STATE
versus
RONALD NDANGANA CRB M 155/10
STATE
versus
DAVID DHLIWAYO CRB J86/10

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE, 16 September, 2010

Criminal Review

MUTEMA J: The two matters landed on my desk for review, having been forwarded from the office of the Regional Magistrate in Mutare. Both were dealt with by the same trial magistrate, who is a provincial magistrate stationed at Chipinge.

I have decided to review both cases in one judgment because I formed the opinion that this trial magistrate seems to have no clue whatsoever regarding basic principles of sentencing.

In the case of *State v Ronald Ndangana*, for unlawful entry and theft of a cellphone and charger valued at $45 which was recovered, the 19 year old first offender accused who had pleaded guilty to the charge was sentenced to 6 months imprisonment of which 2 months were suspended for 5 years on the usual conditions of good behaviour by the trial provincial magistrate.

When the matter went for scrutiny, the learned Regional Magistrate commented on the sentence as follows:

> "Is it not that the sentence you imposed is brutalizing him?..... Won't you think this was ideal that a sentence of community service should have been imposed? I am doubtful whether the accused would have refused to do community service if this was properly explained to him than for him to go to prison".

In response to the query the trial magistrate said,

> "…. Maybe the explanation by the Court could have been inadequate, leading to the unfortunate decision to incarcerate the accused. I ….request that if possible, may corrective measures be instituted".

The learned scrutiny Regional Magistrate withheld his certificate and referred the proceedings to this Court.

I am constrained to lend my excoriating voice to the learned scrutiny Regional Magistrate's sentiments regarding the trial magistrate's failure to diligently and judiciously sufficiently explain the benefits of community service to the accused and convince him to

appreciate the same and agree to such sentence, instead of perfunctorily asking the accused whether he knew "what community service is all about". Following accused's answer that he knew very well, the following exchange ensued:

"Q. Are you prepared to do community service?

A. No. I would request to be given an option to pay a fine.

Q. Do you have cash?

A. No".

In his reasons for sentence, the trial magistrate correctly observed that mitigatory factors far exceeded the sole exitant aggravating factor he found, viz "prevalence of cases of dishonesty of a major concern". He then misdirected himself by reasoning thus,

> "It is on this basis therefore that the court had been very desirous to place the accused on the community service type of punishment but regretably (*sic*) is the fact that accused said he would rather prefer to be given an option to pay a fine when he in fact does not have the money. This is deplorable and moreso unwarranted for the court to allow an accused person to choose his own form of punishment. Unacceptable indeed it is. In the circumstances accused has been incarcerated and with a portion of the sentence suspended to act as deterrence".

Regarding the factor of deterrence, GUBBAY JA (as he then was) stated in *S v Borogodo* 1988(2) ZLR 379 (S) at 382H-383 A that,

> "what is to be guarded against is such an excessive devotion to the cause of deterrence as may so obscure other relevant considerations, as to lead to a punishment which is disparate to the offender's desserts I cannot conceive of any principle which can justify, for the sake of deterrence and public indignation, the imposition of a sentence grossly in excess of what, having regard to the crime and to the degree of the offender's moral reprehensibility, would be a fair and just punishment".

As for the prevalence of an offence, while it is a relevant and appropriate aggravating feature, it should not be over-emphasized and should never be regarded as a warrant to impose unduly harsh sentences: *S v Katsaura* 1997(2) ZLR 102 (HC).

On the length of the period of imprisonment imposed, REYNOLDS J, in *S v Ngombe* HH 504-87 at p 2 stated:

> "It has been repeatedly stressed that a sentence of imprisonment is a rigorous and severe form of punishment, often bearing drastic and destructive consequences for the accused and the members of his immediate family. This form of penalty should be resorted to only if absolutely essential in the circumstances of the case, and only if no other available form of punishment would be preferable and appropriate"

From the perfunctory manner the enquiry into the accused's suitability for community service was conducted, it is crystal clear that the trial magistrate did not genuinely endeavor to eschew imprisonment. Even if the accused had no cash on his person, he could have been

sentenced to pay a fine and be given time to pay if the trial magistrate had been judicious and humane enough to avoid brutalizing the young offender by incarcerating him for such a fairly petty offence. The sentence imposed will not rehabilitate or deter the accused. On the contrary it is most likely going to achieve the opposite.

In view of the mitigatory factors, viz the accused's status as a first offender, his young age of 19 years, his plea of guilty, the paltry value of the stolen property ($45), coupled with its recovery certainly merited a non-custodial sentence in any civilized society. It is only in a medieval society that values human liberty less than a teaspoon that such a sentence can be imposed, given the attendant facts of this case.

In the result, I too shall withhold my certificate.

In the case of *State v David Dhliwayo* the 41 year old accused initially pleaded not guilty to assault as defined in s 89(1)(a) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*]. The matter went into a trial. Soon after cross-examining the first State witness the accused indicated to the trial court that he wished to alter his initial plea to one of guilty. He was asked why and his answer was that he had found the evidence overwhelming.

The trial court altered the plea as requested. The astute public prosecutor requested the trial court to proceed in terms of s 271(2)(b) of the Criminal Procedure and Evidence Act, [*Cap 9:07*]. The trial court took no heed and proceeded to find the accused guilty as pleaded. This constitutes the first misdirection.

The accused, a first offender who had had his maize crop nibbled by the 38 year old female complainant's goats had simply clapped her once on the cheek. Accused is married with three children. He was sentenced to a whooping 12 months imprisonment of which 3 months were suspended for 5 years on the usual condition of future good conduct. This constitutes the second misdirection by the trial magistrate. This happened on 10 March, 2010. With one third remission, the accused has already finished serving the sentence. It is not clear when the proceedings were sent for scrutiny but the learned scrutiny Regional Magistrate first raised the query with the trial magistrate on 10 June, 2010.

There are countless review judgments reminding magistrates to comply with the statutory requirements in the Magistrates Court Act, [*Cap 7:10*] to expeditiously transmit scrutinable and reviewable cases for the purpose in order to obviate, *inter alia*, unwarranted incarceration of humans who do not deserve such inhuman and degrading punishment such as happened *in casu.*

The learned scrutinizing Regional Magistrate took issue, rightly in my view, with two misdirections alluded to *supra* with the trial magistrate who lamely and grudgingly conceded his errors.

Regarding the first misdirection, where an accused enters a plea of not guilty and subsequently alters that plea to guilty during the course of the trial, s 271 (2) of the Criminal Procedure and Evidence Act must be invoked. *In casu* the trial magistrate seemed to have invoked para (a) of that section but went on to impose a sentence as if he had proceeded in terms of para (b). This is incompetent.

Regarding the sentence itself, given the mitigatory features that obtained, to sentence the accused to 12 months imprisonment even with 3 months thereof suspended for a single clap on the cheek offends against all known tenets of civilized justice. Such a sentence definitely induces a sense of shock, not only to the convict but to society as a whole including the complainant herself. In his reasons for sentence the trial magistrate said accused's plea of guilty should be rewarded. However, it is clear that the trial magistrate did not actually give sufficient weight to this for he went on to say "..…the court did not wish to consider community service or option to pay a fine……for to do so would sort of trivialize the seriousness of this particular offence. Accused had wasted the court's valuable time by trying to enter into trial and to change his plea midway on noticing overwhelming evidence against himself." This was not a serious offence by any stretch of the imagination. A custodial sentence of any duration was not justified given the exitant mitigation vis-à-vis the pettiness of the offence.

These two cases paint a sad story of a judicial officer of the grade of provincial magistrate who not only has no clue regarding sentencing principles but has a knack for cruelty.

In both cases it is unfortunate that the two accused have since finished serving their respective sentences which they clearly did not deserve. In the event there is nothing which this court can do to reverse the damage done other than to refuse to confirm that the proceedings were in accordance with true and substantial justice.

MUTEMA J

MTSHIYA J I agree…….