

**THE STATE****Versus****MGUNI BORNWELL**IN THE HIGH COURT OF ZIMBABWE  
BERE J  
BULAWAYO, 31 OCTOBER & 3 NOVEMBER 2016**Criminal Review**

**BERE J:** The accused in this case was properly convicted of the crime of contravening section 49 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The accused was then sentenced to pay a fine of \$300,00 or in default of payment to undergo 24 months imprisonment. In addition the accused was prohibited from driving any class of motor vehicle for a period of 24 months. It is the approach to sentence which has caught my attention.

The brief facts are that on the 23<sup>rd</sup> of June 2016 and along Masiyephambili Road close to the intersection of Masiyephambili road, and Luveve road the accused negligently hit the deceased who subsequently passed on at Mpilo Hospital from injuries sustained in the accident. I have no qualms with the prohibition order from driving imposed by the court *a quo* as part of the accused's punishment. It is the alternative period of 24 months imprisonment in the event of the accused failing to pay a fine of \$300 which has given me discomfort.

The record of proceedings does not show how the magistrate decided to settle for 24 months imprisonment in the event that the accused failed to raise \$300. The alternative period of incarceration is not a matter of guess work or intuitively arrived at but must be well anchored. The alternative period of imprisonment must be a result of an enquiry carried out by the presiding magistrate and the record of proceedings must show that such an enquiry would have been properly carried out.

This court's view is that this enquiry must involve *inter alia* questions and answers pertaining to the accused person's source of income and how much time the accused person

would require to raise the fine imposed. The enquiry must also cover such questions centred on trying to extract information around the accused’s savings and other assets of value. It is only after carrying out such an enquiry that the court would then be in a position to come up with a more realistic alternative period of incarceration in the event that the accused fails to raise the amount of fine imposed. The process has no room for guess work as reflected in these proceedings.

If the magistrates were allowed to indulge in intuitive approach, a serious injustice would result like what has happened in this case.

It is for these reasons that the fine imposed by the court *a quo* is confirmed but the alternative period of imprisonment is set aside and substituted by 3 months imprisonment so that the new fine reads as follows:

\$300 or in default of payment the accused undergo 3 months imprisonment.

It is for these reasons that I withhold my certificate.

Takuva J ..... I agree