JOEL HANDSON
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 23 April 2021

Review Judgment

CHITAPI J: The proceedings in this matter were first placed before me on review in July, 2020 whereupon I gave a direction that the record be transcribed as I could not make out the magistrates handwriting, much as I tried to. It took nearly 5 months for the transcribed record to be forwarded back to the Registrar. The accused had already served the sentence imposed on him. This is one of the unsatisfactory consequences of the late compliance with the transcription directions. In regard to ineligible handwritings, we are all gifted differently in the art of handwriting. What is important is to consider the plight of the reader since the writer is expected to read his or her handwriting although there have been rare cases where the writer fails to make out their handwriting.

In the proceedings, the accused was, after a separation of trial with his co-accused Kukunda Mhungu convicted on 4 counts of unlawful entry committed within Chinhoyi city environs. He was convicted and sentenced on 28 February 2020. In count 1, the accused unlawfully entered into a dwelling house at 3 Schonland Mzari by breaking the toilet to gain entry on 3 December 2019. The accused stole house hold goods worth $23 435. Goods valued at $14 000.00 were recovered. He was sentenced to 3 months imprisonment.

In count 2 the accused unlawfully gained entry into a dwelling house number 10893 Mapako Phase one on 15 December 2019. The accused gained entry through the roof after removing a roof vent and using an opening in the ceiling to access the inside of the house. The accused then stole household property valued at$18 100. Property worth $16 750 was recovered. The accused was sentenced to 3 months imprisonment.

In count 3, the accused unlawfully entered a dwelling house number 5806 Gold Course Mzari on 21 December 2021. The accused broke the back door of the house using an

unknown object. He entered the house and stole a laptop and power pack valued at $8 000. It was recovered. He was sentenced to 3 months imprisonment. In count 4, the accused proceeded to unlawfully enter the cottage at the same premises from which he stole another laptop and power pack valued at $5170. It was recovered. He was sentenced to 3 months imprisonment.

The accused was therefore sentenced to a total of 12 months imprisonment in respect of all 4 counts. Of the total 12 months imprisonment, 3 months was suspended on the usual conditions of good behaviour leaving an effective sentence of 9 months imprisonment to run concurrently with a sentence which the accused was serving in CRB 1470/19. The level of sentence required that the proceeding be submitted for scrutiny by the regional magistrate. The regional magistrate was of the view that the sentence imposed was too lenient. The regional magistrate addressed a query to the trial magistrate on 19 March 2020 in the following terms

> "*STATE* v *JOEL HANDSON* CHNP 39/20 – SC 83/20
> 1. The record was placed before me for scrutiny and after going through the proceedings. I remained with a query on the appropriateness of the sentence. My observation is that the sentences are shockingly lenient especially considering the circumstances of the offences also values involved.
> 2. May the magistrate comment."

The trial magistrate responded as follows by letter dated 29 May 2020. The delay of 2 months in responding to the query is not explained. Such delays should be avoided as they potentially prejudice the accused person especially in cases where a lesser penalty is imposed on review consequential to scrutiny and the accused has already served the sentence

> "*STATE* v *JOEL HANDSON* CHNP 39/20 – SC 83/20
> The court notes the queries raised by the regional magistrate and responds as follows:
> "The court attached too much weight on the accused's age. The court admits it erred and I imposed a lenient sentence and stands guided."

By letter addressed to the Registrar dated 12 June 2020, the regional magistrate referred the record for review by a judge of the court as *per* procedure. He wrote as follows:

> "*STATE* v *JOEL HANDSON* CRB CHN 39/20 – SC 83/20
> May you kindly place this record before the honourable judge with the following comments
> 1. The record was placed before me for scrutiny and after noting the manner in which the offences were committed, the value involved and the rate at which the accused was committing offences, I am of the view that the overall sentence was too lenient regardless of the accused person's youthful ages.
> 2. I Raised the query with the trial magistrate who also conceded that the sentence was too lenient.
> 3. May the honourable judge provide guidance?"

There is an unsatisfactory feature of this scrutiny reference for review to this court which requires comment. The regional magistrate requested for guidance. There is no guidance which is required. Both the trial and regional magistrate were *ad idem* on scrutiny that the sentence imposed was too lenient. What they both did not do was to research on what should have been the appropriate sentence. The trial magistrate in handsight agreed that the sentence which he imposed was too lenient. The question he should have asked himself was, "what should then have been the appropriate sentence". He ought to have sought guidance from decided cases or other sources like the provisions of the Act that created the offence of unlawful entry on what the appropriate sentence should have been. Equally the regional magistrate in querying the adequacy of the sentence ought to have provided proper references and precedent for the trial magistrate's guidance. It is important that debate or discourse in relation to short comings observed on scrutiny is initiated at local level, If for example the query raised by the regional magistrate relates to sentence, the regional magistrate should ask the trial magistrate whether the magistrate considered case law or statutory provisions which the regional magistrate should set out. The trial magistrate will then be properly guided.

In my view, where proceedings otherwise subject of scrutiny are referred for review by the regional magistrate, the regional magistrate and the trial magistrate must have meaningfully engaged on the issue of concern on scrutiny. For example, in this reference, I expected to find discourse on what the suggested sentence which ought to have been imposed was. It is not proper to view the review judge as a research engine for magistrates and to expect that the judge will research on what an appropriate sentence in the circumstances of each case should have been. The same must apply where the regional magistrate considers that the sentence imposed by the trial magistrate is grossly excessive as to be unconscionable. Some research should be carried out and an opinion on what the appropriate sentence ought to be also given.

Reverting to the substance of the review, I do agree with both the regional and trial magistrates that the sentence which was imposed by the trial magistrate was too lenient. It induces a sense of shock and public outrage. The accused committed very serious offences which contravene a persons right to privacy. Subsection (a) of s 57 of the Constitution provides for the right to privacy of every person, "which includes the right not to have their home, premises or property entered without their permission." In cases of unlawful; entry as defined in s 131 of the Criminal Law (Codification and Reform) Act, Chapter 9:23, a

distinction is made for sentence purposes between unlawful entry simpliciter and unlawful entry committed in any of the aggravating circumstances set out in subsection(2) of s 131 aforesaid. For avoidance of the doubt, the whole of s 131 provides as follows:

> "131 **Unlawful entry into premises**
> (1) Any person who, intentionally and without permission or authority from the lawful occupier of the premises concerned, or without other lawful authority, enters the premises shall be guilty of unlawful entry into premises and liable –
> (a) to a fine not exceeding level thirteen or not exceeding twice the value of any property stolen, destroyed or damaged by the person as a result of the crime, whichever is the greater or imprisonment for a period not exceeding fifteen years, or both, if the crime was committed in any one or more of the aggravating circumstances set out in subsection (2); or
> (b) in any other case, to a fine not exceeding level ten or not exceeding twice the value of any property destroyed or damaged by the person as a result of the crime, whichever is the greater, or imprisonment for a period not exceeding ten years, or both.
> (2) For the purposes of paragraph (a) of subsection (1), the crime of unlawful entry ito premises is committed in aggravating circumstances if, on the occasion on which the crime was committed, the convicted person-
> a) entered a dwelling –house; or
> (b) knew there were people present in the premises; or
> (c) carried a weapon; or
> (d) used violence against any person or damaged or destroyed any property, in effecting the entry; or
> (e) committed or intended to commit some other crime."

In every case of unlawful entry, the trial magistrate must consider whether or not the unlawful entry was committed in aggravating circumstances. Needless to state that an unlawful entry committed in aggravating circumstance attracts a more severe sentence than where there are no aggravating circumstances. In *casu*, the offences were committed in aggravating circumstances. The trial magistrate ought to have been properly guided by the sentencing provision of s 131 aforesaid. The trial magistrate must in future be guided accordingly.

In terms of the provisions of 29(2) of the High Court Act, [*Chapter 7:06*], the review judges is given extensive powers to correct proceedings including quashing then. It is competent to substitute a different sentence from the one imposed by the magistrate or to refer the proceedings back to the trial magistrate to take into account all relevant factors and sentence the accused afresh. The accused has however served the effective sentence of 9 months which was the effective sentence. If the accused was still serving the sentence it would have made sense to recall him. In the circumstances, as there is no prejudice to the accused since his convictions were proper, the sentence will be left as it is. I however

determine that the proceedings against the accused are not in accordance with real and substantial justice. I accordingly withhold my certificate of confirmation of the proceedings.

I have considered that the directions I have made on the need for the regional and trial magistrate to debate and research on matters arising on scrutiny which necessitate a review reference to this court to be of such importance that I should bounce off this judgment off another judge. MUSITHU J has gone through this judgment and agrees with the directives I have given herein.

The Registrar shall bring a copy of this judgment to the attention of the Chief Magistrate.