THE STATE
versus
TINOTENDA NYAMHUNGA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE,15 September, 2021

Review Judgment

CHITAPI J: This record of proceedings was subject of scrutiny by the Acting Regional Magistrate, Northern Division, Marondera. The scrutinizing regional magistrate considered that the trial magistrate had misdirected himself in imposing sentence in that he imposed a fine which was way above the means of the accused and failed to consider and grant time to pay to the accused. The scrutinizing regional magistrate consequently referred the proceedings for review in terms of s 58(3)(b) of the Magistrate Court Act, [*Chapter 7:10*]. I should indicate that the accused has since served the sentence which was impugned by the scrutinizing regional magistrate. The accused will not benefit from any correction which may be made on review. The corrections and comments made on review are therefore for posterity.

The accused an adult male aged 23 years old appeared before the trial provincial magistrate on 9 April 2021 at Marondera Magistrate Court, charged with the offence of assault as defined in s 89 (1)(a) of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*]. The facts grounding the charge were that on 7 April 2021, the accused and the complainant were part of a group of people playing a game of snooker in Marondera Business Centre at a place near the main bus terminus. A misunderstanding arose between them as to who was next in line to play the game. The accused then struck the complaint with his fist below the left eye. The accused further struck the complainant on the head with a snooker ball on the head. The accused was restricted from further assaulting the complainant by another snooker player. The complainant made a police report which resulted in the arrest of the accused. The complainant was not medically examined.

The trial of the accused was purportedly conducted in terms of the provisions of s 271(2)(b) of the Criminal Procedure & Evidence Act, [*Chapter 7:10*]. I use the word "purportedly" because

the guilty plea was not conducted in terms of the applicable provisions of the law. In particular the record shows an endorsement:

"Charge read and understood."

It has already been decreed by this court that the correct manner of dealing with a trial on a guilty plea as provided for in s 271(2)(b) as aforesaid should be in strict compliance with the provisions of s 271(2) as read with s 271(3). The two provisions aforesaid are peremptory which implies that a failure to comply with them is fatal to the validity of the guilty plea trial. The case of *S* v *Mangwende* HH 695/20 delivered on 28 October 2020 is instructive in this regard. See also *S* v *Liberty Musimva* HH 52/20. Essentially, the law provides that the charge be explained to the accused and the content of the explanation given should be recorded. The magistrate did not comply with the requirements. The guilty plea trial was therefore invalid. This aspect of the matter was not raised by the scrutinizing regional magistrate. It is however an issue which has been noted on review.

The accused having pleaded guilty and been convicted as charged, was sentenced to pay a fine of $60 000 in default 2 months imprisonment. In mitigation, the accused indicated that he was 23 years old, single and was not in formal employment. He owned a push cart from which he realized $15 *per* month. He had no other assets of value. He asked the court to be lenient on him. It is common cause that the accused was a first offender who pleaded guilty hence showing contrition and saving the court's time.

The scrutinizing regional magistrate was critical that there was no relationship between the fine imposed and the accused's means. It was more a case of giving with one hand and taking away with the other. The scrutinizing regional magistrate noted that the accused not unexpectedly was still serving sentence of imprisonment because he could not afford to pay the fine. The scrutinizing regional magistrate was also critical that the trial magistrate did not consider granting the accused person time to pay, such consideration having been advised in view of the accused person's indigence. I have also noted that there was no reference to community service as having been considered despite the clear direction of the Superior Courts that community service should always be considered as the default punishment in cases where sentences of 24 months or less are considered appropriate, unless the offender does not qualify for community services. See *Square Zondo* v *S* HB 210/17, *S* v *Chiweshe* 1996 (1) ZLR 425 (H).

There was also no correlation between the fine and the alternative imprisonment term. This aside, it is a policy of the law on sentencing that the fine imposed as with a term of imprisonment should be commensurate with the degree of the accused's blameworthiness, the interests of society and the seriousness of the offence. In *casu*, there was no allegation made that the complainant suffered visible injury. At most he suffered certain hurts and discomforts commensurate with an application of force, no matter its severity. The trial magistrate took too serious a view of what in the circumstances of the case was an ordinary case of assault arising out of a misunderstanding. The magistrate emphasized the need for general deterrence. There was however no indication that such offences were wide spread. The decision of this court in *Moyo & Ors* v *S* HB 114/06 is very helpful for magistrates to acquaint themselves with. It sets out the factors, to take into account in assessing sentence. The list is not exhaustive-

(a) the degree of premeditation of the offender
(b) the gravity of the offence and in this regard, the maximum penalty provided for becomes an indication of how serious the offence is viewed
(c) the attitude of the offender
(d) the age, mode of life and personality of the offender
(e) any recommendations made by an officer designated by court to assess the accused for fitness for a particular sentence like community service.
(f) sentences in similar decided cases.

It is clear that the trial magistrate was misdirected on the procedure for a guilty plea trial. He was further misdirected in the assessment of sentence which in the circumstances was so unconscionable as to be irrational.

In my determination, the scrutinizing regional magistrate was justified to raise a red flag over the proceedings. The trial magistrate did not conduct a fair trial of the accused as required by the law that requires that there be substantive and procedural compliance with the law in conducting a trial. The proceedings *in casu* did not measure to that.

Disposition

I have indicated that any corrections made on review will be for posterity because the accused has served his sentence. Under the circumstances I hold that the proceedings in this matter

were not in accordance with real and substantial justice. The proceedings cannot be confirmed. I therefore refuse to confirm the proceedings. I withhold my certififcate.