HH 17-2003
CA 4000-1/02
FELIX MADEMBO
and
PENNIUS NHONGONHEMA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHINHENGO AND PARADZA JJ
HARARE, 21 and 29 January, 2003

W Zhangazha **for appellants**
M Nemadire **for respondent**

Criminal Appeal

CHINHENGO J: This is an appeal from the decision of the Regional Magistrate's Court for the Eastern Division sitting at Harare. It is an appeal against sentence only.

The appellants are forty-six and twenty-six years old respectively. On a date between March and September, 2001 the appellants received from their employer and took into their possession certain goods described as follows -

> "84 DF 6 inch pieces; 95 DAF 7 inch pieces; 8 x 6½ inch blocks, 2 x 14 inch blocks; 8 x 10 inch concord linings; 2 sets 7 inch concord clutch facings; 2 sets of 8 inch concord clutch facings; 2 sets of 10 inch concord clutch facings; 2 sets of 9 inch concord clutch facings and 2 sets of 10 inch woven clutch facings".

The appellants were under instructions to transport these goods from Harare and to deliver them to their employer's Mutare branch. The goods were valued at $100 000. Instead of delivering the goods to the Mutare branch the appellants sold them and converted the proceeds to their own use. The goods were however, all recovered when this offence was discovered. The complainant did not suffer actual prejudice.

On these facts the appellants were charged with the offence of theft by conversion. They pleaded guilty to the charge and they were each sentenced to forty-four months imprisonment of which twelve months imprisonment was suspended for five years on condition that each of them did not, within that period, commit any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine.

The appellants appealed to this court on the grounds that in passing sentence the

magistrate failed to take into account that all the property was recovered and that he failed to consider all the factors of mitigation with the result that the sentence which he imposed is so excessive that it induces a sense of shock. In the heads of argument filed on behalf of the appellants an additional ground of appeal appears. It is that the magistrate did not give his reasons for sentence at the time that he passed the sentence. This was not one of the grounds of appeal in the notice of appeal. As such this allegation was not put to the magistrate so that he could comment on it. There are no sufficient facts on the record before me to show that the allegation has any basis. I will therefore disregard it as it does not really affect the decision which I must come to.

The appellants contended that the following were strong factors of mitigation which the magistrate failed to take into account or to which he did not attach sufficient weight- that the stolen property was all recovered; that the appellants were first offenders, that they pleaded guilty to the charge, that they earned very low salaries which were also disproportionate to their responsibility thereby creating a temptation to normally honest people; that they lost their employment and that the value of the property was low having regard to the inflationary conditions in this country.

The respondent conceded that the magistrate erred in two respects. First it conceded that the magistrate assessed his sentence on inaccurate facts such as the number of counts involved and on the finding that the offence was planned. Secondly, it conceded that the magistrate failed to appreciate that the mitigating factors outweighed the aggravating factors. Overall the respondent conceded that a custodial sentence was not warranted.

The appellants applied for bail pending appeal. That application was dismissed on the grounds that they did not have a reasonable prospect of success on appeal. The record of proceedings does not indicate that they challenged this decision by appealing to a higher court.

Before accepting as valid the criticism levelled against the magistrate's decision I must record what the magistrate said in passing sentence. He said:

> "In assessing sentence the court has taken into account that you are both first offenders and that you both pleaded guilty to the charge. The court has also taken into account what each of you has said in mitigation of sentence. Finally the court has also taken into account that all the property valued at $100 000 was recovered and that you did not gain anything from your criminal venture.

However you were both employed by the complainant in positions of trust. There is no doubt that you breached that trust and abused your positions. You stole from your trusting employer on various occasions. It cannot be said that you yielded to a sudden temptation. It clearly shows planning and determination to commit the offence. The plan was well executed resulting in the complainant losing property valued at $100 000. It was only through a tip that this offence came to light. Usually the courts are very reluctant to send first offenders to prison but where serious offences are committed even first offenders might find themselves in prison".

In their submissions in mitigation the appellants stated that the first appellant was

married and had four children. He earned "about $4 000 per month". He had no savings and no valuable assets. H was the only person employed in his family and as such the only breadwinner. The second appellant said that he was single. He earned $3 800 per month. He had no savings nor valuable assets. His mother and five siblings were dependent on him because his father was deceased. As I have noted the magistrate said that he also took all these personal circumstances of the appellants into account in assessing the appropriate sentence.

Judicial officers have often been criticised for failing to take into account factors of mitigation in assessing sentence even where, as in this case, they said that they did so. In some instances they have been criticised for failing to accord due and appropriate weight to factors of mitigation. In other cases, they have been criticised for paying lip service to those factors. In *S* v *Buka* 1995 (2) ZLR 130 (S), EBRAHIM JA said that judicial officers do not always give sufficient weight to a plea of guilty. At 124 G - 135 A he said:

> "It is my view, however, that judicial officers do not always give sufficient weight to where an accused person tenders a plea of guilty to a charge levelled against him. It is important not merely to pay lip service by repeating what one is expected to say when a plea of guilty has been tendered. One often reads in a judgment the following : 'I have taken into account that you have pleaded guilty, that you are a first offender and that you have expressed contrition'. It is not enough to repeat these phrases without giving due weight to the plea proffered. They are factors of mitigation and judicial officers should take proper account of them".

The need to meaningfully take into account all mitigatory factors has been stressed in a number of decisions of the superior courts in this country. See also *S* v *Sidat*

1997 (1)ZLR 487 (S) at 492-493 and *S* v *Katsaura* 1987 (2) ZLR 103 (H). In the *Katsaura* case *supra* BARTLETT J was quite strong in his criticism of judicial officers who pay lip service to mitigatory factors. He referred to the decisions in *Sidat* and *Buka*, *supra* and said at 105 D-F that:

> **"It is my view that the magistrate did not give sufficient weight to the plea of guilty but fell into the trap so eloquently described by EBRAHIM JA *supra*. I would go further than EBRAHIM JA and state that this is a trap into which magistrates fall so often that it has become the rule rather than the exception to become ensnared in it. I believe it is true to say, from the multitude of review matters which pass across my desk in the course of a year, that it is difficult to discern any meaningful difference between sentences imposed by magistrates when accused persons plead guilty as opposed to when they plead not guilty. It would accordingly seem fair to observe that there appears to be a definite reluctance on the part of magistrates to give meaningful effect to the views expressed by EBRAHIM JA and MCNALLY JA. This is unfortunate. It is time magistrates heeded the clear direction provided by the Supreme Court and gave appropriate weight to pleas of guilty. This is of particular importance when consideration is given to the overcrowded situation of Zimbabwe's prisons. See the Comments of GARWE J in *S* v *Chapanduka* HH 65-95 at p.2."**

The criticism levelled against magistrates in respect of whether or not they have taken into account, either at all or sufficiently, any mitigatory factors may be fair and unfair at the same time. It may be fair if one is able to show exactly how insufficiently the magistrate has taken into account those factors. It may be unfair, and I think it always is, where the magistrate has stated that he has taken those factors into account but a judge, because of his loftier position is able to decree, on the basis of the degree to which he thinks those factors should have been taken into account, that the magistrate did not do so. Judges routinely state that magistrates have not given sufficient or appropriate weight to one or other factor of mitigation. What is appropriate or sufficient is largely a

subjective matter. To one judicial officer appropriate or sufficient may mean quite a different thing from what it may mean to another judicial officer. I am quite certain that when a judge of the High Court says of a magistrate that he has failed to give appropriate or sufficient weight to a factor of mitigation, a judge of the Supreme Court may equally say that the High Court judge did not give appropriate or sufficient weight to the same factor of mitigation despite that he has reduced the sentence imposed by the magistrate on account of that factor of mitigation.

The subjectivity which arises from the use of the words "appropriate" or "sufficient" is often taken advantage of by legal practitioners who appear for accused persons in an appeal. They also, like the magistrates and the judges repeat the same phrases i.e. "that the magistrate failed to give appropriate or sufficient weight to a factor of mitigation". A judicial officer who sits in an appeal against the decision on sentence by another judicial officer has the advantage that he can show, by reducing the sentence earlier imposed, how and by how much he has taken into account a given factor of mitigation. That advantage is not enjoyed by a judicial officer of a lower court.

How then should judicial officers try to avoid the criticisms that are so often levelled against them in regard to the taking into account of certain factors of mitigation. The answer lies in the guidance that has been provided in a number of cases and, in particular, in *S* v *Munechawo* 1998 (1) ZLR 129 (H) where DEVITTIE J said that a clear quantification of the discount given by the court to a person who has pleaded guilty to a charge should be made or specified.

At 135 B-E he said:

> **"The pronouncement of a discount from an otherwise appropriate sentence merely serves to ensure that proper effect is given to the principle stated by BARTLETT J in *Matida* case *supra*. The policy considerations that have weighted in favour of the discount in England and Australia are even more compelling in this jurisiction given the greater scarcity of resources with which to service the administration of criminal justice. I would summarise**

my conclusion in this way:

a) Considerations of public policy demand that recognition be given to a plea of guilty by reducing the sentence below the level appropriate to the facts of the offence;
b) It is within the sentencing discretion of the court, should it so choose, to give effect to the policy consideration by first selecting an appropriate sentence before reducing it by a specified amount on account of a plea of guilty;
c) A bare plea of guilty usually justifies a discount in its own right; it is for the court to evaluate the weight to be given to that plea and no fixed discount can be prescribed. In some cases the court may decide that no discount is justified".

I respectfully agree with this approach where, on sentencing an accused person, a judicial officer takes into account a factor of mitigation such as a plea of guilty, or that the accused is a first or youthful offender or that the property has been recovered in whole or in part, or that the accused has already paid compensation to his victim and the judicial officer says he has done so, he should be able to quantify the amount by which he has reduced the sentence on account of any one or more of these factors of mitigation.

Quantification of discounts of the sentence are often specified in cases where a juvenile is jointly sentenced with an adult. It is a general principle of our law that a juvenile or young person must not be punished exactly in the same way as an adult. See *S* v *Tendai* & *Anor* (Juveniles) 1998 (2) ZLR 423 (H); *Innocent Tichareva Munukwa* v *The State* HH 35/02 and *S* v *Zaranyika* 1995 (1) ZLR 270 (H). In *Tendai* (*supra*) GILLESPIE J commented in reference to *Zaranyika supra* at 429 D as follows -

> "That judgment has been successful in ensuring that a necessary distinction is drawn in sentencing older juveniles and young adults as opposed to more mature

offenders. The success has been limited, however, to achieving only a reduction in the overall punishment".

The learned judge went on to suggest other ways of dealing with juvenile offers with which I agreed in *Munukwa's* case *supra*.

Where a court is sentencing a juvenile or young person together with an adult, it is quite easy to see how youth as a factor of mitigation has been taken into account. The adult is for example given a custodial sentence and the juvenile, if below 18 years of age is sentenced to corporal punishment or the adult is sentenced to a certain period of imprisonment and the young co-offender is sentenced to a half of that period or some other proportion. In such a case a quantifiable discount of the sentence on account of a factor of mitigation is readily ascertainable. In *Munukwa's* case *supra* I had regard to the sentence imposed on an adult in *S* v *Dube* 1996 (1) ZLR 77 (S) where the facts were similar and I said at p 7-8 of the cyclostyled judgment that -

> **"The facts in the present case are quite similar to the facts in *S* v *Dube* 1996 (1) ZLR 77(S). In that case the appellant, an adult male, had made a proposition to the complainant which was rejected. He had seized the complainant, thrown her to the ground and tried to remove her pants but he then got up and desisted from further attack because he discovered that she was menstruating. The Supreme Court set aside a sentence of imprisonment of 3 years and substituted it with one of imprisonment for 3 years of which one year was suspended for 3 years. It was held that it was desirable to suspend a portion of the sentence because of the 'rehabilitative and salutary effect' of such a suspension. The court, it must be emphasized was dealing with an adult male. That distinguishes that case from the present case where a youthful offender is the subject…I consider that the age of the appellant, the absence of persistent violence in his conduct, the genuine contrition and that he is a first offender are weighty factors in any judicious assessment of the appropriate sentence".**

I then reduced the sentenced from one of 3 years imprisonment of which 12 months were conditionally suspended to one of 24 months imprisonment of which 12 months were suspended on condition of good behaviour and the remaining 12 months were suspended on condition that he performed 420 hours of community service. Quite

clearly I had, in what appeared to me to be similar facts to those in *Dube's* case, *supra,* to reduce the sentence substantially because a young person was the accused in *Munukwa's* case *supra*. That reduction is readily quantifiable. It is implicit that had the accused in *Munukwa's* case, *supra* been an adult, I would in all probability have imposed the same or substantially the same sentence as in *Dube's* case *supra*.

In *S* v *Sidat*, *supra*, the appellant had been sentenced on a charge of receiving stolen property knowing it to have been stolen to 42 months imprisonment of which 24 months were conditionally suspended. The value of the property was $33 593,27 of which goods worth $4 493,42 were recovered. Before his trial the appellant had re-paid $32 152,03 to the complainant. MCNALLY JA at 492 H - 493 A recognised the fact that the appellant had repaid the complainant a substantial sum to compensate him for his loss. He said:

> "We usually suspend a significant portion of a prison sentence on condition of repayment. He has gone one stage better, by repaying. So he must benefit at least by the amount we would have suspended to induce him to repay. I bear in mind that I have remarked that offenders must not be allowed to buy themselves out of prison completely. But they must certainly be rewarded for making restitution. Otherwise why should they bother to do so".

Again this was an instance where the court made a quantifiable discount of sentence on account of a factor of mitigation.

It seems to me therefore that in order to avoid criticism that a judicial officer has not taken a factor of mitigation sufficiently into account, the judicial officer must quantify the discount he gives on account of any or all factors of mitigation which are favourable to the accused person. This is not a novel idea as I have shown above. Distinct and quantifiable discounts or reductions of sentences on account of some factor are routinely given. Where for instance, a judicial officer suspends a portion of the sentence on some condition in terms of s 358 of the Criminal

Procedure and Evidence Act [Chapter 8:02] he always specifies the amount by which the sentence has been reduced on account of that factor. Sentences which read:

> "36 months imprisonment of which 12 months imprisonment is suspended for three years on condition that the accused does not within that period commit any offence involving dishonesty for which he is sentenced to imprisonment".
>
> or
>
> "36 months imprisonment of which 12 months imprisonment is suspended on condition that the accused pays compensation in the sum of $X on or before (a given date)";

are routinely imposed. Apart from the recognised purposes for which such sentences are imposed, such as deterrence and the reconciliation of offender and victim, such sentences clearly specifiy the amount by which the sentence has been reduced by on account of some factor which was necessary to consider in imposing the sentence. In my view therefore in every case where a judicial officer has accepted any factor of mitigation he must, as stated in *Munechawo* case *supra,* clearly specify the amount by which he has reduced the sentence on account of that factor. Where it is one factor of mitigation to be taken into account the reduction so specified may be small. But where there are two or more such factors the reduction must progressively be greater. In all cases however the amount thereof must be specified. In this way a judicial officer will be able to avoid the criticism that he has not sufficiently taken into account any factor or factors of mitigation. In his way the appellate court or a reviewing or scrutinizing judicial officer will be less inclined to decree, rather subjectively that the other judicial officer erred. His task will be

simply to determine whether there is any basis for giving a greater discount of the sentence.

In the present case, the factors of mitigation are quite numerous. The appellants are first offenders who should, generally, be spared the rigours of a custodial sentence if that can be done. They pleaded guilty to the charge. The stolen property was all recovered. They lost their employment. They were in receipt of very low salaries. The value of the property stolen was low having regard to the inflationary economic situation in this country. See *Katsaura* (*supra*). A discount of the sentence can therefore be given and specified.

Before making the discount I must first show how inflation has affected the value of our currency. In order to show the depreciation of the purchasing power of the Zimbabwe dollar over the past ten years I will use a basic value of $100 000 of 1990 money. I will adjust this value progressively to 2002 by the average annual rate of inflation as determined from year on year official inflation statistics issued by the Central Statistical Office. For the period 1990-1991 the average rate of inflation was 22.41%. By the end of 1971 therefore an amount of $100 000 had its purchasing value diminished by a figure determined as:

$$= \frac{\text{Amount}}{1 + \text{inflation rate}}$$

$$= \frac{100\,000}{1 + 9{,}2245}$$

= $81 669.

Adjusting this new value of $81 669 using the same formula one arrives at the 1992 diminished purchasing power of $52 853. The final result as shown in the schedule below is that for the period 31 December 1990 to 31 December, 2002 the purchasing power of the Zimbabwe dollar fell to $1 216, in other words, $100 000 of Zimbabwe money as at 31 December, 2002 was the equivalent of $1 216 of 1990 money.

Date	Average Inflation Rate	Value
31/12/90		100 000
31/12/91	22,45	81 689
31/12/92	54,52	52 853
31/12/93	43,46	36 841
31/12/94	25,65	29 321
31/12/95	27,21	23 048
31/12/96	28,09	17 994
31/12/97	17,27	15 344
31/12/98	37,87	11 130
31/12/99	67,65	6 639
31/12/00	49,72	4 434
31/12/01	61,04	2 751
31/12/02	126,51	1 216

In the past I have sought the co-operation of the Central Statistical Office on these matters with little joy. If the figures which I have used in the schedule are incorrect in any respect, the fault is mine entirely as I had to do my own research. The schedule shows that if the appellants were to be punished in the same way as any accused who was punished in 1990 for a similar offence the sentence to be imposed on the appellants should, everything being equal, be the same punishment as any accused who stole $1 216 in 1990.

ADAM J in *S* v *Chitofu* 1997 (1) ZLR 468 (H) referred to many cases in which comparable sentences were imposed. In that case the learned judge refused to certify the proceedings as being in accordance with real and substantial justice where a sentence of 4 months imprisonment for the theft in June 1996 of irrigation pipes valued at $3 600 was imposed. He had regard to the many cases which he cited - *S* v *Mohammed* HB 71/88; *S* v *Mutengwe* S-179/90; *S* v *Mangwende* S-121-92;

S Wabatagore HH 253,89; _S_ v _Jaya_ HH 271/89; _S_ v _Bandira_ S-6-89; _S v Masvosve_ HB 83-90; _S_ v _Dube_ HB 87-90 and _S_ v _Hwemba_ HH 16/98 where the sentences for the theft from employers or for the theft by conversion of goods with values ranging between $2 300 and $4 00 the effective sentences ranged between 6 and 10 months imprisonment the average effective sentence being 8 months imprisonment. If the appellants in this case were sentenced about that time they would, for the theft by conversion of the goods within the same range of value have been sentenced to an effective period of imprisonment of 8 months. The comparative analysis which I have undertaken reveals, without any doubt that the sentence imposed on the appellants was so excessive as to induce a sense of shock - an effective 32 months imprisonment compared to 8 months in the other cases. The ravages of inflation show that the value of the goods which the appellants stole in 2001 was the equivalent of $2 751 in 1990.

Applying the principle in _Munechawo's_ case _supra_ on account of the factors of mitigation in this case, which in my view are strong and numerous I would reduce the average sentence of an effective period of 8 months by about 3 months to result in an effective sentence of 5 months. This means that a sentence of 12 months imprisonment of which 7 months imprisonment is suspended on condition of good behaviour would be appropriate. Most of the cases referred to in _Chitofu's_ case _supra_ were decided before community service was adopted as a desirable alternative punishment to imprisonment. Community service must generally be imposed where the offence is minor by reference to the effective sentence of imprisonment unless there is a good reason not to do so. In this case I am of the view that the appellants' salaries per month were low and they created a temptation to commit the offence. I am mindful that theft from an employer is an offence which is viewed very seriously because of the breach of trust involved. Nonetheless on the particular facts of this case I consider that the sentence of community service, viewed against the value of

the goods which is law, the plea of guilty, the full recovery of the goods, the fact that the appellants are first offenders and their family and personal circumstances, does not trivialise the offence which they committed. The need to discount the sentence on account of the mitigatory factors is supportive of the imposition of community service as a suitable punishment .

Accordingly the appeal is allowed. The sentence is set aside and the following is substituted -

> "Each : 12 months imprisonment of which 7 months is suspended for 3 years on condition that during that period the accused does not commit any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine. The remaining 5 months imprisonment is suspended on condition that the accused performs 175 hours of community service at such institution and on such other conditions as the trial magistrate may determine".

The matter is remitted to the magistrates court for the assessment of the appellants' suitability to perform community service and if they are found to be suitable the sentence above shall be imposed otherwise the sentence of imprisonment will stand.

PARADZA J, I agree.

Chinamasa Mudimu and Chinogwenya **appellants' legal practitioners**
Office of the Attorney General **, respondent's legal practitioners**