THE STATE
versus
GARIKAYI CHINYEMBA

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 17 JULY 2015

Criminal Review

MUSAKWA J: The record of proceedings was referred to the Registrar by the Provincial Magistrate, Harare with an accompanying minute in which review is sought.

On 28 June 2013 the accused person and another pleaded guilty to two counts of fraud. With both counts being treated as one for purposes of sentence each was sentenced to 26 months' imprisonment of which 6 months were suspended for 5 years on condition during that period each accused does not commit any offence of which dishonesty is an element for which he will be sentenced to imprisonment without the option of a fine. A further 12 months were suspended on condition the accused restituted to each of the complainants the sum of $3 500-00 through the clerk of court, Chitungwiza on or before 30 August 2013. The remaining 8 months imprisonment was suspended on condition that the accused completes 280 hours of community service at Seke 5 High School.

The proceedings were previously submitted for automatic review and on 17 December 2013 they were confirmed to be in accordance with real and substantial justice.

What prompted the Provincial Magistrate to resubmit the record of proceedings is that the accused person failed to pay restitution by 30 August 2013. A warrant for his arrest was issued on 18 November 2013. It is said the accused was released without paying anything. Another warrant for his arrest was issued on 15 January 2014 and again the accused did not make good his default. There are no accompanying notes to confirm what took place when the accused was released on those two occasions. This is contrary to s 5 of the Magistrates Court Act [*Chapter 7:10*] which provides that every court is a court of record. Ultimately, another warrant for his arrest was issued on 6 December 2014.

Upon the third arrest a default enquiry was conducted by the Senior Magistrate, Mr Murendo. Having not been satisfied by the explanation given, the magistrate ordered that the accused should serve the suspended sentence. Mr Murendo confirms conducting that enquiry in his minute that is part of the record of proceedings. Again, I observe that no accompanying notes appear to have been taken.

Then on 12 December 2014 another hearing was conducted before Mr Murendo. The record shows that the accused was legally represented. An affidavit deposed to by the accused's brother was tendered in which an undertaking to pay US$500-00 per month was made.

Counsel for the accused submitted that he had liaised with the prosecutor who was not opposed to the relief sought. It was further submitted that the accused had by then paid US$1 000-00, leaving a balance of US$2 500-00. The prosecutor indicated that he had no further submissions to make, as if he had previously made any submissions.

The court then ruled that after perusing the affidavit it felt that the complainant would benefit from the relief sought. The warrant of committal in default of restitution was suspended on condition the accused paid monthly instalments of US$500-00 until the whole amount had been paid in full.

The Provincial Magistrate indicates that subsequent to this *faux pas* the accused's brother never honoured his undertaking. Mr Murendo confirms reversing his earlier decision of 8 December 2014. He makes reference to s 358 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. He bases his decision on what he terms changed circumstances. By this he refers to the affidavit of the accused's brother. Further confirming that restitution had since been paid in full, Mr Murendo also invoked a review of his decision in order to determine the correctness of his interpretation of s 358.

There is no doubt that in terms of s 358 (2) a court may pass sentence in respect of any offence other than in respect of an offence specified in the eighth schedule and order the suspension of the operation of the whole or any part of the sentence for any period not exceeding five years on conditions the court may specify in the order. The condition may relate to compensation for pecuniary loss, like in this case. If, in terms of s 358 (4) the accused fulfils the conditions of suspension the suspended sentence shall not be enforced.

Then in terms of s 358 (5)-

> "Subject to section 55 of the Magistrates Court Act [*Chapter 7:10*] and of subsections (12) and (13), if a magistrate has reason to believe, whether from information on oath or otherwise, that a condition of any postponement or suspension made in terms of paragraph (*a*), (*b*) or (*c*) of subsection (2) has been contravened or that the offender has failed to pay a fine or any instalment thereof on a date fixed in terms of paragraph (*c*) of subsection (2), he may, whether before or after the expiration of the period of postponement or suspension, order the offender to be brought—
> (*a*) where the postponement or suspension was made by the High Court, before that court; or
> (*b*) where the postponement or suspension was made by a magistrates court, before a magistrates court or the High Court; for the purposes of subsection (7)."

For purposes of securing the presence of the accused the court can order that he be arrested without warrant in terms of s 358 (6). It is not in dispute that several warrants for the arrest of the accused were issued in the present case.

In terms of s 358 (7)-

> "When the offender is brought before the court in accordance with an order made in terms of subsection (5), the court may commit him to undergo the sentence which may then be or has been lawfully passed or, in its discretion, the reasons whereof shall be recorded on good cause shown by the offender—
> (*a*) grant a further postponement or suspension, as the case may be, for a further period not exceeding five years where the original postponement or suspension was in terms of paragraph (*a*) or (*b*) of subsection (2) or one year where the original suspension was in terms of paragraph (*c*) of subsection (2), subject to such conditions as might have been imposed at the time of the original postponement or suspension; or
> (*b*) in the case of a postponement or suspension in terms of paragraph (*a*) or (*b*) of subsection (2), 0refuse to pass sentence or bring the suspended sentence into operation, as the case may be."

Therefore what is plainly clear is that upon enquiry into non-fulfilment of a suspended condition, a court has discretion to pass the suspended sentence or to grant a further postponement. But it must record the reasons. I have already observed that no reasons were recorded when the accused was committed to serve the suspended sentence on 8 December 2014. The same applies to the hearings relating to the warrants of arrest issued on 18 November 2013 and 15 January 2014. The record of proceedings does not specify which magistrate presided over those proceedings and ordered the release of the accused person.

When a court makes a final order, it becomes *functus officio*. In this respect see *Feignbaum and Another* v *Germanis NO and Others* 1998 (1) ZLR 286 (HC) and *Harare Sports Club and Another* v *United Bottlers Limited* 2000 (1) ZLR 264. In criminal matters a court is *functus officio* once it finally pronounces sentence. In this respect see *S* v *Woods and Others* 1993 (2) ZLR 258 (SC) and *S* v *Kwainona and Others* 1993 (2) ZLR 354 (SC). In my view, once a magistrate decides to commit an accused person to serve a suspended sentence

or to grant a further postponement, he becomes *functus officio*. He cannot revisit his decision. In *Harare Sports Club and Another* v *United Bottlers Limited* **supra** at 267(HC) Gillespie J expressed this principle as follows:

> "There are in principle major obstacles to a court interfering with its own judgment. The first of these is the principle "functus officio". Where a court has determined a cause and given its decision then to the extent to which its function has been discharged it has no power to revisit the matter. 2 Second, and reinforcing the first, is the desideratum of finality in litigation. Third, considerations of res judicata have also entered the equation."

It is however accepted that there are certain circumstances where a court may revisit its own decision. On this score Gillespie J in *Harare Sports Club and Another* v *United Bottlers Limited* **supra** further went on to state at 267-268:

> "Despite this the common law recognises the power of the court to rescind, vary or correct its judgment. This power has traditionally been stated in extremely circumscribed terms. Hence, a party might claim restitution in interim, on the grounds of fraud or *iustus* error. In addition, certain other categories were acknowledged where a judgment could be set aside on discovery of new documents after judgment.
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> Proof of *iustus* error was said to involve proof of "a supremely just cause free of all blame whatsoever". This ground of rescission applied pre-eminently to cases of default but was also extended (questionably?) to certain idiosyncratic instances and to judgment given by consent. The perceived strictures of this common law were seen as abated by rules of court. These permit the rescission of default judgment "on good and sufficient cause";7 the rescission, variation or correction of judgments or orders for error;8 and the rescission of judgments entered in terms of a written consent for "good and sufficient cause". The rules (especially rr 56 and 63) were seen as relaxing the common law.
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> Our law, however, is not aptly a casuistic set of rules and exceptions but rather a just and logical application of principle. It is therefore not surprising, and most to be welcomed, that this rigid and brittle view of this area of the law has been reconsidered. It is now recognised that the complicated rules may be explained in principle and that the principle is by no means as intractable as was defined earlier in the last century."

In criminal matters, s 201 (2) of the Criminal Procedure and Evidence Act appears to be the only provision that empowers a court to revisit its own decision. The provision states that-

> "When by mistake a wrong judgment or sentence is delivered, the court may, before or immediately after it is recorded, amend the judgment or sentence, and it shall stand as ultimately amended."

See also *S* v *Masundulwane* 2006 (1) ZLR 294 (H).

In view of s 201 (1) cited above, it cannot be the case that when the accused was allowed to make restitution in instalments on the strength of the deposition by his brother, the

court was correcting its earlier decision to commit him to serve the suspended sentence. The correction of a decision cannot be premised on changed circumstances as Mr Murendo puts it. As further explained by Mr Murendo, he was convinced that the complainants would stand to benefit if restitution was paid. The suspension of a sentence on condition of restitution is primarily for the benefit of the accused person. He benefits in the sense of a reduced sentence if he complies with the condition of suspension. A complainant may benefit as a result but this should not be confused with an award a court may make at the instance of an injured party or the prosecutor. Such an award is made in terms of s 362 of the Criminal Procedure and Evidence Act. It is such an award that is lodged with the clerk of court or registrar for enforcement in terms of s 372 (1).

In light of these observations, the decision to allow the accused person to pay restitution after he had been committed to serve the suspended sentence amounts to a gross irregularity. In the result, that decision is set aside and in its place is substituted the following-

> "The accused is ordered to undergo 12 months' imprisonment in lieu of payment of restitution in the sum of US$3 500-00."

In the event that it is confirmed that restitution has been paid in full the accused shall not be committed to serve the sentence.

MAWADZE J :agrees…….