Mpofu* HB 5-82; *Chikopa v State* SC 37-84; *Mutanho v S* SC 35-87 and *Mangwende v S* SC 12-87.

The accused person's conduct here was serious calling for a term of imprisonment in the region 24 to 30 months with part thereof suspended on appropriate conditions.

But, assuming the option of fine was correct there would still be another serious flaw as the trial court imposed a paltry fine of $4000-00 for theft of very scarce x-ray films valued at just under half a million dollars. It is generally, wrong to fine an offender an amount which is less than the value stolen – *S v Urayayi* HB 54-84; *S v Dhokwani* HH 2-82 and *S v Matika* HB 17-06.

Coming back to the suggestion by the trial magistrate that the sentence be set aside,

there is no reason for doing so. I say so because a sentence substituted on review cannot be more severe than that imposed by lower court unless the convicted person is either a company or was represented at the trial by a legal practitioner, and review was requested by the accused – Section 29(2)(b)(ii) of the High Court Act [Chapter 7:06], and *R v John* 1965(3) SA 19(R).

Accordingly, the only option is for me to decline to confirm the proceedings as being in accordance with true and substantial justice. I withhold my certificate.