ZWELITHINI DLAMINI

And

SHERMAN CARTERS

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU AND KAMOCHA J J
BULAWAYO, 20 SEPTEMBER 2010 AND 10 FEBRUARY 2011

Miss N. Moyo, for the appellants
Miss N. Ndlovu for the respondents

Criminal Appeal

NDOU J: The appellants were convicted by a Bulawayo Regional Magistrate of theft of 600 car tubes from their employer as defined in section 113 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. They were both convicted on their own pleas of guilty and were subsequently sentenced each to nine (9) years imprisonment of which three (3) years imprisonment was suspended for five (5) years on the usual conditions of good future behavior.

They have appealed against the sentence. After hearing both counsel we allowed the appeal in part by setting aside the sentence imposed by the learned Regional Magistrate and substituting it with one of two (2) years imprisonment. We indicated then that our reasons will follow. These are they. The appellants and their accomplice were all employed by the complainant and resided at their place of employment. The charge they were convicted of was that they jointly and acting in common purpose stole six hundred car tubes from their employer between October 2007 and December 2007. The appellants sold the stolen tubes and not surprisingly none of the stolen property was recovered. The stolen tubes were valued at ZS$12 billion, a considerable amount at the time of the theft. It is apparent from the record of proceedings that the learned Regional Magistrate failed to obtain detailed and meaningful mitigation from the appellants who were at the time, unrepresented. This was a mis-direction and the state conceded that fact. It is trite that magistrates must equip themselves with sufficient and meaningful pre-sentencing in order to come up with a suitable sentence – *S* v *Maponga* HH-276-84 and *S* v *Shariwa* 2003(1) ZLR 314 (H). *In casu,* the learned Regional

Magistrate only obtained scant information centred on their personal circumstances. He did not attempt to seek reasons from the appellants for stealing from their employer. The result is that the trial magistrate did not attach sufficient weight to the mitigatory facts. This was a mis-direction – *S* v *Munechawo* 1998(1) ZLR 129 (H) and *S* v *Madembo & Anor* 2003 (1) ZLR 137 (H).

On account of the said mis-direction we are at large as far as sentence is concerned. The mitigatory factors are that the appellants pleaded guilty to the charge and showed some measure of contrition. They were young offenders. They were first offenders as a result of the conviction and sentence they will most likely lose their employment. Against this, theft from an employer is viewed as a serious offence involving breach of trust. The stolen property was sold by the appellants. None of the stolen property was recovered. Value of the stolen property, as alluded to above, was considerable. The sentence of 9 years with 3 years suspended is manifestly excessive in the circumstances. It is for the above reasons that we reduced the sentence to two (2) years. We also directed that the period that the appellants served prior their admission to bail be taken into account.

Kamocha J …… I agree

Advocate S K M Sibanda & Partners, appellants' legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners