

STATE
versus
KUDZAISHE CHINYANI

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 31 January 2023

Criminal Review

CHITAPI J:

1. The accused aged 22 years old was properly convicted of the charge of robbery as defined in s 126(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] by the learned magistrate sitting at Bindura Magistrates Court on 21 October 2022. The accused was sentenced as follows:

“24 months imprisonment of which 2 months imprisonment is suspended on condition accused restitutes to the complainant in the sum of \$71 992.00 through the Clerk of Court Bindura on or before 30 November 2022. 22 months imprisonment effective.”
2. For completeness of record, the details of the charge on which the accused was convicted were that on 29 August 2022, at Marimira Shopping Centre, Bindura the accused unlawfully assaulted the complainant on the head and face with fists in order to induce the submission of the complainant, whereafter the accused then robbed the complainant of a black jacket, black satchel, a cellphone, sunglasses, phone charger and cash of USD\$11.00.
3. The outlined facts supporting the charge were that the complainant a male adult aged 41 years old was at 2100 hours on 29 August 2022 going about his business at Marimira Shopping Centre in Bindura when he was accosted by the accused and three accomplices who are yet to be accounted for. They asked the complainant for a cigarette. The complainant who does not smoke told the accused and his accomplices of the fact of his being a non smoker.
4. As the complainant made his way the accused and his accomplices followed the complainant and assaulted the complainant with fists on his head and face before walking

away with the complainants property listed in para 2(*supra*). The accused was arrested on 1 September 2022 and upon his arrest he led the police to the recovery of the complainant's cellphone and black jacket. The value of stolen property was put at US\$46, 00 and recovered property was US\$20. 00 leaving a balance of US\$26. 00 which the learned magistrate converted to \$71 992 Zimbabwe dollars.

5. When the record of proceeding was placed before on review I noted that the accused had previous convictions which given the nature of the charge and conviction in the proceedings on review appeared relevant. The details of the previous convictions were as follows:-

- a) On 19 June 2017 under record CRB BNP 1093/17 the accused was convicted at Bindura Magistrate on a charge of theft as defined in s 113 of the Criminal Law (Codification and Reform)Act. He was sentenced to imprisonment for 6 months with 2 months suspended for 5 years on condition of future good behaviour leaving an effective 4 months imprisonment.
- b) On 15 March 2018 under record CRB BNP 531/18 the accused was convicted of theft at Bindura Magistrate Court. He was warned and cautioned.
- c) On 30 October 2019 under record CRB BNP 2929/19 the accused was convicted of theft as defined in s 113 of the Criminal Code by the Magistrates Court Bindura. He was sentenced to 12 months imprisonment with 2 months wholly suspended for 5 years on condition of future good behaviour. The two imprisonment suspended in case No. BNP 1093/17 on 19 June 2017 was brought into effect.
- d) On 21 August 2020 under case No. BNP 2082/20 at Bindura Magistrates Court, the accused was convicted of 2 counts of theft as defined in s 113 of the Criminal Code. He was sentenced to 4 months imprisonment, wholly suspended for 5 years on usual conditions of future good behaviour.

6. When I perused the reasons for sentence following perusal of the judgment which I do not query, I noted that the learned magistrate did not deal with or take into account the previous convictions. I then generated the usual query letter and asked the learned magistrate for his/her comment on why the previous conviction on CRB BNP 2820/20 appeared not to have been considered in assessing sentence. The learned magistrate responded that he or she committed an omission which was attributed to oversight in failing to deal with the suspended sentence. The learned magistrate asked to be guided on review.

7. It is clear from the record that the learned magistrate properly asked the accused to admit or deny the listed previous convictions. The accused admitted all of the previous convictions. The learned magistrate notably stated as follows in relation to the accused's past criminal history:

“Moreover, accused is a repeat offender as shown by the previous convictions filed of record. This clearly shows committing crimes is accused's life style and he is non repentant.”

The learned magistrate as admitted by her/him did not then consider that the accused had current suspended sentences in case Nos. BNP 2929/19 and BNP 2820/20. It was necessary for the learned magistrate to take into consideration and deal with the fate of the suspended sentence imposed therein.

8. The requirement to take into account, a previous conviction for purposes of sentence after conviction is a statutory duty imposed upon the court. Section 327 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] generally deals with the procedure to prove previous conviction. Subsection (4) thereof is however significant for purposes of this review. It reads as follows:

“(4) If on any trial any previous conviction is lawfully proved against the accused or if he confesses or has admitted such previous conviction, the court shall take it into consideration in determining sentence for the offence to which he has been found guilty.”

9. The learned magistrate did mention that the accused had previous convictions. If I am liberal, I must accept that the accused's previous convictions were taken into account by the learned magistrate. I cannot however say that the learned magistrate as accepted by him or her by implication from the response to the query, took the previous convictions

into account as an aggravating factor. If that had been so the learned magistrate would have noted that there were suspended sentences which the accused had breached in case Nos. BNP 2929/19 and BNP 2820/20. The court has a duty to bring into operation and impose a suspended sentence which the accused has breached unless the accused shows or establishes good cause why the suspended sentence should not be imposed in addition to the sentence imposed for the offence for which the accused will have been convicted. It must however be appreciated that the bringing into effect of a suspended sentence does not make the suspended sentence a part of the sentence for the offence for which the accused has been convicted. It is an act of ordering the accused to serve the sentence of the offence for which the suspended sentence was imposed. It amounts to some implied reopening of the sentence in the matter whose conditions of sentence has been breached.

10. The quoted provision ss (4) of s 327 of the Criminal Procedure and Evidence Act, is couched in peremptory terms. The court must take into account previous convictions. They aggravate the accused's moral blameworthiness. The failure to comply with a peremptory or mandatory statutory provision renders the process done outside of the law invalid. In this regard it must be noted that the provisions of subsection (4) of s 327 do not oblige the court to bring a suspended sentence into effect. It obliges the court to take into consideration when assessing an appropriate sentence which fits the crime, the offender and interests of society the accused's criminal past. As a general observation courts do not treat repeat and first offenders alike. The latter courts the sympathy of the court easily. The repeat offenders are bad apples and invariably receive heavier penalties compared to first offenders. Where therefore the previous convictions have not been taken into consideration effectively but only perfunctorily, the ensuing sentence is afflicted with a fatal irregularity and should be set aside.

Therefore, in consequence of the learned's magistrate omission to properly consider the individual previous convictions as required by statute and thus failing to note that the accused was also in breach of some suspended sentences, the sentence imposed cannot be certifiable as being in accordance with real and substantial justice for fatal procedural irregularity. The irregularity must be corrected for the record.

The following order therefore issues

- (i) The conviction of the accused in case No BNP 1875/20 is confirmed
- (ii) The sentence is aside
- (iii) The matter is referred back to the learned magistrate to sentence the accused afresh after taking into account effectively the individual previous convictions of the accused.
- (iv) The accused shall however not be liable to a sentence which is more than that which had been imposed. This notwithstanding, the magistrates' discretion to impose any of the suspended sentences in case No BNP 2929/19 and BNP 1875/20 shall not be affected by the order that the new sentence should not be more severe than that which was previously imposed.

MUSITHU J:..... I agree