THE STATE

Versus

GREATJOYNDLOVU

IN THE HIGH COURT OF ZIMBABWE
MUTEMA J
BULAWAYO,5 JUNE, 2014

Review Judgment

MUTEMA J: The accused Greatjoy Ndlovu was arraigned before the resident magistrate at Victoria Falls facing one count of criminal trespass in contravention of section 132 (1) and theft in contravention of section 113 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It would, however, seem that contrary to the meaning of his first name, the accused did not get joy, let alone great joy out of his court appearance.

The terse facts are that the accused, under cover of darkness, trespassed into the complainant's yard and stole a bicycle parked therein. His criminal joy was short-lived when he was arrested the following day when the astute potential buyer took both the cycle and the accused to the police station to have the cycle cleared.

The accused pleaded guilty to both counts and was duly convicted. Nothing turns on the conviction. He was sentenced as follows:

> "Count 1 and 2 taken as one for sentence: 7 months imprisonment. The 6 months suspended on CRB VF 96/12 remain suspended for 4 years on condition accused does not within that period commit any offence involving dishonesty as an element (*sic*) upon conviction he is sentenced to imprisonment without the option of a fine."

I raised the following query with the trial magistrate:

> "For criminal trespass and theft the trial magistrate took both counts as one and sentenced the accused to 7 months imprisonment. However, section 132 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] provides a maximum imprisonment term of 6 months for criminal trespass. Did the trial magistrate not over sentence the accused in respect of that offence?

The accused had a previous conviction whose sentence had been suspended for a period on condition of good conduct. He breached the condition of the suspension by committing the current theft offence. He admitted the previous conviction. The trial magistrate further suspended the sentence relating to that previous conviction for 4 years on condition of good behaviour. Previously the sentence had been suspended on 27 February, 2012 for 5 years. On 30 September, 2013 the trial magistrate further suspended the 6 months for 4 years on the same conditions as imposed previously. If the 5 year period of suspension ran from 27 February, 2012, it will end on 27 February, 2017 and if the same suspended 6 months was further suspended by the trial magistrate for 4 years on 30 September, 2013, the four years will end on 30 September, 2017 – some 7 months after the 27 February, 2017 originally scheduled to end. Does this not prejudice the accused? Was it really necessary for the trial magistrate to calculate and pronounce that the 6 months suspended sentence is further suspended for 4 years …? Is the norm not simply to say that the suspended sentence of 6 months imposed on accused in CRB VF 96/12 is further suspended on the same conditions?

In any event, before she further suspended that sentence did the trial magistrate ask the accused to show cause why that sentence should be further suspended in terms of section 358 (5) and (7) of the Criminal Procedure and Evidence Act, [Chapter 9:07]?

Could I have the trial magistrate's comments."

The trial magistrate's response was this:

"May the following comments be placed before the Honourable Reviewing Judge with the following comments:-

Indeed note that S 132 (i) of the criminal law (Codification and Reform) Act chapter 9:23 provides a maximum imprisonment term of 6 months for criminal trespass. At the time of sentencing, I was looking at the offence combined, instead of looking at the individual maximum sentence provision. I truly stand guided.

I would also add that, despite that oversight, in my humble view the sentence of seven (7) months for the two (2) counts, would still be justified. I stand guided on that by the learned judge.

Concerning the further suspension after going through the esteemed judges calculations, I agree that the suspended term would be lengthened by seven (7) months. When I suspended it, my concern was just to address the issue of suspension so that the accused would have a suspended term keeping him check since the previous conviction had been produced. I should have taken this into account. It is unfortunate that it lengthened the suspension.

Concerning S 358 (5) and (7), it is true that accused should have been given a chance to show cause why that sentence should be further suspended. That was a regrettable oversight on my part.

In summary the esteemed judge's letter has been a learning curve for me, with the result that I will endeavor not to make such errors again.

These are my comments, humbly submitted."

It is noted with some disquiet that it has become a common error by some trial magistrates of treating counts as one for sentence purposes and proceed to over-sentence in respect of one of the counts. Logic and simple statutory interpretation demand that where multiple dissimilar counts are taken as one for sentence, the apex of the sentence so imposed is necessarily limited to the maximum of the least statutory limit of one of those counts. Anything above that least statutory limit amounts to over-sentencing in respect of the offence with the least maximum sentence. Trial magistrates are accordingly urged to always bear this in mind whenever they decide to adopt that course of sentencing.

Regarding the previous conviction which was admitted though its certificate was not made part of the record of proceedings, the provisions of section 358 (5) and (7) of the Criminal Procedure and Evidence Act [Chapter 9:07] are clear but some trial magistrates still overlook the aspect of inviting the accused to show cause why the suspended sentence should not be brought into operation.

Lastly the trial magistrate *in casu* had no business in altering the period of the previously suspended sentence by effecting her own calculations thereby prejudicing the accused by seven months.

The accused person was 19 years old at the time. He pleaded guilty to both counts and the bicycle was recovered. Apparently as can be gleaned from exhibit 1 – the medical report – he was severely assaulted by the police to the extent of sustaining a conjuctival haematoma in the left eye, a black spot around the left eye and was complaining of dysuria (painful urination). It is not stated why the police assaulted him and the issue was not explored to its logical conclusion.

Although there exists some aggravation, *viz* that cycle theft is prevalent and that the offences were committed in the dead of night, it would not be in the interest of justice at this stage after finishing serving his sentence to direct that he be recalled to show cause why the previously suspended sentence should not be brought into operation. Probably the trial magistrate eschewed bringing it into operation on account of the brutal assault perpetrated upon him by the police.

The fair and just course of action to take here is to correct the over-sentencing alluded to *supra* as well as the period for which the previously suspended sentence was further suspended. In the result, the sentence imposed by the trial magistrate is set aside and is

substituted with one of: both counts are taken as one for sentence and accused is sentenced to 6 months imprisonment. The previously suspended sentence imposed upon the accused in CRB VF 96/12 is further suspended on the same conditions. With those amendments the proceedings are otherwise confirmed.

Takuva J concurs …….