HB 210-17
HCA 17-16
XREF MBER 61-16

SQUARE ZONDO
versus
THE STATE

HIGH COURT OF ZIMBABWE
BERE AND MATHONSI JJ
BULAWAYO 10 JULY 2017 AND 13 JULY 2017

Criminal Appeal

E Mandipa for the appellant
W Mabaudhi for the respondent

MATHONSI J: The 35 year old appellant is a widower with four children to look after over and above other orphans. All in all he has ten dependants to take care of. He was employed by the complainant as a security guard earning $180-00 per month when, on 3 February 2016 whilst guarding Tees Marketing Yorks in Mberengwa, he saw a broken window. He then put his hand through the window and fished out 53 2kg packets of sugar worth $90-00. He was observed by an onlooker as he did so who quickly alerted a police officer leading to the appellant's arrest. The property was immediately recovered.

For his troubles the appellant was arraigned before a magistrate at Mberengwa facing a charge of unlawful entry in breach of s131 and a charge of theft in breach of s113 of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. He pleaded guilty and was, upon conviction, sentenced to 12 months imprisonment none of which was suspended after both counts were treated as one for purposes of sentence, the trial magistrate reasoning that "they occurred at the same time one after the other."

The appellant has appealed to this court against sentence only because, in his view, it was a misdirection to settle for an effective 12 months without considering the appropriateness of other non-custodial sentences like community service. In his view the court *a quo* paid lip-service to the weighty mitigating factors that he set out including the fact that he is a first offender who pleaded guilty thereby showing remorse. He is the sole breadwinner of a large

family. The appellant craves the setting aside of the custodial sentence and its substitution with 420 hours of unpaid work at Mberengwa Police Station.

The appeal is strongly opposed by the state. In his heads of argument Mr *Mabaudhi* for the respondent submitted that although there are indeed strong mitigating circumstances, the fact that the appellant betrayed the trust bestowed to him by his employer and was caught *in fragrante delicto* is aggravating enough to outweigh all the mitigating factors. For that reason, the appellant must go down. He however suggested that of the 12 months imprisonment imposed four months must be suspended on condition of future good behaviour such that the appellant serves an effective eight months imprisonment. In making that submission Mr *Mabaudhi* referred to a number of pronouncements in which this court has appeared to take the view that theft from an employer should be visited with incarceration even in respect of first offenders. See *S* v *Munyoro* HH 28-89; *S* v *Ngwenyeni and Others* HH 12-07 and *S* v *Zimbudzana* HH-109-15.

Mr *Mabaudhi* also submitted that although in this jurisdiction, the sentencing policy of the courts is to consider community service as an option where the court settles for an effective prison term of 24 months or less, it should not matter that the court *a quo* did not even conduct an inquiry into the suitability of the option of community service. This is because the appeal court should always take care that it does not erode the sentencing discretion of the court of first instance. In any event in the present matter the court was aware of the option of community service but dismissed it as inappropriate highlighting the fact that the appellant's moral blameworthiness was high.

In my view nobody has ever said that a magistrate does not have a discretion but to impose the sentence of community service where he or she settles for an effective prison term of 24 months or less. That is where Mr *Mabaudhi* gets it all wrong. The guidelines given by this court to magistrates from the time the sentencing trend in this country deliberately moved away from retributive incarceration towards reformative and indeed beneficial options like unpaid service, are that the moment the magistrate realizes that the appropriate sentence should be 24 months or less he or she must then conduct an inquiry into the suitability of community service

as a sentencing option. It is not enough for the magistrate to say without more, as he did in the present matter:

> "Unlawful entry is a serious offence and is aggravated by committing further offences after the unlawful entry. This offence is common in the district and must be put to a stop. A fine or community (service) will trivialize the offence."

What the authorities say is that the magistrate must inquire into the suitability of community service. For instance community service will not be suitable where the accused person is a repeat offender in which event following an inquiry it will become apparent that the convicted person does not qualify for community service because of that reason. The magistrate should record the inquiry and if, following that inquiry he or she comes to the conclusion that community service is inappropriate, to give cogent reasons which must appear in the record, as to why community service is being rejected in favour of imprisonment. The misdirection, which is also very apparent in this matter, is in the failure to conduct the inquiry and to simply divine that community service will trivialize the offence.

In fact the pronouncement of CHINHENGO J, which is very impressive and I completely associate with, in *S* v *Antonio and Others* 1998 (2) ZLR 64 (H) 67 E-G, 68 A-C is apposite. He stated:

> "Thus it must be stated that where the presiding judicial officer is called upon to sentence a non-serious offender and decides on a sentence of 12 months or less (that being an indication that the offence is not serious), the judicial officer is required to undertake an inquiry into the suitability or otherwise of sentencing the convicted person to do community service either as an alternative to a fine or imprisonment or as a direct punishment. In *S* v *Gumbo* 1995 (1) ZLR 162 (H) BARTLETT J stated as follows:
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> > 'To my mind, this would have been an appropriate matter for a magistrate to have considered the imposition of community service. There is nothing in the magistrate's reasons for sentence to indicate that the option of community service was considered. It is particularly important that magistrates give active consideration to the new concept of community service (at 166 A-C).'
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> This statement supports the position both of the National Committee on Community Service, which has been stated repeatedly at seminars held throughout the country during 1997 and 1998, that where a magistrate would otherwise impose a sentence of less than 12 months' imprisonment he is enjoined to consider the option of community service or the imposition of a fine. Community service is no longer only imposed as an alternative to imprisonment as provided in s358 of the Criminal Procedure and Evidence Act but it is now a substantive punishment in its own right (see s336 of the Criminal Procedure and Evidence Act as amended by s11 of Act 8 of 1997 and *S* v *Chinyenze* 1998 (1) ZLR 470 (H)). That being the case, a judicial officer should

> give reasons in his judgment why he opts for one form of punishment as against any other. It is not a judicious exercise of the sentencing discretion to sentence an accused person to a custodial term, or to payment of a fine or to the suspension of either of them on any condition or to community service without showing why he has settled on any of those forms of punishment. In my opinion to do so is a misdirection. It is a misdirection because the sentencer will not have applied his mind to the most appropriate sentence. If he would have applied his mind to the question of sentence the clearest evidence of it is to reflect on the record the reason for his choice of sentence."

See also *S* v *Mabhena* 1996 (1) ZLR 134 (H) 140E; *S* v *Chireyi and others* 2011 (1) ZLR 254 (H) 260D; *S* v *Mutenha and Another* HB-35-16.

I really have a serious problem with someone advocating for a term of imprisonment of 12 months as the magistrate did in this case or of 8 months as proposed by the state in respect of a first offender and then hiding behind such banal assertions like saying that unlawful entry is a very serious offence. To my mind that is a glaring contradiction. An offence cannot be "very serious" and then attract such a short term of imprisonment. If indeed it is serious then the appropriate sentence would not be that short. What it simply means is that it is a less serious offence for which the sentencing jurisprudence I have referred to applies.

This court recently had the occasion to comment on the so-called "short and sharp imprisonment" sentences and in rejecting them stated in *S* v *Zikhali* HB-163-17;

> "The current sentencing policy focuses on non-custodial sentences for less serious offences. See *S* v *Gumede* 2003 (1) ZLR 408(H). Therefore magistrates are always advised to give serious consideration to the new concept of community service whose object is to benefit the community from less serious offenders who should be given the chance to keep out of prison by doing useful work for the benefit of the community. See *S* v *Gumbo* 1995 (1) ZLR 163. To the extent that what the trial magistrate calls 'a short and sharp' prison term would have been preferred because the offence is not serious, otherwise if it were serious the offence would attract a longer prison term, it means that such a sentence falls squarely within the community service grid. There would be no chance for such a sentence in modern society."

See also *S* v *Usavi* HH-182-10.

It occurs to me that the sentence imposed by the court *a quo* and indeed the one suggested by the respondent is intended to take our sentencing jurisprudence exactly 20 years backwards. We have long shifted from that kind of approach in response to changing socio-economic circumstances, as the law is supposed to. It is now accepted that our prisons are over-

crowded and do not have to be further burdened by small time offenders. It is also accepted that a short term of imprisonment is not only destructive to the offender having as it does a detrimental effect on such offender who gets influenced by hardened criminals and becomes a social outcast, it also does not serve any useful purpose at all. In fact it results in everything being lost whereas alternative punishment serves and reforms the offender.

In my view there is nothing really out of the ordinary about this matter as to call for imprisonment. As much as the appellant was a security guard who attempted to steal from the premises he was guarding, the circumstances of both the offence and the offender call for a sentence other than imprisonment. He did not break a window or door to gain entry. In fact he did not enter the premises except for his hand and arm which fished out sugar through a broken window. This is a person who succumbed to human temptation and tried to take advantage of a situation. He did not benefit from the offence and the complainant only suffered potential prejudice as he was immediately arrested.

On the other hand, this a widower with a large family of ten that looks to him for support. He was earning a paltry salary of $180-00 a month which could scarcely provide for his family. He therefore stole out of need as opposed to greed. If all that is taken together with his guilty plea and that he is a first offender, it becomes apparent that he should have benefited from a sentence of community service. He qualified.

In the result, it is ordered that;

1. The appeal against sentence is hereby upheld.

2. The sentence of the court *a quo* is set aside and substituted with the following sentence;

> "The two counts are treated as one for purposes of sentence and the appellant is sentenced to 12 months imprisonment of which 4 months imprisonment is suspended for 3 years on condition he does not, during that period commit any offence involving unlawful entry and theft for which, upon conviction he is sentenced to imprisonment without the option of a fine. The remaining 8 months is suspended on condition he completes 315 hours of community service at Mberengwa Police Station. The community service starts on 17 July 2017 and must be completed within 24 weeks.
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> The community service must be performed between the hours of 0800 hours and 1300 hours and 1400 hours and 1600 each Monday to Friday, which is not a public holiday, to

the satisfaction of the person in charge of Mberengwa Police Station or his/her delegate who may grant the appellant leave to be absent on a particular day or days or during certain hours. Any such leave of absence shall not count as part of the community service to be performed."

Bere J agrees……

Mutendi, Mudisi and Shumba, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners