THE STATE
versus
LEE KAWAREWARE

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 25 October 2011

Criminal Review

UCHENA J: The accused person was charged with theft in contravention of s 113 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. He pleaded guilty, and was convicted on his own plea. He was sentenced to 6 months imprisonment, of which 3 months were suspended on conditions of good behaviour.

The record of proceedings was referred for, scrutiny by a Regional Magistrate. The Regional Magistrate raised an issue on the propriety of the accused's conviction because the record revealed the following exchange between the accused and the trial magistrate during the canvassing of essential elements.

"Q Do you admit that your intention was to permanently deprive complainant of his property?
A No"

The Regional Magistrate asked the trial magistrate to comment on the effect of the accused's answer to the question quoted above.

In response to the Regional Magistrate's inquiry the trial magistrate responded as follows:

> "I am convinced that I properly convicted the accused person. I think I made an error in recording the response. The accused admitted as evidenced by his mitigation that when he took the stones he sold them and paid for medical bills using the money. This clearly shows intention of permanently depriving complainant of his property".

The Regional Magistrate was not satisfied. He referred the record of proceedings and the communication between him and the trial magistrate for review by a judge of the High Court. The lot fell on me to resolve their dispute. Such disputes are unfortunately increasing because of an apparent failure to appreciate the standard required before proceedings can be certified as being in accordance with real and substantial justice.

A reading of the whole record proves that the trial magistrate erroneously recorded the accused's answer. This is supported by what the accused said in mitigation, and what he had said when he was asked if he agreed with the facts. He agreed with the facts which clearly state that he had sold the stones and had not surrendered the proceeds to the complainant. This coupled with what the accused said in mitigation confirms that the accused intended to deprive the complainant permanently.

The purpose of a scrutiny or a review is to ascertain whether or not the proceedings are in accordance with real and substantial justice.

Section 58 (3) of the Magistrates' Court Act [*Cap 7*:*10*] herein after referred to as the Magistrate's Court Act, provides for scrutiny by Regional Magistrate as follows:

> "(3) The regional magistrate shall, as soon as possible after receiving the papers referred to in subsection (1), upon considering the proceedings—
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> (a) if he is satisfied that the proceedings are in accordance with real and substantial justice, endorse his certificate to that effect upon the proceedings which shall then be returned to the court from which they were transmitted;
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> (b) if it appears to him 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 accordance with the High Court Act [*Chapter 7:06*]."

In terms of s 58 (3) (a) of the Magistrate's Court Act all the Regional Magistrate is required to do is to satisfy himself that the proceedings are in accordance with real and substantial justice. If they are he should certify them. If he is in doubt he should refer them for review by a judge of the High Court.

The judge is in his review of the proceedings required by s 29 (2) of the High Court Act [*Cap 7*:*06*] (2), to determine whether or not the proceedings are in accordance

with real and substantial justice. If they are, he should confirm the proceedings. If they are not he can, withhold his certificate, alter or quash the conviction, or reduce or set aside the sentence as the circumstances of the case may require. Section 29 (2) provides as follows;

> "If on a review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings—
>
> (a) are in accordance with real and substantial justice, it shall confirm the proceedings;
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> (b) are not in accordance with real and substantial justice, it may, subject to this section—
>
> (i) alter or quash the conviction; or
>
> (ii) reduce or set aside the sentence or any order of the inferior court or tribunal or substitute a different sentence from that imposed by the inferior court or tribunal:"

The words "real and substantial justice", are not defined in both the Magistrate Court's Act and the High Court Act. An attempt was made to define them in *S* v *Chidodo & Anor* 1988 (1) ZLR 299 (HC) at pp 302C to 303C where GREENLAND J said:

> "The power of certifying proceedings as being in accordance with real and substantial justice is an additional power more properly viewed as a prerogative. It seems clear from the words employed, ie "in accordance with real and substantial justice", that a judge (and regional magistrate) is required to make a value judgment on the question. He must be satisfied that everything that transpired at the criminal trial conforms with the notions of justice that these words imply. The words employed are individually and collectively very wide in ambit. Notions of justice, being essentially abstract, are necessarily as wide, as any textbook on jurisprudence will show. As SCRUTTON LJ pithily observed:
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> > 'I am sure it is justice. It is probably the law for that reason' (*Gardiner* v *Heading* (1928) 2 KB 284 at 290).
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> What is to be considered just, depends on the norms and sense of values generally prevailing in society. The test therefore can only be objective and can be expressed by quoting LORD DEVLIN, The Judge at p 58:

> 'The British ... says that justice should not only be done but should be seen to be done, and the English system observes this precept in the spirit and in the letter'.

So too with our own criminal law and procedure, which are largely English in character.

Adopting this approach it might be difficult to determine what is just. It is however easier to determine what is not just. It is not just that a man should be treated more favourably than others are treated, on the same facts, by a court of law. It is not just that he should be charged with and convicted of a lesser offence when the admitted facts show that he is guilty of a more serious crime. It is not just that he should be so favoured because of his status as a member of the CIO. These are all impressions, reactions and assumptions which are induced in the mind of a reasonable man with variable degrees of certainty by the facts in this case, in the absence of an explanation or reason advanced for the apparently extremely favourable treatment. The position is akin to that in the case of *S* v *Chisango* HH 705-87 where a certificate was withheld because-

> 'Unfortunately, and to the great prejudice of justice and in breach of the sacrosanct notions of justice adverted to herein, the impression which is given is that the accused was afforded special and favourable treatment because of his status as a soldier. It is therefore necessary to emphasize that all persons are equal before the law.'

It should be noted that that case was different in the sense that the presiding magistrate had it within his power to prevent the injustice. In this case the magistrate's hands were tied because the State, as dominus litis, put the lesser charge. However, the magistrate's sense of justice should have induced him to, at the least, query the matter. It may be that some satisfactory explanation would have been advanced although this is difficult to imagine in the light of the admitted facts.'"

The case of *Chidodo* (*supra*) establishes that the determination of whether proceedings are in accordance with real and substantial justice is a value judgment to be made by the scrutunising or reviewing judicial officer, and should be supported by notions of what is just or not just. I would add that the decision to grant or withhold the certificate should first and foremost be based on the law and the facts on which the charge is based. It can in most cases be determined by whether what has been accepted or proved satisfies the essential elements of the crime charged. In such cases it would not be a value judgment but an assessment of the trial against the applicable law and

procedure. Value judgments would only be applicable in the type of cases GREENLAND J was dealing with.

In a criminal review or scrutiny the judicial officer must be guided by his knowledge of criminal law and criminal procedure. GREENLAND J said the judge or regional magistrate "must be satisfied that everything that transpired at the criminal trial conforms with the notions of justice that these words imply." As GREENLAND J pointed out:

> "The words real and substantial justice are individually and collectively very wide in ambit, and notions of justice, being essentially abstract, are necessarily as wide, as any textbook on jurisprudence will show."

This leaves the standard leading to the confirmation of proceedings or a refusal to confirm in the abstract. It sounds mystic and may not be of assistance to an inexperienced regional magistrate. This may leave unnecessary doubts which will lead to unnecessary referrals to reviewing judges. A clearer definition of the phrase "in accordance with real and substantial justice" is called for.

The Shorter Oxford English Dictionary in the relevant ambits of the words defines the words "real", "substantial" and "justice" as follows:

> "real" means "Having an objective existence; actually existing as a thing", "Actually existing or present as a state or quality of things having a foundation in fact; actually occurring or happening- That is actually and truly such as its name implies; possessing the essential qualities denoted by its name; hence, genuine, undoubted- The actual thing or person that properly bears the name- Sincere straight forward, honest"
>
> "substantial" means "That is constitutes or involves an essential part, point, or feature; essential material—that is such in the main; real or true for the most part"
>
> "justice" means "The quality of being (morally) just or righteous; the principle of just dealing; just conduct; integrity, rectitude—Exercise of authority or power in maintenance of right; vindication of right by assignment of reward or punishment; requital of desert"

The word "substantial" which is central to the standard required for "real and substantial justice" was defined by Viscount Simon in *Palser* v *Grinling, Property Holding Co Ltd* v *Mischeff* (1947) A C 291 at pp 316 to 317, as follows:

> "What does 'substantial portion' mean? It is plain that the phrase requires a comparison with the whole rent, and the whole rent means the entire contractual rent payable by the tenant in return for the occupation of the premises together with all the other covenants of the landlord. 'Substantial in this connection is not the same as 'not unsubstantial' i.e just enough to avoid the '*de minimis* principle. One of the primary meanings of the word is equivalent to considerable, solid, or big"—

The word 'substantial' is also similarly defined by Butterworth's "Words and Phrases Legally Defined" Volume 5 Second Edition at pp 141 to 142.

Real and substantial justice would thus be the considerable judicious exercise of judicial authority by the trial court, which satisfies in the main the essential requirements of the law and procedure. Failure to comply with minor requirements, minor mistakes and immaterial irregularities, should, however not result in the scrutinising or reviewing judicial officer's refusal to certify proceedings as being in accordance with real and substantial justice. This is demonstrated by the case of *S* v *Gore* 1999 (1) ZLR 177 (HC) @ 180 F–G to 181 A–E, where GILLESPIE J commenting on "real and substantial justice" having been done in spite of some rather serious irregularities said:

> "This brings me back to the irregularity arising out of the failure to record an explanation of essential elements and the apparent failure to give that explanation. My dilemma here is that on the one hand is the clear statutory requirement, reinforced by judicial decisions, for the giving and recording of that explanation. On the other hand is the equally clear statutory injunction that a judge should not quash a conviction on the grounds of irregularity unless he considers that a substantial miscarriage of justice has occurred. Is there conflict between these two positions?
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> In my judgment, there is not. If I might be permitted to explain the many dicta to the effect that failure to comply with s 271(2)(b) of the criminal code is a fatal defect, I would say this. So fundamental is the need to confirm a plea of guilty, where a sentence other than a trifling one may be imposed, that in the vast majority of cases one cannot be satisfied as to the absence of a miscarriage of justice if a magistrate has taken no steps, as are required by law, to confirm the plea by explaining the elements of the offence and recording that explanation and the accused's acknowledgement of guilt. This is not to say that in no such case can one be confident that there is no miscarriage of justice where such a failure has occurred. Indeed, as every judge knows, in the enormous volume of cases on review there are many occasions where one overlooks technical inadequacies or

> irregularities in s 271(2)(b) procedure because the justice of the result cannot be in doubt.
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> I consider that in this case there can be no fear that the convictions constituted a miscarriage of justice. The charge is one which is utterly devoid of legal complexity and innocent of any occasion for misunderstanding and ignorance. There can have been no doubt in the mind of the accused, a highly experienced road user, as to what he was admitting. There can be no doubt, that the facts recorded on the "tickets", admitted as they are by the accused, disclose the offence. I would therefore decline to interfere with the convictions for speeding."

This case proves that "real and substantial justice" is proof that the conviction is safe despite the imperfections in the proceedings.

In the case of *S* v *Mugebe* 2000 (1) ZLR 376 (HC) @ 378E BARTLET J after pointing out some irregularities in the proceedings commenting on 'real and substantial justice' having been achieved said:

> "The remainder of the proceedings, are probably in broad accordance with real and substantial justice and are confirmed."

The critical consideration is therefore, whether the proceedings broadly satisfy the requirements of justice.

See also the case of *S* v *Mutemi* 1998 (2) ZLR 290 (HC) @ 298E where CHINHENGO J said:

> "I will therefore, despite the failure by the magistrate in principle to adopt the correct approach to sentencing in this matter, confirm the proceedings as having been in accordance with real and substantial justice."

In a criminal scrutiny or review, the process leading to the confirmation of proceedings or a refusal to certify the proceedings should in spite of what GREENLAND J said, be fairly easy to follow. Every crime has essential elements which if correctly charged in the charge sheet, and amplified in the agreed facts, state outline, and proved in the canvassing of essential elements or in evidence would indicate the correctness of the conviction. The standard of proof required in a criminal trial is a good guide. The scrutinising regional magistrate or reviewing judge should be satisfied if the proceedings before him were a full trial, whether or not the evidence led proves the accused guilty

beyond reasonable doubt. The standard of proof beyond reasonable doubt indicates what real and substantial justice means. It is the standard of justice which justifies a conviction when there is no reasonable doubt that the accused committed the offence. It is the standard of justice which requires that the guilt be convicted and the innocent be acquitted. According to our law a conviction can be safe even if there are some irregularities, as long as they do not vitiate it. Substantial justice is not only achieved by an impeccable trial but one which is in the main; real or true for the most part, according to the law being applied satisfies that standard. The evidence on the record of proceedings should guide the scrutinizing or reviewing judicial officer. The crucial question should always be has the accused been correctly convicted and sentenced. If he has the proceedings should be confirmed. If not the certificate should be withheld.

The main features to look out for in scrutinising or reviewing proceedings are therefore;

1) The correctness of the charge preferred;
2) The agreed facts or state and defence outlines;
3) Compliance with statutory requirements in taking a plea of guilty or in conducting a trial where the accused pleads not guilty;
4) The acceptance or proof of the facts on which the charge is based;
5) The assessment of evidence i.e matching of the law and the accepted or proved facts;
6) The trial court's reasons for judgment;
7) The correctness or otherwise of the conviction; and
8) The justifiability of the charge or sentence as discussed in *Chidodo* (*supra*)

Since the codification of our criminal law, all sentences are provided for in the code, or the statute which creates the crime charged. All the reviewing or scrutinizing judicial officer should do is check if the sentence suits the offence and the offender, within the range of sentences provided for in the code or other statutes. He or she must also check the trial court's reasons for sentence to determine whether or not the correct sentencing principles were applied in passing sentence. Where a crime was committed under common law, before codification the judicial officer should be guided by precedents in similar cases. In all cases the scrutunising or reviewing judicial officer should bear in mind the trial court's sentencing discretion, and not interfere unless the sentence imposed induces a sense of shock or the trial court misdirected itself in a

manner which warrants the intervention of the reviewing judge. In the case of *S* v *Mugwenhe & Anor* 1991 (2) ZLR 66 (SC) at p 71 A- C EBRAHIM JA while encouraging trial courts to fully exercise their sentencing discretion said:

> "This is not to say that judicial officers are to throw up their judicial arms in exasperation and do nothing more. All that is being suggested is that judicial officers exercise their judicial discretion to the full and acknowledge where necessary the shortfalls of existing penal policy. The dynamism necessary for this approach is not achieved by reference to alleged "tariffs" of sentences for specific categories of offences. Invariably when dealing with sentences the court refers, or is referred to, innumerable cases which purportedly lay down the limits of the range of appropriate sentences for the case actually before it.
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> All but the most dogmatic will confess the narrowness of this approach; for it becomes apparent that it is by no means easy to treat the various cases as entirely uniform and even less so to attempt to extract therefrom a means of propounding a precise statement of principles which can be invoked before the courts which would guide it in respect of the quantum of the sentence to be imposed. (See eg *S* v *Ncube* HB 19-86; *S* v *Machetbi* 1974 (2) SA 369 (T); *S* v *Mutadza* 1983 (1) ZLR 123 (HC); *S* v *Ndlovu* HH 197-87".

In the case of *S* v *Mundowa* 1998 (2) ZLR 392 (HC) at 395 A-E SMITH J commenting on the need for the appeal court not to lightly interfere with the trial court's sentencing discretion said:

> "The sentence imposed by the magistrate in this case is severe. However, it seems to me that the magistrate did not misdirect himself. He considered suspending part of the sentence on condition that the appellant perform community service but decided that that would not be appropriate in this case. I cannot disagree with that assessment."

In *S* v *Nhumwa* S-40-88 KORSAH JA, at p 5 of the cyclostyled judgment, said:

> "It is not for the court of appeal to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from that imposed. If the sentence complies with the relevant principles, even if it is severer than one that the court would have imposed, sitting as a court of first instance, this court will not interfere with the discretion of the sentencing court.
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> He referred with approval to *S* v *de Jager & Anor* 1965 (2) SA 616 (A) at 628-9 where HOLMES JA said:

> 'It would not appear to be sufficiently realised that a court of appeal does not have a general discretion to ameliorate the sentences of the trial courts. The matter is governed by principle. It is the trial court which had the discretion, and a court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say, unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard, an accepted test is whether the sentence induces a sense of shock, that is to say, if there is a striking disparity between the sentence passed and that which the court of appeal would have imposed. It should therefore be recognised that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited.'

Accordingly, the appeal is dismissed."

This applies with equal force to a scrutinising and reviewing judicial officer. His duty is merely to be satisfied that real and substantial justice has been done.

In the present case the simple issue to be determined is whether or not it is probable that the trial magistrate erroneously, recorded the word "no" instead of "yes". The probabilities favour his explanation. The accused confirmed it in his mitigation, when he explained what he did with the proceeds of the stones he sold. The record of proceedings must be read as a whole. It should if thus read and understood inform the scrutunising or reviewing judicial officer on whether or not the accused admitted the element in doubt or the evidence proves him guilty beyond reasonable doubt.

If the accused had indeed said "no" the magistrate would have been expected to ask him to explain his answer which would have indicated whether or not a plea of not guilty should have been entered in terms of section 272 of the Criminal Procedure and Evidence Act [*Cap 9:07*]. The fact that he did not tends to show his recording of that answer was a mistake. This is supported by the accused's acceptance of the agreed facts and his confirming in mitigation that he sold the complainant's property and kept the proceeds for his own use. If the regional magistrate had considered the facts of this case in view of the principles to be applied in determining whether or not real and substantial justice had been done, he would not have remained in doubt and would have himself

confirmed the proceedings without referring them for review by a judge of the High court.

In the result I am satisfied that the accused's conviction is safe and should be allowed to stand. The sentence imposed is within the permissible range and the trial magistrate's discretion. The proceedings are therefore confirmed as being in accordance with real and substantial justice.

BHUNU J: agrees ……..