

THE STATE  
versus  
THOMAS BENHURA

HIGH COURT OF ZIMBABWE  
DUBE J  
HARARE, 9 June 2015

### **Criminal Review**

DUBE J: The accused person aged 65 years old, appeared before the trial court facing a charge of theft of trust property brought in terms of s 113 (2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The allegations are that he failed to handover proceeds of a sale of a stand he sold on behalf of the complainant amounting to \$1700-00. The brief facts may be summarised as follows. The accused is an estate agent. On 15 December 2013, the complainant approached the accused and requested him to sell his stand at Crowhill Views in Harare for \$10 000-00. The accused thereafter sold the stand and was paid \$10 000-00 for it by the buyer. The accused gave the complainant \$8 300-00 and converted balance of \$1 700-00 to his own use.

The accused was convicted on his own plea and sentenced as follows,

“\$200, in default of payment 4 months imprisonment. In addition 6 months imprisonment is suspended on condition accused restitutes the complainant Temba Zingwari in the sum of \$1 700-00 through the Clerk of Court Harare on or before 31 January 2015.”

The learned Regional Magistrate who scrutinised the record requested this court to review the proceedings in terms of s58 (3) of the Magistrates Court Act .He commented as follows,

“The trial magistrate sentenced the accused to a fine of \$200/4 months imprisonment with a 6 months additional prison term suspended on condition of restitution on a charge of contravening section 113(2) of the Criminal Law (Codification and Reform) Act, Chapter 9;23 (theft). It is my considered view that the relevant penal provision stipulates a fine not exceeding twice the value of the stolen property or level 14 whichever is greater(section 113(b) (i).)”

The trial magistrate in response to the query conceded that the penalty provision of the offence prescribes a fine not exceeding twice the value of the stolen property or level 14

whichever is greater. The court's explanation for the sentence is as follows. The reason why it coupled the restitution order with a fine was that it did not want the court to be reduced into a civil court by simply ordering restitution. The court was of the view that community service or effective imprisonment would be harsh to the accused who was aged 65 years. The court also took into account that the accused was a first offender and had pleaded guilty to the offence.

The penalty provision to s 113 provides that a person convicted of theft in terms of the section shall be liable to the following,

- “(i) a fine not exceeding level fourteen or twice the value of the stolen property, whichever is the greater; or
  - (ii) imprisonment for a period not exceeding twenty-five years;
- or both:

Provided that a court may suspend the whole or any part of a sentence of imprisonment imposed for theft on condition that the convicted person restores any property stolen by him or her to the person deprived of it or compensates such person for its loss.”

The court was at liberty to impose either a fine, imprisonment or both. The court could also suspend a portion of any imprisonment sentence imposed on condition of restitution. The trial magistrate fell into the error of thinking that once it imposed an additional sentence of imprisonment, it was not required to adhere strictly to the requirements prescribed where a fine is also imposed. Once the trial court decided to impose a fine as part of the sentence, it was required to comply strictly with the requirements of s 113 (1) (b) (1). There is a growing tendency on the part of magistrates to ignore the criteria set down in the imposition of fines and tend to impose whatever fines they deem fit without adhering to the requirements of s 113(1) (b)(1) in convictions of theft. This approach offends the concept of uniformity of sentences.

Once the trial court decided to impose a fine, it was required to be guided by the penalty section of the offence. The court was required to impose a fine not exceeding level fourteen which is \$5 000-00 or twice the value of the stolen property thus \$3 400-00 whichever is greater. If the trial court was of the view that that the accused did not have the means to pay the fine, or that the accused was too old and that a custodial sentence would be too harsh, then it should have opted for an imprisonment sentence suspended on appropriate conditions or community service.

The fine imposed does not meet the justice of the case as it falls far short of the requirements of the law.

I am unable to certify these proceedings as being in accordance with real and substantial justice. Accordingly, I withdraw my certificate.