HB 86-17
HCAR 535-17
CRB BTB R17-16

THE STATE
versus
AUSTIN MAKWINJA PHIRI

HIGH COURT OF ZIMBABAWE
MATHONSI J
BULAWAYO 6 APRIL 2017

Criminal Review

MATHONSI J: The accused person cherishes domicile in Johannesburg South Africa. He appeared before a regional magistrate in Beitbridge on 12 December 2016 facing three charges. In count one he was charged with theft of a motor vehicle in contravention of s113 (1) (a) of the Criminal Law [Codification and Reform] Act [Chapter 9:23] it being alleged that on 5 March 2016 he stole an Isuzu Double Cab motor vehicle belonging to Mohlahla Molameso Moses and later drove it to Beitbridge Zimbabwe.

In count two he was charged with smuggling in contravention of s182 of the Customs and Excise Act [Chapter 23:02]. The allegations in that count were that he had, on 5 March 2016 smuggled the Isuzu Double Cab motor vehicle through an undesignated point of entry into Zimbabwe in breach of the law. In count 3, he was charged with entering the country at a place other than a designated port of entry in contravention of s11 (1) as read with (5)(b) of the Immigration Act [Chapter 4:02] in that on 7 March 2016 he had unlawfully entered into the country through the Limpopo River at an undesignated port of entry.

The accused who was initially represented but was later left to his devises pleaded not guilty to count one and pleaded guilty to counts two and three. The matter was thereafter postponed for trial on a later date. When it resumed on 21 February 2017 the accused was no longer represented. The state withdrew the charge of theft of motor vehicle after plea stating that the complainant was no longer interested in pursuing the prosecution of the accused person in that regard. As a result, the accused was acquitted in respect of count one and convicted in counts two and three.

Upon such conviction he was sentenced to 5 years imprisonment respect of count two and 1 year imprisonment in respect of count three none of which was suspended. When the matter was placed before me for automatic review that outcome presented me with some discomfort. My source of disquiet arose from the fact that the penal provision in s182 of the Customs and Excise Act [Chapter 23:02] is first and foremost a fine not exceeding level fourteen or three times the duty paid value of the goods whichever is greater, alternatively imprisonment not exceeding 5 years or both. The penalty for contravening s11 (1) of the Immigration Act [Chapter 4:02] is again first and foremost a fine not exceeding level six or imprisonment for a period not exceeding 1 year or both.

In light of the fact that it is the sentencing policy of the courts in this jurisdiction that where a statute provides for the sentence of a fine alternatively imprisonment or both, the sentencer must give serious consideration to the imposition of a fine and leave imprisonment for bad cases or repeat offenders, the fact that in respect of both counts the court imposed the maximum imprisonment term permitted, I desired to know from the learned regional magistrate why that was so. This was also informed by the fact that in his reasons for sentence the trial magistrate had said a lot. He made reference to the seriousness of the offence, that both offences deprive the fiscus of much needed revenue, that the accused had shown a willingness to participate in economic crime and that the accused was a foreigner who came to Zimbabwe to destroy the economy. Most of those reasons were not supported by the facts of a person who had tried to drive a motor vehicle through Zimbabwe to Malawi without passing through a designated port of entry.

The reasons for sentence are remarkable not for what they say but for what they do not say. They do not say why the court settled for the maximum imprisonment terms provided in the two sections under which the accused person was charged having regard to the fact that the accused was a first offender and other relevant mitigatory factors.

The trial magistrate defended the sentences he imposed in the following terms:

> "On the smuggling charge, the court took into account that the offence involved smuggling a motor vehicle which on the facts of the case was proven stolen in South Africa. For the accused to travel all the way from South Africa to Bubi in Zimbabwe where he was arrested, he must have evaded the toll gates in that country or bribed his

> way past them. He was using Zimbabwe as a transit route intending to drive the stolen motor vehicle to Malawi his country of origin. The Dande Mine area is notorious as an illegal crossing point used by syndicates of criminals who smuggle mostly stolen cars from South Africa into Zimbabwe. For someone like the accused to know of the existence of that illegal crossing point, points to his willing participation in the crime of smuggling cars through that point. For a foreign national and even for a Zimbabwean, it was this court's view that the maximum term of imprisonment for smuggling a motor vehicle which had been reported as stolen in South Africa, was the most befitting penalty as the option to pay a fine or any other non-custodial sentence would have tended to trivialize an otherwise serious offence. Smuggling of cars through our porous border with South Africa is a syndicated crime which does not involve simple criminals but sophisticated ones. Regarding the contravention of section 11(1) of the Immigration Act [Chapter 4:02], the court considered the fact that since the offence was committed in furtherance of the smuggling of the stolen car, it was equally serious to call for the maximum term of imprisonment provided for by the legislature. This was a case of someone who was not avoiding the Border Post at Beitbridge to smuggle some few items of grocery but in order to use Zimbabwe as a transit route to drive a stolen motor vehicle to Malawi. The above aggravating factors and others cited in the reasons for sentence far outweighed the mitigation and this court settled for the sentences imposed." (The underlining is mine).

That thought process clearly betrays a misdirection. The accused person may have been punished for theft of a motor vehicle, an offence for which he was found not guilty and acquitted. Having acquitted him in respect of count one the trial magistrate did not disabuse himself of the notions that had coalesced in his mind that the accused stole a motor vehicle in South Africa, and drove it through an illegal crossing point intending to smuggle it through to Malawi. As he considered sentence he kept it in his mind that a motor vehicle was stolen with the intention of taking it to Malawi. He then unwittingly sentenced the accused for that and not the real indiscretions for which he stood before the court for sentence.

Clearly it was not proved that the motor vehicle was stolen in South Africa. So for the trial magistrate to repeatedly harp on about a stolen vehicle means that he saw aggravation where it was completely non-existent. He then concluded that the accused's moral blameworthiness was very high because the motor vehicle was "proved" stolen in South Africa. The obvious pitfall with that reasoning is that he had already acquitted the accused on the charge of theft of a motor vehicle. To then use facts for which the accused person was acquitted as aggravation is in my view a misdirection.

There is scarcely any doubt that in criminalizing smuggling the way it did, the law giver intended to protect the fiscus. For that reason it gave guidance to the sentencing court by providing for the sentence of a fine or treble the duty-paid value of the goods whichever is greater. It would therefore be logical for the trial court to have as its first port of call consideration of the imposition of a fine.

While it is true that the aggravating circumstances were weighty, it occurs to me that the facts of this case do not represent the worst case of smuggling as to warrant the imposition of the maximum penalty permissible. This is particularly so having regard to the fact that the accused is a first offender. He was not importing the motor vehicle into Zimbabwe for keeps but was transiting to another country. The court acquitted him of theft of motor vehicle and therefore this could not be treated as a stolen vehicle. In that regard the failure to suspend a portion of the sentence also makes the sentence excessive.

The accused is 50 years old. He pleaded guilty and is a first offender. Those were hard facts which confronted the trial court and not those imagined by it like saying that he wanted to destroy the economy of Zimbabwe, that he drove a stolen vehicle and that he was part of a syndicate involved in smuggling motor vehicles all of which were not established at all.

Regarding the offence of border jumping in count three, it is apparent that it is closely linked and interconnected to the smuggling. In fact evading the designated port of entry is a consequence of trying to smuggle an item. For that reason it is just one criminal transaction, his first prize having been to smuggle the motor vehicle. Nothing would be achieved by imposing the maximum sentence permitted in those circumstances. Whatever sentence is imposed for count three should run concurrently with the sentence in count two. Clearly therefore the sentences do not accord with real and substantial justice and should be interfered with

In the result, it is ordered that;

1) The conviction of the accused person in both counts two and three is hereby confirmed.

2) The sentences in counts two and three are set aside and in their place is substituted the following;

"In count 2, the accused is sentenced to 3 years imprisonment of which 1 year imprisonment is suspended for 5 years on condition he does not within that period commit any offence involving smuggling or entering the country at an undesignated port of entry for which, upon conviction, he is sentenced to imprisonment without the option of a fine. In count 3 the accused is sentenced to 6 months imprisonment. The sentence in count three to run concurrently with that in count 2."

Takuva J agrees…….