THE STATE
versus
VALENTINE DOUBT

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 13 April, 2021

Criminal Review Judgment

CHITAPI J: The proceedings in this matter were referred by the scrutinising regional magistrate for review by a judge of this court in terms of s 58 of the Magistrates Court Act, [*Chapter 7:10*]. The scrutinizing regional magistrate was in doubt on whether the proceedings were in accordance with real and substantial justice when he scrutinized them. The scrutinizing regional magistrate raised two issues one of which was resolved in circumstances of a suspicion raised on the integrity of the learned trial magistrate

To place the matter in context, the accused appeared before the learned trial magistrate to answer a charge of Malicious Damage to Property as defined in s 140 (1) (4) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] on 19 March, 2020 at Banket Magistrates Court. The details of the charge were that on 17 February, 2020 at a farm in Banket, the accused damaged the complainant's motor vehicle windscreen by hitting the windscreen with his hands. The windscreen shattered as a result. The value of the damage was put as "USD145 or $4 250 RTGS." In passing I comment that "RTGS" is not a currency but a mode of payments. The Zimbabwe currency is the Zimbabwe dollar and internationally it is abbreviated as "ZWL".

The matter was disposed of by way of guilty plea as provided for in s 271 (2) (b) of the Criminal Procedure and Evidence Act. I should comment that in order that the guilty plea procedure is adhered to strictly as required by law, it must be captured or recorded that the guilty plea is dealt with in terms of the provisions of s 271 (2) (b) as read with s 271 (3) of the Criminal Procedure and Evidence Act, [*Chapter 9:07]*. Subs (3) of s 271 sets out the details which the magistrate is required to record as proof that he or she has complied with the procedure. For example para (a) of subs (3) provides that

"(3) Where a magistrate proceeds in terms of paragraph (b) of subsection (2) -
(a) the explanation of the charge and the essential elements of the offence: and
(b) ……
(c) ……
(d) ……..
Shall be recorded."

In *casu,* this is how the learned magistrate proceeded from what appears on record

"17/03/20
Ct: Do you have any complaints against the police?
- No
Ct: Constitutional rights and rights to legal representation explained and understood
- I will be a self- actor
Ct: Put the charge to the accused
Ct: How do you plead
- Guilty S 271 (2) (b)
Facts read and understood
Ct: Admit that on the day in question you committed an act of MOP breaking the windscreen of complainant's car using your hand
- Yes
Ct: Admit that it was your intention to break the windscreen
- Yes
Ct: Was it lawful
- No
Ct: Any right act in the manner that you did
- No
Ct: GAP (guilty as pleaded)
P.P No previous convictions"

The learned trial magistrate did not comply with the requirements to explain the charge and record the explanation given to the accused and the confirmation that the accused understood the charge. The reason why a charge must be explained is to ensure that the accused fully understands the charge before he or she is asked to confirm the essential elements of the charge when they are put to him. In the absence of a recording of the explanation of the charge on record, it cannot be ascertained that the charge was explained as required. In fact, the learned trial magistrate simply directed the prosecutor to put the charge to the accused person without first explaining the charge herself.

The learned trial magistrate committed yet another misdirection as noted hereunder. During mitigation, the learned trial magistrate asked the accused as follows:-

"Ct Why did you commit the offence
- I was angry"

The response by the accused should have been explored further because the accused was in fact alleging that he acted under provocation, Provocation is not a defence to a crime save as may be provided in any other enactment which is not the Criminal Law Codification and Reform Act. In terms of the provisions of s 238 of the Criminal Law Codification and Reform Act, provocation may be regarded as a mitigating factor when assessing sentence. In *casu*, not only did the learned trial magistrate not probe the issue of acting in anger by asking the accused to provide details of what angered him, but, the reasons for sentence are do not capture the issue. The alleged provocation was therefore not considered. It is trite that a failure by a judicial officer to take into account a relevant and material mitigatory factor submitted by the accused when assessing sentence is a misdirection that justifies interference with the sentence on review or appeal. This is so because the omission to consider the submitted factor necessarily means that the process of balancing mitigatory and aggravating factors is flawed.

The scrutinizing regional magistrate did not raise the issues I have discussed above. He obviously did not pick the issues on scrutiny. However, once the proceedings have been referred for review by the scrutinizing magistrate, the review judge is not bound to only deal with those issues raised by the scrutinizing magistrate. The proceedings are reviewed by the judge as with any other records which are automatically referred for review by reason of the level of sentence imposed. The scrutinizing regional magistrate's comments are taken into account on review. In short, where the proceedings which were otherwise subject to scrutiny have not passed scrutiny but have been referred for review, the position will be that the judge reviews the proceedings like any other review. The principle that the court should determine only the issues brought by the parties and not issues outside the referral issues does not apply to the situation where a reference of proceedings on scrutiny is made by the scrutinizing regional magistrate for the proceedings to be reviewed. In this regard s 58 (3) (b) of the Magistrates Court Act [*Chapter 7:10*] provides as follows in regard to considering proceeding on scrutiny—

> "58 (3) (b) If it appears to him (scrutinizing magistrate) that doubt exists whether the proceedings are in accordance with real and substantial justice cause the papers to be forwarded to the registrar who shall lay them before a judge of the High Court in chambers for review in terms of the High Court Act [*Chapter 7:06*]."

Reverting to queries raised by the scrutinizing regional magistrate, he queried the adequacy of and completeness of the canvassing of essential elements by the learned trial magistrate. The

scrutinizing regional magistrate believed that the learned trial magistrate must have rewritten the record in this regard after receiving the query. The scrutinizing regional magistrate noted that the issue which he raised appeared to have been corrected. Upon asking himself as to why he would have raised the query if the essential elements had been dealt with correctly, the scrutinizing regional magistrate gave the trial mgistrate the benefit of doubt and reasoned that he probably misread the magistrate's handwriting. The query raised by the scrutinizing regional had been, whether the accused was asked whether he intended to damage the windscreen of the motor vehicle. Since the scrutinizing magistrate has not persisted in the query, it must be left to rest.

The remaining query is on the appropriateness of the prison sentence which the learned trial magistrate imposed given the circumstances of the case. The reasons for sentence given by the learned trial magistrate are very scanty. There is no mention of provocation or of the accused acting out of anger. The circumstances of the case were such that the learned magistrate ought to have investigated how a *compos mentis* person would just proceed to a vehicle and hit its windscreen without an underlying reason to do so. The scrutinizing regional magistrate questioned the legality of portion of the sentence which the learned trial magistrate imposed. The accused was sentenced as follows-

> "8 months imprisonment. 3 months wholly suspended for 5 years on condition that within that period the offender does not commit any offence of which malicious damage to property is an element for which upon conviction he will be imprisoned without the option of a fine. A further 3 months is suspended on condition that the accused restitutes $4 250 RTGS to the complainant by 31 March 2020 by 4 p.m. through Banket Magistrates Court. The remaining 2 months is suspended on condition that the accused pays a fine of $500 through the Clerk of Court Banket by 4 p.m. 17 March 2020."

The scrutinizing regional magistrate queried the propriety of imposing an additional sentence of a fine in addition to the 8 months imprisonment which were first imposed with portions suspended on conditions as set out above. The scrutinizing magistrate in this respect posed the question to the learned trial magistrate as follows-

> "(b) Was it competent to suspend 2 months imprisonment on condition accused pays $500 fine?"

The learned trial magistrate responded on that point responded as follows in his letter of response dated 23 June 2020

> "I stand guided."

The learned magistrate's *terse* response is totally unacceptable. The question asked was a legal question. The learned trial magistrate had a duty to research on the question and either justify that queried portion of the sentence which she imposed or admitted the error, if the research revealed so. The scrutinizing regional magistrate was equally guilty of the same unacceptable conduct. In para 5 of the letter to the registrar to place the record of proceedings before the judge on review, the scrutinizing regional magistrate wrote as follows-

> "5 As regards the competence of the sentence, I am of the view that the sentence was not competent for the main reason that in my view it is not competent to suspend a term of imprisonment on condition accused pays a fine. May the honourable judge provide guidance."

As evident from the reference, the scrutinizing regional magistrate entertained a view on the impropriety of the sentence. He was duty bound to support his view of the law by explaining why he considered that what the learned trial magistrate did was incompetent. The scrutinizing regional magistrate had an obligation to support his point of view through research. The learned trial magistrate had a similar duty. It is not the function of the judge to give guidance on polarized positions without facts or positions which are polarized being articulated by the authors of those positions. In the case of *S* v *Zwangendaba Phiri, HB 104/17* BERE J (as then he was) on p 4 of the cyclostyled review judgment in which there was a differing position on a legal point between the learned trial magistrate and the scrutinizing regional magistrate stated that

> "I find no misdirection in this matter, and if anything the trial magistrate must be commended for her alertness and knowledge of the correct procedure. I am only concerned with the ease with which the trial magistrate gave in to the letter written to her by the regional magistrate. The response shows the trial magistrate did not herself have the conviction of the correctness of the approach she had taken. She could have easily referred to the relevant sections of the Act and stood her ground. Our jurisprudence is not shaped by those magistrates who shy away from engaging in honest and serious professional intercourse with their seniors. The response given to queries raised must be ended by proper research on such issues."

Both magistrates should have engaged in professional intercourse on their points of polarity. Their exchanges ought to have dealt with the legal question raised and answered it. If they still disagreed, the polarised researched positions are the ones which should have been referred for answer by the judge on review. The position in this matter was one akin to the scrutinizing magistrate asking the learned trial magistrate to justify what he did, the trial magistrate saying in answer, if you think I am wrong guide me and the scrutinizing regional magistrate saying lets be guided by the judge. It was the duty of the scrutinizing magistrate to guide the learned trial

magistrate yet he abdicated the duty to the judge. The correct approach should have been for the question raised to be researched and answered at local level before referring the record of proceedings together with the researched answer on review since the scrutinizing regional magistrate does not have power to correct, alter or quash any proceedings on account of an irregularity or misdirection noted on review.

To answer the question raised, as to the competency of suspending a term of imprisonment on condition the accused paid the fine, the question must not be interrogated as an abstract enquiry. One must consider the sentencing provisions of s 140 of the Criminal Law Codification & Reform Act which creates the offence of Malicious Damage to Property which the accused was convicted and sentenced on. It reads as follows:-

> "140. **Malicious damage to property**
> Any person who, knowing that another person is entitled to own, possess or control any property or realising that there is a real risk or possibility that another person may be so entitled, damages or destroys the property –
> a) Intending to cause such damage or destruction; or
> b) Realising that there is a real risk or possibility that such damage or destruction may result from his or her act or omissions shall be guilty of malicious damage to property, and liable to –
> i. a fine not exceeding level fourteen or not exceeding twice the value of the property damaged as a result of the crime whichever is the greater; or
> ii. imprisonment for a period not exceeding twenty five years."

The two competent sentences are disjunctive. Only one of the two can be imposed. If the magistrates considers the imposition of a fine to be justified as opposed to imprisonment, then the convict should be sentenced to pay a fine in default of which the convict will be ordered to serve a defined prison term. The attention of the two magistrates is drawn to the provisions of s 347 of the Criminal Procedure & Evidence Act on the imposition of an alternative punishment to a fine. The provisions of section 347 read as follows:-

> "**347 Imprisonment or community service in default of payment of fine**
> (1) Subject to this section, a court which imposes a sentence of a fine upon an offender may do either or both of the following-
> (*a*) impose, as an alternative punishment to the fine, a sentence of imprisonment of any duration within the limits of the court's punitive jurisdiction;
> (*b*) permit the offender, as an alternative to paying the fine, to render such community service as may be specified by the court.
> (2) The period of any sentence of imprisonment imposed in terms of paragraph (*a*) of subsection (1) shall not, either alone or together with any period of imprisonment imposed on the offender as a direct punishment for the same offence, exceed the longest period of imprisonment prescribed by any enactment as a punishment for the offence.

(3) Where a court has imposed upon an offender a sentence of a fine without an alternative referred to in paragraph (*a*) or (*b*) of subsection (1) and the fine has not been paid in full or has not been recovered in full by a levy in terms of section *three hundred and forty-eight*, the court may issue a warrant directing that the offender be arrested and brought before the court, which may thereupon impose such sentence of imprisonment and additionally, or alternatively, permit him to render such community service, as is provided in subsection (1).
(4) Nothing in this section shall be construed as limiting the power of a court under section *three hundred and fifty-eight* to postpone or suspend any sentence.
(5) A court may exercise the powers conferred upon it by this section even in relation to an offence prescribed in an enactment which purports-
(*a*) to limit the duration of a sentence of imprisonment that may be imposed as an alternative to a fine; or
(*b*) to permit only a sentence of imprisonment to be imposed as an alternative to a fine:
Provided that this subsection shall not apply where a minimum penalty is prescribed in the enactment concerned as punishment for the offence."

Thus, a fine can be imposed following a conviction for malicious damage to property. In addition to s 347 (supra), s 358 (2) also provides for suspension of the operation of a sentence of a fine subject to the conditions set out in subs (3) thereof. The provisions of s 358 (2) read as follows:-

"(2) When a person is convicted by any court of any offence other than an offence specified in the Eighth Schedule, it may—
(*a*) postpone for a period not exceeding five years the passing of sentence and release the offender on such conditions as the court may specify in the order; or
(*b*) pass sentence, but order the operation of the whole or any part of the sentence to be suspended for a period not exceeding five years on such conditions as the court may specify in the order; or
(*c*) pass sentence of a fine or, in default of payment, imprisonment, but suspend the issue of a warrant for committing the offender to prison in default of payment until the expiry of such period, not exceeding twelve months, as the court may fix for payment, in instalments or otherwise, of the amount of the fine, or until default has been made by the offender in payment of the fine or any such instalment, the amounts of any instalments and the dates of payment thereof being fixed by order of the court, and the court may in respect of the suspension of the issue of the warrant impose such conditions as it may think necessary or advisable in the interests of justice; or
(*d*) discharge the offender with a caution or reprimand.
(3) Conditions specified in terms of paragraph (*a*) or (*b*) of subsection (1) may relate to any one or more of the following matters—
(*a*) good conduct;
(*b*) compensation for damage or pecuniary loss caused by the offence:
Provided that no such condition shall require compensation to be paid in respect of damage or loss that is the subject of an award of compensation in terms of Part XIX;
(*c*) the rendering of some specified benefit or service to any person injured or aggrieved by the offence:
Provided that no such condition shall be specified unless the person injured or aggrieved by the offence has consented thereto;
(*d*) the rendering of service for the benefit of the community or a section thereof;
(*e*) submission to instruction or treatment;

(*f*) submission to the supervision or control of a probation officer appointed in terms of the Children's Act [*Chapter 5:06*] or regulations made under section *three hundred and eighty-nine*, or submission to the supervision and control of any other suitable person;
(*g*) compulsory attendance or residence at some specified centre for a specified purpose;
(*h*) any other matter which the court considers it necessary or desirable to specify having regard to the interests of the offender or of any other person or of the public generally.
(4) If the offender has, during the period of any postponement or suspension ordered under paragraph (*a*) or
(*b*) of subsection (2), observed all the conditions specified in the order, the sentence shall not be passed or enforced, as the case may be."

I have quoted the above provisions so that the magistrates herein are properly guided on what powers they have and how the powers are exercised when a fine is imposed as an appropriate sentence.

If a fine is considered inappropriate following a conviction for malicious damage to property, then the alternative sentence which can be imposed is imprisonment subject to the outer limit of 25 years as regards duration. Such period of imprisonment which may be imposed is subject to the jurisdictional limit on punishment for the grade of magistrate concerned. In terms of para (b) of subs (2) of s 358 (quoted supra) the imprisonment term may be wholly or partly suspended on such conditions as the court may specify."

Suggested conditions are set out in subs (3) of the Criminal Procedure and Evidence Act. In *casu*, the learned magistrate was misdirected to suspend the two months imprisonment on condition of payment of a fine. A fine is a stand-alone punishment under para (a) of subs (2) of s 358. Section 140 aforesaid does not provide that the accused can be sentenced to both a fine and imprisonment. In *S* v *Keith Magirazi* HH 209/2013 CHATUKUTA J held that it was appropriate to impose the two sentences of both a fine and imprisonment on a conviction for fraud as defined in s 136 of the Criminal Law Codification and Reform Act because it is provided in the penalty section that the accused can be sentenced to both a fine and imprisonment.

That said, the learned trial magistrate must stand guided that she cannot, even where fine and imprisonment may competently be imposed, conflate the two. The accused may be sentenced to each of the two sentences. The magistrate could sentence the accused to a definite term of imprisonment and in his or her discretion suspend portions thereof on conditions as set out in subs 3 of s 347. Such conditions do not and cannot include payment of a fine because the imposition of a fine is a stand alone sentence. The magistrate can then in addition sentence the accused to pay a fine or in default imprisonment for a definite period. The payment of a fine cannot be suspended

on any conditions save that the court can grant time to pay on such conditions as it may consider appropriate to impose. The learned regional magistrate was correct and the learned trial magistrate wrong. Both magistrates were however wrong to use the judge as their research tool. They needed to have researched the query and expressed their view points to the review judge.

Lastly the issue arises on whether l should grant my certificate confirming the proceedings as being in accordance with real and substantial justice. The proceedings were clearly not in accordance with real and substantial on account of various irregularities and misdirections which l have interrogated. The best course to adopt under the circumstances given the nature of the sentence which kept the accused out of prison if he paid the fine and restitution is to withhold my certificate. I therefore withhold my certificate.

I direct that a copy of this judgment is forwarded to the Chief Magistrate. It is important in my view to ensure that all magistrates including the learned trial magistrate in question are made aware of the procedural issues that arise from this judgment including referral of scrutiny cases for review by a judge of the High Court.