TONDERAI MAHACHI
versus
THE STATE

HIGH COURT OF ZIMBABWE
TAGU, MUREMBA JJ
HARARE, 19 November 2013

Criminal appeal

R. Chivaura, for the appellant
T. Mapfuwa, for the respondent

MUREMBA J: On 11 July 2006 the appellant entered a hardware shop. He took a kilogram of trinepon wood glue which he hid in his trousers. He walked out of the shop without paying for it. He was arrested soon after leaving the shop. The trinepon wood glue was recovered. It was valued at $1 800-00(Zimbabwean dollars).

When the appellant appeared before a magistrate at Chitungwiza Magistrates Court he was duly convicted on his own plea of guilty to a charge of making off without payment as defined in s 117(2) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. However, I have reservations with the charge that was preferred because s 117 of the Criminal Law Codification and Reform Act deals with situations where "services'' rather than "goods" are stolen. In terms of this section a person commits this crime if he or she benefits from a service or consumes goods lawfully provided to him or her and that person intentionally makes off without paying for the services or goods. See Commentary on the Criminal Law (Codification and Reform) Act, 2004 by Professor G. Feltoe p(p) 158 and 159.

The appropriate charge is theft as defined in s 113(1) of the Criminal Law (Codification and Reform) Act. Since making off without payment is a competent verdict of theft there will be no prejudice to the appellant if the charge is amended. The charge is amended accordingly.

In convicting the appellant, the trial magistrate proceeded in terms of s 271(2) (a) of the Criminal Procedure and Evidence Act [*Cap 9:07*].

Having proceeded in terms of s 271 (2) (a) of the Criminal Procedure and Evidence Act, the trial Magistrate went on to sentence the appellant to 1 month imprisonment.

The appellant appeals against the sentence on the ground that having proceeded in terms of s 271 (2) (a) of the Criminal Procedure and Evidence Act, the trial magistrate erred

and misdirected himself by imposing a sentence of imprisonment without the option of a fine.

The appellant was granted bail pending appeal 4 days after having been sentenced.

The respondent's counsel does not oppose the appeal.

Section 271 (2) (a) of the Criminal Procedure and Evidence Act reads

> "Where a person arraigned before a magistrates court on any charge pleads guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts that plea—
> (*a*) the court may, if it is of the opinion that the offence does not merit punishment of imprisonment without
> the option of a fine or of a fine exceeding level three, convict the accused of the offence to which he has
> pleaded guilty and impose any competent sentence other than—
> i) imprisonment without the option of a fine; or
> (ii) a fine exceeding level three;
> or deal with the accused otherwise in accordance with the law."

During the Zimbabwean dollar era and before being amended s 271 (2) (a) (ii) used to read, "a fine exceeding $200."

What this means is that if an accused is convicted in terms of this section he cannot be sentenced to imprisonment without the option of a fine or to a fine in excess of a fine exceeding level three (a fine in excess of Zimbabwean $200 then). This provision is only appropriate for petty crimes or trivial cases. It cannot be used in cases where imprisonment may be imposed even if the period of imprisonment is then wholly suspended.

In *casu* the crime was indeed petty. The accused was a first offender. Proceeding in terms of s 271 (2) (a) was appropriate but the sentence that was imposed is incompetent. The sentence is set aside and substituted with the following sentence:

US$20-00 in default of payment 10 days imprisonment.

TAGU J agrees ----------

Chivaura & Associates for the appellant
Attorney-General's Office, for the respondent