Judgment No. HB 22/06
Case No. HC 4632/04
CRB No. 3062/04

THE STATE

Versus

TINASHE MASUNDULWANE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 16 MARCH 2006

Criminal Review

NDOU J: This matter was referred to me by a Gweru Senior Regional Magistrate who was seized with the matter on scrutiny. The accused was properly convicted on a charge of theft by conversion of a speaker. Nothing turns on the conviction.

The learned Senior Regional Magistrate queried the propriety of the sentence(s). The sentence imposed by the learned trial magistrate is in incomprehensible and unclear. First, on the review case cover and an annexure to the charge sheet, the sentence endorsed is -

> "one month imprisonment with labour of which (not clear) months imprisonment with labour is suspended for (sic) years on condition accused does not within that period commit an offence of which theft is an element and for which upon conviction is sentenced to imprisonment with labour without the option of a fine. A further 30 days imprisonment with labour is suspended on condition accused completes 35 hours of community service at Batanai Old Peoples' Home …"

This on its own is an improper sentence since accused cannot be sentenced twice on the same matter i.e. 1 month plus 30 days. The trial court does not have authority to pass two sentences for

one offence – see section 358(2) of the Criminal Procedure and Evidence Act [Chapter 9:07].

This provision does not enable the trial court to impose two sentences for one offence. The sentence for the offence remains one, which is either wholly or partially suspended on appropriate conditions – *S* v *Musakwa* HH-239-83; *S* v *Msakasa* HH-302-83; *S* v *Chipxere* HH-314-83; *S* v *Kangadepe* HH-433-84; *S* v *Danda* HB 21-83 and *S* v *Gwandu* HB-133-04. In this case the intended sentence that I can discern from the record was one of two months imprisonment, the wholly of which is suspended partly on conditions of good behaviour [the magistrate forgot to state for how long] and partly on conditions the accused performs 35 hours of community service. Were it not for what follows, I would have altered the sentence to reflect the correct formulation. But, the record of proceedings reveals more confusion in that on the back of the charge sheet the trial magistrate endorsed a sentence of $50 000/30 days imprisonment with labour. Below that he then wrote "converted to 35 hours community service" whatever that means. The learned scrutinising Regional Magistrate queried this obvious confusion. In his reply the trial magistrate does not explain why he would have two different sentences imposed against the accused for the same offence. Instead he purports to disown the former sentence and says the latter sentence is the correct one. This

prompted the learned scrutinising Senior Regional Magistrate to probe further. The prosecutor who dealt with the matter stated that in fact the former sentence was the one pronounced by the trial magistrate in court. This is the sentence that he endorsed on his docket. I suspect that the latter sentence was doctored in the trial magistrate's chambers after the matter was finalised in court.

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Even assuming the latter sentence is the correct one imposed it is still not properly couched to reflect what the trial magistrate now says was his intention. In his own words-

> "The accused was sentenced to $50 000/30 days imprisonment with labour. However, accused pleaded with the court to convert that sentence into community service because he could not afford a fine. That request is recorded immediately under the sentence behind the charge sheet. The sentence of $50 000/30 days imprisonment with labour therefore converted to 35 hours of community service."

It was not competent for the trial magistrate to "convert" the original sentence of $50 000/30 days to that of imprisonment suspended on conditions of community service after the accused person's post sentence pleas. The general rule is that a magistrate is not entitled to alter either his or her verdict or his or her sentence after is has been pronounced. The only exception is provided for in section 201(2) of the Criminal Procedure and Evidence Act, supra. This subsection provides:

> "2. When by mistake a wrong judgment or sentence is delivered, the court may, before or immediately after it is recorded, amend the judgment or sentence, and it

shall stand as ultimately amended."

This subsection gives the trial court the power in regard to a wrong verdict or sentence delivered "by mistake". That implies a misunderstanding or an inadvertency resulting in an order not intended, or also a wrong calculation. A verdict or sentence, however, much open to criticism, cannot be altered if it was deliberately given or imposed. The correction must be done immediately on the same day preferably before the magistrate leaves the bench – *S* v *Moabi* 1979(2) SA 648 (BSC). The

sentence here was not delivered by mistake. It was deliberately imposed. The trial court, after sentence was imposed, allowed the accused a further opportunity to make submissions in mitigation. It is a result of these further submissions that he felt persuaded to impose a different sentence. It was not competent for the trial court to do so. This scenario is not what subsection 201(2), supra provides for. There was no error when the first sentence was imposed. The latter sentence [the result of the said conversion] is incompetent.

Accordingly, the conviction is confirmed and the sentence of $50 000/30 days (the original sentence) is to stand. The subsequent proceedings and sentence imposed are set aside. If the accused has already performed community service he will not be

required to pay the fine or serve the alternative custodial sentence.

Bere J ..... I agree