

THE STATE
versus
TAMIRIRASHE MOYO

HGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 29 October 2020

Review Judgment

CHITAPI J: The proceedings in the above matter were referred for review by the scrutinizing regional magistrate under cover of a letter dated 7 September 2019. The letter referred to four records of trials presided over by the same magistrate in which there appears what the scrutinizing regional magistrate termed a “common error.” I should point out though that although the letter aforesaid referred to four records, only one record is before me for review. The learned scrutinizing regional magistrate described the common error as follows-

“The above four records have a common error. The second sentences of imprisonment suspended on condition accused pays restitution appear incompetent. In all the four records, the State nor the complainant applied for restitution in terms of s 268 Criminal Procedure & Evidence Act. (sic)
The trial magistrate views were sought. She believes the sentence are competent.”

It is totally unacceptable for the regional magistrate and indeed the trial magistrate having taken divergent positions on a point of law to fail to advance their respective stand points. If the trial magistrate believed she is a right, then a researched and supported response should have been furnished to the scrutinizing regional magistrate. Equally if the scrutinizing regional magistrate did not agree, he or she was required to research and support the dissenting position. It cannot be left to the judge to figure out the points of divergence between the two magistrates. The two magistrates are therefore corrected for the future to support their adopted legal positions on the point of divergence. I will however review the proceedings without their output.

To answer the query, it is necessary to give a brief background of the case and to generally review the proceedings.

The accused was charged with the offence of unlawful entry as defined in s 131 of the Criminal Law Codification & Reform Act [*Chapter 9:23*]. The charge alleged that between 13 and 25 June 2019, the accused unlawfully forced open the door to the complainant's dwelling house and stole 52 buckets of shelled maize. The offence occurred at Magwaza Village, Chief Mashayamombe, Mhondoro.

The facts as outlined in the outline of State case were that the accused was aged 23 years old. He was employed as a domestic worker by the complainant and resided at the complainant's homestead. The complainant was a 60-year-old female adult who stayed with her daughter. Complainant left her homestead and came to Harare on 9 June 2019. She left her daughter in charge of the home. The daughter subsequently followed to Harare on 13 June 2019 leaving accused in charge of the homestead. The accused during the period of the absence of the complainant and her daughter forced open the door of the house where the maize was stored and stole 52 buckets of shelled maize which he sold at the local business centre for \$520.00. Maize worth \$290.00 was recovered.

The trial was purportedly held in terms of s 271 (2) (b) of the Criminal Procedure & Evidence Act, [*Chapter 9:07*], that is, by guilty plea. It is necessary to quote the plea proceedings recording as per the learned trial magistrate's record.

“PLEA

Q Any complaints against police?

A No

Q Constitutional rights explained?

A I will be self-actor

Charge

P Guilty s 271 (2) (b)

Facts read and u/d

Q Admit that on the day in question you committed an unlawful entry by forced opening of the complainant's house and after “(--- not legible)” and stole 52 buckets of shelled maize?

A Yes

Q Admit it you intended to deprive the owner

A Yes

Q Was it lawful

A No

Q Any right

A No

V GAP

PP First offender

The learned trial magistrate adopted a very casual approach to the disposal of this matter by way of guilty plea. The learned trial magistrate started by asking the accused if he had any complaints against the police. What sort of complaints if one may ask? One cannot expect a simple villager to be able to appreciate the purport of a generalized question like “do you have complaints against the police?” In my view, direct and specific questions should be asked. For example, the starting point is to deal with a constitutional issue. An arrested person should be brought before the court within 48 hours of arrest with the period being reckoned to include weekends and public holidays. The accused should be asked to give details of when he was arrested, where and how he was arrested. Questions can be put like who arrested him. How he was treated upon arrest and whilst in police custody. One cannot give an exhaustive list of the nature of questions which may be asked. I surmise that some magistrates may not even appreciate why the court enquires as to whether the accused has complaints against the police.

In order to appreciate the rationale for ascertaining whether or not the accused has complaints against the police, it is important to refresh and keep in mind that the law provides for the presumption of innocence until proven guilty. Every accused person has a right to claim that presumption. The constitution provides for rights of an accused upon arrest until the accused is brought to court. Upon appearing in court further rights are accorded the accused. The accused’s rights before appearing in court are set out in s 50 of the constitution. The court is therefore advised where it puts questions to the accused on whether he has any complaints against the police to tailor make the questions in such a manner that they address the rights of the accused in terms of s 50 and generally to ascertain that the police did not act unlawfully in their handling of the accused. For example, if the accused alleges and proves assault, the court would make the necessary order for the accused to be medically examined and a report compiled. The court in terms of s 44 of the constitution has a duty to protect, promote and fulfil the human rights set out in the declaration of rights, [*Chapter 4*], of the constitution. The role of the court is in terms of s 165 (1) (c) of the constitution made “paramount in safeguarding human rights and freedoms and the rule of law.”

Therefore, the court should go deeper in ascertaining whether the accused's rights were not violated by the police. The enquiry on police treatment should not start and end with the colourless question, do you have any complaints against the police as is the norm?" The magistrate must adopt an active role in ascertaining that the accused's rights were not trampled upon by the police.

The next observation I make is the learned trial magistrate's handling of the peremptory provisions of s 163A of the Criminal Procedure & Evidence Act. The provisions of that section require that the accused must be informed of his right to legal or other representation (where applicable) as provided for in s 191 of the same Act [*Chapter 9:07*]. The s 191 rights derive from the constitution. They are part of fair trial rights. The right to a fair trial as given in s 69 of the constitution cannot in terms of s 86 (2) and (3) of the constitution be abrogated by any law. The right is absolute. The right to legal representation is part of safeguards which ensure that the accused receives a fair trial. In *casu*, the learned trial magistrate simply recorded as follows:

"Q Constitutional rights explained
- I will be a self-actor."

The endorsement by the learned trial magistrate is meaningless. The constitution comprises many rights. It is not possible therefore to determine what constitutional rights were explained to the accused and to which of the rights the accused responded. Section 163 A requires that the accused is informed of s 191 rights. Although the rights in s 191 derive from the constitution because s 163 A is specific that the accused shall be informed of his or her rights in terms of s 191 of the Criminal Procedure and Evidence, the magistrate should specify that the rights which the accused has been informed of are those set out in s 191. Whilst it is onerous a duty to perform, the learned trial magistrate must record the content of the information or explanation given to the accused in relation to the s 191 rights. To simply record that a right has been explained leaves the question open, as to "what was the accused told or how was he informed of the right." The Magistrates Court is a court of record. What that means is that the record should bear testimony to what transpired in the proceedings. The record cannot be a complete record where answers to what transpired during the proceedings have to be sought outside the record. It is important that the reader of the record of proceedings including the scrutinizing magistrate and/or review judge as the case may be is not left to wonder as to the content of the information given to the accused and/or its accuracy. The recorded explanations should not leave room for doubt that there was full compliance with the

peremptory requirements of s 163 A. The magistracy must be guided in future that there is no provision for a curtailed procedure in complying with the requirements of s 163A. The trial magistrate must record the content of the information given to the accused. It is important to do so because the accuracy of the information given is subject to review to ensure that indeed it is the correct information as set out in s 191. In *casu*, it is not possible to hold so.

The other issue pertains to non-compliance with the provisions of s 271 (3) of the Criminal Procedure and Evidence. The learned trial magistrate in *casu* simply recorded “P. Guilty s 271 (2) (b)”. Amongst other peremptory requirements s 271 (2) (b) sets out what the trial magistrate should do by way of exchange between him or her and the accused. The section provides that the magistrate shall explain the charge and the essential elements of the offence to the accused. The magistrate then must enquire from the accused whether the accused understands the charge and the essential elements. Section 271 (3) however lists the matters which should be recorded in the process of the guilty plea disposal. For example, para (a) of subs (3) of s 271 requires that “the explanation of the charge and essential elements of the offence...” shall be recorded. In other words, the full content of the explanation given must be recorded. The reason for this is simple. Again because magistrates court proceedings are susceptible to scrutiny and review, which are quality control measures imposed by statute and are peremptory, the scrutinizing magistrate or review judge should be satisfied that the correct explanation of the charge was given to the accused. If properly explained there would be no doubt arising that the accused who pleaded guilty did so well aware of what constitutes the offence. It is not in my view too onerous a duty to explain the charge and record it because the criminal offences are codified in this jurisdiction.

Lastly, I address the specific query by the learned regional magistrate. The learned trial magistrate sentenced the accused as follows:

“6 months imprisonment of which 3 months is suspended for 5 years on condition within this period the offender does not commit any offence of which unlawful entry is an element for which upon conviction he will be imprisoned with the option of a fine 3 months effective. In addition, 30 days wholly suspended on condition that the accused restitutes \$230 to the complainant by 31/07/19”

I should firstly record that there is no explanation why the restitution amount was assessed at \$230 when the agreed facts showed this amount as \$290. This lack of attention to detail should be avoided. Figures should not be plucked off from nowhere and a sentence determined on the basis of a ghost figure.

The learned magistrate in this case passed two sentences, the first sentence of 6 months with part suspended on condition of good behaviour and an additional term of imprisonment of 30 days wholly suspended on condition of restitution. It is incompetent to compose sentence in this fashion. Section 358 (2) (b) provides as follows:

- “(2) When a person is convicted by any court of any offence other than an offence specified in the Eighth Schedule, it may
- (a)
 - (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...”

The above provision would be the one that the leaned trial magistrate proceeded in terms of Subsection (3) of s 258 lists the conditions on which the sentence may be suspended in whole or in part. The list is not close ended. The court may include other matters considered necessary or desirable in the interests of the offender, any other person or the general public as a condition of suspension of the sentence. This discretion is provided for in para (h) of subs (3) of s 358.

With regard to restitution, it is provided for in s 365 of the Criminal Procedure and Evidence Act, as follows;

“365 Restitution of unlawfully obtained property

- (1) Subject to this Part, a court which has convicted a person of an offence involving the unlawful obtaining of property of any description may order the property to be restored to its owner or the person entitled to possess it.
- (2) For the purposes of subsection (1), where the property referred to in that subsection consists of—
 - (a) money, the court may order that an equivalent amount be paid to the injured party from moneys—
 - (i) taken from the convicted person on his arrest or search in terms of any law; or
 - (ii) held in any account kept by the convicted person with a bank, building society or similar institution; or
 - (iii) otherwise in the possession or under the control of the convicted person;
 - (b) fungibles other than money, the court may order that an equivalent amount or quantity be handed over to the injured party from similar fungibles in the possession or under the control of the convicted person.”

It will be apparent that the restitution envisaged in s 365 is not accompanied by a criminal sanction if not complied with. In this regard restitution becomes a circumstance of mitigation. Ideally the accused should be given the opportunity to make restitution before sentence in which case the restitution is considered mitigatory. The restitution envisaged is one to be ordered in circumstances where the accused actually has the property subject of the

offence or some other property of a tangible nature or money from which the equivalent of the unlawfully obtained property can be exacted. Restitution is then ordered to be effected.

It is however also competent to make restitution a condition of a suspension of a sentence in terms of paragraph (b) of subs (2) of s 258. The learned trial magistrate was correct to consider restitution as a condition of suspension of part of the sentence imposed. The learned trial magistrate could not however impose an additional sentence suspended on condition of restitution. What was competent was to impose one sentence with part suspended on condition of future good behaviour and a further portion on condition of restitution. The learned magistrate should have determined what sentence he or she considered appropriate in all the circumstances of the case. The global sentence imposed in this case was 6 months imprisonment. Part of the 6 months should have been suspended on condition of good behaviour and a further portion on condition of restitution. It was incompetent to impose an additional imprisonment term suspended on condition of restitution. The learned regional magistrate was correct to query the sentence. The learned magistrate was wrong and misdirected to insist that the sentence was proper.

In disposing of the review, I note that the accused has already served the sentence imposed. No useful purpose will be served by correcting the sentence. For all the irregularities which I have set out, the proceedings cannot be said to accord with real and substantial justice dictates.

I accordingly refuse to confirm the proceedings as being in accordance with real and substantial justice. I accordingly withhold my certificate.