JUDGMENT No. HB 21/11
Case No. HC 186/10
X-Ref CRB W/C 74/10

STATE

Versus

NOMPUMELELO MPOFU

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 10 February 2011

T. Makoni for the state
S. Nkiwane for the accused

REVIEW JUDGMENT

MATHONSI J: This matter came to me for review in terms of section 57 of the Magistrates Court Act [chapter 7:10] following the conviction and sentence of the accused person by the Magistrate Court at Western Commonage. There has been an extremely inordinate delay in bringing the matter to finality which is unacceptable indeed.

The matter was previously placed before my brother CHEDA J and it is not clear why it was set down for argument on 19 November 2010. He later recused himself and it was then placed before me. When I went through the record I ordered the immediate release of the accused person and said that the reasons will follow. These are the reasons.

The accused was convicted on her own plea of guilty on 19 January 2010 of theft in contravention of section 113 of the Criminal Law Code, [Chapter 9:23]. She was sentenced to 3 years imprisonment of which 4 months imprisonment was suspended for 5 years on condition she does not within that period commit an offence involving dishonesty and for which upon conviction she is sentenced to imprisonment without the option of a fine. A further 6 months imprisonment was suspended on condition of restitution.

The facts are that the accused and the complainant are lovers. She is employed as a hair dresser at Nu Look Hair Salon in Bulawayo while he is employed by the Veterinary Services Department also in Bulawayo. On 2 January 2010 the complainant brought the accused to his house and they spent the night together. During the night she woke up as the complainant was sleeping and took the keys to the cupboard which she opened and stole US$700-00 and ZAR 5 000-00 belonging to her complainant boy friend.

The following morning when the complainant discovered that his money was missing, he inquired from the accused if she had taken it but she denied. Instead she quickly left the place. Of the stolen money only ZAR 1 000-00 was recovered.

In considering sentence the magistrate converted the United States Dollars to South African rands and came up with a total of ZAR 12 000-00 as the value of the prejudice. It is not clear why he saw it fit to make the conversion which must have been at a rate of 1 US$ to 10 rands.

When counsel for the accused person (she had been unrepresented at the trial), perused the court record for purposes of preparing submissions for review, there were no reasons for sentence, a point that he took up in his submissions. The matter was referred back to the magistrate for his response to those submissions. His response reads in part as follows:

> ''Reasons for sentence were given *ex tempo* (sic) in court in the presence of accused person during the sentence. It could be the legal practitioner has (sic) sight of the record before the trial magistrate had placed the same in the record.''

Mr Nkiwane for the accused has commented as follows:

> ''When counsel went to look for the record a considerable time, about two weeks, had elapsed after the passing of sentence. At that time a review cover had been completed and the record, according to the clerk of court, was ready for dispatch to the Criminal Registrar for his Lord - ship's attention. It was dispatched on 27 January 2010 sentence having been passed on the 13th January. One has difficulty in understanding how a judicial officer could remember some two weeks later, what he had said orally without writing in open court. One should be forgiven for taking the view that the learned trial magistrate adopted the reasoning process of Shake - spear's characters – starting with the conclusion and later going back to justify it ---. Had his worship not adopted the wrong reasoning process, he would probably not have misdirected himself on sentence, for misdirect himself he did, by exaggerating the gravity of the offence.''

It is a cardinal principle of our criminal justice system that before assessing an appropriate sentence a judicial officer must seriously engage in a pre-sentencing inquiry in order to gather as much information as possible to enable him or her to humanely and meaningfully assess sentence. Sentencing cannot be left to the caprices and instincts of the judicial officer. A thorough investigation should be carried out by the judicial officer before arriving at an appropriate sentence.

Where the judicial officer gives an *ex tempore* judgment with reasons for sentence contained in his head, only to be inserted in the court record much later, he runs the risk of someone concluding that he did not apply his mind to the case at hand. Indeed, it is a misdirection for the judicial officer not to record the reasons for sentence, a misdirection which entitles the reviewing judge to tamper with the sentence.

I agree with Mr Nkiwane that the magistrate may have come up with reasons which were added on long after the sentence simply to justify the sentence he had already imposed. I

can assign no other reason for the fact that at some stage after sentence the reasons for sentence were missing and he ''placed'' them in the record later.

It is for that reason that the trial magistrate gave overdue weight to the fact that the accused was the complainant's girl friend who betrayed the trust bestowed to her by the complainant. There was an over –emphasis on the accused's crime which translated to an under-estimation of her personal circumstances.

The accused is a female first offender who was aged 37 at the time of the offence. She is unmarried with 4 children to look after. She stole from her boy friend, a factor which should have weighed in her favour but which the magistrate elected to take as aggravation. Surely a person who steals from a stranger has a higher level of blame worthiness than one stealing from a lover.

She pleaded guilty showing remorse and even the state asked the court to have regard to the guilty plea in assessing sentence. The current trend is to give a lot of weight to a guilty plea and an accused person who pleads guilty has to be rewarded by a substantial reduction of sentence in recognition of that. See *S v Dhliwayo* 1999 (1) ZLR 229 (H) ; *S v Katsaura* 1997 (2) ZLR 102(H).

It is not easy to understand how the magistrate was able to come up with a sentence of 3 years, if any regard was given to the mitigating factors that exist in this matter. It is even more difficult to comprehend how only 4 months of that sentence was suspended on condition of good behaviour and only 6 months was suspended on condition of restitution. The question may be asked why restitute at all if one still remains with such a lengthy term of imprisonment.

Converting the United States Dollars component of the offence to rands gave the impression that a lot of money was involved. The question may well be asked why the rand component was not converted to United States Dollars, a more stable currency, so that the value would be reckoned simply as US$ 1 200-00.

In my view the sentence imposed was excessive. An appropriate sentence should have been one which left the accused with an effective sentence of 12 months.

Accordingly, I make the following order that;
1. The conviction of the accused be and is hereby confirmed.

2. The sentence of 3 years imprisonment be and is hereby set aside and in its place is substituted the sentence of 24 months imprisonment of which 12 months is suspended for 5 years on condition the accused does not during that period commit an offence involving dishonesty for which she is sentenced to imprisonment without the option of a fine.

3. Of the remaining 12 months imprisonment, a further 6 months imprisonment is suspended on condition the accused makes restitution to the complainant of the sums of US $700-00 and ZAR 4 000-00.

4. As the accused has already served the period of 12 months imprisonment, she is entitled to her immediate release.

NDOU J..... I agree.

S. Nkiwane, Counsel for the Accused
Criminal Division, Attorney General's office, Respondent's Legal Practitioners