STATE
versus
1. ACCIDENT MASHUMBA
and
2. ABIGAIL TARUONA
and
3. FIONA DHLODHLO
and
4. ELTON MASAWI
and
5. NOMATTER NYAMURARA
and
6. LONELY MARIZANI
and
7. GIBSON NDIDZO
and
8. DARLINGTON SAKARE
and
9.TENDAI KATSANDE

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 10 May 2018

Criminal Review

CHATUKUTA J: The above records of proceedings were placed before me on automatic review. I caused the trial magistrate to have the records in the first five matters transcribed because the magistrate's handwriting is illegible. The records have been typed. Subsequent records under consideration were sent on review and this time with the proceedings having been typed. I have dealt with all these matters under one judgment as they were dealt with by the same trial magistrate and raise similar fundamental issues.

1. Accident Mashumba CRB CHTP 3043

The accused was convicted of contravening section 157 of the Criminal Law Code. He was found in possession of dagga weighing 0.001 grams.

The accused submitted in mitigation that he was 25 years old single with no children. He was a vendor earning between $10 and $15 per day. The trial magistrate's handwritten reasons for sentence have three paragraphs. In the last paragraph the trial magistrate stated that the accused was a family man with children. There is some reference to "the family will suffer". There are also three paragraphs to the typed reasons. In the second paragraph, the trial magistrate notes that the accused is single. At the end of the paragraph, he refers to *S* v *Katsaura* 1997 (2) ZLR 102 (H) which case is not referred to in the hand written reasons. He concludes that after considering the mitigating factors, the accused person's moral blameworthiness is very high.

The mitigating factors are the standard personal circumstances of the accused which are his age, marital status, means of living and assets.

2. Abigail Taruona CRB CHTP 3025/17

Accused was convicted of contravening s 3(1) (a) as read with section 4 (1) of the Domestic Violence Act [*Chapter 5:16*]. She assaulted her niece with fists and is said to have pulled out her hair. A medical report was produced which stated that complainant sustained soft tissue injuries on the right finger with mild swelling. The force used was minor. The injuries were not serious and there was no possibility of permanent disability. There was however no mention of any injuries on the head.

The accused submitted in mitigation that she was aged 33 years old, married with four children. She was a vendor with no savings or assets. The typed reasons for sentence are at variance with the handwritten reasons. There is no reference to her age in the handwritten reasons while in the second paragraph of the typed reasons there is mention of her age. The third paragraphs are different with more detail in the typed reasons. The second sentence to

the third paragraph of the typed reasons is incomplete. It reads: "Looking at her being a female offender her moral blameworthiness is very high because." It is not clear why being a female offender should be a basis for concluding that her moral blameworthiness is high. The trial magistrate also concluded that the accused's mitigating factors disclosed that her moral blameworthiness was high.

As in the first case, the mitigating factors are the accused's personal circumstances.

3. Fiona Dhlodhlo CRB HRE P9293/17

The accused was convicted of contravening section 89 (1) of the Criminal Law Code. She assaulted her aunt with open hands and fists several times on the face and struck her with a stone on the leg. A medical report was produced which revealed that the complainant required a tooth to be extracted. Injuries were moderate and there was likelihood of permanent injury.

The accused stated in mitigation that she was 24 years old, single and self-employed. In the last paragraph of the typed reasons for sentence, the accused is said to be a family man with children. There appears to be no mention of the accused's marital status in the handwritten reasons for sentence. The accused is a female offender and single. She therefore cannot be a "family man".

4. Elton Masawi CRB CHTP 3036/17

Accused was convicted of contravening section 89 (1) of the code. He hit the complainant with a fist once on the mouth and struck him with a ½ brick on the right hand. No medical affidavit was produced. The extent of the complainant's injuries and the force used is therefore not known.

The accused was 26 years old, single with no children, unemployed and with no assets or savings. In the last paragraph of the handwritten reasons for sentence, the accused is said to be a family man with children. There is mention of his family suffering. However the

typed reasons capture the mitigating factors and more particularly that the accused is single with no family. The trial magistrate concluded that the accused's moral blameworthiness was very high. There is no indication why the moral blameworthiness was said to be high given the nature of the assault and the fact that the complainant was not medically examined and no evidence was led as to the extent of the complainant's injuries.

5. Nomatter Nyamuraga CRB P9083/17

The accused was convicted of contravening section 89 (1) of the Code. He head-butted the complainant. No medical report was produced and there is no indication whether or not the complainant was medically examined. However, it was stated in the Outline of the State Case that the complainant sustained a deep cut on the left eye. The accused was 18 years old and a student. The handwritten reasons for sentence appear to have been properly transcribed.

6. **Lonely Marizani CRB CHTP 1245/18**

Accused was convicted of contravening section 113 (1) of the Code. He stole 2 blankets from a durawall when they were hanging to dry. The blankets were valued at $25 and both were recovered.

Accused was 25years of age. He had one child and separated from the wife. The handwritten and the typed reasons for sentence appear not to tally. It is indicated in the typed reasons that the trial magistrate concluded from the mitigating factors that the accused's moral blameworthiness was very high. Again as in the preceding cases, the mitigating factors are just the accused's personal circumstances.

7. Gibson Nhidzo CRB CHTP 1376/18

Accused was convicted of contravening section 89 (1) of the Code. He was sentenced to 16 months imprisonment of which 8 months were suspended on condition of future good

behaviour. The remaining 8 months were suspended on condition the accused performed community service.

The agreed facts were that the complainant and the accused resided at the same address. They had an altercation which resulted in the accused striking the complainant on the leg once with a stone. The complainant, who was 32 years old sustained bruises on the leg. She however, did not seek treatment.

The accused was 61 years old, married with 6 children. He did not have any valuable assets or savings. The handwritten reasons and the typed reasons do not tally at all. There appear to be only twenty nine words in the handwritten reasons. There are three detailed paragraphs and a one sentence fourth paragraph of the typed reasons for sentence.

The degree of force and the seriousness of the injury are not known. The state did not lead any evidence as to the size of the stone used and the extent of the injury other than just to mention in the Outline of the State Case that the complainant sustained bruises. There is no explanation on record why she did not receive medical attention.

The trial magistrate again concluded from the mitigating factors that the accused persons moral blameworthiness was very high. The mitigation is very simple and refers to the accused's personal mitigating factors.

8. Darlington Sakare CRB NO. CRB CHTP 29/18

Accused was convicted of contravening s 3 (1) (a) as read with s 4 (1) of the Domestic Violence Act [*Chapter 5:16*]. He assaulted his brother-in-law with a clenched fist. The brother-in-law lost two teeth as a result of the assault.

According to the mitigation, the accused was 22 years old, married with one child. He was self-employed realizing $40 per month. He did not have any savings or valuable assets. He was sentenced to 18 months imprisonment of which 6 months were suspended for a period of 5 years on condition of future good behavior. In the reasons for sentence, the trial magistrate observed that community service would be appropriate under the circumstance.

However no portion of the sentence was suspended on condition that the accused performed community service.

I queried the inconsistency between the reasons for sentence and the actual sentence endorsed on the back of the indictment. The trial magistrate conceded to the inconsistency. He commented as follows:

> "The accused was sentenced effective 12 months imprisonment (*sic*). I have corrected the anomaly and the court will guard against such grave mistake in future."

It is however not clear how the trial magistrate corrected the anomaly. What appears to have happened is that he retained the sentence as originally stated at the back of the indictment and decided to disregard his earlier position in the handwritten reasons for sentence that community service was warranted under the circumstances.

In addition to the above observations, the typed reasons are different from the handwritten reasons. The typed reasons have four paragraphs whilst the handwritten reasons have 3 paragraphs only. Whilst the handwriting is illegible, one can easily decipher "23 yrs of age" in the third line of the first paragraph of the reasons for sentence. (It is not clear where the trial magistrate got the 23 years from when age is stated as 22 years in the mitigation. Second paragraph of the handwritten reasons begins with "Accused….assaulted 3 persons on …." The written reasons begin with "Accused pleaded guilty." The last paragraph of the handwritten reasons begins with what appears to be: "It's aggravating that the complainant lost two teeth." The third paragraph of the typed reasons begins with "The accused committed an act of domestic violence…"

9. Tendai Katsande CRB HRE P 8966/17

Accused was convicted of contravening section 132 (1) of the Code. He was found at Acturus Quarry Stone Mine, Caledonia Harare at around 1:45 am. According to the facts, he could not explain his presence at the mine at that odd hour.

He was a single 23 year old, unemployed with no assets. The handwritten reasons for sentence are also different from the typed reasons. Whilst they appear to be substantially the same, in para 3 of the handwritten reasons, the age of the accused is mentioned. This is not the case in the typed reasons.

Analysis of the matters

Nothing turns on the convictions in all the cases. The convictions were proper and are accordingly confirmed. In addition to the observations made on each matter, there are however issues which are common to almost all the matters. The first issue relates to the differences between the handwritten and the typed reasons. The second issue relates to the injudicious exercise of the sentencing discretion of the trial magistrate.

Differences between the handwritten and the typed reasons

As indicated earlier, I directed that the first five records be transcribed. The records were returned with what I initially assumed were the transcripts. Upon perusal of the typed documents I realized that the contents were not the same as the handwritten reasons. I have therefore intentionally referred to the contents as typed reasons instead of transcripts.

I specifically requested for the records to be transcribed because a magistrate court is a court of record. (See s 5 (1) of the Magistrates Court Act [*Chapter 7:10*]). The court is therefore required to maintain a comprehensive record of proceedings. Failure to do so amounts to gross irregularity. This was aptly expressed by GUBBAY CJ in *S* v *Davy* 1988 (1) ZLR 386 (S) at 393 where he had this to say-

> "Before concluding on this aspect, I wish to sound a note of warning to judicial officers who find themselves presiding at a trial in which the facility of a mechanical recorder is not available. It is their duty to write down completely, clearly and accurately, everything that is said and happens before them which can be of any relevance to the merits of the case. They must ensure that they do not record the evidence in a way which is meaningless or confusing or does not give the real sense of what the witness says. They must remove obscurities of language or meaning whenever possible by asking questions. This is because the record kept

> by them is the only reliable source of ascertaining what took place and what was said and from which it can be determined whether justice was done. See *R* v *Sikumba* 1955 (3) SA 125 (E) at 128E-F; S v K 1974 (3) SA 857 (C) at 858H. A failure to comply with this essential function, where the deficiencies in the transcript are shown to be substantial and material, will constitute a gross irregularity necessitating the quashing of the conviction."

The rationale for maintaining an accurate record is further articulated by John Reid Rowland in his book *Criminal Procedure In Zimbabwe*, and cited with approval in *The State* v *Charles Mutero & Another* & 27 Ors HH 424/12. At p16-39-40 the author observed that:

> "A full and comprehensive record should be kept of the trial. A failure to do so amounts to gross irregularity. The need for a full and comprehensive record is obvious: without one, **how could any review or appellate tribunal assess the correctness of proceedings placed before it**?----------.
> Where there is no mechanical recorder or shorthand writer available, presiding judicial officers have a duty to write down completely, clearly and accurately everything that is said and happens before them which can be of any relevance to the merits of the case. They must ensure that they do not record the evidence in a way which is meaningless or confusing or which does not give the real sense of what the wittiness says—." (own emphasis).

This is the quagmire this court has found itself in. The correctness of the proceedings is questionable and the possibility that the accused were prejudiced by the sentences that were meted out becomes apparent.

As evidenced in case of *State* v *Darlington Sakare***,** (which is under review in this matter) the court in its handwritten reasons indicated that the accused was entitled to community service yet the sentence did not include the condition of community service. It is assumed that what the accused heard during sentencing is reflected in the handwritten reasons for sentence. As the sentence was being read out he must have waited with bated breath for the suspension of a portion if not the entire sentence on condition he performed community service. He therefore, after pronouncement that he deserved to undergo community service, had a vested interest in that sentence. He instead was sentenced to an effective term of imprisonment.

In fact community service would have been appropriate under the circumstances. The accused was 22 years old (as opposed to 23 years) which appears in the handwritten reasons for sentence). He therefore was a youthful offender. He had pleaded guilty and therefore did not waste the court's time. He was a first offender. The accused did not use a weapon to assault the complainant. All these factors are certainly highly mitigatory.

The trial magistrate in his new reasons for sentence after what he termed a correction of his error did not explain why he decided to abandon community service.

The sentence imposed was clearly harsh and induces a sense of shock and cannot be allowed to stand. The accused was sentenced on 3 January 2018 and is expected to be released in September 2018 if he were to receive one third remission. An inquiry with the Prisons and Correctional Services has disclosed that the accused may still be in custody. He has therefore been unduly prejudiced.

What is of even greater concern to this court in all the above matters under review is that the trial magistrate tampered with the records of proceedings in beefing up his handwritten reasons. A magistrate does not in my view enjoy the luxury of writing one thing in court only to make elaborations in the comfort of his office. To do so amounts to tampering with the record of proceedings. It is trite that it is not proper for a trial magistrate to tamper with a record of proceedings and such tampering amounts to gross misdirection. In *S* v *Mukadziwashe* 1984 (1) ZLR 254, WADDINGTON J observed at 256 B-D

> "It is most important for magistrates to remember, when conducting a criminal trial, or a civil trial for that matter, that the record of the proceedings should not be altered, especially after the proceedings have been concluded. Appeal courts and reviewing judges must be able to enjoy complete confidence in the accuracy of the records which are placed before them. If a mistake concerning an important particular is made on the record by a magistrate *per incuriam*, the magistrate should make a note on the record as to the nature of the mistake and explain how the record ought to read."

The conduct of the trial magistrate resulted in distorted reasons for sentence. The difference between what the accused were told in court and what was then typed later is

apparent from the inconsistencies between the handwritten reasons and the typed reasons. The accused persons would obviously be prejudiced by such disparity.

Sentencing discretion of the trial magistrate

This court can only interfere with the sentencing discretion of the lower court where some miscarriage of justice is occasioned by the injudicious exercise of that discretion. (See *S* v *Nhumwa* SC 40/88 and *S* v *de Jager and Anor* 1965 (2) SA 616 AD at 628). Some of the considerations that a superior court takes into account in determining whether the trial magistrate has acted injudiciously is where the court does not give adequate reasons to justify its decision, has not taken into consideration the particular facts of each case and the circumstances of each accused, and has resorted to rigorous form of punishment where a less rigorous punishment is provided for. (See *S* v *Sparks* 1972 (3) SA 396, *S* v *Mugwenhe & Anor* 1991 (2) ZLR 66, S v Mpofu 1985 (2) ZLR 285 1997 (1) ZLR 487*S* v *Antonio & Ors* 1998 (2) ZLR 64 (HC) and *S* v *Shariwa* 2003 (1) ZLR 314

Failure to consider all these factors and many more would result in the imposition of an unwarranted and excessively harsh sentence.

In all the cases under consideration, except for *S* v *Gibson Nhidzo* and *S* v *Darlington Sakare***,** all the accused were sentenced to 14 months imprisonment of which 7 months were suspended on condition of future good behaviour with the remaining 7 months being suspended on condition the accused performed 245 hours of community service. An accused found in possession of 0.001grams of dagga (*S* v *Accident Mashamba*) was given the same sentence as an 18 year old accused who head butted another only once (*S* v *Nomatter Nyamuraga*), a female offender who assaulted relatives with fists several times (*S* v *Abibail Taruona* and *S* v *Fiona Dhlodhlo*) and an accused who was found trespassing on a mine (*S* v *Tendai Katsande*).

The sentences imposed on the accused persons are difficult to justify. The trial magistrate adopted a one size fits all sentence irrespective of the circumstances of the offence and the personal circumstances of each accused. The cases all fell under different sections of

the Criminal Code yet attracted the same overall sentence of 14 months. It is not clear what was so magical about 14 months that it would be applied in all the cases irrespective of the circumstances of each case and the personal circumstances of each accused and why the trial magistrate resorted to rigorous forms of punishment where a fine would have met the justice of each case. Put simply, the trial magistrate did not explain his preference of a custodial sentence.

It appears that the trial magistrate considered that suspending a portion of the sentence on condition of performance of community service was adequate discharge of his discrection. He clearly seems to have lost sight of the fact that while community service is intended to keep an accused from prison it nonetheless can be an exacting sentence particularly where it is not warranted in the first place.

In all the above cases, the trial magistrate did not give due regard to the mitigating factors of the accused. All the accused were unrepresented, pleaded guilty and were youthful first offenders or relatively youthful except for Gibson Nhidzo. In fact, Gibson Nhidzo would equally have been entitled to leniency by virtue of his advanced age of 61 years and the fact that he had an unblemished record all his 61 years. The mitigating factors in all the cases outweighed any aggravating factors which the trial magistrate would have found.

In addition to the magical 14 months' imprisonment sentence, what is also striking is the trial magistrate's statement in almost all the matters that: "Looking at the mitigating factors accused person's moral blameworthiness is very high". The trial magistrate did not explain why the mitigating factors heightened the accused persons' moral blameworthiness. What heighten the moral blameworthiness of an accused are not the mitigating factors but the aggravating factors. The statement by the magistrate is a clear indicator that he did not address his mind properly to the mitigating factors, if at all.

A disregard of the sentencing considerations alluded to resulted in the trial magistrate imposing an incompetent sentence in the case of *S* v *Tendai Katsande*. He did not have regard to the penalty provision for contravening s 132 of the Code. A contravening of s 132 (1)

attracts a level 5 fine or imprisonment for a period not exceeding 6 months. The magistrate sentenced the accused to 14 months' imprisonment which is incompetent.

It is unfortunate that all the accused sentenced to perform community service have completed performing their sentences by now. However, they have hanging over their heads unwarranted sentences. It is in the interest of justice that the sentences be set aside and substituted with the following:

1. S v ACCIDENT MASHUMBA
2. S v ABIGAIL TARUONA
3. S v FIONA DHLODHLO
4. S v ELTON MASAWI
5. S v NOMATTER NYAMURARA
6. S v LONELY MARIZANI

   "7 months imprisonment wholly suspended on condition that the accused performs 245 hours of community service."

7. S v GIBSON NHIDZO

   "8 months imprisonment wholly suspended on condition the accused performs 245 hours of community service."

8. S v TENDAI KATSANDE

   " 6 months imprisonment suspended on condition the accused performs 211 hours of community service."

9. S v DARLINGTON

   "5 months imprisonment."

Darlington Sakare was sentenced on 3 January 2018 and is expected to be released in September 2018 if he were to receive one third remission. The accused is entitled to immediate release. I have therefore caused the issuance of a warrant for his immediate release.

CHATUKUTA J:……..

MUSAKWA J agrees…….