THE STATE

versus

MUNDONDO ZAVA

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 13 March, 2017

Criminal Review

MAWADZE J: The gospel of community service cannot have possibly escaped this learned and experienced Provincial Magistrate based at Gutu Magistrates Court. Probably his situation can be likened to the biblical parable where the farmer in planting the seeds some of the seeds fell on barren rocky soil and completely failed to properly mature.

It is saddening to note that when the concept of community service is now like what a bible is to Christians this learned Provincial Magistrate has simply decided to sing his own disharmonious tune much to the detriment of the noble concept of justice. There are now a plethora of cases from this court which give guidance to trial Magistrates on the aspect of sentence in relation to the option of community service. For this court to continue to harp on these general principles is akin to preaching to the converted.

It is unfortunate that this 19 year old boy who has had his first brush with the law by committing 3 counts of unlawful entry into premises in aggravating circumstances and stealing property in all counts valued at a paltry US$179 of which property valued at US$108 was recovered (his benefit is just US$61) has been incarcerated for 24 months. The only reprieve he got is to have 6 months imprisonment suspended on the usual conditions of good behaviour and a further 3 months on condition he pays restitution (never mind that he has no

bond note to his name). This means this teenage boy would serve an effective prison term of 15 months (if not 18 months as he is unlikely to pay restitution).

The bare bones of the facts of this matter are that on 14 December 2016 in Village Musendo, in count 2 and on 22 February 2017 in Chikanda and Murivi Villages in counts 1 and 3 all in Chief Chiwara, Gutu the 19 year old accused approached the complainants' homesteads.

In count 1 the accused unlawfully entered into the complainant's kitchen hut and stole 2 kg sugar, 750 ml cooking oil, one silver pot, 2 kg rice and a pair of tackies all valued at US$33.00. After his arrest property valued at US$15 was recovered.

In count 2 the accused entered into complainant's house through a window and stole a loaf of bread, an MTN cell phone line, 2 kg sugar, 2 kg rice and a satchel all valued at US$28 of which nothing was recovered.

In count 3 the accused gained access into the complainant's house through an unlocked door and stole a Samsung cellphone, a pair of tackies, 3 trousers and one pair of shorts all valued at US$118 of which property valued at US$103 was recovered.

The total value of the property stolen in all the 3 counts is US$179 of which property valued at US$108 was recovered hence the actual prejudice is property valued at US$61.

It is clear from the agreed facts that the accused went on a spree of committing the offence of unlawful entry into premises in aggravating circumstances as is defined in s 131(2) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*]. The accused's moral blameworthiness is elevated by this persistent criminal conduct. To that extent the accused deserves to be punished lest he believes that there is some virtue in committing crime. The proprietary interest of our rural folk should be protected even where it is not of any significant monitory value.

Be that as it may the accused is a youthful first offender with neither savings nor assets. The element of immaturity on his part probably explains his criminal conduct. While the offence of unlawful entry into premises in aggravating circumstances remains a serious offence the trial court should not lose sight of the value of the property stolen in each count in assessing the appropriate sentence.

The sentence imposed by the trial Magistrate in this case does not only induce a sense of shock if not revulsion but completely ignores basic sentencing principles. It offends against notions of justice see *S* v *Shariwa* 2003 (1) ZLR 314 (H).

It is trite in our law that that where a trial court imposes a sentence of 24 months or less the suitability of community service should be considered. Failure to do so constitutes a misdirection see *S* v *Antonio* 1998 (1) ZLR 64 (H); *S* v *Gumbo* 1995 (1) ZLR 163 (H), *S* v *Chinzenze & Ors*. 1998 (1) ZLR 470.

The learned trial Magistrate *in casu* did not even bother to carry out an inquiry into the suitability of community service. Further no good and sound reasons are advanced in this case as to why community service was not imposed. See *S* v *Mapweza* HH 125/95; *S* v *Mabhena* 1996 (1) ZLR 134.

A proper inquiry would have enabled the learned trial Magistrate to determine if community service is suitable punishment for the offense this 19 year old boy committed, his suitability to perform such Community service and all other relevant factors.

The conviction of the accused in respect of all the 3 counts is in order and is therefore confirmed.

The learned trial Magistrate, for reasons outlined above failed to exercise his discretion in deciding the appropriate sentence and assessing that sentence. This court however is harmstrung from the facts before it to carry out a meaningful inquiry into the suitability of community service. I am however satisfied that community service would have been appropriate in this case.

The accused was sentenced on 27 February 2017 and has now been in custody for 15 days. I do not believe that the accused should have been sentenced to an effective term of imprisonment at all. The accused is entitled to his immediate release.

In the result the sentence imposed by the trial court is set aside in its entirety and substituted with the following;

> "All 3 counts are treated as one for sentence and accused is sentence to 6 months imprisonment of which 5 ½ months imprisonment are suspended for 5 years on condition accused does not commit within that period any offence involving unlawful

entry into premises and or dishonesty for which he will be sentenced to a term of imprisonment without the option of fine."

I have issued a Warrant of Liberation for the accused.

Mawadze J. ……

Mafusire J. agrees