

THE STATE
versus
JOEL DUBE

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 2ND November, 2016

Criminal Review

MAWADZE J: The trial Magistrate in this matter has deliberately avoided to answer to the queries which I raised in a very clear manner in my review minute. It is important for trial Magistrates to apply their minds to queries raised on review to ensure that less time is wasted dealing with the same issues.

In my review minute I raised a total of 5 queries which I clearly numbered and advised the trial Magistrate to address or explain. The response by the trial Magistrate clearly avoids specific reference to my queries in their chronological order. The response is therefore unhelpful and is muddled up.

In my review minute I had asked the trial Magistrate to explain the following;

- i. Why various counts were treated as one for sentence when they related to different complainants, different types of offences and different dates. In short I sought the rationale behind treating those counts as one for sentence.
- ii. I inquired why restitution was ordered in some of the counts when nothing was stolen.
- iii. I took issue as to why in some counts restitution was ordered which was unrelated to the amounts of the value of the property stolen.

- iv. I inquired why restitution was not ordered in some of the counts where actual prejudice was occasioned.
- v. Lastly I opined whether it was not less cumbersome in the circumstances of this case to impose a globular sentence and suspend part of it on conditions of good behaviour and restitution rather than the piece meal manner the trial Magistrate adopted.

As already said the response by the trial Magistrate is unhelpful and confirms the fact that the trial Magistrate did not apply his or her mind to this matter, both at the time accused was sentenced, and after I raised the queries.

The facts of this matter in brief are as follows;

The accused appeared before the Magistrates Court at Chiredzi facing a total of 21 counts of unlawful entry into premises as defined in s 131 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and theft as defined in s 113 of the same Act. The State, during the hearing withdrew after plea count 7 of theft and count 18 of unlawful entry into premises. The accused was therefore convicted on his own pleas of guilty of 9 counts of unlawful entry into premises and 10 counts of theft as defined in the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The total value of the property stolen in all the counts is US\$3 332 and property valued at US\$2 411 was recovered, thus causing the actual prejudice of property valued at US\$921.00.

In a rather irrational manner the trial Magistrate treated the following counts as one for sentence and sentenced the accused on each set of counts to 12 months imprisonment;

- (a) Counts 1 to 3
- (b) Counts 4 and 5
- (c) Counts 6 and 8
- (d) Counts 9 to 11
- (e) Counts 12 to 14
- (f) Counts 15 to 17
- (g) Counts 19 to 21

The trial Magistrate proceeded to suspend part of the sentence on (a) to (g) on conditions of good behaviour and for inexplicable reason in some counts on condition of restitution. All in all the accused was sentenced to a total of 84 months of which 14 months

were suspended on condition of good behaviour and 11 months on condition accused paid restitution to some of the complainants.

The bare bones of the facts in this matter are that (except in count 1 and count 19) between the period extending from March 2016 to August 2016 the accused broke and entered into various premises in Chiredzi from which he stole an assortment of property. Counts 1 and 19 relate to theft.

The accused pleaded guilty to all the 19 counts and was properly convicted. The convictions in respect of the 19 counts are in order and are therefore confirmed.

There are a number of misdirections on how the trial Magistrate approached the question of sentence.

It is trite that in dealing with the question of sentence involving numerous counts the trial court may decide to treat all counts as one for purposes of sentence and impose an appropriate globular sentence or may treat some of the counts as one for sentence and impose an appropriate sentence or may treat each count separately for purposes of sentence. The guiding principle is to ensure that a fair and just sentence is arrived at whatever the option is adopted by the sentencing court. There should however be a rational approach justifying the option the sentencing court would have adopted see *S v Damba & Anor*. 2004 (1) ZLR 296 (H); *S v Chera & Anor* 2008 (2) ZLR 58 (H); *S v Nyathi* 2003 (1) ZLR 587 (H).

There is no rational basis in this case why count 1 was grouped together with counts 2 and 3. Count 1 relates to theft which was committed on 6 March 2016 and counts 2 and 3 relate to unlawful entry into premises and theft on 31 March 2016. The complainant in count 1 is different from the complainant in counts 2 and 3. This irrationality which the trial Magistrate totally failed to justify is evident also in relation to the following counts which were treated as one for purposes of sentence;

- i. Count 6 relates to unlawful entry into premises on 31 July 2016 and count 8 relates to unlawful entry into different premises on 17 July 2016. It would have been prudent to treat counts 8 and 9 as one as they relate to unlawful entry into premises and theft from the same premises on the same date involving the same complainant.
- ii. The same can be said in relation to counts 9, 10 and 11 in which it was sensible to combine counts 10 and 11.
- iii. Counts 12, 13 and 14 should not have been treated as one but instead one should have combined counts 12 and 13 which related to the same premises the same

complainant and the same date. The same can be said of counts 15, 16, and 17; counts 19, 20 and 21.

It is disingenuous for the trial Magistrate to try and justify such irrationality on the basis that the trial court treated those counts as one for purposes of sentence because the common feature in all those counts is dishonesty. All the offences accused was convicted of relate to dishonesty.

The other misdirection is that the trial Magistrate ordered restitution in respect of counts 6 and 8 which both relate to unlawful entry when nothing of value was stolen. In order to justify this anomaly, the trial Magistrate makes reference to count 7 which was withdrawn after plea. This clearly shows that the trial Magistrate did not apply his mind to the query raised.

In relation to counts 9, 10 and 11 the value of restitution ordered is totally unrelated to the actual prejudice caused. At least in this regard the trial Magistrate concedes to the error. Further there is no explanation as to why restitution was not ordered in respect of counts 15, 17 and 19.

I am satisfied that the trial Magistrate did not apply his or her mind to the question of sentence in this case as is outlined above. I am also of the view that the total sentence of 84 months imprisonment is excessive in view of the value of the property involved in all the counts. The overall sentence induces a sense of shock and cannot be allowed to stand.

The approach I have adopted in this case is to treat all the counts as one for purposes of sentence. I shall thereafter suspend part of that sentence on condition of good behaviour and another part on condition accused pays restitution to the complainants in proportional to specific amounts of prejudice.

In the result the sentence imposed by the trial court is set aside in its entirety and substituted with the following;

“All counts 1,2,3,4,5,6,8,9,10,11,12,13,14,15,16,17,19,20 & 21 are treated as one for sentence and accused is sentenced to 36 months imprisonment of which 6 months imprisonment are suspended for 5 years on condition accused does not commit within that period any offence involving dishonesty for which accused is sentence to a term of imprisonment without the option of a fine.

Of the remainder of 30 months, 11 months imprisonment are suspended on condition accused pays restitution in the sum of US\$895.00 to the following complainants through the Clerk of Court at Chiredzi Magistrates on or before 30 December 2016 which is broken down as follows;

- (a) 1 month imprisonment in respect of the complainant SIJABULISIWE SIBANDA in count 1 in the sum of US\$50.00
- (b) 1 month imprisonment in respect of the complainant JUSTOS MUFUKANI in count 3 in the sum of US\$40.00
- (c) 2 months imprisonment in respect of the complainant DAISY ZIREBWA in count 5 in the sum of US\$225.00.
- (d) 3 months imprisonment in respect of complainant RONALD TINASHE GADAGA in count 9 in the sum of US\$270.00.
- (e) 3 months imprisonment in respect of the complainant PETER PHOSA in count 11 in the sum of US\$260.00, and
- (f) 1 month imprisonment in respect of the complainant AMON MAJONI in count 17 in the sum of US\$50.00.

Effective : 19 months imprisonment.”

The accused should be summoned to court and advised of the altered sentence.

MAFUSIRE J. agrees