THE STATE
versus
SHEPHERED KATSANDE

HIGH COURT OF ZIMBABWE
MUZENDA & MUNGWARI JJ
MUTARE, 6 March 2023

Criminal review

MUNGWARI J: The proceedings in this case were placed before me under cover of a minute of the scrutinising regional magistrate in terms of s 58(3) (b) of the Magistrates' Court Act [*chapter 7:10*]. He queried the propriety of the sentence which was imposed by the trial magistrate. In his view, it was unnecessarily harsh.

The background of the case is that on 16 December 2022 around 1000 hours, the accused went to the complainant's homestead in Mayo. From outside the complainant's bedroom window he managed to identify an itel cellphone which he liked. He decided to help himself to it even though he knew it belonged to someone else. He stretched his hand right through a broken window pane and reached the inside of the room. I presume the phone was on the inside of the window ledge. The record of proceedings simply alludes to it being "inside the complaint's bedroom on the window." He took the cellphone and went away unnoticed. At some stage the offence was discovered, (the record of proceedings is silent on the date of discovery). The cellphone was subsequently recovered from the accused who had it in his trousers' pocket.

The accused was thereafter arraigned before the court sitting at Mayo on a charge of theft as defined in s 113(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9.23*]. He was convicted on his own plea of guilty and sentenced to:

> $20 000 fine in default of payment 1 month imprisonment.
> In addition, a further 4 months imprisonment is imposed but is wholly suspended for 3 years on condition accused does not within that period commit any offence involving dishonesty and for which upon conviction accused is sentenced to imprisonment without the option of a fine.

Time to pay- 30/12/22 (sic)

As already said, the scrutinizing regional magistrate took issue with that sentence. He directed a minute to the trial magistrate querying the propriety of imposing a wholly suspended sentence on the 18 year old in addition to the payment of a fine in circumstances where all the stolen property had been recovered.

The trial magistrate responded. I found the language used in that response to be unnecessarily patronizing and over the top flowery. The response was as follows:

> "May you kindly place the matter before the Learned Regional Magistrate, with the following comments:
> Thank you for your comments dated 10 January 2023. I am very much indebted to His Worship's insight and sagacity.
> I accede that following such comments, I now realize that my sentence was harsh and disproportionate to the offence. It is trite in our law that a sentence must befit the offence committed.
> I will however, endeavor that in future, I will vehemently exercise my mind before imposing sentence."

The regional magistrate was equally not impressed by the over the top show of respect and humility by the trial court. On 26 January 2023 he referred the record to this court for review with the following comment:

> "Accused person is a first offender. He pleaded guilty to the charge and did not waste the court's time and resources. The property he stole was recovered meaning he did not benefit from the criminal enterprise. With all these mitigating factors the court went on to impose 4 months imprisonment which it suspended for 3 years on condition of good behavior. The sentence imposed does not fit both the crime and the offender. The sentence imposed is against the correct principles of sentencing.
> In *S* v *Ngulube* 2002 (2) ZLR 316 (H) Ndou J had this to say, "Judgments in our jurisdiction have always emphasised that the sentencing court, in deciding upon the appropriate punishment, must strive to find a punishment which will fit both the crime and the offence. The sentence must be fair and just instead of excessive, savage and draconian….. the punishment must fit the criminal as well as the crime, be fair to the State and to the accused and be blended with a measure of mercy.
>
> My view is that there is need for intervention by the High Court so that if the accused is to contravene the law in future, he will not be punished by having the unjustified 4 months imprisonment being brought into effect. The trial magistrate conceded that his sentence is harsh and disproportionate to the offence.
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> The record of proceedings is therefore being referred for corrective measures to be taken."

My understanding of the regional magistrate's comment was that the sentence imposed particularly the portion which was wholly suspended was harsh. I am not of the same view because sentencing is a largely discretionary process with which a reviewing court can only

interfere when it is clear that the sentence imposed is disproportionate or that the wrong considerations were used to arrive at the sentence. The accused as will be shown below, did not commit a simple theft if at all the offence was a theft.

Regional magistrates are urged to always strive to be discerning in their scrutiny of other magistrates' work in order to be able to pick out material issues such as the one I believe should have been detected in these proceedings. What really exercised my mind was whether the charge preferred was the correct one to begin with?

S130 of the Code is couched in the following manner:

> **130 Interpretation in Part II of Chapter VI in this Part–**
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> "enter", in relation to any premises, land or enclosed area, includes–
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> (a) for the purposes of sections one hundred and thirty-one and one hundred and thirty-two, to insert any part of one's body or an instrument into the premises, land or enclosed area;

The definition of *"enter"* for purposes of the charge of unlawful entry into premises speaks to a situation whereby the simple insertion of any part of the body into the premises will suffice. I have already outlined the facts as provided in the record of proceedings. The accused stretched his hand and through a broken window pane reached out for the complainant's cellphone. He then took it from inside the house and made good his escape. For all intents and purposes the facts of this matter disclose a charge of unlawful entry into premises in aggravating circumstances. The trial magistrate should have exercised his mind around the propriety of the charge. The scrutinizing regional magistrate should have equally picked this up. Neither did. For that reason the accused should actually count himself lucky to have escaped with a conviction for a less serious offence than the circumstances of his case disclose.

It is for that reason that I have already said the sentence imposed is not out of range with sentences imposable on similar thefts which are aggravated by one issue or another. Because the accused got a penalty which he would have more or less received for unlawful entry into premises, I am hesitant to do anything about the conviction.

Further, I wish to remind judicial officers that when a regional magistrate invites a trial court's views and comments on a particular issue, he/she does not do so for purposes of fulfilling a ritual. The objective is for the trial court by virtue of it being privy to the circumstances surrounding the offence and the offender to justify or explain the issues being queried by the scrutinising regional magistrate. It is not a requirement that the trial magistrate

should rush to wash his/her hands by conceding to the query raised. At times the concessions betray an attitude that the regional magistrate should do as he/she pleases. That defeats the purpose of these checks and balances. Instead the two of them are expected to respectfully engage in meaningful discourse as members of the same team. Both of them are expected to respectfully explain their positions and understanding of the law. Taking refuge in offering profuse apologies does not help anybody. A properly considered response to the issues raised on scrutiny will more often than not result in the regional magistrate and the trial magistrate finding common ground. This was one case which cried out loud for that engagement. That notwithstanding I will proceed to explain why I say the sentence is appropriate.

The accused in this case was sentenced to pay a fine. Whilst it is accepted that he is youthful, he remains an adult on whom the imposition of a fine is competent. Given the inflationary environment our economy finds itself in, it cannot be argued that $20000 is excessive. Much as it is mitigating that the stolen property was recovered it does not take away the gravity of the offence. In its pre-sentencing inquiry the trial court established that the accused realizes $ 60 USD from his business of selling fuel even though at the time of sentencing he had no money on his person. He is therefore a person of some means and he is in a position to pay the fine. Out of an abundance of caution the trial court granted him a reprieve by giving him time to raise the money. Having realized that that alone might neither teach the youthful offender anything nor reform him the trial court decided that he needed to be deterred from conducting himself in a like manner in future. It additionally imposed a wholly suspended sentence on condition of good behavior in the hope that this would deter him.

BERE J in the case of *S* v *Celani Ndhlovu HB 213-15* explained the benefits of imposing a wholly suspended custodial sentence on a youthful offender. He held that it is deterrent as one has a suspended sentence hanging over his head. It serves to temper an otherwise severe penalty. It recognizes the rashness of youthful transgressions. The trial court's approach is exactly what the youthful offender required – a leash that will assist him and guide him against any future transgressions. The accused simply has to avoid re-offending for him not to serve the suspended imprisonment term. The trial court's reasons for sentence clearly explain the reasoning behind the imposition of the sentence. I see no fault in that. I also see no reason for the trial court to have fallen over itself thanking the regional magistrate for his "sagacity" when it had been on the right track.

As already said this court could only interfere with that sentence if it were of the view that it was disproportionately harsh and that it induced a sense of shock. It is not. In my view

a fine and a wholly suspended sentence was not outside the realm of sentences that maybe imposed on an 18 year old.

I am cognizant of the fact that the accused was sentenced in December 2022. By now he would have paid the fine or in default thereof served the alternative sentence of 1 month imprisonment. As such this review minute only stands to guide magistrates in future.

It is for the above reasons that I certify the proceedings as having been in accordance with real and substantial justice.

MUNGWARI J……..

MUZENDA J…… Agrees