Judgment No. HB 156/04
CRB 3358/04
CRB 3378/04 & 3381/04

(1) THE STATE versus ONIAS SIBANDA

(2) THE STATE versus ZEFIAS NKALA & TUPANI SIPHUMA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 16 DECEMBER 2004

Criminal Review

NDOU J: These matters were all dealt with by the same Provincial Magistrate sitting in Bulawayo. The scrutinising Regional Magistrate, Western Division, was not satisfied with the conduct of the proceedings, and neither am I.

The elementary errors in *casu*, are not the kind one would expect of a Provincial Magistrate. Sibanda was convicted of theft and sentenced to $100 000 or in default of payment 1 month imprisonment. Siphuma was also convicted of theft and sentenced to $100 000 or in default of payment 10 days imprisonment and Nkala was convicted of a similar offence and sentenced to $100 000 or in default of payment 10 days imprisonment. The trial magistrate made two blunders. First, he conducted the trials in terms of the provisions of section 271(2)(a) of the Criminal Procedure and Evidence Act [Chapter 9:07] (the code). Having chosen this route the trial magistrate was confined to a maximum fine of $25 000. If he intended to impose the sentences that he eventually passed he had to proceed by way of the provision of section 271(2)(b) of the code. Second, he did not give the accused persons an opportunity to address him in mitigation prior the imposition of the sentence. When the scrutinising Regional Magistrate highlighted these shortcomings he casually responded-

> "I was used to doing jurisdiction cases. I did not realise that the correct fine under 271(2)(a) was only $25 000. I did not ask for mitigation as I thought I was imposing a small fine."

The procedure adopted by the trial magistrate is one for an offence that warrants a minor punishment. What constitutes a minor punishment depends on the individual circumstances of each case. In *Criminal Procedure in Zimbabwe* – John Reid Rowland at 17-3 the learned author correctly observed that in deciding whether to follow the section 271(2)(a) procedure, the magistrate should take into account-

> "(a) the nature of the charge, especially as it appears from the particulars of the offence;
> (a) the penalties to which the accused would be liable on conviction;
> (b) the complexity of the charge and the accused's ability to understand it;
> (c) any informal explanation given by the prosecutor on aspects of the case on which the court may legitimately be informed before conviction;
> (d) the fact that the procedure is intended to be used only for minor offences and should not be used where there is any doubt as to the minor nature of the offence" – *S* v *Mienie; S* v *Van Zyl* 1972(20 RLR 250(G); *S* v *Wall* 1981 ZLR 261(G) and *S* v *Hade & Ors* HB-27—91.

In *casu*, the value of the stolen property was well above te maximum fine permissible of $25 000. In the Nkala case the accused stole (shoplifting) property valued at $97 252,53. In the Siphuma case the accused stole a track suit from his place of employment with the value of $64 400,00. In the Sibanda case the accused who is in charge of ticket sales at Boys Scouts event stole admission tickets and cash amounting to $200 000. I do not understand how, in the absence of special mitigatory circumstances, the trial magistrate came to the conclusion that a fine of less than $25 000 would meet the justices of the case. The trial magistrate confessed ignorance of the maximum fine permissible under the section 271(2)(a) procedure. These cases should have been conducted in terms of section 271(2)(b) procedure.

The trial magistrate did not hear any mitigation from the accused persons. The trial magistrate failed to give the accused the opportunity to address in mitigation. The practice is that he should have done so – *R* v *Fedrew* 1956 R & N 47 (SR). From

the foregoing it is clear that the accused persons were denied justice. The sentences cannot stand in view of the provisions of section 271(2)(a) of the Code.

Accordingly the convictions in all the three matters be and are hereby confirmed. The sentences imposed by the trial magistrate, are, however, set aside and substituted as follows:

1. *S* v *Onias Sibanda* - $25 000 or in default of payment 10 days imprisonment
2. *S* v *Zifias Nkala* - $25 000 or in default of payment 10 days imprisonment
3. *S* v *Tupani Siphuma* - $25 000 or in default of payment 10 days imprisonment

Cheda J …… I agree