

THE STATE
versus
BORDEN TSHUMA

HIGH COURT OF ZIMBABWE
MAWADZE J & ZISENGWE J
MASVINGO, 20 June 2022

Criminal Review: Sentence

ZISENGWE J: The accused in this matter is a 69-year old man. He was convicted, following his plea of guilty to seven counts of theft i.e. contravening section 113 (1) of the Criminal Law (Codification and Reform) act, [*Chapter 9:23*]. In a spate of relatively petty thefts during the period stretching from January to April 2022, the accused stole various items (mainly empty drums and portable water tanks) from residential and commercial premises in and around the city of Masvingo. When his pilfering spree screeched to an abrupt end following his arrest, his rather interesting haul consisted of the following: nine empty drums, two plastic water tanks (each with a capacity of 1000 litres) 7 loose beer trays and a wheel barrow. Had it not been for the fact that the items were meant for sale, one would have been forgiven for assuming that the accused has an unusual fondness for empty containers. All the items were recovered.

In the wake of his conviction, accused was sentenced to prison terms ranging from 2 months to 10 months for each of the seven counts, depending on the value of the goods stolen in each. From the cumulative sentence of 19 months' imprisonment, 10 were suspended on condition he did not reoffend leaving him with an effective term of imprisonment of 9 months.

It appears the Magistrate initially toyed with the idea of imposing community service, but soon discarded that idea after reading the report by community service officer's report who interviewed the accused. In that report the community service officer reported that the accused is

afflicted by a myriad of debilitating ailments rendering community service unsuitable for him. The magistrate opted therefore instead to mete out a term of direct imprisonment as aforesaid.

I have no quarrel with any of the convictions for the seven counts of theft as I find them in order and stand to be confirmed. It is the imposition of a direct term of imprisonment that I find disconcerting in light of the mitigating factors, not least the advanced age of the accused. It is often said that a proper approach to sentence is one that strikes the appropriate balance between a triad of factors consisting of the personal circumstances of the accused, (i.e. those that are relevant for sentencing purposes), the crime committed (i.e. its nature and seriousness) and the interests of society (i.e. one that best serves the needs of society), see *State vs Zinn* 1969 (2) SA 537 (A). It is also a salutary practice to blend justice with a measure of mercy. Finally, it is imperative for the sentencing court to bear in mind objects of punishment namely, deterrence (both specific and general) reformation, retribution and prevention.

The accused's personal circumstances that are quite compelling and, in my view, render an effective custodial sentence inappropriate. His advanced age and physical infirmity should have persuaded the court not to impose an effective term of imprisonment as a combination of these factors undoubtedly makes imprisonment harder for him to bear than a person not so afflicted.

In the *Zinn* case (supra), the following was said in relation to the question of age.

“Appellant’s age undoubtedly requires consideration. He is 58 years old and as has been submitted, a very long period of imprisonment, particularly if regard be had to his physical condition, would probably not offer him the opportunity to reform and begin life anew. It has also been submitted that the purpose of punishment, in a case like the present, should not be to destroy the offender completely.”

See also *S v Munyai* 1993(1) SACR 252 (A); *S v Du Toit* 1979(3) SA 864 (A), *S v Heller* 1971 (2) SA 29 (A) and *S v Naran* HH 56-84.

As far as poor health is concerned, the following was stated in the *Zinn* case (supra):

“The appellant’s physical condition is certainly a matter which must be considered because it will make imprisonment considerably more disagreeable to him than to a healthy

man of his age. There is nevertheless the fact that in gaol the appellant will be under constant medical supervision...”

The accused submitted in mitigation that he was of poor health and was recently admitted in hospital. He indicated that he had scars on his chest and a wound on his leg and further stated that he was advised to seek further management of his condition with private doctors. The community service officer who interviewed the accused with a view to establishing his suitability to perform community service made the following pertinent observations:

“Accused is a male adult who is unemployed and is not physically fit to perform community service. Accused has acute chest pains and one of his legs is in a plaster. Community service requires physical fitness since the duties performed at the institution are manual. The court may consider another sentencing option for the accused since accused is of ill health. Accused has medical records with him.”

Without elevating the community service officer’s report to the level of a medical report, it nonetheless provides valuable insights to the accused’s physical state. Unfortunately, the magistrate failed to make a detailed enquiry as to accused’s state of health during mitigation and only made perfunctory allusion to the same. Had he, for example, called for the accused’s health records, or inquired from the accused about his prognosis, following his recent hospitalisation, as the community service officer did, he would in all probability have adopted a more empathetic approach towards sentencing the accused. He is unlikely to have settled for a direct term of imprisonment as did.

This by no means implies granting *carte blanche* the elderly and the infirm a right to commit crime with impunity, all that is being said is that these factors when considered alongside other considerations such as his plea of guilty, that he is a first offender and that all the property he pilfered was recovered required of the court to exercise restraint and spare accused the burden of imprisonment. The magistrate should have explored other non-custodial sentencing options. There is therefore need to take appropriate remedial action. In this regard, I believe a wholly suspended prison term is appropriate. It will serve the salutary effect of deterring the accused from reoffending by hanging over his head like the proverbial sword of *Damocles*.

Accordingly, the following order is hereby made:

- a) The conviction in respect of each of the seven counts is hereby confirmed.
- b) The sentence imposed by the court *a quo* is hereby set aside and substituted with the following:

“All seven counts treated as one for sentence: 19 months’ imprisonment which is wholly suspended for 5 years on condition accused does not with that period commit any offence involving dishonesty and for which upon conviction accused is sentenced to imprisonment without the option of a fine.”

- c) Accused to be released from prison with immediate effect.

ZISENGWE J



MAWADZE J agrees.....