

THE STATE
versus
KUDAKWASHE JOE SHOKO
and
CAIN PEMBEDZA

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 15 June 2020

Criminal Review

MUSAKWA J: The record of proceedings was submitted by the scrutinizing magistrate who drew attention to some procedural irregularities in the manner in which trial was conducted, how the condition of suspension of sentence was formulated and the inadequacy of the sentence that was imposed.

Having convicted the accused persons of robbery, each was sentenced to 9 months' imprisonment of which 3 months were suspended on condition of good behavior. A further 3 months were suspended on condition of restituting \$80 by 15 December 2019.

Section 358 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides for powers of court as to suspension and postponement of sentences. The relevant provisions for purposes of the present matter provide that-

“(1) In this section—

“postponement” means the postponement of the passing of sentence under paragraph (a) of subsection (2) and includes any further postponement granted in terms of paragraph (a) of subsection (7);

“suspension” means the suspension of the operation of the whole or part of a sentence under paragraph (b) of subsection (2) or of a warrant under paragraph (c) of that subsection, and includes any further such suspension granted in terms of paragraph (a) of subsection (7).

(2) When a person is convicted by any court of any offence other than an offence specified in the Eighth

Schedule, it may—

(a) postpone for a period not exceeding five years the passing of sentence and release the offender on such conditions as the court may specify in the order; or

(b) pass sentence, but order the operation of the whole or any part of the sentence to be suspended for a period not exceeding five years on such conditions as the court may specify in the order; or

(c) pass sentence of a fine or, in default of payment, imprisonment, but suspend the issue of a warrant for committing the offender to prison in default of payment until the expiry of such period, not exceeding twelve months, as the court may fix for payment, in instalments or otherwise, of the amount of the fine, or until default has been made by the offender in payment of the fine or any such instalment, the amounts of any instalments and the dates of payment

thereof being fixed by order of the court, and the court may in respect of the suspension of the issue of the warrant impose such conditions as it may think necessary or advisable in the interests of justice; or

(d) discharge the offender with a caution or reprimand.

(3) Conditions specified in terms of paragraph (a) or (b) of subsection (1) may relate to any one or more of the following matters—

(a) **good conduct;**

(b) compensation for damage or pecuniary loss caused by the offence:

Provided that no such condition shall require compensation to be paid in respect of damage or loss that is the subject of an award of compensation in terms of Part XIX;

(c) the rendering of some specified benefit or service to any person injured or aggrieved by the offence:

Provided that no such condition shall be specified unless the person injured or aggrieved by the offence has consented thereto;

(d) the rendering of service for the benefit of the community or a section thereof;

(e) submission to instruction or treatment;

(f) submission to the supervision or control of a probation officer appointed in terms of the Children's Act [*Chapter 5:06*] or regulations made under section *three hundred and eighty-nine*, or submission to the supervision and control of any other suitable person;

(g) compulsory attendance or residence at some specified centre for a specified purpose;

(h) any other matter which the court considers it necessary or desirable to specify having regard to the interests of the offender or of any other person or of the public generally."

Whilst good conduct is one of the conditions for which a court may suspend a sentence, the practice has always been to specify the conduct. It is a well-established principle of sentencing that a condition of suspension must be capable of fulfilment. In the present matter it is too wide a condition to simply suspend a sentence on condition of good behaviour that is not specified. With such a widely stated condition, it means that any crime that the accused persons subsequently commit would attract the imposition of the suspended sentence.

A more serious blunder occurred in the manner in which the proceedings were conducted. On 11th October 2019 both accused persons pleaded guilty to the charge. When the facts were read the first accused stated that he did not take some of the items stated in the charge. The matter was stood down to enable the prosecutor to interview the complainant. Proceedings resumed and the court put questions to the accused whereupon the first accused stated that he took airtime worth \$62. Upon enquiry by the court the prosecutor submitted that he was accepting the limited plea. Following further canvassing of essential elements the first accused was found guilty. When it came to the second accused, he denied taking the complainant's money. The matter was postponed to 15th October 2019 for trial.

There is no record of what transpired on 15th October 2019. On 25th November 2019, notwithstanding that the first accused had already been convicted, the trial court enquired whether he was still denying the charge. To this the first accused replied in the negative. Without further ado, at the instigation of the prosecutor, Noel Tanana took to the witness stand.

The record does not show that the witness was sworn. The witness was informed about the accused admitting taking airtime only and was asked if he would be prejudiced by the accused's denial of stealing the other items. When the complainant confirmed that he would be prejudiced the court then ordered that the matter proceed to trial.

The charge was again put to the accused persons. This is despite that they had previously pleaded to the same charge. The first accused who had pleaded guilty and had been convicted pleaded not guilty. The second accused, who had previously pleaded not guilty again pleaded not guilty. The accused persons outlined their defences. The nature of the outlined defences prompted the trial court to ask the accused persons whether they were admitting the charge. The record does not reflect that the first accused was specifically asked whether he was admitting. A similar question posed by the court reflects that it was directed at the second accused. Having received affirmative answers to the question posed, the trial court then proceeded to convict both accused persons.

The manner in which the proceedings were conducted reflects a lack of appreciation of how a criminal trial is conducted. Even though the first accused person pleaded guilty from the onset and was convicted accordingly, the canvassing of essential elements was rather jumbled. Following the entering of pleas the proceedings of 11th October 2019 went as follows (and I reproduce verbatim the manuscript notes):

"Listen to facts-facts read.

Q Have you understood the facts Axd 1

Brown bag marked exh 1, Smaung.. marked exh 2, Hosepipe, 3

Q Anything to add or subtract

1st Axd -I did not take some of the staff on (sic) the charge.

Matter stood down for state to interview comp.

Q Correct that on 7th /10/19 u wr at Pfuajena Stadium at 20:10 hrs

Yes

Q Axd 1 earlier on u sed u tuk the etym worth how much: It was \$62

Q State do u accept the limited plea

Yes

Q Axd 2 do u hv anything to add or subtract

Nothing

Q Correct that on 7/10/19 @ 20:10 hrs u wr at Pfuajena Stadium

Yes

Q Admit that you committed an offence of robbery on e day

Yes

Q Admit that u tuk \$62-00, wallet & Samsung charger

Yes

Q what did u intend to do w e property

To raise money

Q

Any ryt to do so

No

Any defence

No

I have found u guilty as charged

Axd 2

Q Correct tht u wr at Pfupajena on 7/10/19

Yes

Q Admit u committed an offence of robbery

Yes

Q Admit u tuk the said property

I didn't take the money

FFP to 15/10/19 @ 8:00 for trial

Noel Tanana warned to appear

Axd to remain in custody.”

Then on 25th November 2019 the following took place-

“Q Are you still denying e charges Axd 1 No

PPV May Noel Tanana take e witness stand

Q How old are u

32 yrs

Q whr do u reside

Industrial area.

Q Do you know e axxd

Yes

Q Axxd are admitting taking e etym & deny taking e other property. So is there any prejudice if ey deny

Yes I will be prejudiced coz ey took my property

PP May we proceed to trial

Crt Very well

Q Charge put to axd & ubnderstood

Q How do you plead

A Plea not guilty entered- Axd 1

A Plea o not guilty entered- Axd 2

Facts read to axd & understood

Prov o s 188 & 189 CPEA explained

DEFENCE OUTLINE 1st Axd

I deny coz we found out tht e ety wr 62 recharge cards, a charger, Samsung cell phone, data cable, black wallethts wat we saw in the wallets.

DEFENCE OUTLINE 2nd Axd

There wr 62 recharge cards, a charger, a brown bad, a wallet with no wallet (sic)

Q So are admitting to e charge 1st

Yes

Q You are also admitting toe charge axd 2

Yes

I therefore found u guilt as pleaded

1st & 2nd axd we went (sic)

PP May e 2 be treated as 1st offenders.”

When an accused person pleads to a charge other than by pleading guilty, that plea should be determined by the court. In this respect s 186 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides that-

“If the accused pleads any plea or pleas other than the plea of guilty or a plea to the jurisdiction of the court, he is, by such plea without any further form, deemed to have demanded that the issues raised by such plea or pleas shall be tried by the court.”

By virtue of the above provision, it makes no sense that an accused person who has pleaded not guilty can be made to enter another plea, even if that plea is again that of not guilty.

Equally, where an accused person pleads guilty, he cannot be asked to plead again without disposal of the guilty plea. A plea of guilty raises no issues unless doubt arises regarding the genuineness of such a plea. Following the first accused's conviction on the plea of guilty, the trial court should have proceeded to sentence him after recording mitigation. In respect of the first accused, if there had been doubt regarding the genuineness of the initial plea of guilty, the trial court was enjoined to alter that plea to that of not guilty. In this respect s 272 of the Criminal Procedure and Evidence Act provides that-

“If the court, at any stage of the proceedings in terms of section *two hundred and seventy-one* and before sentence is passed—

(a) is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty; or

(b) is not satisfied that the accused has admitted or correctly admitted all the essential elements of the offence or all the acts or omissions on which the charge is based; or

(c) is not satisfied that the accused has no valid defence to the charge;

the court shall record a plea of not guilty and require the prosecution to proceed with the trial: Provided that any element or act or omission correctly admitted by the accused up to the stage at which the court records a plea of not guilty and which has been recorded in terms of subsection (3) of section *two hundred and seventy-one* shall be sufficient proof in any court of that element or act or omission.”

Even the canvassing of essential elements of the offence was cursory. The canvassing of essential elements in terms of s 272 (2) (b) is not confined to asking the accused whether he agrees with the outlined facts and as happened in the present case, whether the accused admitted to committing robbery. The essential elements of the crime of robbery should have been apparent from the canvassing of the essential elements. Authorities are clear that a court must be careful when canvassing essential elements where a guilty plea is involved; see *S v Dube and Another* 1988 (2) ZLR 385 (S) and *S v Sibanda* 1989 (2) ZLR 329 (S). The care that was exhorted in the cited authorities is not apparent in the present case.

Apart from tripping on procedure regarding plea taking, the trial court further erred on how to conduct a trial. After the accused persons outlined their defences, no evidence was led by the state. The trial court then reverted to eliciting admissions from the accused persons. At that stage when the accused persons indicated that they were admitting the charge, the trial court should have ascertained whether they were altering their pleas. With the accused having confirmed so, the trial court should then have canvassed the essential elements of the crime. It is evident that the proceedings are tainted with gross irregularity. It is unnecessary to consider the adequacy of the sentence that was imposed.

Accordingly the conviction and sentence is hereby set aside. I leave it open to the Prosecutor General to institute fresh proceedings before a different magistrate if he is so inclined. In the event that such re-trial takes place and the accused are convicted, the trial court should take into account the sentence that the accused have served.

MUZOF A J AGREES:.....