

THE STATE

Versus

AGNES NDLOVU

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 30 AUGUST 2007

Criminal Review

NDOU J: The matter was referred for review very late with a memorandum in the following terms:

“The above stated case was sentenced on the 16.01.07 and the presiding magistrate was Mrs M Siti. After sentencing the relatives intended to appeal on behalf of the accused. The Attorney-General’s office requested for the record and it was forwarded to the office on the 05.02.07. Therefore the record was not forwarded for review, the A.G’s office returned the record to us on 27th June 2007 and it has no reasons for sentence because the magistrate who presided over the case, Mrs M Rukoni Siti has since left service.”

The trial magistrate had a duty to give reasons – see *S v Mpofu* HB-73-03 wherein CHEDA J dealt with this issue and consequences of failure to give reasons for sentence. This is a case where community service should also have been seriously considered as the sentence was below 24 months – *S v Majaya* HB-15-03 and *S v Shariwa* HB-37-03.

In the light of these serious misdirections the best that can be done is to set aside the sentence and look at the facts of the case and what accused said in mitigation and determine the appropriate sentence.

The accused has been serving the sentence from 16 January 2007. The accused was convicted of malicious injury to property as defined in section 140 of the Criminal Law Codification and Reform Act [Chapter 9:23]. The accused had an extra-marital affair with the complainant’s husband. The accused called the

complainant’s husband at 0300 hours. The complainant answered the phone and started insulting the accused [presumably for calling her husband at that hour]. The accused told the complainant that she was coming to her place. True to her word, the accused proceeded to the complainant’s residence and threw stones at her residence resulting in the breaking four window panes and a windscreen. The damage was valued at \$1 800 000,00. She pleaded guilty. She said in mitigation that she is a single parent of one four year old child. She is a hair dresser realising \$8 000,00 per

day. She said she had \$500 000,00 in savings and \$20 000,00 at home. She said that she committed the offence because the complainant insulted her over the phone. She is a first offender. The aggravating features are that she went to the complainant's home to commit the offence and the value is high.

In the *Majaya* case, *supra*, CHEDA J admirably highlighted that sentencing policy has dramatically changed and that judicial officers should first explore non-custodial forms of sentence before imposing imprisonment, which is a rigorous punishment that should be resorted to only in the absence of any non-custodial form of sentence. I also emphasised this point in the *Shariwa* case, *supra*. It is trite that community service should be considered in all cases warranting effective imprisonment of 24 months or less. The imposition of the prison sentence *in casu*, *per se*, cannot be faulted. It is the failure to consider community service that constitutes the misdirection – *S v Manyevere* HB-38-03 and *S v Dangaremba* HH-123-03. Because of the delay, the option of community service is no longer feasible. The accused has almost served her sentence by now. She would be out by now if she paid compensation.

Accordingly, the conviction is confirmed. The sentence imposed by the trial magistrate on 16 January 2007 is set aside and substituted as follows:

“12 months imprisonment of which 8 months is suspended on the following conditions: (a) 4 months suspended for 3 years on condition the accused does not within that period commit any offence involving malicious injury to property and for which she is convicted and sentenced to imprisonment without the option of a fine, and, (b) 4 months on condition the accused pays restitution to the complainant through the Clerk of Court Magistrates' Court before 17 August 2007.”

As the accused has served the effective sentence she is entitled to immediate release if she is still in prison.

Cheda J I agree