MUNYARADZI MAPETURE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA & MANGOTA JJ
HARARE, 16 November 2015 and 21 September 2016

Criminal appeal

S. Chinaire, for the appellant
E. Makoto, for the State

CHATUKUTA J: The appellant was convicted on 17 April 2015 on his own guilty plea, of contravening s 113 (1) (a) (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to 24 months imprisonment of which 12 months imprisonment were suspended for a period of 5 years on condition of future good behaviour.

The appellant was not satisfied with the sentence and hence this appeal. The appeal is premised on the following grounds, that the court *a quo* erred by failing to:

(a) give reasons for the sentence.
(b) consider other sentencing options such as the imposition of such non- custodial sentences as a fine or community service.
(c) give due regard to the appellant's plea of guilty and
(d) consider that all the stolen property was recovered and hence the complainant did not suffer any financial prejudice.

The appeal was not opposed. The respondent conceded that the court *a quo* misdirected itself by not giving reasons for sentence and not imposing a non-custodial sentence given the circumstances of the case and more particularly that the court had imposed a sentence of 24 months imprisonment which falls within the sentencing range considered appropriate for community service.

The facts giving rise to the conviction were that the appellant was attached as an apprentice at Green Fuel Company (the complainant) Chisumbanje. On 14 April 2015 and at

around 1700hrs, the appellant was at the complainant's workshop alone as everyone had knocked off-duty. The appellant stole equipment from the workshop and took it to his home. The property was valued at $18 060 and all was recovered.

It is trite that an appeal court will only interfere with the sentence imposed by a lower court where there has been a misdirection in arriving at the sentence or where the sentence is manifestly excessive as to induce a sense of shock. In assessing the appropriate sentence on appeal, GUBBAY CJ (as he then was) remarked in *Ramushu & Ors* v *The State* SC 25/93 at p 5 that:

> "But in every appeal against sentence, save where it is vitiated by irregularity or misdirection, the guiding principle to be applied is that sentence is pre-eminently a matter for the discretion of the trial court, and that an appellate court should be careful not to erode such discretion. The propriety of a sentence, attacked on the general ground of being excessive, should only be altered if it is viewed as being disturbingly inappropriate." See also *S* v *Mundowa* 1998 (2) ZLR 392 (S), *S* v *Dullada* 1994 (2) ZLR (H) 130 and *S* v *De Jager & Anor* 1965 (2) SA 616 at 628 H-629 A-B).

Further Section 38 (2) of the High Court Act [*Chapter 7:06*] provides:

> "Notwithstanding that the High Court is of the opinion that any point raised might be decided in favour of the appellant, no conviction or sentence shall be set aside or actioned unless the High Court considers that a substantial miscarriage of justice has actually occurred." (See *S* v *Gono* 2000 (2) ZLR 62).

It is not in issue that the trial magistrate did not provide written reasons for sentence. A magistrate court is a court of record and is required to put in writing all the proceedings before it. The trial magistrate explained that he gave ex-tempore reasons. However this did not justify his failure to record in writing the proceedings. This amounts to a misdirection on the part of the trial magistrate. As stated in *S* v *Chirisa* 1989 (2) 102, failure by a trial magistrate to give reasons for sentence is a misdirection. It prevents the higher court on appeal or review from determining whether or not the lower court exercised its discretion properly. Consequent to this misdirection, the court on appeal is at large regarding what sentence to impose (See *S* v *Mateketa* 1985 (2) 248 (S).

Although the appellant and the respondent are in agreement that the sentence which was imposed by the court *a quo* is excessive and induces a sense of shock, I hold a different view. The appellant, although a first offender who pleaded guilty, stole from his employer. He thus breached his employer's trust. The offence appears to have been premeditated as the appellant waited for everyone to go home before he stole the equipment. The appellant cannot be said to have committed the offence out of need. He owned a Mazda pickup B2500

valued at between US$6000 and $7000 despite the fact that he was a student at Harare Poly-Technical College, The offence was therefore committed out of greed. The appellant clearly admitted so. In response to a question by the court *a quo* why he committed the offence, he responded as follows:

"A spirit of lust has (*sic*) possessed me".

The value of the stolen property was very high standing at $18 060. The potential prejudice to the complainant was colossal. Had he succeeded to sell the property as he intended to do, the employer would have incurred substantial loss as a result.

Under the circumstances, I am of the view that the misdirection by the trial court did not cause the appellant any substantial injustice. The sentence imposed is within the sentencing range of similar offences. Given the reasons above, either community service or fine would not be appropriate. Therefore there is no basis to interfere with the sentence.

The appeal is accordingly dismissed.

MANGOTA J: agrees

Saratoga Makausi Law Chambers, appellant's legal practitioners