HB 196/16
HCA 21/15

CARLISIE TASHINGA MUPOMWI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & TAKUVA JJ
BULAWAYO 11 JULY 2016

Criminal Appeal

Mrs N. Maguranyanga for the appellant
Miss S. Ndlovu for the respondent

MAKONESE J: The appellant appeared before a magistrate at Zvishavane Magistrates' Court on a charge of contravening section 113 (1) (a) of the Criminal Law Codification and Reform Act (Chapter 9:23), that is to say theft. Appellant stole two Nokia cellphones belonging to the complainant at F C Platinum Club, Zvishavane on 23 January 2015. The appellant was convicted on his own plea of guilty and sentenced to 8 months imprisonment of which 3 months was suspended for 3 years on condition accused restitutes the value of the two cellphones.

In his grounds of appeal the appellant argues that the sentence imposed by the court a quo was so severe as to induce a sense of shock. Further, the trial magistrate misdirected himself and erred when he sentenced the appellant to a custodial sentence regard being had to the fact that a sentence of community service would have been appropriate. It was argued on appellant behalf that the appellant was a youthful 1st offender who was only aged 21 years at the relevant time. It was further argued that the practice of the courts was to keep young first offenders out of prison wherever possible, and not to send them to prison where there are likely to be hardened by hard-core criminals.

The brief facts surrounding the commission of the offence are that on the day in question at about 1900 hours and at F C Platinum Club, Nite Club at Zvishavane, the appellant asked complainant to lend him his phone to enable him to make a phone call. The complainant gave

appellant two Nokia cellphones. The accused simply took the phones and disappeared. It is not clear why the complainant handed two cellphones to the appellant for the purpose of making a phone call. The undisputed facts are however that accused subsequently sold the phones. The value of these phones is US$110.

In his reasons for sentence the learned magistrates in the court *a quo* stated as follows:

> "The accused stole two cell phones belonging to Pilathe Ndlovu and sold them. The two cellphones were not recovered. Theft of cellphones is a very serious offence. This is because nowadays cellphones are regarded as gadgets of necessity. They are often used to store vital data and contact numbers. Accused's moral blameworthiness is very high. A custodial sentence is called for. The punishment is aimed at reforming the accused, rehabilitate him as well as deter other would be offenders. Accused will also be ordered to restitute complainant of the value of the cellphones since they were not recovered."

It is clear from the learned magistrate's reasons for sentence that he over-emphasised the aggravating features of the case without even taking into consideration the mitigating features of the case as well as the personal circumstances of the accused. It is important for judicial officers to note that imprisonment should be imposed when other forms of punishment would be inappropriate. Imprisonment should not be imposed unless the trial court has made a careful assessment of all the factors in mitigation. In this matter, had the learned magistrate properly taken into consideration the following factors he would have realised that imprisonment was not the only appropriate penalty:

(a) The appellant was aged 21
(b) The appellant pleaded guilty
(c) The appellant was a first offender
(d) The value of the stolen property was US$110
(e) The appellant was employed and was most likely going to lose employment as a result of the conviction and sentence
(f) The appellant was contrite and asked the court for forgiveness

The state concedes that the sentence is wholly inappropriate and should not be allowed to stand. It is now a well established principle that it is a misdirection for a trial court not to enquire into the suitability of community service where the court settles for an effective sentence of 24 months imprisonment and less. See *S* v *Chireyi & Ors* 2001 (1) ZLR 254 (H) and *S* v *Mugwenhe & Anor* 1991 (2) ZLR 66

I am of the view that the aggravation referred to by the trial court is not out of the ordinary. To assert that theft of a cellphone is a very serious offence because mobile phones are now used as gadgets of convenience is to over play the importance of mobile phones. As I have already indicated it is a misdirection to have failed to consider community service as an alternative form of punishment.

In all the circumstances of the case, the sentence is excessive and harsh and cannot be allowed to stand. A sentence of a fine or community service would have served the justice of the case.

It is accordingly ordered as follows:

1. The conviction is hereby confirmed
2. The appeal against sentence is upheld
3. The sentence of the court *a quo* is set aside and substituted with the following

"Accused is sentenced to pay a fine of US$100 or in default of payment 30 days imprisonment. In addition 2 months is suspended on condition accused restitutes the complainant in the sum of US$110 on or before 31 August 2016."

Takuva J …… I agree

Mutendi & Shumba Legal Practitioners c/o Dube-Tachiona & Tsvangirai, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners