

**THE STATE**

**Versus**

**GODKNOWS NKIWANE**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 4 OCTOBER 2017

**Criminal Review**

**MAKONESE J:** Locating that elusive gold nugget or gold flake can become a reality with the use of a gold metal detector. In recent times treasure hunters and gold prospectors have been found across the length and breadth of the country in search of gold.

The accused appeared before a magistrate at Filabusi on the 2<sup>nd</sup> of September 2017 facing one count of theft in contravention of section 113 of the Criminal Law (Codification and Reform) Act (Chapter 9:23). It was alleged that on 27<sup>th</sup> August 2017 at Chelo Farm, Mayfair, Filabusi, the accused unlawfully stole a gold metal detector SD 2300 and various groceries belonging to the complainant, one Sheila Mpofu. The brief facts are that the 21 year old accused proceeded to the complainant's house where he loosened the screws used to secure the door to a storeroom where a gold metal detector and an assortment of groceries were kept. Upon gaining entry into the storeroom the accused person stole the metal detector and groceries. The accused was arrested after attempting to sell the metal detector to a certain gold baron based at Esigodini. The metal detector was valued at US\$4 600 and was not recovered. Apparently the accused was duped and lost the metal detector to some conmen.

The accused pleaded guilty to the charge and was duly convicted and sentenced to 4 years imprisonment of which 1 year was suspended for 5 years on the usual conditions of future good conduct. Nothing turns on the conviction in this matter. The conviction was proper and is accordingly confirmed. It is the sentence which is excessive and unduly harsh in all

circumstances of the case. In his reasons for sentence the magistrate in the court *a quo* reasoned as follows:

*“In arriving at a sentence, the court has taken into account that accused is a young first offender who has pleaded guilty. These issues serve to mitigate his conduct. However, the accused owed the complainant a duty to be trustworthy as he was employed by the complainant. His actions of betraying that truth have served to aggravate his conduct.*

*The property stolen was also not recovered and the value of that property is quite great and in that in all probability, the complainant has lost it forever without a chance of compensation by the complainant.*

*This offence is quite serious looking at the level of dishonesty displayed and the value of the property.*

*As such all considerations of community service are incapable of being pursued by the court.*

*A custodial sentence is accordingly called for.”*

In addressing the court in mitigation, the accused indicated that he only wished the persons that dispossessed him of the metal detector were found and apprehended.

I note that the trial magistrate over emphasised the aggravating factors of this case and paid little attention to the mitigating factors. It is indeed aggravatory that the stolen metal detector was not recovered. The value of the detector is placed at US\$4 600. The record does not indicate how that value was arrived at. It was incumbent for the trial magistrate to indicate how the value of the detector was arrived at, rather than accept the value on the mere say-so of the state. This court takes judicial notice of the fact that there are various types of gold metal detectors with different capabilities. The price of this detector had to be properly ascertained. The charge sheet reflects that the accused also stole “various groceries”. The nature and value of such groceries is not stated in specific terms. The court was not told what groceries had been stolen presumably because the main focus was on the gold metal detector. It is however important for trial magistrates to insist on specific particulars of items stolen that appear in a charge sheet. This is so because when sentencing an accused person, the sentence imposed must

not be arbitrary but based on proven facts. The value of a stolen thing if over-stated, tends to lead to an inappropriate sentence.

I also observe that no attempt was made to induce the accused to retribute by compensating the value of the gold metal detector. The trial court ought to have enquired from the accused if he was in a position to effect restitution. A substantial portion of the sentence would have been suspended on condition of restitution. The learned magistrate believed in his wisdom that considerations of community service were incapable of being pursued by the court. The accused who is 21 years old and is a first offender who pleaded guilty was a proper candidate for community service. It has been indicated by this court time and time again that custodial sentences should only be resorted to as a last resort.

In *Leonard Silume v The State* HB-12-16 MATHONSI J, stated at page 3 of the cyclostyled judgment as follows:

*“The sentencing court has a discretion in assessing an appropriate sentence. The appeal court will not just interfere with that sentencing discretion and will only do so where there is a misdirection or the sentence imposed is manifestly excessive; S v Chiweshe 1996 (1) ZLR 425 (H) 429 D; R v Ramushu S – 25/93; S v Nhumwa S – 40/88. Where it can be shown that the sentence imposed is vitiated by a misdirection the appeal court will step in to correct the misdirection. Where the sentence imposed falls within the sentencing discretion of the trial court and it has not been shown that there exists a misdirection, the appeal court will not interfere merely to substitute its own opinion regarding sentence ...”*

See also *S v Chireyi & Ors* 2011 (1) ZLR 254 (H), where MAWADZE J took the view that it was a misdirection for a trial magistrate not to inquire into the possibility of community service where he or she settles for an effective sentence of 24 months imprisonment or less.

In this matter, I have little doubt that the learned trial magistrate relied heavily on the seriousness of the offence based on what I perceive to be an over-stated value of the gold metal detector. The failure by the trial magistrate to enquire into the possibility of restitution as a condition of suspending a portion of the term of imprisonment is a misdirection. In any event,

the sentence of 4 years imprisonment is excessive and induces a sense of shock. It would seem that the learned magistrate paid lip service to the fact that accused pleaded guilty and that he was a first offender. Accused is a youthful first offender and a lengthy prison sentence is clearly punitive and will not have a rehabilitative effect. See also the remarks of MUSAKWA J in, *State v Gilmore Karambe* HH-182-15.

I am satisfied that this matter cries out for interference by this court regarding the sentence imposed by the court *a quo*. The sentences imposed against offenders must be just and fair. The courts must carefully balance the interests of an accused against the interests of the due administration of justice.

It is therefore ordered that the sentence imposed by the trial court be set aside and in its place substituted with the following.

“Accused is sentenced to 3 years imprisonment with 1 year suspended on condition accused restitutes complainant the value of the metal detector through the Clerk of Court Filabusi, a further one year is suspended for 5 years on condition accused is not within that period convicted of an offence involving dishonesty and for which upon conviction he is sentenced to imprisonment without the option of a fine.”

The trial magistrate is directed to recall the accused and pronounce to him the above altered sentence.

Mathonsi J ..... I agree