THE STATE
versus
EDSON MAKANGANWA

HIGH COURT OF ZIMBABWE
MUTEVEDZI and MUNGWARI JJ
HARARE 9 March 2022

Criminal Review

MUNGWARI J: The record of proceedings was referred to this court by the Scrutinising Regional magistrate with the following comment:

> "May this record of proceedings be placed before any Honourable High Court Judge with the following comment;
> Upon scrutinising the proceedings I enumerated a number of scrutiny errors and sent back record for the learned trial magistrate's comment. He commented but I still feel that not enough was done. I submit the record for further treatment of the issues"

Unfortunately the learned Regional Magistrate did not deem it prudent to summarize the issues with which he was not satisfied resulting in him referring the proceedings for review. He equally did not give his opinion on what it is he found anomalous and wished this court to focus on. He left it entirely to this court to decipher from the record of proceedings and the communications between him and the trial magistrate. I will revert to comment on this undesirable position later in this judgment. Needless to say, I could not ignore the scrutinising regional magistrate's hue and cry and had to plough through the proceedings anew.

Summarised Facts of the matter

The Accused Edson Makanganwa, who was unrepresented at his trial, was convicted by a Provincial Magistrate sitting at Karoi on 3 counts of:

Count 1- Assault as defined in section 89 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23]* (Code)

Count 2-Malicious Damage to Property as defined in section 140 of the Code.

Count 3-Physical abuse as defined in section 3(a) as read with section 4 of the Domestic Violence Act [*Chapter 5:16]*

The three counts arose on 23 May 2021 when accused intercepted a telephone call from Isaac Munenge his wife's suspected paramour (Complainant in count 1 and 2). In a fit of rage the accused went on a rampage. He headed straight to Isaac's, (the suspected paramour) house

where he confronted him over the alleged affair with his wife. An altercation ensued resulting in accused assaulting Isaac several times all over the body using fists and sticks. He also assaulted him on the head with a stone. Isaac sustained injuries which required medical attention. Accused did not stop there because a while later, he took another stone and repeatedly hit complainant's motor vehicle a Toyota Noah. He damaged the complainant's front windscreen. Still fired up and upset, accused returned to his homestead where he equally confronted his wife over the alleged affair with Isaac. A scuffle ensued and the accused assaulted his wife Franscisca Musoma (Franscisca) with a stick all over the body. Franscisca sustained injuries on her left cheek and lost 2 teeth in the process. Isaac and Franscisca subsequently reported the accused to the police leading to him being arraigned before the trial court on these three charges.

On 13 August 2021 the accused appeared before a provincial magistrate sitting at Karoi formally charged with the three offences. On the same day he was convicted on his own plea of guilty and sentenced to:

> "Both counts -12months imprisonment of which 2 months imprisonment is suspended for 5 years on condition accused does not during that period commit any offence involving violence and for which upon conviction he will be sentenced to imprisonment without the option of a fine. The remainder of 10 months is suspended on condition accused completes 350 hours of Community service…."

The record of proceedings was forwarded to the regional magistrate for scrutiny on 17 August 2021.The regional magistrate only raised issue with the missing sentence for the third count .His letter to the trial magistrate dated 27 August 2021 reads as follows:

> "Accused in this case was duly convicted on his own plea of guilty to 3 counts of assault, count one, M.D.P in terms of section 140 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23]* and lastly on Contravening Section 3(a) as read with Section 4 of the Domestic Violence Act [*Chapter 5:16*].
> He was sentenced to Community service on 12 months, 2 of which was wholly suspended for good behaviour condition on "both counts" in terms of the community service proforma attached as an Annexure. According to the back of the charge sheet, he pleaded to two counts only. The verdict says he is guilty as pleaded on both counts. As I said above the sentence indicate she was sentenced on both counts. The proceedings are very clear that all 3 counts were canvassed one by one and was duly found guilty as pleaded in all 3.
> I have perused the record of proceedings thoroughly and there is no plea, verdict and sentence for count 3.The scrutiny covers also only cover first two counts and it was certified as carrying the true reflection and summary of the record. The CRB scrutiny cover suggests there were 2 accused instead of one
> May the learned trial magistrate comment?" (*sic*)

A reading of the regional magistrate's query reveals a mass of contradictions. In one breathe he says the proceedings clearly indicate that the essential elements of all 3 counts were canvassed and accused duly convicted. In the next he says I have perused the record thoroughly and there is no plea, verdict and sentence for count 3- an obvious contradiction! A further reading of the query reveals that he took issue with the absence of the endorsements of plea, verdict and sentence on both the back page of the charge sheet and the scrutiny cover of the record. The record cover also suggested that there possibly might have been two accused persons involved.

On 17 September 2021, the trial magistrate courteously responded as follows:

> "As reflected in the record of proceedings the accused pleaded guilty to all three counts and was duly convicted on all the three counts. The sentence imposed was in respect of all three counts. It was an oversight on my part due to pressure of work that on the back of the charge sheet the Magistrate *a quo* recorded only two counts leaving the third count. The Magistrate apologises for the inconveniences" (*sic)*

Three months later the regional magistrate forwarded the record to the High Court with the vague comment already alluded to.

I have quoted *in extenso* the correspondence between the scrutinising regional magistrate and the trial magistrate to lay the basis for this judgment.

Submission of records for Review

Section 58 of the Magistrates Court Act [*Chapter 7:10*] (the MCA) reads as follows;

> **"58. Scrutiny of certain cases not falling within section 57 (1)**
> (1) ……..
>
> (2)……..
>
> (3) The regional magistrate shall, as soon as possible after receiving the papers referred to in subsection (1), upon considering the proceedings-(underlining for emphasis)
>
> (a)……..
>
> (b)if it appears to him that doubt exists whether the proceedings are in accordance with real and substantial justice, cause the papers to be forwarded to the registrar, who shall lay them before a judge of the High Court in chambers for review in accordance with the High Court Act *[Chapter 7:06]*.

In this case the accused was convicted by the trial magistrate on 13 August 2021. The record of proceedings was sent for scrutiny on 17 August 2021. A minute was raised by the regional magistrate on 27 August 2021. The trial magistrate responded to the minute on 17

September 2021. The record was only referred to the High court and received on 6 January 2022 representing an unexplained delay of more than six months. There was a complete disregard of both the spirit and letter of section 58(3) of the MCA. There is no hiding that trial magistrates are obliged to comply with those mandatory provisions. Scrutinising regional magistrates probably have a more heightened responsibility to comply with and enforce compliance with the same provisions given the supervisory position they hold. In cases where there is a delay it is imperative for the magistrate to explain the reasons for the delay. In this case it was incumbent upon the regional magistrate to explain the delay. The scrutiny and review procedure is intended to prevent miscarriages of justice. It is intended to correct errors which may be made by the trial courts including incompetent sentences. Section 58(3) requires a regional magistrate to scrutinise and refer the cases he or she is in doubt of to the registrar of the High Court" as soon as possible" after receipt of the scrutiny record. Delays in attending to scrutiny queries may lead to a serious miscarriage of justice.

S 58(3) (b) of the MCA speaks to situations where the regional magistrate appears to be in doubt. Where such doubt as to the compliance of the proceedings with real and substantial justice exists he should forward the proceedings for review. I do not understand this section to mean that the regional magistrate plays a clerical role of simply referring papers to the High Court. My comprehension is that he/she is part of the three man team. He is therefore expected to unequivocally articulate where his doubts lie and what his opinion is on the issue. He/she must express his/her views as clearly as possible so that the issues perceived are not misconstrued but are understood by both the trial magistrate whose record he is scrutinising and by the judge who will review the matter.

The conviction in *casu*

A reading of the record of proceedings indicates that pleas of guilty were duly recorded by the trial magistrate in relation to all the 3 charges. After the accused pleaded guilty the court proceeded in terms of section 271(2) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] In terms of the Criminal Procedure and Evidence Act, the magistrate is required to explain the essential elements of the offence to the accused and enquire whether the accused understands the same. In addition he is required to ascertain whether the accused's plea of guilty is an admission of the charge and its essential elements. This the trial magistrate did separately and clearly for each count. Verdicts of guilty as pleaded were endorsed for each respective count.

A perusal of the back of the charge sheet shows that the trial magistrate did not however record the plea, verdict and sentence of count three thereat. Taking into account the trial magistrate's explanation, this appears to be an error as all these proceedings are in fact captured in the record of proceedings. That omission cannot be taken as an affront to the fact that the Magistrate's Court is created by statute as a court of record and as such all its proceedings ought to be recorded. Indeed there is no gainsaying that the Magistrate's Court is a court of record. But the fact that such a magistrate omitted to make an endorsement on the back page of the charge sheet cannot vitiate the proper conviction of an accused where the main body of the proceedings clearly shows that the proceedings substantially complied with the substantive and procedural law. The accused unequivocally admitted the charges, the essential elements of the charges were properly canvassed and the accused admitted the same. Nothing therefore can turn on the convictions.

I have already said that what` the regional magistrate only took issue with was the fact that there was no sentence for count 3. I unfortunately noted a litany of misdirections in the sentencing process and the sentence ultimately imposed on the accused. What exercised my mind is the following:

1. **Pre-sentencing inquiry**

The trial magistrate did not fully inquire into and understand the facts surrounding the commission of the offences before sentencing. What is contained in the record of proceedings is a very scanty outline of mitigation by the accused. Even from that, the State is conspicuous by its absence. The record is silent on whether any aggravation was advanced or whether the State was even afforded the opportunity to do so but turned it down. It was evident that the court unilaterally carried out the enquiry which I have already deemed scanty. It is reproduced hereunder

"**Mitigation**
-Aged 30 years
-Married with 2 children
-I am in to carpentry realizing USD $60 per month
-No money on person
-No savings
-I own a beast
Q-why did you commit the offences
A-I was angry"

Firstly there is no indication that an explanation was proffered on the need for the accused to avail his personal circumstances and the purpose for which those personal

circumstances are required. There is no indication that he understood the need for him to answer all the questions that the court was asking. It appeared it was just going through the motions where the accused was obliged to respond and float along. The one-sided process illustrates a failure on the part of the magistrate to appreciate the purpose of mitigation. That failure militated against the magistrate getting sufficient and relevant information to enable him to sentence the accused appropriately. The sentencing process is a distinct and vital factual enquiry aimed at assisting the court to arrive at an individualised punishment for the accused. A magistrate is and must never be alone in the sentencing process. Both the accused and the prosecutor have significant roles to play. After all by virtue of his position which allows him/her to freely interact with the accused, the complainant and other actors in the investigation of the crime, the prosecutor usually has critical information which may mitigate or aggravate the sentence which a court may impose on an accused. Without his/her involvement, the magistrate may never be aware of that information.

Section 334(3) of the CP & E Act provides as follows:

334 Provisions applicable to sentences in courts

(1)…….

(2)…….

(a)……

(b)……..

(c) …….

(d) ……

(e)…….

(f)…….

(3) The court may, before passing sentence and for the purpose of informing itself as to proper sentence to be passed, receive—

(a) evidence on oath, including hearsay evidence;

(b) affidavits and written reports which may be tendered by the prosecutor, the accused or his legal representative;

(c) written statements made by the prosecutor, the accused or his legal representative;

(d) statements not on oath made by the accused:

Provided that—

(i) no hearsay evidence, other than evidence of a statistical nature, and no affidavit, written report or written statement shall be called or tendered by the prosecutor unless the accused or his legal representative consents thereto;

(ii) no hearsay evidence, other than evidence of a statistical nature, and no affidavit, written report or written statement shall be called or tendered by the accused or his legal representative unless the prosecutor consents thereto;

(iii) the court in which any affidavit or written report is tendered may cause the person making it to be summoned to give oral evidence in the proceedings;

(iv) no hearsay evidence, other than evidence of a statistical nature, shall be given by a witness called by the court pursuant to its powers conferred by section two hundred and thirty-two unless both the prosecutor and the accused or his legal representative consent thereto.

A reading of the cited provision fortifies my finding that the prosecutor has a central role to play at the sentencing stage. He/she must participate actively in the process of determining punishment. The accused person or his representative, must also assist the court in arriving at an appropriate sentence. Unfortunately in this case no attempt to do any of this was made. It comes as no surprise that as a result the sentence imposed is disproportionate and not balanced. It doesn't speak to the crime, offender and the interests of society. Below, I demonstrate why.

Reasons for sentence

The trial magistrate's reasons for sentence are unhelpful and perfunctory. Surprisingly, they relate to only one charge i.e Physical abuse as defined in section 3(a) ARW section 4 of the Domestic Violence Act [*Chapter 5:16]*. Even those appear misplaced because they relate to one *Edison Makainganwa* in CRB MGJ218/ 21. The case under review is registered under CRB KAR217-8 /21. Clearly the CRB numbers are completely different. Even if one were to be persuaded that this could be a typing error of the CRB number, the findings therein make it clear that this cannot be the same accused the court makes reference to. The trial magistrate stated that complainant was not seriously injured and that the injuries sustained were not life

threatening. He concluded that there was no possibility of permanent injuries. There is no indication where that information came from. There was no medical report tendered by the state for Franscisca, the complainant in count 3. There wasn't any other evidence adduced on the nature of injuries. The only guide on the nature of injuries sustained by Franscisca was in the state outline for that charge. It stated that the complainant sustained injuries in the form of a cut on the left cheek and she lost two teeth. Surely, the magistrate's findings that the injuries sustained were not serious are markedly different from the reality in the case he tried. The loss of two teeth is by any standard of injury serious and permanent. With the loss of two teeth the complainant would have been disfigured. Her appearance must have changed. The loss of two teeth ought to be considered as a serious and permanent injury. There is no reference to either of the other two charges in the magistrate's so-called reasons for sentence. This being the only document titled reasons for sentence in the record of proceedings it follows that there were no reasons for sentence for all the 3 counts.

I have no doubt that the regional magistrate did not even read the typed reasons for sentence or else he would have picked this up and would have had a meaningful discourse with the trial magistrate.

The primary purpose of scrutiny is to ensure that a senior and more experienced judicial officer investigates and satisfies himself on the correctness and propriety of the manner the criminal proceedings were conducted by the trial magistrate. The mechanism is essentially the sieve which exists between the proceedings of members of the lower magistracy and the reviewing judges. It interrogates compliance with procedural requirements of decisions at that level.

After researching on both the substantive and procedural law a scrutinising regional magistrate is expected to engage a trial magistrate from an informed position on how the proceedings ought to have been conducted. In doing so guidance and training is also availed to the magistrates under his jurisdiction. The checks and balances process is rendered meaningless where scrutiny is conducted in a cursory manner.

The fact that there are no reasons for sentence is disconcerting as it raises the question of how the trial magistrate deemed the sentence imposed as a suitable one. His justification for sentencing accused to the penalties imposed remains unknown. It is a thumb suck.

In the case of *S* v *Shariwa* HB 37-03 this court stated the following:

> "There is no room in our system for an "instinctive "approach to sentencing. Sentencing should be a rational process. The sentencing 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"

In the absence of any meaningful and relevant reasons for sentence it would appear what was meant to be avoided in undertaking the process of sentencing is exactly what the trial magistrate did. He adopted the instinctive sentencing method.

Sentence

The sentence is not anchored on any meaningful pre- sentence inquiry. It is arbitrary, it neither fits the offence nor the offender. It does not take into account the interests of society. It refers to only two counts when there are 3 counts. It was plucked from nowhere.

As a point of illustration one only needs to remind themselves that the 3 charges that the accused was convicted of are different and have different essential elements. The magistrate could not therefore have purported to impose a globular sentence and treat all 3 counts as one for sentence. The conviction of assault denotes violence upon the person of another and so does physical abuse. The offence of malicious damage to property implies that violence upon the property of another was committed. The condition of suspension (violence) imposed by the trial magistrate purportedly for all 3 counts cannot therefore suffice. It is too wide and is void of sufficient particularity for accused to understand the ambit of the condition. The word violence alone is vague. The accused person certainly will not know what conduct to avoid for the next 5 years for him to avoid violating the condition of suspension. These deficiencies render the sentence arbitrary.Seperate sentencing for some of the counts would have met the instance of justice in the case.

It is disheartening to note that the provincial magistrate who should be fairly experienced on the bench disregarded the most basic principles of sentencing. At that level, the trial magistrate must appreciate that being a judicial officer comes with heightened pressure of work. Succumbing to that pressure at the expense of the due administration of justice is never an excuse. The aim of a judicial officer must never be to complete as many cases as possible but to do justice to all those who appear before him/her. The hurried manner in which the proceedings under review were conducted indicates a hard pressed individual with a predetermined sentence to impose regardless of whether it is appropriate or not. In the end he appeared to cut and paste proceedings from a different case onto those at hand. By doing so he

was unfair to the accused, to society and probably unfair to the complainant. In the final analysis he neither did justice nor exercised his authority judiciously.

The delay in submitting this record for review rendered this process an academic exercise. By 30 December 2021 the accused ought to have completed serving his community service sentence of 350 hours. That notwithstanding the sentence imposed in counts 1 and 3 cannot be allowed to stand. It is set aside and substituted with the sentence indicated below. The accused was not sentenced in count 2. The trial court will have to attend to that. It is in the end ordered as follows:

1. *Counts 1 and 3* are taken as 1 for sentence:- 12months imprisonment of which 2 months imprisonment is suspended for 5 years on condition accused does not within that period commit any offence involving violence upon the person of another and for which upon conviction he will be sentenced to imprisonment without the option of a fine. The remaining 10 months imprisonment is suspended on condition accused performs 350 hours of Community service as set out in the trial court's order.
2. *Count 2*: The trial magistrate is directed to recall the accused and attend to the accused's proper sentencing on the charge of malicious damage to property.

MUNGWARI J …….

MUTEVEDZI J …… ……..Agrees