

THE STATE
versus
KUDZANAI MATEREKE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 20 May 2021

Review Judgment

CHITAPI J: The accused was convicted by the magistrate at Kadoma on two counts of theft as defined in s 113 of the Criminal Law (Codification & Reform) Act, [Chapter 9:23] On 15 March 2021. It was alleged that on 24 February 2021, the accused stole two cell phones from two different patrons who were revelling at Nyamuziwa Night Club at Patchway, Kadoma. From one of two complainants, the accused additionally stole a tracksuit jacket. The accused was sentenced to 8 months imprisonment of which 2 months was suspended for 5 years on the usual condition of good behaviour leaving 6 months effective imprisonment. The magistrate then recorded that 4 months was suspended on condition that the accused performed community service of 140 hours at a local school. The record was referred to the learned regional magistrate for scrutiny as *per* procedure.

On scrutiny, the learned regional magistrate passed the conviction. She was not satisfied with the sentence in two respects. The learned regional magistrate queried that although the accused was convicted on two counts of theft as aforesaid, the manner in which the sentence was worded did not reflect that the sentence imposed was in respect of the two counts. It was therefore not clear to which count the sentence related or whether it related to both the two counts. The second query raised by the learned regional magistrate was that 2 months of the overall sentence was not accounted for because of the 8 months imposed by the trial magistrate, 2 months was suspended on conditions of future good behaviour and 4 months on condition of the accused performing community service. The trial magistrate therefore left 2 months hanging.

When the learned magistrate invited a comment from the trial magistrate on the anomalies as noted, the trial magistrate responded that in regard to a failure to indicate whether or not the two counts were covered in the sentence of 8 months, it was through oversight that

he/she did not indicate that both the two counts had been taken as one for purposes of sentence. In respect to a failure to account for 2 months as I have noted, the trial magistrate indicated that he/she made a mathematical error because the intention was that of the 8 months in regard to both counts, 4 months would be suspended on condition of future good behaviour and the remaining 4 months on condition of performance of community service.

The learned regional magistrate was prepared to and did accept that the trial magistrate's explanation in regard to whether both counts were accounted for was reasonable and that since the two offences had been committed in the same place the same night, it would be proper to treat the 2 counts as one for purposes of sentence. It is however, the answer to the second query which left the regional magistrate unsure of how to proceed. The trial magistrate's error of calculation must be corrected. I accept that the trial magistrate made an error of calculation. The error substantially affects the accused who according to the record believes that he only has 2 months hanging over his head as the suspended sentence. If the record is corrected to reflect that the suspended sentence is 4 months instead of 2 months, this amounts to an increase in the sentence let alone that the increase resulted from an error of calculation.

In order not to prejudice the accused, a correction of the sentence which does not result in the accused not being subject to a more severe sentence than the one imposed is in my view the most appropriate course to adopt. It is competent on review to substitute a different sentence from the one imposed. The provisions of s 29 (2)(b)(ii) as read with proviso (1) and (ii) to the same subsection of the High Court Act provide that, on review of criminal proceedings, the judge can reduce or set aside the sentence or any order of the inferior court and where a sentence is tinkered with, the substituted sentence should not exceed that previously imposed. The proceedings will therefore be corrected by order as follows:

- (a) The conviction of the accused in both counts as charged is confirmed.
- (b) The sentence imposed by the trial magistrate is altered to the following extent:
 - (i) By deleting the words "8 months" and replacing them with "Both counts taken as one, 6 months ... (the rest to remain).
- (c) The records at the trial court should be corrected to reflect the above change and accused advised accordingly.

MUSITHU J agrees.....