JOHN MUZADZI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 14 March & 15 June 2023

Chamber Application for Condonation and Review

L Mangachena, for the applicant
T Mapfuwa, for the respondent

CHITAPI J: The applicant as accused person, appeared before the provincial magistrate Gatsi Esquire at Murewa Magistrates Court on 15 February 2023 on a charge of assault as defined on s 89(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The charge alleged against the applicant was couched as follows:

> "In that on the 12th day of February 2023 at Musami Business Centre, Murewa, John Muzadzi unlawfully committed an act of assault upon Priviledge Mungate by assaulting him with an empty beer bottle once on the mouth intending to cause Priviledge Mungate bodily harm or realizing that there was a real risk to possibility that bodily harm may result."

The facts of the case were that on the night of 12 February 2023 at around 10.00 p.m. a sexagenarian aged 66 years old was out for a beer drink at VIP Night Club, at Musami Business Centre, Murewa. The applicant having probably taken one too many or for some other reason dozed off whilst holding his quart of beer. The complainant, a tricenarian aged 33 years in an act of mischief stealthily dispossessed the applicant of his beer and cheekily drank it all and left the empty bottle at the scene. The applicant was not aware in his sleep that he had been dispossessed of his quart of beer. Upon waking up from his slumber, the applicant no doubt incensed upon discovering that someone had imbibed the applicant's wise waters enquired on who the culprit was. On discovering that the culprit was the complainant, the applicant followed the complainant outside the Night Club and struck the complainant once on the mouth with the empty beer bottle.

Fortunately, the applicant was held back by other patrons from further assaulting the complainant and a report was made to the police leading to the arrest of the applicant.

At his trial, the applicant pleaded guilty to the charge. He was duly convicted. The learned provincial magistrate considered that a fairly lengthy custodial sentence was merited in the circumstances of the case. The applicant not only lost his beer, but for his uncontrolled reaction of striking the complainant with the empty bottle, earned an 18 months term of imprisonment with six months of that sentence suspended on the usual conditions of future good behaviour. The applicant was to serve an effective 12 months imprisonment.

The applicant subsequently engaged the services of a legal practitioner Ms *Mangachena* who appeared for him in this chamber application. This application was filed on 6 March 2023, about 19 days post 15 February 2023 the latter being the date of sentence. The legal practitioner decided to file the application which is described as "URGENT CHAMBER APPLICATION FOR CONDONATION OF THE LATE FILING OF THE ACCUSED PERSONS STATEMENT ON REVIEW"

The substance of the application in which the founding affidavit was deposed to by the applicant's legal practitioner was to seek condonation of the late filing of the applicant's statement on review. If condonation be granted, an additional prayer was sought that the statement be incorporated as part of the record of proceedings to be reviewed by the judge as provided in terms of s 57 of the Magistrate Court Act [*Chapter 7:10*]. The draft order was couched as follows:

> "IT IS ORDERED THAT:
> 1. The late filing of the applicant's statement on review be and is hereby condoned.
> 2. The time within which to the file the accused person's statement on review be and is hereby extended with the applicant having to file his statement on review within 5 days of knowledge of the granting of this order.
> 3. No order as to costs."

For reasons that shall become apparent later herein, I shall not detail the explanation for the delay and the rest of averments made on prospects of success. Suffice that the applicant's counsel and Mr *Mapfuw*a of the National Prosecuting Authority, for the respondent appeared before me on 14 March 2023. Upon exchanges between myself and both counsel, it turned out that the order of condonation sought was not opposed.

When I asked for the sentiments of Mr *Mapfuwa* on what he thought of the appropriateness and/or fairness of the sentence in the light of the facts surrounding the assault, counsel and I daresay I agreed with him expressed the *prima facie* view that he thought that the sentence was so severe as to induce a sense of shock and outrage. The original record of proceedings was however not to hand. The record was located as pending review on allocation to CHIRAWU-MUGOMBA J.

It made sense to also then deal with the review itself at the same time as this application. Both counsel agreed to the following order being granted to move the matter forward.

> "IT IS ORDERED THAT:
> 1. The application to file a review statement out of time is allowed.
> 2. The applicant shall file the proposed statement and serve the Prosecutor General by no later than 15 March 2023.
> 3. The Prosecutor General's representative, Mr *Mapfuwa* shall file any comments that the Prosecutor General may have on the propriety of the sentence imposed on the applicant by no later than 17 March 2023.

In consequence of the order, the applicant's counsel filed the statement on review and Mr *Mapfuwa* also filed a response to the applicant's statement on review. Counsel made submissions on their filed documents and I reserved judgement.

In the course of preparing judgment, I formed the impression that the order of condonation and extension of time to file the applicant's statement on review was granted in error of the law which was common to the parties. The error revolves around the validity or propriety of the application itself. I have sought the views of both counsel and they are in agreement that the order was made in error. It is necessary to correct it. The process of correction entails having to interrogate the relevant law on reviews and the filing of statements on review by convicted and sentenced persons.

The starting point is to consider the relevant provisions of s 57 of the Magistrates Court Act [*Chapter 7:10*]. The full content of s 57 reads as follows:-

> "**57 Review**
>
> (1) When any court sentences any person-
> (a) to be imprisonment for any period exceeding twelve months; or
> (b) to pay a fine exceeding level six;

the clerk of court shall forward to the registrar, not later than one week next after the determination of the case, the record of the proceedings in the case, together with such remarks, if any, as the magistrate may desire to append:

Provided that –

(i) where any of the evidence in the case has been taken down in shorthand writing or recorded by mechanical means, it shall, unless the magistrate otherwise directs, be a sufficient compliance with this subsection if the clerk of the court forwards to the registrar the manuscript notes of such evidence made by the magistrate in accordance with rules;

(ii) this subsection shall not apply in relation to any person

(a) who is represented by a legal practitioner;
(b) which is a company as defined in the Companies Act [*Chapter 24:03*];

unless within three days after the determination of the case the legal practitioner of the accused or the person representing the company in terms of subsection (2) of section 385 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] As the case may be, in terms of subsection (2) requests the clerk of the court to forward the case on review.

[Subsection amended by Act 22 of 2001]

(2) A request made in terms of provisio (ii) to subsection (1) shall be-

(a) made in writing; and
(b) accompanied by a brief statement of the reasons for the request;

and the magistrate shall comment upon the reasons referred to in paragraph (b) before the record of the proceedings is forwarded, together with such comments, in terms of subsection (1).

(3) The accused person in any criminal case in which the court has imposed a sentence which is not subject to review in the ordinary course in terms of subsection (1) may, if he considers that such sentence is not in accordance with real and substantial justice, within three days after the date of such sentence, in writing, request the clerk of court to forward the record of the proceedings in terms of subsection (1) and the clerk of the court shall thereupon deal with the matter in terms of subsection (1) as if the case were subject to review in the ordinary course.

[Prosivo repealed by section 3 of Act of 1997]

(4) The registrar shall with all convenient speed lay papers forwarded to him in terms of his section before a judge of the High Court in chambers for review in accordance with the High Court Act [*Chapter 7:06*]."

Next is to consider the provisions of s 59 of the same Act which provide as follows:-

"**59 Accused's right to submit statement on review**

In any criminal case which is subject to review in terms of section fifty-seven the accused person may, if he thinks the sentence passed upon him is excessive, deliver to the clerk of the court within three days after the date of such sentence any written statement of arguments setting out the grounds or reasons upon which he considers such sentence excessive, which statement or arguments shall be forwarded with

the proceedings of the case to the reviewing judge and shall be taken into account in the review of the proceedings."

It will be seen that in terms of s 57(1) as quoted, the clerk of court of the convicting and sentencing magistrates court is under peremptory obligation to forward a reviewable record of proceedings to the Registrar of the High Court not later than seven days from the date of sentence or completion of proceedings. In terms of proviso (ii)(a) and (b) of subs (1) of s 57 as quoted certain proceedings, being where the accused was represented by a legal practitioner or is a company are not subject of automatic review unless the legal practitioner or the company representative as the case maybe acts in terms of subs (2) of s (57). In terms thereof the legal practitioner or company representative shall make a written request accompanied by a brief statement of the reasons for the request and the clerk of court to whom the documents are directly filed will place the request before the magistrate for any comments which the magistrate may consider necessary to make to assist the judge on review. Significantly the request must be made within three days after the date of sentence.

Next are the provisions of s 59 of the Magistrates Court Act as quoted. They provide that an accused person who considers that the sentence passed upon him is excessive may within three days after sentence has been imposed upon him/her file a statement with the clerk of court setting out written arguments, grounds or reasons depended upon to support the belief that the sentence is excessive. The statement is then made part of the record to be forwarded to the High Court on review. The reviewing judge is obligated to take into account the statement so submitted in reviewing the proceedings. In regard to the provisions of s 59 and for purposes of extrapolating the common error made in granting the order, I underline the period of three days within which the statement may be filed calculated from the date of sentence.

A simple analysis of s 57(1) shows that the obligation placed on the clerk of court to submit within seven days of sentence reviewable records of proceedings to the Registrar of the High Court to place before judges for review is peremptory. On the other hand the submission of statements by the accused or his/her legal practitioner for consideration by the judge on review in terms of the proviso (ii) to s 57(1), subs 3 of s 57 and s 59 is permissive. In other words the convicted and sentenced person is granted a leeway at his or her own prompting or resolve to submit written

representatives on review in relation to sentence where the person deems it excessive. The judge on review is obliged to consider the statement. The filing of the statement is a matter of choice by the person wishing to do so once the accused has decided to exercise the option to submit a statement.

It seemed to me therefore that the time limit of three days written which to file the statement post the date of sentence is significant and serves the purpose that the clerk of court until have sufficient time to prepare the record of proceedings incorporating the statement timeously in order to meet the peremptory time limit of seven days within which to submit the record of proceeding on review post sentence.

The time limits given in ss 57 and 59 as discussed are given by statute. There is no provision in the Magistates Court Act which gave the court power to extend the time limits set out therein. The court cannot arrogate itself power to add to subtract or vary a statutory provision where the statute concerned or any other enactment does not provide for such power. Whilst it is true that a court can condone none compliance with the rules, the time limits under discussion are not provided for in the rules of court but in the Act passed by the legislature. With that body having omitted to grant power of extending the time limits to the court, then its *finis rei*, that is the end of the matter. The convicted and sentenced person simply loses the opportunity or window to submit a statement on review upon failure to take advantage of the window to submit it within three days from the date of sentence. The procedural aspect arising is at best summed up by stating that whilst it is permissive or directory for the accused to file the statement on the sentence on review, once the accused elects to do so, the period of three days to have done so is peremptory.

In casu, the applicant's legal practitioner did not specify nor allude to the provisions of the law under which condonation was being sought. The application was in the form of a generalized application for condonation. There is no provision in law for generalized applications for condonation of failure to abide time limits for doing an act provided for in a legislative enactment. It is therefore incumbent upon a person who wishes to exercise a right conferred by statute to do so within the time limit provided for in the statute failing which the right will be lost. The order which I granted to condone the non-filing by the applicant of the statement on review was a nullity

as anything done to give effect to a nullity is in itself a nullity. The correct order which ought to have been granted was to strike the matter off the roll as the application was a nullity. See *Chirosva Minerals (Pvt) Ltd* v *Minister of Mines & Ors* 2011 (2) ZLR 274; *Air Duet Fabricators (Pvt) Ltd* v *A.M. Machado & Sons (Pvt) Ltd* HH 54/16, both cases quoted with approved by BHUNU JA in the *Garrat Trust* v *Creative Credit (Pvt) Ltd* SC 146/21. The authorities cited state that a failure to comply with mandatory provisions of the law in an application renders that application a nullity. *In casu*, the period of three days to file the statement on review cannot be extended as an extension is not provided for. The application being incompetent is a nullity.

In relation to the appropriate action to take, there is r 29 in the High Court Rules, 2021 which permits the correction, variation and rescission of judgements and orders. Paragraph (c) of subrule (1) of r 29 provides that:

> "Correction, variation and rescission of judgements and orders –
> 29. The court or a judge may in addition to any other powers at or he may have, on its own initiative or upon the application of any affected party correct, descend or vary –
> (a) ……
> (b) ……
> (c) an order or judgement granted as a result of a mistake common to both parties."

In this matter, both counsel with myself concurring agreed to the issuance of a consent order which in fact arose from an incompetent application. The order cannot stand. It stands to be rescinded and an order stating the application HC 1506/23 is struck off the roll be substituted in its place.

I deal with the review itself. As I indicated earlier, the review record had been allocated to CHIRAWU-MUGOMBA J. The learned judge and myself were after considering the record of proceedings, agreed that the sentence imposed in the matter was so severe that it easily resulted in invoking feelings of shock over the severity. In such a case the sentence does not pass the threshold of real and substantial justice. The judge or court has power to interfere with such a sentence. Section 29(2)(b) of the High Court Act, provides as follows:

> "(2) If on a review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings –
> (a) ……
> (b) are not in accordance with real and substantial justice, it may, subject to this section;

(i) ……
(ii) reduce or set aside the sentence or any order of the inferior court or tribunal."

The exercise of this power is subject to guidelines given to in s 29(2)(b)(ii) – viii which do not require repeating. It suffices however for the purposes of this review that the court is permitted to substitute a different sentence which must not more severe than the sentence set aside or substituted.

Having already set out the facts of the case, there is no doubt that the conduct of the complainant was provocative, daring and disrespectful. This aspect of the case was not considered by the learned magistrate. Whilst provocation is not a defence to any crime save as a partial defence in cases of murder in circumstances set out in s 238 of the Criminal Law Codification and Reform Act, it may at the discretion of the court be treated as a mitigatory circumstance. For the benefit of the learned magistrate and avoidance of doubt, s 238 of the Criminal Law Codification and Reform Act, provides as follows:

"238 **Provocation in relation to crimes other than murder**

Except as provided in section two hundred and thirty-nine and subject to any other enactment, provocation shall not be a defence to a crime but the court may regard it as mitigatory when assessing the sentence to be imposed for the crime."

The learned magistrate was oblivious to the issue of provocation. He or she did not refer to provocation at all in the reasons for sentence. In this respect, an important element or factor which was central to the assessment of the accused's moral blameworthiness was not taken into consideration. In this regard, the learned magistrate was seriously misdirected. It is fair to say that had the learned magistrate been mindful of and directed to take provocation into account, a less harsh sentence would likely have been imposed on the accused. The applicant and the respondent's counsel had filed submissions on review consequent on the order which turned out to be a nullity. The court is however permitted to refer to its records. Further counsel's submission were researched and are of relevance and assistance to the court.

Mr *Mapfuwa* for the respondent picked up the issue of provocation as not having been considered by the learned magistrate. Counsel's submissions were in this regard well taken. I have already touched on provocation and noted that it is provided for as a mitigatory circumstance

by statute. A failure to consider provocation and its impact in assessing sentence where facts proved reveal that the accused acted under provocation is a misdirection which vitiates the sentence imposed. The point I make is not that the magistrate must necessarily find in every case where provocation is raised that it mitigates the offence. The circumstances of each case will determine whether provocation mitigates sentence. The misdirection arises in a failure to take account of provocation in exercising the discretion on sentence and to then discount it as a mitigatory or feud it to be mitigatory.

In their submissions both counsel correctly pointed out that the learned magistrate was misdirected in assessing sentence by reasons of the failure to consider community service as an option once the learned magistrate had considered that a sentence within the community service band of two years imprisonment and below would be an appropriate sentence. The learned magistrate in the reasons for sentence appears to have been swayed by the nature of the injuries suffered by the complainant. The learned magistrate reasoned that the accused given his age of 66 years should have exercised self-restraint. The reasoning is correct. This notwithstanding, failure to consider the community service option where the sentence of community service may be competent amounts to a misdirection which entitles the court to interfere with the sentence on appeal or review. See *S* v *Progress Mushonganhande & Anor* HH 200/22 and cases therein cited.

Both counsel also submitted that the sentence imposed did not reflect that the guilty plea offered by the applicant had been given due weight. The learned magistrate did consider that the accused had pleaded guilty and that for that reason he should be treated with lenience. For purposes of review, there was no misdirection on the part of the learned magistrate in that regard.

Counsel for the parties are in agreement that the sentence, imposed in this matter is afflicted by irregularities or misdirections which have been articulated herein. Both myself and my sister CHIRAWU-MUGOMBA J who has considered the record of proceedings on review agree with counsel that the sentence imposed does not accord with real and substantial justice. A sentence other than effective imprisonment would have met the justice of the case. Account is taken that the complainant suffered injuries of note with the medical report produced at the trial showing that the complainant suffered bruises and lacerations to the lower lip area and fractures on three teeth.

The report indicated that permanent disability was likely. Like most such reports the nature of the permanent disability was not explained. In such a case it is wrong for the trial court to simply repeat that permanent disability is likely. I can from the report only surmise that the disability would perhaps be an extracted tooth or teeth. The court did not but was supposed to enquire into the nature of the so called permanent disability. The learned magistrate was again misdirected in failing to do so.

Both CHIRAWU-MUGOMBA J and myself were satisfied that a failure of justice actually occurred in the proceedings under review. Consequently the sentence imposed will and is hereby set aside and substituted with a sentence which will ensure that the accused is liberated forthwith if still incarcerated and not benefitted from the recent Presidential Amnesty. Had the accused been on bail pending review or appeal the proceedings would have been referred back to the learned magistrate to enquire into and consider the appropriateness of community service. That course is no longer justiciable.

The following order is therefore made:

IT IS ORDERED THAT:

1. The sentence imposed on the accused John Muzadzi in case number CRB MRWP 155/23 is set aside and substituted with the following sentence:
2. 6 months imprisonment of which 3 months imprisonment is suspended for 3 years on condition the accused does not within that period commit any offence involving violence for which if convicted, the accused is sentenced to imprisonment without the option of a fine.
3. The accused having already served the substituted sentence is entitled to immediate release if still held in custody

CHITAPI J:……..

CHIRAWU-MUGOMBA J:……..……..Agrees

Mangachena Attorneys, accused's legal practitioners
National Prosecuting Authority, respondent's legal practitioners