STATE
versus
INNOCENT MANGWIRO

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 16 October 2013

Criminal Review

HUNGWE J: The accused was convicted on his own plea of guilty to theft as defined in s 113 of the Criminal Law (Codification & Reform) Act, [*Cap 9:23*] involving property worth US$70, 00. He was sentenced to 10 months imprisonment of which 4 months imprisonment was suspended for 5 years on appropriate conditions. The learned scrutinising Regional Magistrate before whom the record of proceedings was placed took the view that the sentence imposed on the young first offender whom had pleaded guilty after his loot was fully recovered was unduly harsh. He withheld his certificate and referred the record to the registrar of this court under cover of a minute in which he ventilated his dissatisfaction with the sentence. In it he properly acknowledged that, that young first offenders who pleaded guilty ought to be rewarded for this by a noncustodial sentence like a community service order where appropriate especially where, as here, the property stolen had been recovered in full suggesting the lack of benefit to the young first offender. He termed the theft trivial as the youthful offender had not reaped any benefit from his nefarious activities. The learned scrutinising Regional Magistrate queried with the trial magistrate why in light of the paltry value involved she held that a community service order would trivialize the offence.

In her response the trial magistrate maintained that she took the view there were aggravating features in the matter which placed the accused beyond the usual considerations which the courts accorded to young first offenders. These reasons are well set out in her reasons for sentence where she noted that the accused took advantage of fluid and mobile situations at traffic controlled intersections in the city where under cover of darkness his activities would usually have gone undetected. The facts in this case are that the accused way-laid an open truck at a robot controlled intersection. When complainant pulled to a stop the accused stepped up on the rear bumper of the complainant's truck and removed a box. He

walked away without the complainant realising what had transpired. Alert members of the public observed the accused and apprehended him. It turned out the box had in it 36x500grammes washing powder sachets valued at US$70, 20.

This was a carefully planned and executed misadventure where the accused carefully selected his target - an open bakkie with unprotected goods at the back stopping at the robots at 20h00. The facts clearly indicate that the accused picked a box whose contents he did not know (clearly the bulky size of the object may have attracted him). As with pocket-picking, the thief opts to target a purse whose contents may be rich pickings or just valueless cards. In this type of theft the culprit takes what, in reality, amounts to a gamble, he may strike it rich or he may not. The value of what he eventually discover to have stolen cannot, in my view be the only criteria to guide the court as to what an appropriate sentence ought to be. It is the premeditation, careful pre-planning and single-mindedness in execution which should in my view guide the court in assessing what an appropriate sentence ought, in all the circumstances, to be. Such factors as difficulty in detection, mobility of the scene and so on are thrown into the balance as indicators of the gravity of the type of theft under consideration. Generally theft from motor vehicles are in the ordinary run of the cases committed in broad day light by thieves who target parked motor vehicles after something inside the motor vehicle attracts the thief's attention. Such crimes are difficult to detect. In the instant case the complainant was lucky that some public spirited by-standers took it upon themselves to effect a citizen's arrest leading to the recovery of his goods. In light of all these factors the learned trial magistrate took the view that imposing community service would trivialize the offence and therefore she settled for imprisonment.

Whilst another court may have settled on a different sentence, it is difficult to fault the learned magistrate's reasoning in all the circumstances of this particular case. The learned scrutinising Regional Magistrate is correct in the observation that he makes regarding the value involved as not warranting a custodial sentence where a young first offender was pleading guilty. But in most situations pleas of guilty are a result of the thief's realisation that the game was up and nothing further could be gained from pleading otherwise in light of the weight of the evidence. Nothing should be read into a plea of guilty in those situations. This case demonstrates careful planning and daring execution of the criminal enterprise against a carefully selected target. In *S* v *Ziwange* S-133-90 the Supreme Court held that where a first offender jumps into crime at the deep end he must expect to be dealt with severely by the courts. In my respectful view, this is one such case where the court needed to severely deal

with a first offender. The trial magistrate has exercised her sentencing discretion judicially. She has, in her reasons for sentence, clearly spelt out why she opted for a custodial sentence against community service. In the circumstances of this case, as the conviction is proper, and the accused was served with his just desserts, I find that the proceedings were in accordance with real and substantial justice. They are confirmed.

BHUNU J agrees……..