HB 89-16
HCAR 503-16
CRB ENT 87-16

THE STATE
versus
NJABULO SIBANDA

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 24 MARCH 2016

Criminal Review

MATHONSI J: This matter was placed before me for automatic review in terms of s57(1) of the Magistrates Court Act [Chapter 7:01]. The 32 year old accused person was arraigned before a magistrate at Western Commonage in Bulawayo on 23 February 2016 facing a charge of theft in contravention of s113 (1) (a) of the Criminal Law Code [Chapter 9:23], it being alleged that on 12 February 2016 he had stolen three cellphones and cash all valued at $455-00 from a house in Entumbane Bulawayo.

He pleaded guilty to the charge and upon conviction he was sentenced to 18 months imprisonment of which 6 months imprisonment was suspended for 5 years on condition of future good behavior. A further 6 months imprisonment was suspended on condition that he restitutes the complainant the sum of $455-00 by 31 March 2016. This left the accused person with an effective prison term of 6 months for which he was carted away to Bulawayo prison and commenced serving it on that date.

When the matter came before me for review I immediately queried with the magistrate why, after he had initiated the inquiry into the suitability of community service and the accused had been successfully vetted for it, he had then abandoned that option in favour of imprisonment for a matter falling squarely within the community service grid and the accused was found suitable for community service.

The magistrate responded by letter of 15 March 2016 which reads:

"RE: STATE V NJABULO SIBANDA CRB ENT 87/16

> Kindly place the record of proceedings before the learned MATHONSI J with the following comments:
> I acknowledge receipt of your review minute dated the 7th of March 2016. I did not sentence accused to community service as I took it that this would trivialize the offence.

> Accused has no regard for the law or others and is so gullible as he masqueraded as a man of the cloth and stole from the innocent complainant. I also considered that a substantial amount is involved and complainant suffered prejudice. Therefore I had found a custodial sentence appropriate. May I be guided should the learned reviewing judge find otherwise."

In my view these fanciful reasons not only fail to address the simple concern raised, namely that an effective 6 months imprisonment falls within the community service grid, they are patently an afterthought by someone who does not want to see the light. The reasons for sentence given by the magistrate in the record are as follows:

> "Accused is a first offender who is a family man. It is a trite principle of sentencing to exercise leniency when dealing with first offenders. Accused pleaded guilty and did not waste the court's time. It has been held in a number of cases that weight must be attached to a plea of guilty which shows remorse on the part of accused. However I took as aggravatory the nature of offence accused is facing. Also aggravating is the value involved. I found a custodial sentence coupled with an order for restitution appropriate."

Until such time that magistrates start taking the business of sentencing seriously and apply their minds purposefully to the task at hand we shall continue to have such problems, where magistrates simple adopt an instinctive approach to sentencing which arises out of either emotion or inattention. How else can one explain the inquiry into the suitability of community service and the abandonment of the whole exercise midstream as if the magistrate just forgot that the inquiry had been conducted? This was clearly a misdirection.

It has been stated repeatedly by this court that where the sentencing court settles for an effective sentence of less than 24 months imprisonment, it is obliged to consider community service as an option. See *S* v *Mabhena* 1996 (1) ZLR 134 (H) 140E; *S* v *Chireyi and Others* 2011 (1) ZLR 254 (H) 260D.

Where the magistrate has inquired into community service and found it inappropriate in the circumstances, he or she must give cogent or sound reasons for arriving at that conclusion which reasons must appear in the record: *S* v *Mutenha and Another* HB 35/16. In the end if the sentencer considers that only an effective term of imprisonment is the appropriate sentence he or she should give proper reasons for that decision. See *S* v *Antonio and Others* 1998 (2) ZLR 64 (H); *S* v *Chinzenze and Others* 1998(1) ZLR 470 (H); *S* v *Silume* HB 12/16.

The magistrate did not give any reasons for disregarding community service as an option. This is a case where the pre-sentencing information he had gathered was to the effect that indeed the accused person was a good candidate for that option of sentence. There had to be a reason for discarding it and such reason should have been recorded. It was not.

Instead the magistrate proceeded as if no inquiry into the suitability of community service had been conducted, which is strange indeed. Yet this is a case in which he had settled for an effective 6 months imprisonment and was therefore required, as a matter of principle, to consider community service. That is what happens when sentencing is explained in mystical terms, when the judicial officer is accorded svengali status imbued with magical qualities beyond the ken of mortals. When the magic fades it does so inexplicably and is seen as a terminal development hence the failure to explain the sentence by the magistrate.

Magistrates should simply follow the sentencing guidelines which have been given by the superior courts painstakingly over the years. They should not, in the exercise of their sentencing discretion, pursue other agenda divorced from the penal policies developed over time where such a departure is uncalled for and has the effect of leading to an injustice.

This is a case in which the accused person should have been given community service. He had been in custody for a period of 24 days when, with the thankful concurrence of my sister MOYO J, I ordered his immediate release because that period of incarceration was enough for someone who should have been given a non-custodial sentence.

In the result, it is ordered that:

1. The conviction of the accused person is hereby confirmed.

2. The sentence is set aside and in its place is substituted by the following sentence:

> "18 months imprisonment of which 12 months imprisonment is suspended for 5 years on condition the accused does not, during that period, commit an offence involving dishonesty for which, upon conviction, he is sentenced to imprisonment without the option of a fine.
> A further 5 months and 6 days is suspended on condition the accused restitutes the complainant the sum of $455-00 by 31 March 2016 through the clerk of court Western Commonage."

3. As the accused person has already served 24 days imprisonment, he is entitled to his immediate release.

Moyo J agrees……..