THE STATE
versus
OWEN MPALA

HIGH COURT OF ZIMBABWE
MAKONESE J
HARARE, 10 November 2011

**Criminal Review**

MAKONESE J: This matter comes before me for review from the magistrate's court, Chegutu. The accused was charged and convicted on his own plea of guilty on a charge of contravening s 185(1)(a) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] that is, escaping from lawful custody. He was sentenced to two years imprisonment.

The brief facts as outlined in the record of proceedings are that the accused is aged 39 years. He was arrested on allegations of rape and on 22 September 2011 he was taken to the Chegutu magistrate's court for a court appearance presumably for an initial remand. The accused was then placed in a fence enclosure used as holding cells. He had his hands handcuffed to another suspect, Amos Moses Banda who was also waiting to appear in court.

The accused unlocked the handcuffs using some unknown object and managed to free himself before climbing over the fence and escaping. Amos Moses Banda alerted the police who immediately launched a man hunt for the accused person. The accused was later arrested by a member of the public just behind Hartley 1 Primary School. Accused was later rearrested by police officers and taken into police custody.

Nothing turns on the conviction in this matter which I consider to be proper. It is the sentence which appears to be inappropriate.

In his reasons for sentence the learned magistrate had this to say:-

> "His (accused's) conduct was highly deplorable. He was brought to court facing a serious offence and whilst on that charge he was not yet proved guilty, his escape is highly aggravating. He deserves a custodial sentence. His plea of guilty to the charge cannot be taken as mitigatory since it is an undeniable offence"

The learned magistrate went on to state that due to the high degree of his moral blameworthiness the maximum permissible sentence of two years was appropriate.

It is clear that the learned magistrate erred and misdirected himself when he held that a plea of guilty is not a mitigating factor. By disregarding the fact that the accused had pleaded guilty the magistrate fell into error.

The learned magistrate placed undue weight on the seriousness of the case and did not pay any attention to the specific provisions of the Act which recognise the fact that where no weapon or violence is used in the escape from lawful custody then the sentence ought to be lenient.

I am of the view that a sentence of two years imprisonment is not in accordance with real and substantial justice. The fact that the accused was a first offender who pleaded guilty ought to have been treated in his favour. The sentence of two years imprisonment was excessive in all the circumstances of the case. It is necessary to refer to the provisions of s 185(1)(a) of the Criminal Law (Codification and Reform) Act which provide as follows-

> "(1) Any person who, having been lawfully arrested and held in lawful custody and –
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> (a) not having been lodged in any prison;
> or
> (b) lodged in prison;
>
> escapes or attempts to escape from such custody, shall be guilty of escaping from lawful custody and liable –
>
> (i) if the crime was committed in any of aggravating circumstances described in subs (4).
>
> A. to a fine not exceeding level eleven or imprisonment for a period not exceeding seven years or both, where the person had not yet been lodged in prison
>
> B. to imprisonment not exceeding ten years where the person had been lodged in any prison".

It must be observed here that subs (4) of s 185 provides as follows:-

> "(4) It shall be an aggravating circumstance if any weapon or violence was used by a person charged with escaping from lawful custody".

It is clear that the law provides for stiffer sentences where a weapon or violence is used in the escape from lawful custody. In this case the brief record of proceedings shows that no weapon was used and there was no violence employed in the escape. In this regard the

aggravating circumstances as envisaged by subs (4) do not exist. The learned magistrate fell into error in holding that the escape "was highly aggravating" without any supporting evidence. This again was a serious misdirection on the part of the learned magistrate and this court is therefore at large with regards the sentence.

I have examined decided cases and note that a custodial sentence is appropriate. In the case of *State v Kerias Mukonze* HH 51/93 ROBSIEN J observed as follows:-

> "The offence of escaping from lawful custody is created by s 48(1) of the Criminal Procedure and Evidence Act [*Cap: 59*] which also prescribes the penalty. The penalty prescribed is a fine not exceeding $200 or imprisonment not exceeding 2 years. The disparity between the two maximum penalties is so great that the courts in fact are given little option as to the type of punishment it can impose. A fine not exceeding $200 would be appropriate for only the most trivial contravention of s 48(1). Any more serious contravention could only be visited by a sentence of imprisonment".

The brief facts in the above case were that the accused pleaded guilty to a charge of contravening s 48(1) of the Criminal Procedure and Evidence Act and was convicted. The accused had been charged with stock theft and taken to Inyanga where he escaped from police custody and was apprehended the following day. The magistrate sentenced him to 12 months imprisonment with labour of which 3 months imprisonment was suspended on the usual conditions.

On review, ROBINSON J set aside the sentence and substituted it with the following:-

6 months imprisonment with labour was suspended for 5 years on the usual conditions.

In another case of *State v Mathias Nyakubva* HC –H/17/87 the accused was arrested at a night club by security guards and taken to the Police Mobile Centre. A vehicle came and collected him to convey him to Glen Norah Police Station. On the way the vehicle stopped at a give-way sign and the accused jumped out and escaped even though he was being guarded by a constable. He was convicted of contravening s 48(1) of the Criminal Procedure and Evidence Act [*Cap: 59*] and sentenced to three months imprisonment. The sentence was confirmed on review.

In the circumstances of the present case I am of the view that a custodial sentence is appropriate. I however consider the sentence of two years imprisonment to be excessive and harsh. I would set aside and substitute the sentence imposed by the magistrate as follows:-

(a) Accused is sentenced to 12 months imprisonment of which 6 months is suspended for 5 years on the usual conditions.

ZIMBA-DUBE J: agrees ……..