

THE STATE

Versus

BONGANI NDLOVU

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 25 July 2024

Review Judgment

DUBE-BANDA J

[1] This matter was placed before me on review at the instance of the scrutinizing regional magistrate. The offender was charged with two counts of theft as defined in s 113 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. In both counts it is being alleged that on two occasions he stole green vegetables from the complainant's garden. The total value of the vegetables stolen is UD\$130.00 and nothing was recovered. He pleaded guilty. In count 1 he was sentenced to six months imprisonment of which three months was suspended on the usual conditions of good behaviour. In count 2 he was sentenced to six months imprisonment of which three months was suspended on condition of restitution. The offender remained with an effective sentence of six months imprisonment.

[2] Nothing turns on conviction. It is the sentence that requires closer scrutiny. It is by now established law that sentencing is pre-eminently within the discretion of the trial court. This court on review has limited power to interfere with the sentencing discretion of the trial court. The interference on review must be premised on recognised grounds of review. The reviewing court must be alive to the fact that it is not an appeal court and the grounds of appeal are inapplicable. My view is that this court may review a sentence of the trial court, among others, on the basis of irrationality. This principle acts as a safety net to give this court some degree of control over sentences of the subordinate courts that are not in accordance with real and substantial justice. Review on grounds of irrationality simply means that the trial court did not act in accordance with the established principles, and that if it had correctly applied its mind to

the principles of sentence and the facts of the matter it would not have imposed such a sentence. There must be a rational link between the sentence and the sentencing principles and the facts of the case otherwise the sentence will not be in terms of the law.

[3] It is trite that a sentencing court must consider the personal circumstances of the offender, the nature of the offence and the interest of society. Further, it must consider the objectives of punishment. See *S v Zinn* 1969 (2) SA 537 (A); *S v Manyevere* HB 38-03; *S v Ngulube* 2002(1) ZLR 316 (H); *S v Mpofo* 2011 (1) ZLR 188 (H). In *S v Shariwa* 2003(1) ZLR 314 (H) the court emphasised that in sentencing a court must always strive to find a punishment which will fit both the crime and the offender. Whatever the gravity of the crime and the interests of society, the most important factors in determining the sentence are the person, and the character and circumstances of the crime. Section 6(2) of the Criminal Procedure (Sentencing Guidelines), 2023 says all sentences must be proportional, i.e., the sentence imposed should be the least onerous sanction appropriate in the circumstances and should not be excessive.

[4] This is a case where direct imprisonment is not warranted. Imprisonment is a severe punishment which must only be imposed as a last resort. See *S v Mpofo* (2) 1985 (1) ZLR 285 (H). The offender is 27 years old. He is a first offender. He pleaded guilty to the two counts of theft. He is married with one four month old child. He operates a push-cart and makes between USD5.00 and USD10.00 a month. He is the sole provider of his family. On being asked why he committed this crime, he said he was hungry. It is clear that the trial court did not consider these weighty circumstances before arriving at a sentence of direct imprisonment. See *S v Mahove & Ors* 2009 (2) ZLR 19 (H). There is no rational link between the sentence and the sentencing principles and the facts of this case. The sentence is irrational and destructive and is not in accordance with real and substantial justice.

[5] I do not think that any purpose would be served by referring the matter to the trial court for sentence. All the facts relevant to sentence are before me. The offender was sentenced on 19 June 2024. He has been in prison for just more than a month. Further it will serve no useful purpose to suspend any portion of the sentence on condition of restitution. He earns between USD5.00 and USD10.00 and will not be able to pay USD130.00 to the complainant. This is the reality of the situation. A sentencing court must factor all these factors into account to arrive

at a rational sentence. The trial court did not. This however must not be taken to mean that in all cases where an offender has no means restitution ought not to be considered. Depending on the circumstances restitution may still be imposed as one cannot rule out that such offender may seek assistance to pay such restitution or come into some money of his or her own which would enable him to pay the restitution. Each case has to be decided on its particular facts. On the facts of this case ordering restitution would serve no useful purpose.

[6] It is for these reasons that the sentence of the trial court is not in accordance with real and substantial justice and cannot be allowed to stand.

[7] In the circumstances, I order as follows:

- i. The conviction be and is hereby confirmed.
- ii. The sentence of the trial court is reviewed and set aside and substituted with the following:

“Both counts are taken as one for the purposes of sentence. The accused is sentenced to six (6) months imprisonment wholly suspended for five (5) years on condition the accused is not within that period convicted of an offence of which dishonesty is an element for which he is sentenced to a term of imprisonment without an option of a fine.”

Dube-Banda J

Kabasa J I agree