THE STATE
versus
BILLARD MANGA

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 15 November 2006

KUDYA J: The way in which the sentencing magistrate assumed jurisdiction from the trial magistrate in this matter reminds me of the exhortation of CHATIKOBO J in *S v Blessing Chivafa* HB-64-1995. He cautioned at pages 4-5 of the cyclostyled judgment that:

> "It cannot be over emphasized that it is desirable that offenders be sentenced by the judicial officer who convict them. That being so, absence of magistrates on transfer or study leave must be so organised as to obviate unnecessary resort to section 312 (5) of the Code. The provision should be called into play in circumstances of necessity where not to do so would cause accused persons serious prejudice. If the court calendar is prepared with this in mind the need to resort to their provision would be greatly minimized."

The facts in the present matter are as follows: On 12 July 2004 the accused person was convicted on his own plea of Housebreaking with intent to steal and theft at Mbare Magistrates Court. He was remanded to 13 July 2004 to enable the State to furnish any previous convictions he might have had. Apparently this was not done on that date with the result that he was further remanded to 14 July 2004 out of custody on his own recognisance. He defaulted and a warrant for his arrest was issued.

He was arrested on 18 May 2006. By that date the trial magistrate had been transferred to the Harare Customary Law and Civil Magistrate Court at Old Stables in the city centre. The warrant of arrest was duly dealt with by the sentencing magistrate. He cancelled it and remanded the accused person in custody firstly to 26 May 2006, then to 1 June 2006 and lastly to 6 June 2006. On the latter date he confirmed the plea of guilty and conviction of 12 July 2004 with the accused and sentenced him to 15 months imprisonment of which 1 month imprisonment was suspended on

condition he made restitution of $420 000 through the clerk of court Mbare by 30 June 2006.

In his reasons for sentence, the trial magistrate revealed that he had assumed sentencing jurisdiction in terms of subsection 7 of section 334 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. He further explained therein that he took this course of action because the trial magistrate was not able to come to Mbare Magistrate Court to consider sentence because of pressure of work at his aforesaid new station.

Section 334(7) reads:

> "(7) If, in a magistrates court, sentence is not passed upon an offender, forthwith upon his conviction, or if by reason of any decision or order of the Supreme Court or High Court, as the case may be, on appeal, review or otherwise, it is necessary to add or vary any sentence passed in a magistrate court, or to pass sentence anew in such court, any magistrate of that court may, in the absence of the magistrate who convicted the offender, or passed the sentence, as the case may be, pass sentence on the offender after consideration of the evidence recorded and in the presence of the offender." (my emphasis)

The precursor to this section was section 312(5) in the Criminal Procedure and Evidence Act [*Chapter 59*] and before it section 358(5) of the Criminal Procedure and Evidence Act [*Chapter 31*]. The meaning of the underlined words have received judicial interpretation in this country.

In *State v Mbabvu & Anor* 1980 ZLR 515 at 516D-H WADDINGTON J stated:

> "The proper procedure to adopt when acting under section 312 (5) of the Code has been explained in the case of *R v Kumese,* 1953(3) SA 797(ED). This case has been approved in these courts by the decision in *R v Karonga* 1960(4) SA 64(SR) and *R v Zvimba & Anor* 1968(2) RLR 278. The requirements are, firstly, that the sentencing magistrate must note on the record the absence of the trial magistrate and the reasons for such absence.....
>
> Secondly, the accused must be given the opportunity of addressing in mitigation.....

> Finally, it was incumbent on the second magistrate to consider the evidence recorded and upon which the verdict is returned."

In the present case, the trial magistrate did not note on the record the absence of the trial magistrate and the reasons of such absence. These only appear in his reasons for sentence, which in my view is substantially compliant with his duty in that regard. He also, considered the essential elements of the offence and verdict and confirmed them before he provided the accused with the opportunity to address him in mitigation.

My primary concern is whether on these facts, the sentencing magistrate acted as contemplated by the lawmaker "in the absence of the magistrate who convicted the offender."

In *S v Karonga, supra,* at p 66B-C, QUENET J quashed the sentence that was imposed by another magistrate based in the then Salisbury on behalf of the trial magistrate who was at the time also based in Salisbury on the basis that he was not absent there from.

In *S v Zvimba & Anor, supra*, at 279G-280A, LEWIS J highlighted the three requirements later followed in *Mbabvu's case supra*. He drew attention to the irregularity by the trial magistrate who was based at Macheke of transferring for sentence in Rusape a case in which he had convicted the accused persons on their respective pleas of guilty but nonetheless confirmed the convictions and sentences on the basis that they were appropriate and that the accused person did not suffer any prejudice.

In *S v Vee Ngwenya* HB-19-1992, the accused person was convicted at Inyathi by a magistrate who was on circuit. On the next circuit date a different magistrate sentenced him. He did so without noting the reasons for the trial magistrate's absence, a failure which in MUCHECHETERE J's view could lead to the quashing of the proceedings of the sentencing magistrate. He however confirmed the sentence for fear that if he were to set aside the proceedings it would add to the considerable inconvenience and therefore injustice to the accused who would have to be recalled for sentencing in circumstances where the sentence appeared to be fair and appropriate.

The learned judge made the following pertinent remarks at page 2 of the cyclostyled judgment:

> "I also agree with the views of the Attorney-General's Office that since the words 'in the absence the magistrate who convicted' are unqualified by the statute they should be given the widest possible meaning, which is, that the magistrate in question could be absent for whatever reason, e.g. retirement, leave, discharge from service, death etc."

Lastly, in *S v Chivafa, supra,* where the trial magistrate was going to be away from his station for 4 months while reading law at the University of Zimbabwe convicted the accused person on his own plea before he left and a different magistrate sentenced him while he was away, CHATIKOBO J condoned the failure to record the absence and reasons thereof on the basis that the accused person was not prejudiced by these failures. He however felt driven to issue the exhortation adverted to at the beginning of this judgment.

The importance for me of *Chivafa's case* lies in the attempt by CHATIKOBO J to define the meaning of the phrase 'in the absence of the magistrate who convicted the offender'. He stated at page 3:-

> "It might be argued that the absence contemplated by the lawmaker is one occasioned by death, serious illness, retirement or resignation from the service or lengthy absence abroad for whatever reason. While these are normal forms of absence, there can be no doubt in my mind that any absence for an appreciable lengthy of time would bring into play the provisions of the section especially prejudice if he were made to await the return of the magistrate to the courthouse."

It seems to me that the phrase under consideration must be measured in terms of the triad of time, space and circumstances. While MUCHECHETERE J appeared at first blush to accept that absence be interpreted in the widest sense, he narrowed it down to what CHATIKOBO J described as appreciable length of time, through the examples that he outlined. This would rule out such absences as occasioned by the trial magistrate going out of the courthouse to some nearby shops or taking out occasional leave. Even though he would not be available in the strict sense

of the word that would not be the type of absence contemplated by the lawmaker. The concept of space is also a relevant aspect which must be taken into account. This relates to the distance that the trial magistrate is from the courthouse. The circumstances would relate to the reasons advanced for the trial magistrate's failure to be at the courthouse to impose sentence.

In my estimation the Mbare Magistrates Court and the Old Stables are approximately 8 km apart. There was no justifiable reason why the trial magistrate would fail to proceed to Mbare Magistrates Court to pass sentence if he was advised that he was required for the purpose on any of the days that the matter was remanded to. The Harare Province is sufficiently resourced to have ensured that the trial magistrate went to Mbare to sentence the accused person. There exists a functional administrative machinery which involves the Resident Magistrate Mbare, the Provincial Magistrate in charge of the Harare Civil courts, the overall Provincial Magistrate in charge of Harare Province and the office of Chief Magistrate which would have ensured that the trial magistrate did his duty as reposed on him by law to this accused person.

I am therefore not satisfied that the unavailability of the trial magistrate from Mbare regard being had to both time, space and circumstance was such as is contemplated by the lawmaker which permits the sentencing magistrate to intervene. I therefore hold that the sentencing magistrate improperly stepped into the shoes of the trial magistrate.

In my view the accused person will not prejudice in the sense that he would have to be recalled for sentence as was feared in *Vee Ngwenya, supra*, he is in custody. He has already served close to 5 months imprisonment. The trial magistrate would have to take this into account in imposing the appropriate sentence on the accused person.

It is my considered view that it is necessary that the proceedings of the sentencing magistrates be set aside as was done in *Karonga's case supra.* It is accordingly ordered that:-

1. The sentence imposed be and is hereby set aside.
2. The matter is remitted for sentence anew by the trial magistrate who must take into account the period that the accused had already served.

KUDYA J: .....

BHUNU J, agrees: .....