THE STATE
versus
GILMORE KARAMBE

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 12 February 2015

Criminal Review

MUSAKWA J: This matter was referred to the senior regional magistrate at Masvingo for scrutiny. The senior regional magistrate in turn addressed a minute to the Registrar with the following comments:

> "The accused is a first offender who pleaded guilty to the offence. He is someone who was willing to compensate the complainant. His sentence falls within the range of community service.
>
> The reason for sentence did not show why community service was not taken as an option.
>
> The Magistrate's response to my query appears misplaced. He is referring to accused as someone who has a propensity to commit further crimes and I do not know where the court got that from.
>
> This was not a case of bail pending trial were (sic) such factors are usually considered. The most important thing in this case is he is a first offender.
>
> I do not believe that being married is the pre-requisite requirement (sic) for someone to qualify for community service. He was disqualified from performing community service because he was not married. This was discrimination done by the court which should not be allowed. In any event such reasoning did not fid its way in the reasons for sentence.
>
> Your views and directions."

The accused pleaded guilty to theft and was sentenced to nine months imprisonment of which three months imprisonment was suspended on condition of good behaviour. A further three months imprisonment was suspended on condition the accused restitutes the complainant in the sum of US$560-00 through the clerk of court, Masvingo.

When the senior regional magistrate queried the propriety of the sentence, especially

the trial court's failure to consider community service, the trial magistrate replied thus:

> "Community service was not considered by the court on (*sic*) the following reasons:-
>
> > "(1) The moral blameworthy (*sic*) of the accused person was very high, the accused converted the complainant's money for his own personal use which includes using the money for pleasure according to his statement during plea recording.
> >
> > (2) The court considered that the accused was not a person to be acceptable back to society without a proper rehabilitative process. The potential for the accused to further commit dishonesty offences was likely to be high.
> > This is further aggravated by the fact that the accused is not employed and he had no means to start afresh and thus the likelihood of further committing the offences was high.
> >
> > Accused is not married and thus he had no any (sic) commitments that could not make him to defeat the course of justice if given the option of community service.
> >
> > Therefore even though I concede that the accused was a first offender, but proper rehabilitation could only be done if accused was afforded a custodial sentence.
> >
> > The total amount of money that the complainant was prejudiced is also alarming in the circumstance (*sic*)."

Where a court imposes a sentence of imprisonment not exceeding 24 months it must consider other sentencing options like a fine, community service or a wholly suspended prison term. The trial court opted for imprisonment without considering any other sentencing options. That amounts to a misdirection. I am mindful that the mere omission to specifically mention other sentencing options does not necessarily amount to misdirection. Commenting on this aspect in *S* v *Gono* 2000 (2) ZLR 63 (HC) BLACKIE J at p 66 had this to say:

> "I respectfully agree with and endorse the statements made by both YOUNG J and CHINHENGO J in their judgments concerning the importance of and difficulty in exercising the judicial discretion in sentencing, and the need for a judicial officer, in the exercise of that discretion, to apply his mind to and exercise his discretion in respect of all the relevant facts and to explain, in his reasons for sentence to both the accused and to society at large why he has determined on the sentence he has imposed. It is most important that the accused, the general public and, if necessary, the appeal court clearly understand the reasons for which a particular punishment has been selected."

However, with respect to CHINHENGO J, there is a portion of his judgment that requires qualification. It is that portion which suggests that if the judicial officer does not express the reasons why he has determined on one form of punishment rather than another, he will not have applied his mind to the most appropriate sentence and will, therefore, have

misdirected himself. It does not seem to me that it necessarily follows that because the judicial officer does not expressly mention that he has considered alternative punishments and given reasons why he has rejected those punishments, the judicial officer has not applied his mind to them. An express statement that all the alternative punishments have been considered and that the one imposed has been chosen for the particular reasons set out in the judgment is certainly the best evidence that all the appropriate factors have been taken into account and that they have been correctly applied. However,

> "... (m)erely because a relevant factor has not been mentioned in the judgment on sentence, it does not mean that it has been overlooked for 'no judgment can ever be perfect and all embracing"

See *R* v *Dhlumayo & Ors* 1948 (2) SA 677 (A) at 702), quoted by TROLLIP JA in *S* v *Pillay* 1977 (4) SA 531 (A) at 535 I. In any event, the reasons for accepting one form of punishment as appropriate and another as inappropriate may be implicit in or deducible from the context or reasoning of the judgment."

A reading of the trial court's reasons does not reveal anything implicit regarding alternative sentencing options. All it did was to say:

> "Be it as it may, the court has considered that a custodial sentence will meet the justice of this case. The accused person demonstrated a high level of blameworthy (sic) and thus the court must take appropriate measure (sic). The court will also order restitution."

Courts should endeavour to keep first offenders who plead guilty to less serious crimes out of custody. A rehabilitative sentence is not one of incarceration as the trial magistrate tried to justify in response to the query by the scrutinizing magistrate. As was stated by ADAM J in *S* v *Mabhena* 1996 (1) 134 (HC) at 138:

> "Further, it has been emphasized on countless occasions by this court and the Supreme Court that an effective custodial sentence of imprisonment is a severe and harsh form of punishment which should be imposed on first offenders only if no other punishment would be appropriate. Needless to say there are certain crimes to which the foregoing does not apply because of their nature and magnitude which necessitates the imposition of an effective term of imprisonment. Accordingly such serious crimes as attempted murder, rape, attempted rape, armed robbery, car thefts and aggravated type of assault with intent to cause grievous bodily harm are some examples of serious offences which generally require a magistrate to impose an effective custodial term. Clearly fines, compensatory orders and suspended sentences including those on condition of community service would normally be out of question for them."

Ultimately, the trial magistrate's response clearly shows that he or she never

considered other sentencing options. There is misdirection in the reasons advanced for discounting community service. As correctly pointed out by the scrutinizing magistrate, community service is not reserved for married persons. I would also add that it is also not reserved for employed people. It is not even clear how the trial magistrate concluded that the accused person would commit another offence if ordered to perform community service. The trial magistrate could only have properly assessed the accused' suitability for community service after referring him to a community service officer. There is also the additional misdirection in that the order of restitution was left open ended. Restitution ordered as alternative to imprisonment can only be effective if it has a date by when it has to be rendered. If the accused fails to restitute in this case when can it be said that he defaulted?

The accused person should benefit from a suspended sentence. In view of the sentence that he has already served it would be dilatory to remit the matter to the trial court in order for sentence to be assessed afresh. It is therefore ordered that the sentence imposed by the trial court be set aside and in its place is substituted the following:

> "9 months imprisonment of which 4 months imprisonment is suspended for 4 years on condition within that period the accused does not commit any offence involving dishonesty for which he will be sentenced to imprisonment without the option of a fine. The remaining 5 months imprisonment is suspended on condition the accused restitutes the complainant in the sum of US$560.00 through the clerk of court on or before 30 May 2015."

DUBE J agrees:……