

THE STATE

Versus

MCASISI DUMANI

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 11 OCTOBER 2012

Criminal Review

MAKONESE J: This matter has been brought to me on review from the Plumtree magistrates' court.

The accused was charged with the crime of theft as defined in section 113 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. He was convicted of the offence. He stole a mountain bicycle value at R1000. The bicycle was recovered. The accused was sentenced to 18 months imprisonment of which 6 months imprisonment was suspended for 5 years on the usual conditions of good behaviour.

I am of the view that the conviction was proper, but it is the sentence which is disturbingly harsh and excessive in all the circumstances of the case.

The brief circumstances of the case are that on the 19th of August 2012 around 7pm the complainant was drinking beer at Linda Business Centre in the Mangwe area of Plumtree. The accused left his bicycle outside the bottle store (because he could not obviously take the bicycle inside the bottle store). The accused spotted the bicycle, liked it and decided to help himself to the bicycle. The accused got on the bicycle and rode away unnoticed. When the complainant came out of the bottle store he was horrified to observe that his bicycle was no longer where he had left it. The accused's luck ran out when Shepherd Moyo, the complainant's nephew saw the accused riding the bicycle at Sindisa Business Centre the following day. The matter was reported to the police leading to the arrest of the accused and recovery of the bicycle. The story had a happy ending for the complainant who recovered his bicycle. The accused was not

so fortunate as he found himself before a Magistrate at Plumtree answering charges of theft of a bicycle. The accused pleaded guilty before the trial magistrate and was duly convicted. The trial magistrate took into account the fact that the accused pleaded guilty and is aged 24 years. He is single and has no children. In sentencing the accused the learned magistrate held that the offence was serious and prevalent and that a deterrent sentence was called for. What seems to have persuaded the learned magistrate to impose a custodial sentence is that the State produced a previous conviction dating to September 2011 of an offence of theft where accused person was sentenced to pay a fine of US\$60 or in default of payment 2 months imprisonment.

Having carefully examined the circumstances surrounding this case, I have come to the conclusion that an effective sentence of 12 months for the theft of a mountain bike is unduly harsh and excessive and inappropriate. Sentencing is always at the discretion of the trial magistrate, but in all cases the sentence must of necessity fit the offence and the offender. The punishment imposed must reflect a degree of leniency especially in cases where the offender has pleaded guilty and the stolen property is fully recovered.

I observe that the learned magistrate in this matter placed undue weight on the aggravating features of the case.

See the case of *Douglas Simbarashe Zishiri vs the State* HH 58/09.

The courts have time and time again expressed the view that imprisonment has to be resorted to as a last resort because by its very nature it is a rigorous form of punishment. In this case one has to examine the degree of blameworthiness of the accused person, the nature of the offence committed, as against the personal circumstances of the accused person, more particularly the effect and consequences of the sentence upon the convicted person. The accused person has not benefitted from his criminal behaviour, albeit, because of the fortuitous discovery of the bicycle. It is my view that, the fact that, the sentence itself is unduly harsh and excessive in proportion to the offence committed is a misdirection which leaves this court at large as regards the sentence. See the remarks of McNally JA in the case of *S v Sidat* 1997 (1) ZLR 487.

In this case I consider that nothing can really be achieved by sending a person to prison for stealing a mountain bike worth R1000 which has been recovered. The fact that the accused pleaded guilty and did not raise a spurious defence ought to be taken in his favour. The mere prosecution of the accused for this case and the time he has already spent in custody from the date of his conviction is in my view adequate punishment and inducement for the accused to reconsider mending his criminal tendencies.

Accordingly I would set aside the sentence and substitute it with the following:-

- (1) the accused is sentenced to pay a fine of US\$200 or in default 2 months imprisonment.
- (2) In addition 6 months imprisonment is suspended for three years on condition the accused is not convicted of an offence, during that period involving dishonesty and for which he is sentenced to a term of imprisonment without the option of fine.

Makonese J.....

Cheda J agrees.....