THE STATE

versus

WELLINGTON MAHWAMURE

And

PRINCE DUBE

HIGH COURT OF ZIMBABWE
MAWADZE J, MASVINGO, 6 FEBRUARY 2018

Criminal Review

MAWADZE J: The challenge in this matter is how to rectify the incompetent sentence imposed by the learned Provincial Magistrate following the wrong procedure adopted in respect of count 2. One would have thought that the experienced learned Provincial Magistrate would not make such elementary mistakes.

Both accused persons were convicted on their own pleas of guilt in both counts by the learned Provincial Magistrate. In count 1 the charge relates to unlawful entry into premises as defined in Section 131(1) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*]. Count 2 relates to theft as defined in s 113(1) of the same Act. I mention in passing that in order to avoid such errors both accused should have simply been charged with the offence of unlawful entry into premises in aggravating circumstances as defined in Section 131 (1) as read with s 131(2) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*].

The agreed facts are that on 20 December 2017 at about 0300 hrs both accused persons proceeded to Timmy Bar in Mushayabvudzi, Mvuma owned by Wellington Tsambayo after the bar was closed. They both climbed on to the roof and pulled up an asbestos sheet which was not nailed on both sides. Accused 1 then entered the bar through the roof as accused 2 stood guard. They proceeded to steal cash $36.00, 4 quarts of black label beer, 4 pints of

Zambezi beer and 2 x 20 packets of Madison all valued at $40.40. After their arrest property valued at $30.40 was recovered. The actual prejudice is property valued at a paltry $10.00.

Accused 1 is a repeat offender. He has two previous convictions. The first relates to theft for which he was sentenced on 5 October 2015 to receive moderate correction of 4 strokes with a rattan cane. In addition, 10 months imprisonment were suspended for 5 years on the usual conditions. Accused 1 was back in court on 30 June 2016 facing two counts, one of unlawful entry into premises and the other of theft. Both counts were treated as one and he was sentenced to 6 months imprisonment. In addition, the 10 months imprisonment conditionally suspended on 5 October 2015 were brought into effect. This means that this current conviction is the third one for accused 1 who is 18 years old.

Accused 2 who is 33 years old is a first offender.

As regards sentence both counts *in casu* were treated as one for purposes of sentence and each accused was sentenced to 18 months imprisonment. In respect of accused 1 5 days were suspended on condition accused 1 paid restitution to the complainant in the sum of $5. As regards accused 2 who is a first offender 6 months imprisonment were suspended for 5 years on the usual conditions of good behaviour and a further 5 days on condition of restitution to the complainant.

In relation to the order for restitution I enquired from the learned Provincial Magistrate if it was really necessary and prudent to order restitution of a mere $5?

The response by the learned Magistrate although robust is misplaced. Firstly, the order of restitution was not made under s 362(1) of the Criminal Procedure and Evidence Act [*Cap 9:07*] as the learned Provincial Magistrate rather boastfully states. The correct position is that the restitution was made as a condition of suspending part of the prison term as provided for in s 358(3)(b) of the Criminal Procedure and Evidence, Act [*Cap 9:07*]. This however was not the import of my query but only arises from the learned Provincial Magistrate's response.

The simple import of my query is that it is a sheer waste of time and resources to order restitution in the paltry amount of $5. My experience is that this paltry amount would be receipted by the Clerk of Court (if paid that is). Thereafter it would be banked by the court after which it would then be paid out to the complainant. Surely such a process is not worthy the

paltry amount of $5 no matter the heightened sense of justice the learned Provincial Magistrate may possess. Common sense would dictate otherwise.

The bulwark of my query however relates to the competence of the sentence imposed by the learned Provincial Magistrate in view of the procedure adopted in count 2. In relation to count 1 the trial court proceeded in terms of s 271(2)(b) of the Criminal Procedure and Evidence Act [*Cap 9:07*]. In relation to count 2 the trial court then decided to proceed in terms of s 271 (2)(a) of the Criminal Procedure and Evidence Act [*Cap 9:07*] which provides as follows;

"*271. Procedure on plea of guilty*

1. *Irrelevant*
2. *Where a person arraigned before a Magistrates Court on any charge pleads guilty to the offence charged or for any other offence of which he might be found guilty in that charge and the prosecutor accepts the plea –*
   (a) the court may, if it is of the opinion that the offence does not merit punishment of imprisonment without the option of a fine or a fine exceeding level three, convict the accused of the offence to which he has pleaded guilty and impose any competent sentence other than –
      (i) imprisonment without the option of a fine; or
      (ii) *a fine exceeding level three; or deal with the accused otherwise in accordance with the law*;"

It was improper in this case for the learned Provincial Magistrate to treat both counts as one for purposes of sentence and impose a sentence of 18 months imprisonment after having proceeded in count 2 in terms of s 271(2)(a) of the Criminal Procedure and Evidence Act, [*Cap 9:07*]. That course of action clearly falls foul of the clear provisions of s 271(2)(a) of the Criminal Procedure and Evidence Act [*Cap 9:07]* since a term of imprisonment cannot be imposed without the option of a fine and the fine should not exceed level three. The procedure adopted by the learned Provincial Magistrate in respect of count 2 and ultimately the whole sentence is therefore incurably bad and wrong at law.

This court in the exercise of its review powers may not be able to correct this anomaly despite the fact that *prima facie* the convictions in counts 1 and 2 may be in order. I say so because it is not possible in the circumstances to correct the sentence in respect of count 2. This

is informed by the fact that accused 1 is an incorrigible offender with two previous convictions who cannot be sentenced to a fine not exceeding level three in count 2. That would offend any notions of justice and would be a mockery to my sense of fairness.

It is my considered view that the best course of action to take in the circumstances would be to quash the proceedings in their entirety and allow the learned Provincial Magistrate to hear the matter *de novo* in line with the correct procedure. Further the accused persons if convicted in respect of both counts should not be sentenced to a term of imprisonment not exceeding 18 months for each of the accused persons (*which is rather too harsh anyway in view of the value of the property involved*). Further, the period the accused persons have already served should be taken into account.

Lastly, I do not believe that it is necessary and prudent to order restitution of a mere $5 for each accused person (*unless either of the accused person has already paid the $5*).

In the result, I make the following order;

1. The proceedings in respect of both counts be and are hereby quashed.
2. The convictions and sentence in respect of both accused persons in both counts are set aside.
3. A trial *de novo* be and is hereby ordered before the same learned Provincial Magistrate.

Mafusire J. agrees ……