THE STATE
versus
KENNEDY BANDURA

HIGH COURT OF ZIMBABWE
CHINHENGO J
HARARE 14 January 2004

Criminal Review

CHINHENGO J: The accused pleaded guilty to a charge of theft by conversion. He was duly convicted and sentenced as follows:

> "$20 000 or in default of payment 40 days imprisonment. In addition 2 months imprisonment will be suspended for 5 years on condition accused does not within the period commit an offence of which dishonesty is an element for which he is sentenced to imprisonment without the option of a fine. A further 2 months imprisonment is suspended on condition accused compensates the complainant in the sum of $24 000 through the Clerk of Court, Mutare by 30 June 2003."

The Regional magistrate who scrutinized the record of proceedings and referred it for review said:

> "The conviction is proper. So is the monetary penalty.
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> The imposition of two distinct additional prison terms strikes me as both illegal and against the established practice of our courts.
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> Section 347(1) and the proviso thereto as well as section 347(3) of Chapter 9:07 use the singular articles "any" and "an" when they refer to a prison term imposed in addition to a fine. In my view this clearly signifies that the Legislature never envisaged the imposition of two or more separate prison terms in addition to a monetary penalty. The presumption that the express mention of the one excludes the other applies to this situation in my view.
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> I am accordingly unable to confirm the sentence as being in accordance with the law. I appreciate though that the trial magistrate's intentions were noble. He erred in the process."

The issue raised by the Regional Magistrate does not require me to outline the facts of this case. I shall therefore not do so. The simple issue is whether or not a court may impose a fine and in addition

impose two separate terms of imprisonment which are suspended on two separate conditions. In this case in addition to a fine, the magistrate imposed two months imprisonment which he suspended on condition of good behaviour and a further two months imprisonment which he suspended on condition that the accused paid compensation.

Section 347 of the Criminal procedure and Evidence Act [*Chapter 9:07*] provides as follows -

> "(1) Subject to this section, a court which imposes a sentence of a fine upon an offender may do either or both of the following -
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> (a) impose, as an alternative punishment to the fine, a sentence of imprisonment of any duration within the limits of the court's punitive jurisdiction;
> (b) permit the offender, as an alternative to paying the fine, to render such community service as may be specified by the court.
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> (2) The period of any sentence of imprisonment imposed in terms of paragraph (a) of subsection (a) shall not, either alone or together with any period of imprisonment imposed on the offender as a direct punishment for the same offence, exceed the longest period of imprisonment prescribed by any enactment as a punishment for the offence.
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> (3) Where a court has imposed upon an offender a sentence of a fine without an alternative referred to in paragraph (a) or (b) of subsection (1) and the fine has not been paid in full or has not been recovered in full by a levy in terms of section *three hundred and fifty eight,* the court may issue a warrant directing that the offender be arrested and brought before the court, which may thereupon impose such sentence of imprisonment and additionally or alternatively, permit him to render community service as provided in subsection (1).
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> (4) Nothing in this section shall be construed as limiting the power of a court under section *three hundred and fifty eight* to postpone or suspend any sentence.
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> (5) A court may exercise the powers conferred upon it by this section even in relation to an offence prescribed in an enactment which purports -
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> (a) to limit the duration of a sentence of imprisonment that may be imposed as an alternative to a fine; or

(b) to permit only a sentence of imprisonment to be imposed as an alternative to a fine:

Provided that this section shall not apply where a minimum penalty is prescribed in the enactment concerned as punishment for the offence."

For the view that two additional sentences of imprisonment each suspended on conditions may not be imposed on an offender who has been sentenced to pay a fine, the Regional Magistrate relied on the words "an" and "any" in section 347(1) and 347(3) above as an indication that only one additional sentence of imprisonment may be imposed. This cannot be a proper and only guide to the interpretation of the subsection. Section 9 of The Interpretation Act [*Chapter 1:01*] provides in subsection (2) that -

"Words in the singular include the plural and words in the plural include the singular."

The correct interpretation of s 347 of the Act cannot therefore rest entirely on the use of the words "an" and "any" as denoting the singular. Section 347 of the Act as it now reads was introduced by Act No. 8 of 1997 which amended the then existing section by repealing it and substituting the current provision. The amendments to Part XVIII of the Act were occasioned by the introduction of community service as a substantive and/or alternative form of sentence. As such s 347 of the Act must be read in the context of all the amendments to Part XVIII of the Act.

The issue which the regional Magistrate raised has been raised before see *S v Mugebe* 2000 (1) ZLR 376 (H); *S v Maramba & Anor* 2000 (2) ZLR 69 (H) and *S v Mhlanga* 2000 (2) ZLR 73 (H).

In *Mugebe (supra)* the accused pleaded guilty to theft of $1 000 from his employer and was sentenced to perform 105 hours of community service. A three-months wholly suspended sentence was also imposed on condition he restitutes the complainant the $1 000. In a review judgment in which GARWE J concurred, BARTLETT J held that a court may not impose direct community service as a punishment

and then in addition impose another form of punishment such as imprisonment which is wholly suspended on condition the accused pays compensation to the complainant. His reasoning appears at 377B-H where he said:

> "[The sentence] falls foul of sections of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ("the Act") under which it was imposed – s 350A(1) as read with s 350A(3) (which sections were introduced by the Criminal Procedure and Evidence Amendment Act 8 of 1997). These sections allow a direct sentence of a number of hours of community service as a punishment in itself. They also allow a magistrate to specify a fine or alternative period of imprisonment the offender shall serve, if he fails to render the community service. A magistrate may not impose direct community service and, in addition, another form of punishment. The alternative or additional punishment needs to be specified as only being applicable if the community service is not carried out. A reading of s 350C(3)(b)(i) and (ii) established this as the correct interpretation of s 350A(3).
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> The magistrate's desire to impose both community service and order restitution was entirely understandable. But to achieve that result he would have needed to exercise his powers under s 358 of the Act and imposed a sentence, for example, in the following terms: 6 months imprisonment with labour of which 3 months' imprisonment with labour is suspended on condition the accused performed 105 hours of community service (and then specified the details relating to the community service) and of which a further 3 months' imprisonment with labour is suspended on condition the accused pays restitution to the complainant in the sum of $1 000 (and then specified the details of the payment of restitution).
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> Section 350A(3) is, in my view, not easy to understand. Or conversely, it is easily misunderstood and likely to cause confusion. Prior to the enactment of s 350A, the position was simple. If a magistrate wished to impose community service he ordered it as a condition (or one of the conditions) to be performed when imposing a suspended prison sentence or a fine. That seems to me to be an eminently sensible and easily understandable way of imposing community service. It certainly caused no problems or difficulties in practice. Section 350A(3) is, in my view, unnecessary, unwieldy and easily given to creating misunderstanding and confused interpretation."

In *Maramba supra* CHATIKOBO J (with the concurrence of CHINHENGO J) did not entirely share BARTLETT J's views as expressed in *Mugebe* above.

In *Maramba* the accused was convicted of theft and sentenced to perform 105 hours of community service failing which he would undergo imprisonment for 3 months. In his respectful view contrary to that of BARTLETT J, CHATIKOBO J reasoned as follows at 70E-72D:

> "Section 350A(1) provides that a court which convicts a person of any offence may, instead of sentencing him to prison or a fine, make a community service order requiring him to render service for the benefit of the community. This provision does no more than create the power to impose a direct community service order. Then follows s 350A(3) which provides that:
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> > 'A court which makes a community service order in respect of an offender may sentence the offender to a fine and additionally, or alternatively, to imprisonment as an alternative punishment, to be paid or served, as the case may be, if he fails to render the service specified in the order.'
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> The process of ascertaining the meaning of this provision must start with an analysis of what it says before one delves into the question of what it means. I think it says that, if a court makes a direct community service order, it can impose one alternative of a fine, or one alternative of a prison term, or two alternatives, one of a fine and another of a prison term. Where both a fine and a prison term are imposed as alternatives, an offender who fails to perform the community service either can pay the fine or if he fails to raise the fine, can serve the alternative prison term.
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> As to what it means, it is important to observe that the section deals with the alternatives which are open to an offender who fails to carry out an order of community service. It does not purport to deal with the suspension of sentences. It is silent on the question of additional punishments. What it does is to stipulate the alternative punishments which a defaulter can be subjected to. The logic behind the authorization of more than one alternative sentence in the event of default lies in the need to obviate a situation where a defaulter would be returned to court for resentencing. That is achieved by adopting one or more of three possible options which can best be understood by resorting to the examples which follow. In option one, the sentencing court would say:

> 'You are to perform community service for 105 hours, failing which you will be required to pay a fine of $200.'

The second option would be:

> 'You are to perform community service for 105 hours, failing which you will undergo imprisonment for 2 months.'

And the third option would be:

> 'You are to perform community service for 105 hours, failing which you will pay a fine of $200 and in the event that you fail to pay such fine you will undergo imprisonment for 2 months.'

In terms of the first option, if an offender fails to perform community service and he does not have money with which to pay the fine, he will have to be brought before a court to be sentenced to imprisonment, a course which is sanctioned by s 350C(3)(a) and (c). A defaulter sentenced under the second option will serve a prison term without being afforded the opportunity to pay a fine even if he can afford it. If sentenced under the third option, a defaulter who has money with which to pay the fine will pay to avoid going to prison, but if he does not have the money he will go to prison. The self evident efficacy of the third option is that there will be no need to return an offender to court for resentencing but for enforcement of a sentence already passed, and the offender will not be denied the opportunity to pay a fine.

It is true that the section does not deal with the question of suspending a sentence on condition of future good conduct but it is equally true that the section does not prohibit such a course. The suspension of sentences is regulated by s 358(2)(b) and s 358(3). Section 358(2)(b) gives the court the power to pass sentence, but order the operation of the whole or any part of the sentence to be suspended for a period of fine (*sic*) on such "conditions as the court may specify in the order". Section 358(3) lays down the conditions upon which a sentence may be suspended and they include future good behaviour. On a proper reading of s 350A and s 358, I would confidently venture the opinion that a direct community service order imposed in terms of s 350A can itself be suspended in terms of s 358. If that be so, then there is no logical ground discernible from within the four corners of s 350A which would justify the conclusion that once a court imposes a direct community service order with the concomitant alternatives provided therein, it cannot proceed to impose a prison term and to suspend such prison term on condition of future good behaviour or for that matter on any other suitable condition such as restitution. A direct order of

> community service is clearly a sentence whose operation can be suspended in whole or in part on suitable conditions. Put in a different way, s 358 applies to all offences except those specified in the Eighth Schedule and s 350A(3) does not seek to create an exception.
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> What the trial magistrate did in this case was to suspend a portion of the sentence which he imposed in the exercise of a discretion vested in him by the provisions of s 358, which provisions, as already observed, designedly encompass s 350A(3) as far as the suspension of sentences is concerned. The sentences imposed are not in conflict with s 350A(3).
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> The provisions of s 350C(3)(b)(i) and (ii) do not cause me any problems nor do they support a conclusion which is opposed to the one I have reached. Those provisions are procedural. They make provision for the enforcement of an alternative sentence imposed in accordance with one or more of the three options I have dealt with. They do not, in my view, empower a court to pass sentence afresh but to order that a sentence of a fine or a prison term which has already been passed should now be paid or served, as the case may be."

In *Mhlanga & Anor supra* CHINHENGO J (with the concurrence of CHATIKOBO J) also did not share the views of BARTLETT J in *Mugebe (supra*). The accused pleaded guilty to a charge of theft. He was sentenced to perform 140 hours of community service and in addition to 3 months imprisonment which was suspended on condition that he pays compensation to the complainant. CHINHENGO J's reasoning appears at 74C-76B:

> "The convictions in both cases are not subject to any criticism. I have only to address the issue raised by the regional magistrate whether the imposition of a term of imprisonment suspended on condition of restitution in addition to a direct community service order was proper.
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> The basic idea behind an order of community service is that a person who has been convicted of a minor offence is not imprisoned but rather he is given an opportunity to atone for his offence by doing work beneficial to the community whilst he is not in prison. Imprisonment has several adverse effects on a first offender. He may become a hardened criminal by association with other prisoners. He becomes stigmatized and such stigmatization may affect him psychologically with the result that he may degenerate into criminality – see J Reid Rowland in *Criminal*

Procedure in Zimbabwe pp 25-28 and *S v Antonio & Ors* 1998 (2) ZLR 64 (H) at 67.

In *S v Chinzenze & Ors* 1998 (1) ZLR 470 (H), it was stated that the Criminal Procedure and Evidence Act [*Chapter 9:07*] now provides for community service in three situations, as a condition of suspension of a sentence, as an alternative to a fine, and as a substantive penalty in its own right. This case did not address directly the issue raised by the regional magistrate which is the subject matter of this judgment. Two important principles appear to come into conflict. On the one hand, and dealing with the one, the imposition of community service is intended to keep minor and usually first offenders out of jail. On the other hand, and dealing with the second principle, the suspension of a sentence on condition of restitution is intended to ensure that the accused makes good the wrong he has done by compensating his victim. The two principles would be in conflict if the legislature intended that where a direct order of community service is imposed then no other or additional sentence of imprisonment wholly suspended on condition of restitution may be imposed.

One scrutiny, the regional magistrate relied on subs (3) of s 350A of the Act (as amended by Act 8 of 1997). That subsection reads:

> 'A court which makes a community service order in respect of an offender may sentence the offender to a fine and additionally or alternatively, to imprisonment as an alternative punishment, to be paid or served, as the case may be, if he fails to render the service specified in the order.'

Section 350A deals generally with direct community service orders. In subs (1) the court is empowered to make a community service order instead of sentencing an offender to imprisonment or to a fine. Subs (3) empowers the court to sentence the offender to a fine and *additionally or alternatively* to imprisonment as an alternative punishment if he fails to render the service specified in the order. This subsection makes it clear that a sentence of imprisonment may be imposed as an alternative to performing community service where the offender fails to perform such service. But the section does not detract from the court's power to order restitution. That is a sentence which may be imposed separately from and in addition to the substantive punishment imposed. The imposition of such a sentence is authorized by s 358(2)(b) of the Criminal Procedure and Evidence Act. In my view, an offender can be sentenced to community service, and the court can at the same time impose an additional sentence of imprisonment all of which is suspended on condition of restitution. This is more in keeping with the current trend in

sentencing where the interests of the victim of the offence take centre stage and are not to be disregarded. As stated by REYNOLDS J in *S v Mpofu* (2) 1985 (1) ZLR 285 (H) at 293E-D:

> 'It is in the interests of society as well if restitution takes place in that the complainant is content, the accused is making an effort to redeem himself and part of the affront against the social order has been repaired. As I see it, it is proper for the court itself, if the matter is not raised by the defence, to investigate the prospects of restitution and to give due weight, depending upon the circumstances, if this form of reparation is made. It is, in my view, desirable for the courts to encourage any person convicted of having committed an offence against property, such as theft or arson, to restore to the victim of the crime the value of the property in question.'

Section 350A(3) of the Criminal procedure and Evidence Act cannot therefore be construed as prohibiting the court from imposing a sentence of imprisonment which is suspend on condition of restitution in addition to a direct order of community service. It must be remembered too that an order that the offender should render service beneficial to the community is not a guarantee that the offender may not end up in jail. He may breach the conditions of the community service order and he may, in appropriate cases, end up in jail. In similar vein, where the court has made an order of community service, and has further imposed a term of imprisonment suspended on condition of restitution, its effort at avoiding to send the offender to prison cannot be lightly regarded merely because the court has imposed the additional sentence. During the time that the offender is performing community service, he has the opportunity to raise the funds with which to make restitution and should he fail to make restitution there is nothing fundamentally wrong in requiring him to undergo a prison sentence. I am satisfied that the sentences imposed by the trial court are proper. They are not at variance with the lawgiver's intention as enacted in s 350A(3) of the Criminal Procedure and Evidence Act. What I have tried to articulate is more eloquently stated by CHATIKOBO J in *S v Maramba & Anor* HH-142-2000 …."

It seems to me that the reasoning in *Maramba* [*supra*) is to be preferred. The present case can be distinguished from *Maramba* and *Mhlanga's* cases by the fact that rather than impose one additional sentence suspended on a stated condition the trial magistrate imposed two such additional sentences. In substance the sentence imposed in the present case is similar to the sentences in the cases I have referred

to above. The first additional sentence of which two months were suspended on condition of good behaviour relied for its validity on s 358 of the Act and was similar to the sentence in *Maramba supra* and the second additional sentence of two months suspended on condition of restitution also relied for its validity on s 358 of the Act and it was similar to the sentences in *Mugebe supra* and *Mhlanga supra.*

I think what is to be recognised is that the provisions of the Act relating to the sentencing of offenders, in particular s 358 and Part XVIII of the Act, were intended to give to a judicial officer the widest possible discretion in imposing an appropriate punishment on an offender. In this regard see also the remarks of GUBBAY CJ in *S v Banana* 2000 (1) ZLR 607 (S) at 627H-628G approving of the approach taken by CHIDYAUSIKU JP (as he then was) in the same case reported in 1999 (1) ZLR 50 (H) *in fine* at 54G-56C. I also think that the creative and imaginative assessment of sentence need not necessarily to be hamstrung by too obsessive adherence to the letter of the law where such law, on a generous and purposive approach to interpretation, gives a wide discretion to a judicial officer.

For these reasons I would confirm the proceedings as being in accordance with real and substantial justice. I have sought the concurrence of my brother, HUNGWE J as the matter has been the subject of previous decisions of this court.

HUNGWE J, I agree.