THE STATE
versus
TICHAEDZA MANGAVA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 15 January 2020

Criminal Review

CHITAPI J: In this matter the Provincial Magistrate has brought these proceedings which were presided by the magistrate for review by a judge of this court and exhorted that the review be done in accordance with the provisions of s 29(4) of the High Court Act, [*Chapter 7:06*]. The Provincial Magistrate wrote a minute which accompanied the record in the following wording:

> "The accused appeared before Magistrate Chimhini at Bindura Magistrate' Court on 03 October 2018 facing charges of Contravening Section 136 (a)(b) of the Criminal Law Codification an Reform Act Chapter 9:23. He pleaded guilty to the charge and the presiding magistrate proceeded in terms of Section 271 (2)(a) of the Criminal Procedure and Evidence Act and convicted the accused.
>
> The accused was warned and cautioned and ordered to pay $300 restitution. There was no suspended sentence attached in default of payment of the restitution. The sentence is unenforceable at law. The record of proceedings is in shambles, demanding your attention. I discovered it upon doing CRB checking."

The Provincial Magistrate is not reposed with power or jurisdiction to scrutinize or review proceedings of other magistrates of her level and below. Out of devotion and paying detail to her duties as administrative head of the station, she discovered an anomaly whilst checking on the records and matching them with the Crime Record Book (CRB). Her attention was caught by what she coined as anomalies in the proceedings presided over by a magistrate of lower rank. As the proceedings were not subject to scrutiny by a Regional Magistrate, the learned Provincial Magistrate out of ingenuity referred the record to a judge of this court on review as I have already indicated in terms of s 29(4). The provisions of s 29(4) read as follows:

> "..Subject to rules of court, the powers conferred by subsections (1) and (2) may be exercised whenever it comes to the notice of the High Court or a judge of the High that any criminal proceedings of any inferior court or tribunal are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review."

In terms of s 171(1)(b) of the Constitution, the High Court has "jurisdiction to supervise magistrate courts and other subordinate courts and to review their decisions". Section 29(4) as aforesaid is an example of progressive legislative intervention which ensures that there are no unnecessary barriers to the quality control or review functions of the High Court. In the case of *S* v *Kalenga* HH 416/18 CHITAKUNYE J reviewed a case brought to his attention through reading a Newspaper article headlined "Student Nurse jailed for using forged paper." The learned judge read that the accused had been sentenced to 15 months imprisonment with 5 months suspended on usual conditions of future good behaviour. The learned judge was concerned with the sentence and using the powers provided for in s 29(4) of the High Court Act called for the record and reviewed the proceedings. With the concurrence of MUSAKWA J, the learned judges set aside the sentence and substituted it with a fine. It is therefore within the jurisdiction of this court to review the proceedings which have come to my attention through the report by the Provincial Magistrate even though the proceedings are ordinarily not otherwise subject to review.

The concern by the provincial magistrate as set out in her letter of reference is simply that the magistrate did not impose a sentence suspended on condition of payment of the restitution $300.00 which was imposed. In short the query was "what happens to the accused if he does not pay the restitution?"

The provisions of subsections (1) (2) and (3) of s 358 of the Criminal procedure and Evidence Act, [*Chapter 9:07*] are relevant to this review. The provisions read as follows:

"358 Powers of courts as to postponement or suspension of sentences

(1) In this section—

"postponement" means the postponement of the passing of sentence under paragraph (*a*) of subsection (2) and includes any further postponement granted in terms of paragraph (*a*) of subsection (7);

"suspension" means the suspension of the operation of the whole or part of a sentence under paragraph (*b*) of subsection (2) or of a warrant under paragraph (*c*) of that subsection, and includes any further such suspension granted in terms of paragraph (*a*) of subsection (7).

(2) When a person is convicted by any court of any offence other than an offence specified in the Eighth Schedule, it may—

(*a*) postpone for a period not exceeding five years the passing of sentence and release the offender on such conditions as the court may specify in the order; or

(*b*) pass sentence, but order the operation of the whole or any part of the sentence to be suspended for a period not exceeding five years on such conditions as the court may specify in the order; or

(*c*) pass sentence of a fine or, in default of payment, imprisonment, but suspend the issue of a warrant for committing the offender to prison in default of payment until the expiry of such period, not exceeding twelve months, as the court may fix for payment, in instalments or otherwise, of the amount of the fine, or until default has been made by the offender in payment of the fine or any such instalment, the amounts of any instalments and the dates of payment thereof being fixed by order of the court, and

the court may in respect of the suspension of the issue of the warrant impose such conditions as it may think necessary or advisable in the interests of justice; or
(*d*) discharge the offender with a caution or reprimand.
(3) Conditions specified in terms of paragraph (*a*) or (*b*) of subsection (1) may relate to any one or more of the following matters—
(*a*) good conduct;
(*b*) compensation for damage or pecuniary loss caused by the offence:
Provided that no such condition shall require compensation to be paid in respect of damage or loss that is the subject of an award of compensation in terms of Part XIX;
(*c*) the rendering of some specified benefit or service to any person injured or aggrieved by the offence:
Provided that no such condition shall be specified unless the person injured or aggrieved by the offence has consented thereto;
(*d*) the rendering of service for the benefit of the community or a section thereof;
(*e*) submission to instruction or treatment;
(*f*) submission to the supervision or control of a probation officer appointed in terms of the Children's Act [*Chapter 5:06*] or regulations made under section *three hundred and eighty-nine*, or submission to the supervision and control of any other suitable person;
(*g*) compulsory attendance or residence at some specified centre for a specified purpose;
(*h*) any other matter which the court considers it necessary or desirable to specify having regard to the interests of the offender or of any other person or of the public generally."

The trial magistrate in this case acted in terms of section 358 (2) (d) which provides that the court upon convicting the accused may "discharge the offender with a caution or reprimand". A perusal of subsection 3 of section 358 shows that there is no provision for coupling the sentence of a discharge with a caution or reprimand with any other condition. The import of a discharge with a caution or reprimand that the court does not impose a punishment. There is apparent confusion caused by the wording in the provisions of subsection 2 (d) when read with subsection (2) itself. Subsection (2) presupposes that the options given as to postponement or suspension of sentences can only be applied following a conviction. The problem is the reconciliation of the discharge of the offender and the conviction. Unfortunately cases in which the trial court will have acted in terms of s 358 (2) (d) hardly come before this court because the sentence provided for therein does result in automatic scrutiny or review of proceedings which result in that sentence being imposed. I have not been able to stumble upon a local decision in which the import of the provisions of s 358 (2) (d) has been interrogated.

Although the provision relating to discharge with a caution or reprimand appears at the end as the last option, it should perhaps have been the first to be listed because it is the lightest sentence possible permitted by law. A court in the consideration of an appropriate sentence is enjoined to consider all the possible sentences which it can impose upon conviction of the offender starting with the lightest of the possible sentences and discounting them giving reasons for opting for a more severe sentence. The sentence of a cautionary discharge is reserved for very minor offences. The discharge envisaged is not a discharge on the verdict. It is a discharge

from effective punishment. In that sense, the sentence has the effect of an acquittal, the distinction between the two being that the accused who has been discharged with a caution or reprimand will have a criminal record. See *S* v *Magidson* 1984 (3) SA 825 T. It follows therefore it would be incongruous with the import and purport of a discharge with a caution and reprimand to then impose another criminal or sentence sanction in addition thereto. In my judgment therefore, the order for restitution of $300.00 which the court imposed in addition to the discharge with a caution or reprimand was incompetent.

There is yet another irregularity which was committed by the trial magistrate. To place the matter into perspective, the accused was charged with the offence of fraud as defined in s 136 (a) and (b) of the Criminal Law Codification and Reform Act, [*Chapter 9:23*]. The allegations were that on 28 June, 2018 at Bindura, the accused misrepresented to the complainant that he could access cash in exchange for an ecocash payment. The accused received an ecocash amount of $300 which he did not pay back to the complainant as cash as agreed between them. The charge appeared to have been altered to one of theft of Trust Property as defined in s 113 (2) (d) of the Criminal law (Codification and Reform) Act. A verdict of guilty was recorded at the back of the summary jurisdiction sheet purportedly on the charge of theft of trust property. The charge of fraud was not crossed out and the record did not indicate in the guilty plea proceedings which of the two charges was preferred because the case was purportedly dealt with in terms of s 271 (2) (a) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. In terms of the provisions of the said section minor offences which do not merit punishment of imprisonment without the option of a fine or a fine not exceeding level 3 where the accused pleads guilty may be disposed of summarily on the basis of the charge without the need for the court to go through the facts, explaining the charge and putting the essential elements of the offence to the accused as done where the court disposes of the guilty plea in terms of s 271 (2) (b).

After the accused pleaded guilty. The trial magistrate then asked the prosecutor how the case would proceed. The prosecutor is recorded as having indicated that the court should proceed in terms of s 271 (2) (a). The magistrate recorded this:

> "Impossible as warrants punishment above level 3 fine and imprisonment."

Facts were then read to the accused and the following appears on record:

> "Q. May the be read out to accused
> A. Facts read to accused as stipulated in the state outline
> Q. Accused person do you understand the facts read out to you
> A. Do, Yes

Q. Do you admit
A. I admit the money was sent to my Eco cash .....
Verdict of guilty entered 01.01.18"

The above exchanges were followed by mitigation and the case postponed to 3.10.18. The complainant was called to give evidence on whether there had been repayment made because He testified that only $185 was repaid. The complainant was not subjected to any cross examination. The trial magistrate then determined as follows:

> "Accused person you have failed to prove to the court that you have already discharged part of the debt and the court will therefore stick to its judgment as it has not been convinced of what you said."

After mitigation the trial magistrate again expressed reservations that the matter was civil. The prosecutor responded that the matter was criminal. On 3 October, 2018, a ruling was given as follows:

> "Ruling
> Reasons
> After careful consideration of how the charge sheet and state outline were drafted and taking into account the explanation given by the accused, that he had an agreement with the complainant to give him $300 ecocash and that it would be returned, the court is of the view that this matter is in relation to a contract which went wrong or not as expected.
> However, since the accused has already pleaded guilty, the court will still find the accused guilty as charged.
> Verdict – guilty

Sentence

> Discharge and warn the accused to never do the same offence again otherwise the court will be left with no choice but to arrest the accused. The accused is also ordered to make restitution to the complainant in the sum of $300 through the clerk of court Bindura on or before 20 October, 2018. The reason for the discharge being that the offence charged with does not constitute a criminal offence but is a civil claim."

The irregularities in the proceedings if one can call them such are just too numerous to itemize. This is an example of a sham trial where trial procedures were ignored or the trial magistrate was just ignorant of them. I have already indicated that the charge which the accused was asked to plead to is not clear. There was a clear disregard of following the procedure for dealing with pleas under s 271 (2) (b) of the Criminal Procedure and Evidence Act. The trial magistrate purported to found the guilt of the accused on the basis that the accused had offered a guilty plea whist on the other hand determining that the matter was civil and not criminal. The record of proceedings clearly evidence a sham trial. I sought the views of my brother CHINAMORA J on what he made of the record of proceedings and we were unanimously agreed that the proceedings are so irregular that no other order other than to quash the proceedings would be appropriate. There was a clear miscarriage and failure of justice. If this the level of

ignorance of procedure by the trial magistrate is anything to go by, then he or she is a threat to the integrity of the criminal justice system. The magistrate needs to be monitored trained and properly appraised or evaluated on whether he or she is capable of discharging the duties of magistrate.

The following order is therefore made:

i. The proceedings in case no. BNP 1885/18 are not certifiable as being in accordance with real and substantial.
ii. In terms of the powers granted to this court on review of criminal proceedings by section 29 (2) (b) (i) the conviction and sentence in case no. BNP 1885/18 are quashed.
iii. A copy of this review judgment is to be forwarded to the Chief Magistrate to take remedial measures to ensure that the trial magistrate is properly groomed to discharge criminal trial jurisdiction.

CHINAMORA J agrees:…….