

THE STATE

Versus

NKOSILATHITSHABALALA

IN THE HIGH COURT OF ZIMBABWE
MUTEMA J
BULAWAYO20 & 23 JANUARY 2014

Criminal Review

MUTEMA J: The accused person is a 42 year old male of no fixed abode. He is a first offender. He was arraigned before a senior magistrate Themba Chimiso at the Western Commonage Magistrates' Court on 4 November, 2013 facing one count of criminal trespass and one count of theft. It is alleged that he jumped over the durawall at house number 21/657 Mpopoma, Bulawayo. That is the basis of the first count of criminal trespass. Regarding the theft charge, the facts reveal that once in the yard accused proceeded to a fenced cage whose fence he cut and therefrom took 6 empty quarts bottles of castle, 1 empty castle pint bottle and 1 empty 300ml bottle of coke. These empty bottles are valued at \$2,60 and were all recovered almost immediately.

The accused pleaded guilty to both counts and was duly convicted as charged. He said he stole the empty bottles to sell in order to raise money for food. For criminal trespass he was sentenced to 3 months imprisonment wholly suspended for 5 years on condition of good behaviour. For the theft charge he was sentenced to 6 months imprisonment.

The learned acting Regional magistrate who scrutinized the proceedings referred the matter for review with *inter alia* the following comments:

"To therefore impose, on a first offender a custodial term especially that of six months is a clear indication that the trial magistrate overlooked the reformatory aspect of punishment and that he needed to strike a balance between the personal circumstances of the offender, the nature of the offences and the interest of society. I am of the view that the trial magistrate, having suspended the 3 months for trespassing should have cautioned and reprimanded the accused on a (sic) charge of theft of the empty bottles worth \$2,60. 6 months imprisonment in my view is too harsh and deserves interference. I did not return the record to the trial magistrate for his comments as I am of the view that this is a matter that requires urgent attention."

I could not agree more and I fully associate myself with the above pertinent sentiments. In his reasons for sentence the trial senior magistrate stated this:

"Accused is a first youthful (sic) offender who pleaded guilty and did not waste the court's time. It is a trite principle of sentencing to exercise leniency when dealing with

first offenders. However, I took as aggravatory the nature of offences accused is facing. I found community service inappropriate as accused is of no fixed abode. I found a suspended sentence appropriate for the first count as it would deter accused from further perpetration of the offence. I then found a custodial sentence appropriate for the second count.”

With all due respect, I am constrained to remark that these reasons for sentence do not justify the shock induced by the harshness or severity of the sentences that were imposed *in casu*. It is only during the Dark Ages when Capitalism was in its infancy when the life and liberty of a convicted felon was worth less than the value of a teaspoon that a sentence such as the one imposed *in casu* would be countenanced by society.

For criminal trespass, the maximum statutory sentence of imprisonment is 6 months. Was the present case that bad so as to warrant half the maximum even though it was wholly suspended? I think not. What of the theft charge – theft of empty bottles worth \$2,60 all recovered by a 42 year old destitute first offender who pleaded guilty and who was clearly driven to commit the offences by hunger – was the 6 months imprisonment warranted? Certainly not.

Perhaps it would be salutary to restate the words of BARTLETT J in *S v Hwemba* 1999 (1) ZLR 234 (HC) @ 235 – 236 where the learned Judge had this to say:

“A sentence of imprisonment is a rigorous and severe form of punishment. It should only be imposed as a last resort ... Where imprisonment is the only appropriate sentence a court must impose the minimum effective period to do justice to both the offender and the interests of society ... The rationale behind it was eloquently described by GREENLAND J in *S v Teburo* HH-517-87 (at p 2): “Given the limited chances available to a judicial officer, he can attempt to achieve this by tempering the sentence with mercy and compassion ... Such an approach is more likely to induce a positive response from the accused than a sentence which will simply brutalise him and lead ultimately to the man redefining himself as a criminal and behaving accordingly. ... It is a better approach for a judicial officer to appeal to the good sense of responsibility residual in the contrite first offender and impose the least punishment which will still achieve the objectives of punishment.” ... Six months imprisonment to a first offender must well seem interminable. If [magistrates] disagree perhaps they might like to spend six months in prison and then see if they think is a short period!” See also *S v Katsaura* 1997 (2) ZLR 102.

In casu the second count, in terms of the value involved, was quite a trivial offence which did not deserve any period of effective incarceration at all. Though the accused is not youthful – contrary to what the trial magistrate stated (he being 42 years old) the fact remains that he did not deserve to be incarcerated. A deterrent and reformatory sentence was warranted in the absence of community service on account of accused’s non-suitability due to being of no fixed abode,

Accused was sentenced on 4 November, 2013. He has already served more than two and

half months of the six months imprisonment for count two. He is entitled to immediate release and a warrant for his liberation shall be issued.

The sentence by the trial magistrate cannot be allowed to stand so it is hereby set aside and in its place, substituted with the following:

Count 1: 1 month imprisonment the whole of which is suspended for 5 years on condition accused does not, within that period, commit any offence involving criminal trespass and for which he is sentenced to imprisonment without the option of a fine.

Count 2: Warned, cautioned and discharged.

The Deputy Registrar is directed to issue a warrant for the accused’s liberation forthwith.

TakuvaJ I agree