CHARLES KELLY
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUNGWIRA AND UCHENA JJ
HARARE, 9 October 2003 and 18 February 2004

Criminal Appeal

Advocate *L Mazonde* for the appellant
Mr *R Tokwe* for the respondent

MUNGWIRA J: The appellant was convicted by the magistrate, Harare of theft from employer of chicken and fish valued at $219 000.

Upon convicted he was sentenced to a prison term of 5 years of which 3 years imprisonment was suspended on condition the appellant effected restitution to the complainant in the sum of $219 000. Another year was suspended on the usual conditions of good behaviour. The result was that the appellant if he complied with the conditions of suspension would serve an effective sentenced of l year imprisonment.

The appellant initially lodged an appeal against both conviction and sentence but at the hearing abandoned his appeal against conviction.

The grounds of appeal against sentence are that the sentence imposed is so manifestly excessive as to induce a sense of shock.

It was submitted on behalf of the appellant that the theft was not pre-meditated and that at most the appellant, motivated by greed, acted on the spur of the moment. He, it is said stole from his employer after realising that he could make money out of the portion of goods which was classified as being unfit for human consumption and realised a profit of only $11 000,

This court was urged to take into account the fact that about half, if not most, of the goods stolen was destined for destruction and further that the appellant gave away about l½ tonnes of the goods. It is the appellant's argument that the court *a quo* disregarded the complainant's evidence to the effect that had the approximately 3½ tonnes of goods stolen been considered unfit for human consumption the residual value thereof would be in the region of $20 000. That being the case, the appellant submitted that a heavy fine coupled with an order of restitution of about $11 000 would have met the justice of the case.

The State in its submissions argued that while the issue of sentence is essentially one for the discretion of the trial court, there are in the instant

case, several factors which militate against the imposition of a custodial penalty.

The first factor advanced is the spiraling rate of inflation which has eroded the value of money. According to the respondent the amount involved is such that the decision to impose an effective custodial penalty was not warranted.

The respondent further highlighted that the trial magistrate failed to accord due weight to the fact that the complainant had indicated that in reporting the matter it was never his intention or desire that the appellant be incarcerated. That factor, had it received due consideration, would have, it was submitted, had an impact on the form of or nature of sentence meted out.

In addition the State indicated that account should have been had of the fact that one of the consequences of the commission of the offence was that the appellant lost his employment - *S* v *Ndlovu* HH 32/82. The respondent further urged this court to take note of the fact that after conviction and sentence and before the grant of bail pending appeal the accused served a portion of the sentence imposed. The position adopted by the respondent in this regard is that it is undesirable to send back to prison a man who has already served a portion of his sentence, particularly in circumstances where he or she has subsequently obtained steady employment.

The interests of society can, the respondent contends be served by imposing an alternative form of punishment in the form of a heavy fine a portion of which can be suspended on appropriate conditions of good behaviour or alternatively community service.

The first issue I shall deal with, and which emerges from perusal of the record of proceedings, is that of the quantum of restitution. The evidence adduced in respect of quantum, from our observation appears to have been inconclusive.

In *State* v *Tivafire* 1999 (1) ZLR 358 (HC), CHINHENGO J indicated that unless a judicial officer is in a position to ascertain the liability of the convicted person to pay compensation and unless the quantum of compensation is readily ascertainable, it would not be proper to proceed under s 358(3)(b) or s 358(3)(h), in any case in which compensation must id properly quantified be payable - (*S* v *Chiwoko* 1989 (2) ZLR 364 (H); *S* v *Mufuka* HH 232/98).

It is in the *Tivafire* case further stated that the court must always

make an order in the correct amount (*S* v *Jani & Ors* 1983(1) ZLR 246 at 247H) and that where the correct amount cannot be ascertained or assessed as would be the case if the court acted in terms of s 358 (3)(b) of the Code, where personal injuries are involved prejudice is likely to be caused to both the convicted person and to the victim of his offence. In respect of the convicted person prejudice may arise for instance from ordering him or her to pay a high amount as compensation which may not be justified. In respect of the victim prejudice which may arise in that the order may stipulate a lesser amount than that which is justified, that is the correct amount in the circumstances.

Both counsel for the appellant and the respondent conceded that although the loss in this matter is purely pecuniary the amount awarded as compensation was on the available evidence speculative.

Whilst it is common cause that the appellant effected an unlawful removal of goods from his employer's premises the evidence reveals that the matter proceeded on the basis of approximations. Whilst in the normal course this state of affairs might have compelled us to set aside the order in the circumstances of the present case, the complainant does not appear to have taken issue with the award and acting on the basis of the calculations advanced on behalf of the appellant there is no evidence and neither has any compelling argument been advanced that prejudice has been occasioned to either the complainant or the respondent.

It has been drawn to our attention by counsel for the appellant and confirmed by counsel for the respondent that restitution has since been effected in the amount ordered.

I must confess that I found this to be a rather strange case in that whilst the arguments advanced on behalf of the appellant were for the most part lackluster and not compelling, it is the respondent which saw fit to robustly take up the cudgel on behalf of the appellant. I say so however in full appreciation of the role of counsel for the State in cases of this nature.

I would dismiss on the turn the submission that the offence was not premeditated and was committed on the spur of the moment. The circumstances of the commission of the offence belie that fact. The appellant was employed as a dispatch clerk/operations manager by the complainant. He thus held a fairly senior position. He was responsible for maintaining controls and checks on goods leaving his employer's premises and was familiar with amongst other things the relevant dispatch

procedures. In order to commit the offence he needed to mobilise several junior members of staff to remove the goods from various freezers and he needed a sizeable vehicle for transport given the quantity involved. In addition there were certain hurdles which, he had to overcome such as the independent security check. It is also in my respectful opinion hardly likely that he would have taken the chance of moving that quantity of perishable items without being assured of a market, his intention being to profit from the sale thereof. The whole scenario smacks of pre-planning. It is in light of the aforegoing in my view inconceivable that the appellant acted on the spur of the moment.

There is no substance to the argument that a substantial portion of the goods taken was due for destruction and as such that the stolen goods were virtually worthless. As a matter of fact, the evidence adduced revealed that the bulk of goods taken could be classified as fit for human consumption with only a very small proportion of , in the region of 300 to 350 kilogrammes being classifiable as 'bad'. Even if it were the case that the bulk was unfit for human consumption the fact remains that the appellant did not have the right to determine for the complainant the mode of disposal.

The appellant's argument that most of the goods were not fit for human consumption fails flat on its face when confronted with the incontrovertible evidence that although that may well have been the case the goods were of an ascertainable commercial value. It was up to the complainant to elect to sell to certain customers, return the goods for conversion to pet food or to order destruction. The appellant at no stage pleaded or expressed ignorance of the procedures pertaining to destruction. The bottom line is that the complainant sustained a significant loss. No much weight can be attached to the appellant's assertion that his sole profit was an insignificant sum of $11 000. That was a risk that he took and it does not minimise his high level of moral blameworthiness.

His loss of employment would undoubtedly occasion hardship to the appellant and his kin but again I do not believe that given the circumstances of the commission of the offence undue weight should be placed on that as a mitigatory factor.

The period of barely a week spent in custody, pending the grant of bail after conviction and sentence, is negligible and there is no merit to the unsolicited concession made by the respondent in this regard.

There can be no doubt that the appellant's conduct falls within the category of what would be classified a serious offence. In *S* v *Chamunorwa* 1993(2) ZLR 49 it was stated that with the alarming increase in thefts of property and money involving higher and higher values or amounts, society obviously looks to the courts to impose a severe sentence to deter persons from committing such offences but that the question of sentence remains a difficult one for the court. The need to balance the interests of society which require severe sentences for those who breach the trust placed in them and the interests of the offender which are opposed to those of the society and which two interests appear irreconcilable is brought to the fore in *S* v *Chitopa* 1984(1) ZLR 209 (S).

In the *Chamunorwa* case*, supra*, it was pointed out that the courts cannot be expected to apply some sort of yardstick whereby they simply increase the effective sentence of imprisonment in proportion to the increasing value of the property or money stolen lest the courts fall into the danger of coming up with sentences which will be solely destructive of and soul destroying for the convicted person.

Whereas there is very little that one might find in favour of the appellant, and we were not impressed with most of the arguments advanced on his behalf by both sides there is, however, clearly a glaring misdirection in the sentence imposed by the trial court. Given the quantum involved and the nature of the offence a sentence of 5 years imprisonment, albeit with portions suspended on certain conditions, is not justifiable and is way out of line with sentences imposed in similar cases. The amount involved can by no stretch of the imagination be said to warrant a suspension of 3 years imprisonment on condition of restitution. The period of imprisonment is glaringly disproportionate to the prejudice suffered. Sight should also not be lost of the fact that the court in this case was dealing with a first offender.

The judgment of CHINHENGO J in *Felix Mbambo* v *State* HH 17/2003 provides useful guidelines on the approach to sentence in matters such as the present as the learned judges. Unlike in previous cases in which the issue of the value of money has been addressed the learned judge in this particular matter reviewed past sentences based on concrete data in the form of cost of living indices.

Another shortcoming which I observed is the dismissive attitude of the trial magistrate to the submission in mitigation to the effect that the

complainant had indicated that it was not his desire to have the appellant incarcerated. Although I was not able to trace anywhere in the record of proceedings where this is stated by the complainant judging from the remarks of the magistrate and the prosecutor, a response to the submission, it would appear that this was common cause. I have here no hesitation in agreeing with the respondent's submission that in as much as one appreciates that crimes are generally committed against the State, a sentencing authority ought to attach weight to the expressions of a complainant as such a factor has an impact on the form of sentence imposed.

Had this submission received proper consideration I have no doubt that the trial court might have reached a different conclusion. The failure to do so is a patent misdirection.

Bearing in mind the foregoing, that the appellant has since obtained stable employment and compensation having been effected I am satisfied that interference is warranted.

In the result the appeal against conviction is dismissed. The appeal against sentence succeeds in that the sentence imposed by the trial court is set aside and the following is substituted:

> "The appellant is to pay a fine of $250 000 or in default of payment 18 months imprisonment. In addition 10 months imprisonment is suspended for 4 years on condition that the appellant does not within that period commit any offence involving dishonesty and for which he is sentenced to imprisonment without the option of a fine."

UCHENA J, agrees.