THE STATE

Versus

BHATANANI NLEYA

And

LINDANI MKHWANANZI

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 4 & 11 MARCH 2021

Criminal Review

MAKONESE J: This matter was placed before me by way of review. The scrutinizing Regional Magistrate at Lupane took issue with the sentence imposed by the trial court.

The accused persons were charged and convicted of theft of trust property valued at Z$12 400 in violation of section 113 (2) of the Criminal Law (Codification and Reform) Act (Chapter 9:23). Accused persons sold 16 x 50kg bags of cement which they held in trust on behalf of the complainant. Accused pocketed the proceeds of the illegal sale resulting in their arrest and subsequent conviction.

The scrutinizing magistrate noted that the conviction was proper. Concern was raised over the manner in which the sentence was couched. The sentence imposed by the trial magistrate was in the following terms:

> "Each 9 months imprisonment. In addition 3 months is suspended on condition each accused restitutes complainant a sum of Z$6 200 being the value of the stolen property by 30 July 2020 through the Clerk of Court Lupane".

The trial magistrate was requested to clarify whether it was competent to make an order for each accused person to restitute the complainant a sum of Z$6 200 when property worth Z$2 800 had been recovered at the time the matter was heard. In other words, in view of the fact that some of the stolen property had been recovered, the court should have ordered restitution for the reduced value of the unrecovered goods. Each accused person should have been ordered to restitute an amount of Z$4 800 instead of Z$6 200. The trial magistrate conceded that the made an arithmetical error.

The second and more important issue was whether it was proper and competent to pass an effective sentence of 9 months imprisonment in respect of each accused person and then in

addition to that pass a separate additional sentence of 3 months imprisonment, which is then suspended on condition of restitution.

The Criminal Procedure & Evidence Act, (Chapter 9:07) has no provisions that allow the couching of sentence in the form adopted by the trial magistrate. (See Part XVIII) Any sentence imposed by a court of competent jurisdiction must be clear and unambiguous. A sentence should not be vague and must be understood by the convicted person in its true effect and meaning. A convicted accused must not speculate of the effect and meaning of his sentence. The sentence imposed by the trial magistrate gives an imposition that two sentences of imprisonment were imposed. The first part of the sentence reflected that each of the accused persons received a sentence of 9 months imprisonment. In addition to that a second sentence of 3 months imprisonment is then suspended on condition of restitution. The result is that the total custodial sentence imposed against accused persons is 12 months imprisonment. The accused persons would have been sentenced to imprisonment twice if the sentence is allowed to stand in the present form.

See: *State* v *Magirazi* HH-209-12; *S* v *Msakasa* HH-302-83 and *S* v *Chipwere* HH-314-83.

It is necessary that the sentence imposed by the trial magistrate be corrected. The intention of the trial magistrate was clearly to impose sentence of 12 months imprisonment with a portion suspended on condition of restitution.

In the result it is ordered as follows:

1. The sentence of the court *a quo* is set aside and substituted as follows:

"The accused are each sentenced as follows:

12 months imprisonment of which 3 months is suspended on condition each accused restitutes the complainant a sum of Z$4 800 to be paid through the Clerk of Court Lupane by 30th July 2020.

2. It is directed that this judgment be brought to the attention of the Clerk of Court at Lupane Magistrates' Court for the accused to be advised of the correct sentence".

Moyo J …… I agree