

**THE STATE**

**VERSUS**

**SIPHO NCUBE**

**AND**

**GILBERT MLOTSHWA**

IN THE HIGH COURT OF ZIMBABWE

CHEDA J

BULAWAYO 24 JANUARY 2013

Review Judgment

**CHEDA J:** This matter was referred to me by the learned scrutiny magistrate as he observed that the sentence imposed was manifestly lenient.

The accused aged 30 and 19 respectively were charged with five counts of contravening section 131 of the Criminal law Codification and Reform Act [Chapter 9:23], commonly referred to as House Breaking. They pleaded not guilty but were however convicted. All the counts were treated as one for the purposes of sentence and were each sentenced to 12 months imprisonment.

The learned scrutiny Regional Magistrate was not satisfied with the learned trial magistrate's sentence and referred the record to me. In my view his dissatisfaction with this sentence was indeed justified in circumstances.

Accused persons went on a housebreaking spree for three months in the low density suburbs and stole property valued at \$1150-00 and only \$360-00 was recovered. The learned trial magistrate conceded that the sentences are lenient, but, he was persuaded by the fact that they had been in custody for over a year and that they are young offenders, therefore, there is according to him a need for restorative justice.

With all due respect to the learned trial magistrate even if they had been in custody for over a year, that should have been taken into account by suspending part of the sentence after

harsh sentences were imposed. He goes on to categorise them as young offenders, it boggles one's mind to define a 30 year old person as young, this is with respect to accused 1.

Indeed accused 2 is 19 years of age, but however, there is no justification for him being treated as young in view of the circumstances surrounding the commission of the offences. This, in my view should remove him from category of young offenders who normally find judicial favour with young offenders.

In *casu*, it is not the value for the stolen property alone which matters, but, it is the number of break-ins. It should be borne in mind that when an accused breaks into someone's property his aim would be for the most valuable property the fact that the stolen property turns out to be of a small value is nothing other than a misfortune on his part and not by design.

In my view this is a matter where an effective sentence of between 2-3 years would have met the justice of this case.

The second point which is of great concern is the increasing and fashionable trend of sentencing by this particular magistrate (T Chimiso). I have in the past few months in my review judgments raised concern about the ability, competency and/or professionalism by the said magistrate. Unfortunately he/she does not seem to realise where he/she is going wrong.

In that regard the office of the Chief magistrate is ordered to investigate the said magistrate for his/her competence or otherwise in view of the number of cases which seem to be out of step with decided cases.

In light of the above, I am in total agreement with the learned scrutiny Regional magistrate that these proceedings are not in accordance with real and substantial justice.

My certificate is withheld accordingly.

Cheda J.....