

THE STATE
versus
SAMUEL AGERE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 8 March, 2018

Review judgment

CHITAPI J: This record was referred to this court by the Regional Magistrate who raised queries on scrutiny of the proceedings presided over by a junior magistrate. The Regional Magistrate's minute reads as follows:

“STATE v SAMUEL AGERE CRB 120/17

May the record of proceedings be placed before a Judge of the High Court with the following comments from the scrutinizing Regional Magistrate:

1. The accused person was convicted on his own plea of guilty to contravening section 23 (1) of the Maintenance Act. He was sentenced to a monetary punishment coupled with a wholly suspended prison term on condition accused pays maintenance arrears through the Clerk of Court.
2. The monetary punishment imposed by the trial magistrate is incompetent since the Maintenance Act, section 23 (1) provides only for imprisonment not exceeding 12 months.
3. Assuming the additional sentence of 3 months imprisonment is competent, it is ambiguous. It might mean the sentence has been suspended until a certain date by which accused must have paid the arrears or it might mean the accused will be released from custody.
4. To avoid this ambiguity I believe the sentence must be worded as follows:
“3 months imprisonment which is wholly suspended on condition accused pays arrears in the sum of \$75 through the Clerk of Court on or before 14 March 2017 before 4 pm.”
5. *In casu*, the trial magistrate apart from imposing two incompetent sentences did not state the date by which arrears should have been paid. Since no warrant of committal to prison had been attached, it follows accused was released pending payment of the arrears. The question that would then arise is when will he be held to be in default?
6. The other anomaly I have noticed is that the maintenance order forming the basis of the charge was only produced after accused was convicted. In my view it must have been produced before conviction.

May we be guided accordingly by the Superior Court.”

As evident from the review minute; the queries raised by the scrutinizing Regional Magistrate relate to the propriety of the sentence which was imposed by the trial magistrate and the procedure adopted in allowing the production of the maintenance order whose default in payment was the subject of the trial, after conviction.

To place the matter in perspective, it is convenient to briefly outline the facts of the case. The accused was ordered to pay maintenance in the sum of US\$25-00 per month for his two children on 3 June, 2015 by order of the Maintenance Court sitting at Goromonzi. The accused defaulted in making payments for the months of October, November and December 2016 and accumulated arrears of \$75-00. Consequent on the default, the accused was arrested and charged for contravening s 23 (i) of the Maintenance Act, [*Chapter 5:09*]. He pleaded guilty on 22 February, 2017. He was convicted by the magistrate who dealt with the matter in terms of the procedure for disposing of guilty pleas as provided for in s 271 (2) (b) of the Criminal Procedure & Evidence Act. The procedure entails the putting of the charge to the accused. His plea is recorded. The facts supporting the charge are read to him and the court confirms that he has understood the facts and that he agrees with the facts. The court then explains and puts the essential elements of the offence to the accused and records the questions put to the accused and his answers. I have deliberately outlined the procedure for dealing with pleas because this will be relevant to addressing one of the queries raised by the Regional magistrate regarding the propriety of the procedure of producing the maintenance order forming the subject matter of the trial after conviction.

The accused was asked the following question by the magistrate in canvassing the essential elements

Q. Do you admit that on 3/6/15 you were ordered to pay \$25.00 for 2 minor children as well as paying for fees?

A. Yes.

Q. Do you admit that you wilfully defaulted?

A. I was not aware that I was in arrears as I had paid before. I thought balance had been cleared.

Q. Do you admit you acted unlawfully?

A. Yes.

Q. Do you have any right to act in the manner you did?

A. It was out of ignorance

Q. Any defence to offer?

A. No but I am looking forward to paying the amount this weekend.

The accused was duly convicted as pleaded. The prosecutor then tendered the accused's previous convictions which the accused admitted. I will list them in the order in which they were produced by consent.

- (a) Exhibit 1 Ref GMZ 25/16 – The accused was on 13 January, 2017 convicted for defaulting to pay maintenance in contravention of s 23(1) of the Maintenance Act, [Chapter 5:09]. He was sentenced to pay a fine of \$100-00 in default of payment 30 days imprisonment. In addition he was sentenced to 2 months imprisonment wholly suspended on condition the accused clears arrear maintenance of \$167 through clerk of court Goromonzi. To be released upon payment.
- (b) Exhibit 2 Ref G601/12 – The accused was on 30 October, 2012 convicted of defaulting to pay maintenance in contravention of s 23 of the Maintenance Act, [Chapter 9:23]. He was sentenced 3 months imprisonment. 2 months was suspended for 3 years on condition that within that period, he was not convicted of defaulting to pay maintenance for which upon conviction he was sentenced to imprisonment without the option of a fine. The remaining 1 month was suspended on condition that the accused pays the outstanding arrears of \$65-00 through the clerk of court at the rate of \$15-00 per month effective November, 2012 with full payment being completed by end of February, 2013.
- (c) Exhibit 3 - The court order of maintenance granted on 3 June, 2015.

It reads as follows:

“Maintenance order of 28/09/11 is hereby varied as follows:

Respondent to pay \$25-00 monthly for 2 children with effect from 30 June, 2015 until each child reach (*sic*) the age of 18 years or become self-supporting whichever occurs first. Maintenance shall be valid until varied or discharged by a competent court. In addition the respondent to pay \$52-00 begging (*sic*) of every school term as fees for both children with effect from 3rd term 2015.”

The scrutinizing regional magistrate queried that exh 3 was produced after conviction yet it is the order on which the default for which the accused was prosecuted was founded. The regional magistrate is correct in commenting on the anomaly. To the extent that the prosecutor considered it relevant to produce it, exh 3 should have been made part of the charge or the state outline as an annexure thereto. It is the court order which informs the court that there is an existing and valid order whose terms the accused breached.

The magistrate in the reasons for sentence did not treat the court order as a previous conviction. He or she only considered exh(s) 1 and 2 as relevant previous convictions. The anomaly committed by the court in allowing the production of exh 3 after conviction did not lead to a miscarriage of justice nor did it result in prejudice to the accused. The accused was charged based on the order of 3 June, 2015. The accused understood the charge which he admitted to as well as the facts read to him. I have quoted the details of the plea recording to show that the accused was aware of the charge. As a matter of procedure there is no requirement that the court order be produced especially where facts are admitted. Exhibit 3 constitutes documentary proof which is proved and produced where the accused denies the existence or validity of a court order suffering him to pay maintenance. The magistrate's attention is therefore drawn to the anomaly pointed out to for future guidance.

Exhibit 2 - was not a very relevant previous conviction because it related to a 2012 conviction wherein part of the sentence was suspended for 3 years on conditions of not defaulting to pay maintenance within the 3 years. The 3 years lapsed in 2015 or thereabouts. The accused abided the conditions of suspension. Exhibit 1 should not have been used to aggravate sentence.

Exhibit 1 - is a relevant previous conviction because the accused was convicted for defaulting payment of maintenance. He was sentenced to pay a fine of \$100-00, in default 30 days imprisonment. The sentence was incompetent. The suspended portion also suffered from the same error of uncertainty as that noted by the regional magistrate in *casu* because no date was fixed by which the arrears should have been paid to avoid serving the 2 months suspended sentence.

In *casu* the magistrates appeared to have been influenced to pass a sentence as one passed in exh 1 except for increasing the amount of the fine from \$100-00 to \$150.00 and increasing the suspended sentence from 2 months to 3 months on condition of payment of the arrears of \$75.00 through the clerk of court. The copy and paste exercise led the magistrate to impose an incompetent sentence as observed by the regional magistrate in that the Maintenance Act does not provide for the imposition of a fine against defaulters of payment of maintenance following a court order for maintenance.

Section 23 (1) (2) (3) and 4 of the Maintenance Act provides as follows in part relevant to punishment for maintenance order payment defaults;

“(1) Subject to subsection (1), any person against whom an order to which this section applies has been made who fails to make any particular payment in terms of the order shall be guilty of an offence and liable to imprisonment for a period not exceeding one year.

(2) If a person is convicted of the offence referred to in subsection (1), the court may, in addition to any penalty which it may impose, order that all payments in terms of the order, including any payments which are in arrears, shall be made through the clerk of the appropriate maintenance court of the province or district where the convicted person resides.

(3) Subject to subsection (4), a person who has been convicted or acquitted of an offence referred to in subsection (1) and who fails –

- a) Within two months after such conviction or acquittal; or
- b) If upon such conviction he was sentenced to and has undergone imprisonment, other than periodical imprisonment, within two months after his release from such imprisonment; to make payments in terms of the order shall be liable to be prosecuted again under subsection (1) and his previous conviction or acquittal shall not be a bar to his conviction on the later charge.

4) Proof that any failure which is the subject of a charge under his section was due to a lack of means and that such lack of means was not due to –

- a) Unwillingness to work; or
- b) Misconduct; or
- c) The incurring of debts or obligations which in all the circumstances of the case are unreasonable; shall be a good defence to any such charge.

Provided that, if the court finds that the person charged was able to pay a portion of any particular payment and failed to do so, such proof shall not be a defence in relation to the portion of the particular payment which the person was able to pay.”

Simply put, the punishment for failure to make payment of maintenance in terms of an order of court is imprisonment not exceeding twelve months or one year. The offence is therefore viewed by the courts as a serious one. The legislature in its wisdom did not provide for the alternative of payment of a fine or for a combination of imprisonment and a fine as with most statutory breaches. Maintenance as the name implies has to do with the upkeep of the beneficiary of the order without which such beneficiary would not be able to survive a normal life. The payment of maintenance ensures that the beneficiary’s requirements to live in terms of food and other wants are catered for. It is an order directed against the responsible person to play his or her part towards the sustenance of the beneficiary. Errant defaulters must always keep in mind that they will be sentenced to imprisonment if they default complying with a maintenance order for payment of any money required to be paid in terms of the order.

The magistrate was therefore wrong to impose the payment of a fine as punishment. The punishment of imprisonment is however invariably suspended on condition that the defaulter does not offend again. In terms of s 23 (2) the court may in addition to the sentence aforesaid make an order that the defaulter makes payment in terms of the order including arrears through the clerk of the maintenance court for the province or district where the defaulter will be resident. This ensures that the court through the clerk of court monitors and receives the payments which are then forwarded to the beneficiary of the maintenance order.

The beneficiary is thus spared the trouble of having to chase after the responsible person at every turn when payment of maintenance is due.

In practice, the court will give the defaulter a long rope to hang him or herself by suspending the imprisonment term. As observed by MATANDA-MOYO J in *S v Norman Chagomoka* HH 584/15, courts sentencing defaulters must reserve effective imprisonment for serious cases of default. I would state that serial and habitual defaulters must expect to be sentenced to effective terms of imprisonment where the default is deliberate and the defaulter has not failed to pay because of factors set out in s 23 (4) of the Maintenance Act.

The regional magistrate has suggested that the sentence be corrected as detailed in paragraph 4 of his minute. The suggested correction does not however fully embrace the provisions of s 23 (1) and (2). The order of payment of arrears must be additional to the sentence imposed in terms of s 23 (1). To correct the sentence, a slight variation will be made to what the regional magistrate has suggested. The sentence imposed on the accused is set aside and substituted as follows:

“3 months imprisonment of which 1 month imprisonment is suspended for 3 years on condition that the accused is not convicted of contravening section 23 (1) of the Maintenance Act, [*Chapter 5:09*]. The remaining 2 months is suspended on condition that the accused shall pay the maintenance arrears of \$75.00 through the clerk of court by not later than 28 February, 2018.”

The accused should be brought to court and be appraised of the altered sentence.

FOROMA J agrees.....