

1. THE STATE

versus

TONDERAI MAKOTORE

2. THE STATE

versus

JOSHUA TINARWO

3. THE STATE

versus

MOSES MADANYIKA

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO 6 OCTOBER, 2020

Criminal Review

MAWADZE J: All these three matters were submitted to me by the learned Regional magistrate ostensibly for review purposes.

All these three matters were dealt with by the Resident Magistrate at Bikita. Due to the sentences imposed by the trial Magistrate of 3 months imprisonment wholly suspended on the usual conditions for 5 years in all these matters, the cases would not ordinarily be subject to scrutiny or review.

As per the learned Regional magistrate's minute dated 24 September 2020 all these matters were "discovered" during what is described as routine CRB checks. After such "discovery" the view was that the trial magistrate was imposing manifestly lenient sentences which are not in

accordance with real and substantial justice in a bid to avoid to submit the records for automatic scrutiny or review. This practice is sometimes referred as "hitting under the belt". The learned Regional magistrate's in the said referral minute to this court said;

"In my humble view the trial Magistrate imposed the bare minimum sentences in order to avoid sending the records for scrutiny for reasons best known to himself. Notwithstanding the mitigatory factors and reasons for sentence, the sentences imposed are a far from what substantial justice entails. I humbly believe the irregularities in these matters are so gross to warrant intervention by your good office.

Humbly submitted for our consideration"

After painstakingly ploughing through all the three record of proceedings, I was unable to find what really offended the learned Regional magistrate's sense of justice.

I now proceed to deal with each of the matters;

1. STATE v TONDERAI MAKOTORE CRB BKT 314/20

In this matter the accused whose age is variably given as either 24 years (as per the charge sheet) or 30 years (as per his mitigation) was convicted on his own plea of guilty of contravening section 157 (i) (a) of the Criminal Law (Codification and Reform) Act [Cap 9:23] which relates to unlawful possession of dangerous drugs being dagga.

The facts of this matter are that on 8 July 2020 police received information that the accused was selling dagga as his homestead. They proceeded to the accused's homestead and carried out a search in the presence of the accused wife. They found 700g of dagga in a sack in one of the accused huts.

The trial magistrate proceeded in terms of section 271(2) (b) of the Criminal Procedure and Evidence Act [Cap 9:07].

The accused admitted possession of the 700g of dagga indicating that he wanted to sell it. The accused was duly convicted.

In mitigation the accused stated that he had 3 minor children aged 6 years, 3 years and 1 year respectively and that he had no savings. He only owns 5 chickens.

In his reasons for sentence the trial Magistrate pointed out that on his initial appearance the accused exhibited symptoms of being COVID 19 positive and was therefore remanded in custody before his plea of guilty was taken. Whilst in prison the relevant tests were done as the accused

was isolated from other prisoners. The test results were only availed after one month and they were negative. The pre-trial incarceration period of one month was therefore considered in assessing sentence. It was also considered that the accused who is a first offender pleaded guilty to the charge. The trial Magistrate was of the view that in light of the mitigatory factors a sentence of 3 months imprisonment wholly suspended for 5 years on the usual conditions was in order.

The learned Regional Magistrate wrongly stated that the trial Magistrate proceeded in terms of section 271(2) (b) of the Criminal Procedure and Evidence Act [*Cap 9:07*] without putting the essential elements of the offence to the accused. It is not clear why the learned Regional Magistrate makes this erroneous allegation when the record of proceedings clearly shows that the essential elements of the offence were well canvassed as is required in terms of section 271(2)(b) of the Criminal Procedure and Evidence Act [*Cap 9:07*].

The learned Regional Magistrate also states that the agreed facts as per the State Outline refers to dealing in dangerous drugs as defined in section 156(1)(a) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*] rather than possession of dangerous as defined in section 157(i)(a) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*]. The concerns by the learned Regional Magistrate is of the view that a penalty which is described as “heavier penalty” [whatever that means] should have been imposed. Again, I do not share this view.

The penalty provision for contravening section 157(i) (a) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*] is a fine not exceeding level 10 (\$6 000) or imprisonment not exceeding 5 years or both. The trial Magistrate gave clear reasons as to why an effective custodial sentence was inappropriate. The accused was sentenced to 3 months imprisonment wholly suspended for 5 years on the usual conditions of good behaviour and the 700 g of dagga was forfeited to the State. The accused was convicted of the proper charge as per agreed facts.

I find no basis at all to interfere with these proceedings. Accordingly, the proceedings are confirmed as in accordance with real and substantial justice.

2. STATE v JOSHUA TINARWO: CRB BKT 383/19

In this matter the accused was convicted of contravening section 131(1) as read with section 131(2) (e) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*] which relates

to unlawfully entry into premises in aggravating circumstances. At the commencement of these proceedings the 43 years old accused tendered limited plea of theft of 1 x 10kg of maize grain whose value was never ascertained. The State insisted that the accused had stolen 4 x 14 size tyres, 1 x 15 size tyre and 2 x 50kg of maize grain all valued at \$330 and that only 1 x 50kg of maize grain valued at \$60 was recovered. However after the complainant's evidence the State subsequently ate the proverbial humble pie and accepted the limited plea offered by the accused.

The essential elements of the offence were put to the accused who was duly convicted of opening a closed door and stealing 1 x 10kg of maize grain which was apparently recovered.

In mitigation the 43 year old accused stated that he had 5 minor children and owns 2 beasts and 10 chickens as assets.

In the reasons for sentence the trial Magistrate considered the accused's plea of guilty and the fact that the accused is a first offender who is saddled with family responsibilities. The trial Magistrate reasoned that an effective custodial sentence was uncalled for and proceeded to sentence the accused to 3 months imprisonment wholly suspended for 5 years on the usual conditions of good behaviour.

The learned Regional Magistrate's view is that "a heavier penalty" [whatever that means or implies] should have been imposed. No cogent reasons are given for attacking the sentence imposed by the trial Magistrate.

I find no misdirection all in how the trial Magistrate exercised his discretion in assessing the appropriate sentence. This court has said times without number that imprisonment is a rigorous form of imprisonment which should only be imposed as a last resort for serious offenses committed especially by first offenders.

I am inclined to confirm these proceedings as in accordance with real and substantial justice.

3. STATE v MOSES MADANYIKA: CRB BKT 215/20

In this matter the 22 year old accused was arraigned before the Bikita Magistrate facing two counts.

In count 1, the accused contravened section 3(a) (ii) of the Public Health [COVID 19] Prevention Containment and Treatment (National Lockdown). Amendment Order No. 5 of 2020 by failing to wear a face mask whilst at Nyika Growth point which is a public place.

In count 2, the accused contravened section 185(1)(a) of the Criminal Law (Codification and Reform) Act, [Cap 9:23] when after his arrest in count 1 at Nyika Growth Point he escaped from lawful custody before being lodged in any prison.

The agreed facts are that on 21 May, 2020 at about 1300 hrs, 22 year old accused was at Nyika Growth Point. He was not wearing a mask and two police officers on patrol arrested him as per count 1. The accused was then taken to Nyika Police base for further management of the case.

In count 2, whilst at Nyika Police base in the custody of the police the accused fled from the police and was only arrested some ½ km from the police base.

When the accused appeared before the trial Magistrate and after pleading guilty to both counts, he stated that he had paid an admission of guilty fine in respect of count 1. The trial Magistrate sensibly adjourned the matter to allow the State to verify this assertion by the accused. The trial Prosecutor, when the matter resumed confirmed that indeed the accused had paid an admission of guilty fine in respect of count 1.

The anomaly in this matter which however was not raised by the learned Regional Magistrate is that the trial Magistrate proceeded to put the essential elements of the offence in count 1 to the accused despite the fact the he had paid an admission of guilty fine in count 1. In essence the accused had already been convicted in count 1 and sentenced. It would amount to double jeopardy to proceed to again convict the accused of the same offence in count 1.

In respect of count 1, I am obliged to take corrective measures by quashing the proceedings in respect of count 1 and setting aside the accused's subsequent conviction in respect of count 1 by the trial Magistrate in these proceedings. Since no sentence was passed there is no sentence to set aside.

The query raised by the learned Regional Magistrate is that the sentence imposed in count 2 of 3 months wholly suspended for 5 years on the usual conditions of good behaviour is too lenient.

The penalty provision of contravening section 185(i) (a) of the Criminal Code [*Cap 9:23*] is a fine not exceeding level 10 (\$6 000) or imprisonment not exceeding 5 years.

It is trite that where statute provides for a fine sentencing court is enjoined to consider the option of a fine and only a custodial sentence in circumstances where a fine would be deemed inappropriate.

In casu the youthful 22 year old accused is a first offender. He is still single and makes a living by selling airtime. He naively escaped from the police simply because he failed to wear a face mask. For that failure to wear a face mask he rightly paid an admission of guilty fine.

The trial Magistrate in my view properly reasoned that it was not reasonable and justifiable to incarcerate the accused in count 2 in view of the prevailing COVID 19 pandemic moreso as the accused had already paid the fine in count 1. A conditionally wholly suspended prison term of 3 months was therefore deemed appropriate.

I find no misdirection by the trial Magistrate in respect of count 2. The proceedings in count 2 are therefore confirmed as in accordance with real and substantial justice.

For the avoidance of doubt I make these following orders in respect of all the 3 matters;

1. In State v Tonderai Makotore CRB BKT 341/20 the proceedings are confirmed as in accordance with real and substantial justice.
2. In State v Joshua Tinarwo CRB BKT 383/19 the proceedings are confirmed as in accordance with real and substantial justice.
3. In State v Moses Madenyika CRB BKT 215/20
 - (a) The proceedings in respect of count 1 are quashed and the accused's subsequent conviction by the trial Magistrate in those proceedings be and is hereby set aside.
 - (b) In respect of count 2 the proceedings are confirmed as in accordance with real and substantial justice

Zisengwe J. agrees